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Second 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:

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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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ABBREVIATIONS

EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
I.C.J.	International Court of Justice
I.C.J. Pleadings	I.C.J., *Pleadings, Oral Arguments, Documents*
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
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunication Union
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization

Introduction

1. In a first report [1] dated 3 April 1972, the Special Rapporteur described to the Commission how the subject had developed historically, and he then attempted to outline certain approaches which, in his view, should be adopted from the outset. He also raised a number of questions on which he wished to know the Commission's feelings.

Owing to the Commission's very heavy agenda and the priorities it was obliged to observe, the first report was not considered at its twenty-fifth session (2 May-7 July 1972).

2. This second report is designed to supplement the preceding one, to make it easier to consider by summing up its essential features, and particularly to incorporate new elements [2]—primarily, the substantial information received in the meantime from international organizations.

It will be recalled that at its twenty-third session the Commission, when appointing a Special Rapporteur, stated specifically that the documents to be prepared for the proposed study were to include "an account of the relevant practice of the United Nations and the principal international organizations",[3] the latter being defined "for the time being" and "for the purposes of the present topic" as "those which were invited to send observers to the Vienna Conference on the Law of Treaties".[4]

3. In pursuance of this decision, the Special Rapporteur prepared a questionnaire which the Secretary-General addressed to the organizations concerned, stating in his covering letter that, as the consultation was merely of a preliminary nature, the replies would for the moment be communicated only to the Special Rapporteur. The Secretary-General added: "Once the outline of the account requested by the Commission has been more clearly defined, your organization will again be consulted and given an opportunity of presenting a final reply, which will be published in the account itself".

4. The organizations consulted submitted replies of varying length, depending on the extent of the response which the questions elicited in the light of each organization's own experience and particular concerns; but all their communications are of the greatest interest. Anyone who knows how much work the secretariats of international organizations are required to undertake will appreciate the true value of the effort they have made, and the Special Rapporteur wishes to express his gratitude for the invaluable assistance they have given him. These replies will have to be studied carefully and considered at length but, even before they help to lead the work of the Special Rapporteur to its conclusion, they can already be used to illustrate certain general considerations which must be submitted to the Commission.

[1] *Yearbook ... 1972*, vol. II, p. 171, document A/CN.4/258.

[2] Among the various publications on this subject, particular mention must be made of the provisional report by R. J. Dupuy, *L'application des règles de droit international général des traités aux accords conclus par les organisations internationales* (Geneva, Imprimerie de la Tribune de Genève, 1972), submitted to the Institute of International Law.

[3] *Yearbook ... 1971*, vol. II (Part One), p. 348, document A/8410/Rev.1, para. 118 (*b*).

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

5. The Special Rapporteur will in this connexion abide by the terms and undertakings entered into with respect to the organizations—that is to say, the replies will not for the time being be published; only the questionnaire to which the organizations have replied will be annexed to this report. The substance of the replies will be presented only in general terms, without reference to the position adopted by individual organizations, except in cases where the representatives of an organization have made its position known in circumstances unconnected with the circulation of this questionnaire.

6. To simplify the Commission's work, the Special Rapporteur will refer again—briefly but, he hopes, more precisely and categorically—to some of the approaches proposed in his first report, and he will dwell at some length on the new information received as a result of the co-operation of international secretariats. The following observations will deal first with questions of method, which still appear to be of exceptional importance in this particular case, and secondly with some of the most important questions of substance.

Part One

Questions of method

7. The task which now seems to be incumbent on the Special Rapporteur can be presented under four headings.

A. Preparation of a set of draft articles as the final objective

8. The final objective which the Special Rapporteur is setting himself for his work is the preparation of a set of draft articles, since it seems that this method, which is now followed by all special rapporteurs, is the only one which in itself incorporates the exactitude and the precision which should characterize all the Commission's work; it is indeed essential, unless one rules out the possibility that the work of the Special Rapporteur is ultimately to be reflected in the form of a formal convention. This last remark would be superfluous, were it not at the same time essential to reserve entirely the question of the final legal form to be given to the work, on account of a certain difficulty which is inherent in the subject. The difficulty resides in the fact that the international organizations concerned will in some way or another have to be associated with the undertaking, particularly in order to bring it to its conclusion, and the participation of international organizations in the conclusion of a convention on treaties of this kind raises the very problems of substance which such a convention would be designed to solve, since the participation of international organizations in a general multilateral convention gives rise to certain objections. Possible solutions other than a general convention are a declaration by the General Assembly, or resort to machinery similar to that evolved for the 1947 Convention on the Privileges and Immunities of the Specialized Agencies;[5] we shall return to some of these points later.

[5] See *Yearbook ... 1972*, vol. II, pp. 187 and 192 *et seq.*, document A/CN.4/258, paras. 52 and 68 *et seq.*

B. Adherence to the framework of the 1969 Vienna Convention on the Law of Treaties

9. In the work of the Sub-Committee which preceded the appointment of a Special Rapporteur,[6] it was agreed that the objective to be attained was to extend or, failing that, to adapt the articles of the Vienna Convention on the Law of Treaties [7] to the agreements of international organizations, while adhering faithfully to the spirit, forms and structure of that Convention. This approach has one important negative effect: in principle, matters or questions which, in regard to treaties between States, the 1969 Convention deliberately left aside must not be included. Hence, in particular, it would seem necessary—apart from making one or two observations—to leave aside both the definition and the régime of unwritten agreements.[8]

10. However, this position of principle has many other basic consequences. For instance, in regard to the scope of the draft articles to be prepared, it would be necessary at least at the outset to use a definition of "international organization" identical to that given in the 1969 Convention, since that Convention already contains certain rules concerning international organizations.[9] Assuming for a moment that a set of draft articles on the agreements of international organizations was based on a more limited definition of the organizations to which its provisions related, the result would be a three-fold legal régime applicable to the agreements of organizations—the régime of the 1969 Convention, the régime of the draft articles and the régime deriving from custom and general principles of law. That would defeat all the purposes of codification, by introducing complications and uncertainties into the existing situation.

11. Another consequence of abiding by the framework of the Convention—a consequence to which further reference will be made later, but which is important enough to be mentioned more than once—is that the provisions of the future draft articles would necessarily be very general. If, in regard to international organizations, one starts with the very wide and even indeterminate definition which appears in the 1969 Convention, it follows that the proposed rules must be applicable to all international organizations and they are therefore bound to be very general.

12. Finally, the Special Rapporteur will have to go into greater detail and consider the articles of the 1969 Convention one by one in order to determine which articles can be applied without adaptation to the agreements of international organizations, and to propose the necessary amendments to the other articles.

[6] *Yearbook ... 1971*, vol. II (Part One), pp. 347-348, document A/8410/Rev.1, chap. IV, annex.

[7] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention will be referred to hereafter as "the 1969 Convention".

[8] See para. 37 below.

[9] *Yearbook ... 1972*, pp. 181, 186-187 and 191 *et seq.*, document A/CN.4/258, paras. 36, 51 and 65 *et seq.*

C. Scope of the first questionnaire addressed to international organizations

13. This last remark helps to illustrate the scope of the questionnaire which was addressed to international organizations on the understanding referred to above.

14. This very close adherence to the text and framework of the 1969 Convention is based on the idea that there is not any single problem which is both important and lends itself to a general solution common to all international organizations and, at the same time, lies outside the scope of the provisions of the 1969 Convention. This idea may be correct, but it needs to be verified by counter-proof. It is in fact essential to place oneself outside the carefully elaborated framework of the Convention, and try to discover whether any important point lending itself to codification has been left aside.

15. It was with this in mind that a number of questions, deliberately limited to a few carefully chosen points, were addressed to international organizations. As the Special Rapporteur conceived them, they were designed merely to ascertain opinions, and nothing more. Nothing could be further from his intentions than that they should be thought to represent an attempt to extend the scope of codification, or that it should be imagined that draft articles on the subjects referred to in the questions are to be submitted immediately. The Special Rapporteur had no such far-reaching ambitions on that score; he was hoping above all to obtain confirmation of certain views and to determine more exactly the limits of his undertaking. By the end of this report it will be clear that many questions are not yet ripe for codification, either because the practice has not yet been established or because the problems concerned have not yet been encountered in practice, or even because the solutions for which they call are too varied to lend themselves to codification; it is this last point that we shall now consider.

D. The difficulty of principle

16. As has been stated previously,[10] the international organizations followed with some concern the discussions leading to the 1969 Convention, since the texts adopted seemed to touch upon the activities of international organizations in regard to agreements—both agreements concluded by organizations and agreements concluded within them or under their auspices. Although the scope of the Convention was finally somewhat limited in this respect, and guarantees were provided for international organizations, it is understandable that misgivings of this kind should still be felt concerning the preparation of a draft which deals specifically with agreements concluded by international organizations. The organizations consulted at the request of the Special Rapporteur replied very willingly to the questionnaire addressed to them, and they are all the more deserving of gratitude in that some of the questions related, almost indiscreetly, to practices or positions on which they had not yet adopted a definite line of conduct.

17. The Special Rapporteur has always been aware that, apart from particular aspects affecting a specific issue, the preparation of draft articles on the agreements of international organizations raises a basic question of principle. Hitherto, international organizations, acting principally through their secretariats and in most cases with no general texts or precedents to use as a basis, have—slowly and unobtrusively, by the development of practice alone—built up a corpus of solutions adjusted to the individual needs and character of each organization. The codification now envisaged may affect this spontaneous process by introducing into the régime of the agreements of international organizations two new features: *stability* and *generality*.

18. It was explained at length in the first report [11] that although the 1969 Convention was applicable to the constituent treaties of an international organization and to treaties adopted within an international organization, it was so applicable "without prejudice to any relevant rules of the organization" (article 5), and that some doubt had arisen as to whether the relevant rules of an organization could also include *practice* at a stage when practice could not yet be considered as constituting a rule of law. What is certain in any case is that codification, if it is to retain its essential meaning, must have a stabilizing effect, at least for a certain time, on the development of practice and the origin of custom. Codification would be incomprehensible if it were completely deprived of any legal effect.

19. But codification also has a *generalizing* and *standardizing* effect. Each organization, instead of establishing an individual régime for its own use, will be subject to a general rule formulating an average solution applicable to all organizations. Hence there is a fear that the autonomy hitherto enjoyed by each organization may be lost. Occasionally, even, it is thought and even written that the existence of a law common to all organizations—a "law of international organizations"—would be difficult to imagine and even impossible to achieve.

It was pointed out earlier [12] that the very basis of this position is the existence of a law peculiar to each organization—a law which is itself only the expression of the differences existing in the régime of each organization and especially in its functions. At the same time an indication was given of the general lines on which a place might be found for considerations of this kind without radically undermining the principle of codification in regard to the agreements of international organizations. But the point is of such paramount importance that it is necessary to refer to it again.

20. A comparison between the position of States and that of international organizations will perhaps help to indicate more clearly what can reasonably be accepted in this matter. Each State has considerable freedom to settle the problems of its own constitution and to provide itself with the internal rules most suited to its needs. Nevertheless, in its relations with other States and in particular in regard to the régime of international treaties,

[10] *Ibid.*, pp. 184-185 and 186-187, paras. 46 and 51.

[11] *Ibid.*, pp. 186-187, para. 51.

[12] *Ibid.*, p. 197, paras. 86 *et seq.*

it is essential and universally accepted that there should be some rules of international law which are the same for all States. The same should be true of international organizations. Each international organization has of course a law of its own, which is founded on a constituent charter and on all the law deriving therefrom; but it is inconceivable that the relations of international organizations with each other or with third States should be subject to the law peculiar to any one of them.[13] Such relations must be governed by general rules forming part of general international law. There is of course a fundamental difference from the position regarding States; in general international law, States are on a footing of sovereign equality with regard to one another; from the standpoint of international law they have the same structure and assume the same functions, and the only differences are quantitative. On the other hand, each organization is different from all the others, since it is individually defined by functions which vary widely from one organization to another. This difference between the status of the State in international law and the status of each organization may well prevent the formulation of certain general rules which would disregard the differences that distinguish one international organization from another; but the fact remains that in their relations with each other and with third States international organizations are called upon to follow common general rules and it is essential that they should do so.

21. If this is really the correct approach to the problem of agreements concluded by international organizations, it must be admitted that there should be no major obstacles to the establishment of a body of rules governing agreements by international organizations, provided that certain precautions are taken. One such precaution is to eliminate any formalism or unnecessary details from the formulation of rules, in order to avoid, as far as possible, excessive rigidity; the other precaution is to refrain from establishing common rules on questions that should be regulated, in the case of each organization, according to its own characteristics. If these basic ideas are accepted, there is no reason for thinking that the provisions of the 1969 Convention are not in general valid for the agreements of international organizations.

Part Two

Some problems of substance

22. Part II of this report will deal with certain problems concerning the law of treaties on which—in the light of the replies given by the international organizations to the questionnaire addressed to them, and also of the reflections of the Special Rapporteur—it is now possible to present some elements additional to those given in the first report on most of the points to be discussed.

We shall deal with the various topics in roughly the same order as they are dealt with in the 1969 Convention, though we shall of course be dwelling only on a few characteristic points which have been selected on account of their value as examples or their importance. The topics will be grouped under the titles of the first three parts of the Vienna Convention, namely: Introduction; Conclusion and entry into force of treaties; Observance, application and interpretation of treaties. No reference will be made to points concerning parts IV to VIII of the Convention, on which no questions were addressed to international organizations.

A. Part I (Introduction) of the 1969 Convention and the concept of "party"

23. The general provisions of the 1969 Convention contain some provisions which the Special Rapporteur—offering a tentative opinion before he has heard the views of the Commission—believes it would be better not to change. Also, there will be no further reference to points already made, such as the desirability of considering only written agreements, in the case of the agreements of organizations just as in the case of the agreements of States, or the need to keep the same definition of international organizations. On the other hand, it would be useful to deal at some length with a difficult and important point concerning the definition of "party" to a treaty.

24. Article 2, paragraph 1 (*g*) of the 1969 Convention defines the term "party" as follows: "'party' means a State which has consented to be bound by the treaty and for which the treaty is in force". It is evident both from the context and from the work of the International Law Commission, that this definition was drafted to distinguish the term "party" from the term "contracting State", which is defined as "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" (article 2, paragraph 1 (*f*)). It seems that the question was never raised as to whether a State might be in a position which was neither that of a "party" nor that of a "third State"—that is to say that although the State would be bound by the substantive rules of the treaty, it would not participate in the administration of the treaty, and particularly not in its revision. The 1969 Convention makes provision for machinery collateral to a treaty, whereby a third State can accept certain rights and obligations, but this machinery is an agreement completely distinct from the original treaty and disposes quite freely of certain rights and obligations. It seems therefore that, from the standpoint of the Vienna Convention, there is not, properly speaking, any intermediate position between that of "party" and that of "third State" with regard to a treaty.

25. The question concerning the position of an organization with regard to a multilateral treaty might be solved along the same lines. It may, however, be wondered whether the case of an organization having extensive

[13] The question of agreements concluded by an organization with its own members is not considered here since it is conceivable that, because of their close relationship to the constituent charter, these agreements might be subject to the internal law of the organization, which could thus be independent of public international law. But this hypothesis relates in fact only to political systems in the process of integration. To questions A.3 (Agreements having an internal character) and A.5 (Agreements concluded with a view to applying other agreements), the organizations consulted offered replies which were interesting from other points of view but which showed that they do not at present envisage the general subjection of certain agreements to the "internal" law of the organization.

rights and obligations without being a party to a treaty between States may not be very common, and may therefore need to be considered afresh.

26. Accordingly, each organization consulted was asked in intentionally general terms to state whether, with regard to multilateral treaties between States, it was in the position of "a party to these treaties", "an associate" or "a person bound to respect these treaties" (question A.6).

In general, the replies on this topic have been most informative and show that there are a number of different situations which have been regulated in different ways. A distinction may perhaps be made between two groups of situations described by the international organizations.

27. (A) In the first group, States members of an organization—and sometimes also non-members—conclude a convention to which the organization is not a party but under the terms of which it acquires new rights and obligations. This situation is extremely common in the case of all organizations. Can we say that it does not require any special consideration and can be explained where necessary in terms of a tacit collateral agreement between States parties to the convention and the organization ? Or should it be regarded as a special situation which occurs so often that it requires special codification ?

28. The problem [14] will be discussed again later, [15] since it raises the question of the effects of treaties with respect to third parties. It needs to be studied in greater detail not only from the standpoint of law but also in order to determine whether, in the case of the agreements of international organizations, a special category should be established for organizations which are not parties to an agreement but are closely associated with its implementation.

29. (B) The second group includes agreements which are binding on international organizations in all their substantive provisions but do not confer on the organization the powers normally enjoyed by parties to a treaty in regard to the administration or revision of the convention or participation, with the right to vote, in the organs established by the convention. Apart from certain provisions in commodity agreements, the most recent examples are the agreements which have made it possible for international organizations to participate in certain international conventions concerning outer space; but there are earlier examples, particularly with regard to the position of the United Nations in ITU.

30. Two special cases were referred to in two specific questions, one addressed to the United Nations and the other to the specialized agencies. They relate respectively to the position of the United Nations with regard to the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations,[16] and the position of the specialized agencies with regard to the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies.[17]

31. With regard to the Convention of 13 February 1946 it is enough merely to mention that the position constantly maintained by the Secretary-General since the *Advisory Opinion on reparation for injuries suffered in the service of the United Nations* [18] is that the United Nations is a party to that Convention. The arguments on which this position is founded have been stated frequently in the United Nations [19] and may be summarized by saying that the Organization and the Secretariat claim the right to watch over the observance of that Convention and, if necessary, to ensure that it is complied with by all States. The Special Rapporteur does not seek to question the effects of the status of the United Nations as a "party", or the grounds for affirming the principle itself, which has certain advantages; [20] however, one may ask whether the United Nations *technically* has the position of a *party* in respect of all the problems which may arise in connexion with the life of the Convention and particularly its revision.

32. The same question may be asked in the case of the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies, whose original machinery is well known; there are sound arguments for considering the organizations as parties to that Convention, [21] and almost all the specialized agencies which have accepted its machinery in regard to themselves have considered themselves as parties to it. However, one of them stated that in its view the organizations were not parties, but had a legal interest in the Convention that might be described as *sui generis*; another takes the view that the status of party is acquired, but inclines to the belief that this is a *sui generis* status. Another takes the following position, which is of such interest that it must be quoted in its entirety:

> As to the juridical standing of the specialized agencies under the Convention of 1947, a distinction might be made between being a "party" (a term which the Convention employs only with regard to States) and participation in another sense, i.e., having rights and obligations derived from the provisions of the Convention. The specialized agencies are clearly participants in this wider sense, as pointed out in the legal opinion of the Office of Legal Affairs of the United Nations of 10 July 1964 which concluded:
>
> "Accordingly, each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether

[14] See *Yearbook ... 1972*, vol. II, p. 193, document A/CN.4/258, para. 73.

[15] See below paras. 89 *et seq.*

[16] United Nations Treaty Series, vol. 1, p. 15.

[17] *Ibid.*, vol. 33, p. 261. IAEA is covered not by the Convention of 21 November 1947 but by a special agreement in the case of which the problem under discussion does not arise; in this case it is the organization itself which has reserved to itself the right to revise the agreement (see *Yearbook ... 1972*, vol. II, p. 194, foot-note 181).

[18] *I.C.J. Reports 1949*, p. 185.

[19] See the statement by the Legal Counsel at the 1016th meeting of the Sixth Committee on 6 December 1967 (*Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385).

[20] In particular, it eliminates the theoretical anomaly which existed originally, whereby the Convention could enter into force as a result of ratification by a single State (P. Reuter, *Introduction au droit des traités* (Paris, Colin, 1972), p. 42, para. 69.

[21] See *Yearbook ... 1972*, vol. II, p. 194, foot-note 181.

or not each agency may be described as a 'party' to the Convention in the strict legal sense." [22]

33. These positions show that there is in fact a problem of vocabulary and of substance. To solve it, we shall later have to refer again to the machinery of the Vienna Convention concerning the effects of treaties with respect to third parties. [23] It is sufficient for the time being to have, as it were, established the outer contours of the problem.

B. Part II (Conclusion and entry into force of treaties) of the 1969 Convention

34. There are several points which call for discussion. In the case of some of them, all that can be done is to recall what the Special Rapporteur has stated previously; in the case of others, it will be possible to take a better informed and therefore a firmer position than in the first report. These various points will be grouped under three headings: the form of agreements, the capacity of organizations, and representation.

1. *Form of agreements*

35. There is nothing to add to what has been said on this point in the first report, which can be summarized in two propositions:

(*a*) Most of the objections and reservations made by international organizations to the extension of the 1969 Convention to the agreements of international organizations related to the conditions as to which form the draft articles prepared by the Commission were rightly or wrongly believed to establish for the normal conclusion of international treaties.[24]

(*b*) The adoption by the Conference on the Law of Treaties of the amendment which became the existing article 11 of the 1969 Convention eliminated any rigidity in the conclusion of written agreements.[25]

36. The logical consequence of these two propositions is very simple: the major obstacles which stood in the way of the extension of the 1969 Convention to the agreements of international organizations have now disappeared. The principle of pure consensualism on which the Convention is based cannot have an adverse effect on the practice and development of international organizations. It also justifies the assumption that all the consequences of that principle, which are the subject of the Convention as a whole, apply to international organizations.[26]

37. There is nothing to add to this clear-cut conclusion. However, in order to emphasize the liberty given to parties by article 11 of the 1969 Convention, we shall make one final comment which relates to some especially significant examples. Neither the 1969 Convention nor the work of the International Law Commission contains a very precise definition of a treaty concluded in writing; though this expression excluded purely oral agreements and—even more so, tacit agreements—it was not clear whether the expression applied only on condition that the written agreement consisted of an instrument specially drafted for the purpose, or whether it was enough merely for the text to be expressed in writing. In the latter case, an agreement resulting incidentally from ordinary correspondence may be regarded as a written agreement, as may an agreement based on the record of a meeting accepted by two parties that have made oral statements which are reproduced in the record and from which an agreement results. Before the adoption of article 11, it was still possible to hesitate between the two solutions but now it seems that the question has been settled by adopting the wider solution, since this article states that the consent of a State to be bound by a treaty may be expressed by ". . . any other means if so agreed". It is quite clear that this means may be agreed in ways other than in writing,[27] and these two forms of agreement which are very common in the practice of international organizations—namely, agreement by exchange of correspondence and agreement in the form of the *procès-verbal* of a meeting accepted by the parties concerned—come within the category of written agreements as it seems to be conceived by the 1969 Convention.

2. *Capacity of international organizations to conclude treaties*

38. Article 6 of the 1969 Convention on the Law of Treaties states that: "Every State possesses capacity to conclude treaties". Does not this provision call for a corresponding provision concerning international organizations? Before replying to this question, it must be noted that a provision of this kind would, in the case of international organizations, respond to a somewhat different need. Article 6 is what remains of a much more ambitious article [28] to which we shall refer later; though its meaning has been the subject of discussion, it is probably designed to ensure—with protectorates of the colonial type in mind—that a State cannot forego once and for all this capacity which is inherent in statehood. In the case of international organizations, on the other hand, what is required is a rule which would be applicable in cases where the constituent charter is silent on the matter. The view has often been taken that the capacity to conclude agreements belongs *naturally* to international organizations and is for them an *inherent* capacity. Such a view may be supported by certain precedents of the International Court of Justice which introduced concepts such as functional competence and implicit powers. Such concepts are based on the observation that an international organization is by nature intended to participate in international relations and that such participation is difficult to imagine if the possibility of concluding agreements is ruled out.

[22] United Nations, *Juridical Yearbook, 1964*, p. 267, para. 5.

[23] See below, paras. 89 *et seq.*

[24] See *Yearbook . . . 1972*, vol. II, pp. 186-197 and 195-196, paras. 51, 52 and 80.

[25] *Ibid.*, pp. 188 and 195-196, paras. 55 *et seq* and para. 80.

[26] *Ibid.* See particularly para. 81 concerning the régime of nullity, rules of interpretation, etc.

[27] P. Reuter, *op. cit.*, p. 41, para. 67.

[28] See *Yearbook . . . 1972*, vol. II, pp. 178-180, document A/CN.4/258, paras. 25 and 28 *et seq.*

39. If the Commission inclines towards a solution of this kind it might well take as a basis certain formulations such as that suggested by Professor René Jean Dupuy in his report:

Article 4. Unless the constituent instrument provides otherwise, every international organization has the capacity to conclude agreements in the exercise of its functions and for the achievement of its objectives.[29]

40. However, although the Special Rapporteur is attracted by formulations of this kind, he would prefer rather to propose to the Commission a more radical solution, namely, not to have any article on the capacity of international organizations at all. There are, he believes, some considerations of principle, and also some practical considerations, to justify this solution.

41. The basic consideration of principle relates to the very simple fact that the capacity of an international organization derives from its own statutes, from the law peculiar to the organization, and not from a rule of general international law. It may of course be argued that there is no rule of general international law which prohibits States from establishing any kind of international organization which they want to establish, or from giving the organization the capacity to conclude treaties; and one may be tempted to conclude from this that there is in international law a permissive rule concerning the capacity of international organizations. But this permissive rule is nothing other than the rule *pacta sunt servanda*, and a recognition of the fact that States enjoy a wide freedom in the conclusion of treaties. It should be noted that the existence of the organization with respect to *third States* will depend on its *recognition* by them and is thus also derived from the rule *pacta sunt servanda*. [30]

42. Against this, may be cited the famous precedent of the International Court of Justice, which in the Advisory Opinion on reparation for injuries suffered in the service of the United Nations referred to an "objective" personality of the United Nations [31] which could bring claims against third States. But the United Nations (and perhaps other organizations of the same family) constitute a special case because of their universality, and in any case considerations which apply to them cannot be extended to every organization of every kind. International practice in this matter is too well-known to need further comment.

43. Moreover the fundamental point we have just stressed does not relate to the theoretical existence and significance of the international "personality" of organizations: it is a fact that there are organizations and that they conclude treaties between themselves and with States. The fundamental point is that no organization has a capacity identical with that of any other, and that the capacity of each organization depends on the founding States and subsequently on the member States. On this last principle, agreement is unanimous; it can scarcely be denied that there is a wide variety of possible solutions and that States have complete freedom in the matter.

44. Thus, though a rule stating that, in the absence of any express provision in its constituent charter, an organization enjoys full capacity to conclude the international agreements necessary for the exercise of its functions and the achievement of its objectives may be satisfactory and true in the majority of known cases, it might be open to criticism on the grounds of its universality and excessive rigidity. In the case of certain international organizations whose constituent treaty contains no provision concerning capacity to conclude international agreements, it might well be that the intention of States, as crystallized by continuing practice, was that the organization should not have the capacity to conclude international agreements or should have only a limited capacity; and, even in cases where there is a provision ruling out the capacity to conclude agreements, it is conceivable that a practice might develop permitting the conclusion of certain agreements on administrative matters. However, one would not go so far as to say that it is practice alone which decides the question of the capacity of international organizations, although in fact this is usually the case. This is a problem which may, in the case of international organizations, be described as *constitutional*; it depends on individual solutions and not on a rule common to all organizations, and there may be some very rigid constituent charters that do not recognize this creative power of practice.

45. These are not the only considerations to be advanced on this topic. It might be thought that one possible objective, instead of stating a general rule defining the fundamental principle of the capacity of international organizations, would be to define a *minimum* capacity possessed by *all* international organizations, though some of them would have a more extensive capacity than this *minimum*. However, before attempting to decide what this minimum capacity might be, it is essential to consider carefully the far-reaching implications of such a solution; it would imply re-defining the concept of "international organization" for the purposes of the future draft articles, since the draft could not prevent the term "international organization" from being used in practice to designate entities not possessing this minimum capacity, and a new definition would be needed to exclude these entities from the application of the draft articles. The result would be a departure from the initial position defined above—namely, the maintenance of the definition of international organizations as given in the 1969 Convention.

46. Even with this fairly limited degree of rigidity, the rule envisaged still presents some disadvantages. There may at present *exist* an entity which the member States have described as an international organization, though it has not hitherto concluded any agreement, its constituent instruments make no reference to any capacity to conclude such agreements and the member States do not *at present* envisage any development likely to confer on it even a limited international capacity. If a text referring to a minimum capacity for international organizations was at present in force, it would be necessary to conclude therefrom that *for the purposes of that text* the entity

[29] *Op. cit.*, p. 101 (translation from French by the Secretariat).

[30] *Yearbook . . . 1972*, vol. II, p. 179, document A/CN.4/258 para. 26, and foot-note 69.

[31] *I.C.J. Reports 1949*, p. 185.

in question was not an international organization; and this consequence would do nothing to encourage a possible development whereby States might gradually come to recognize that this entity had a capacity to conclude international agreements.

47. Lastly, the question arises as to the matters to which this minimum capacity would apply. As previously stated,[32] the vast majority of agreements concluded by international organizations relate to administrative questions and operational activities. These two terms may be fairly clear in an academic context, but would seem to need some further clarification if they were to be used in a convention for defining the limits of capacity. For example, the question of the immunities of an organization of its officials and of the representatives of members States is an administrative question, but it also has some purely fundamental aspects and might equally well be described as political; in any event it is noteworthy that in certain cases member States reserve to themselves the conclusion of agreements on immunities and privileges.[33] This is only one example of the problems that would have to be faced if there were a feeling in favour of establishing a definition of the minimum capacity of international organizations.

48. These are the considerations of principle which lead the Special Rapporteur not to recommend to the Commission the insertion of an article or series of articles concerning the capacity of international organizations, although he must admit that he has arrived at this decision after much hesitation and he is prepared in his work to follow any guidance which the Commission may wish to give him.

49. However, certain considerations other than those of principle have reinforced the opinion expressed above; these are practical considerations based on the Commission's previous experience. The Commission examined the problem of the capacity of international organizations in its work on the codification of the law of treaties, in particular at the time when the Special Rapporteur, Sir Humphrey Waldock, was proposing that treaties between States and the agreements of international organizations should be considered simultaneously. The first report [34] contains a lengthy review of the Commission's discussions on the subject. It appears from this that the Commission remained divided on this question, and finally preferred not to include in its draft any provisions relating to the capacity of international organizations. However, if it were thought to be desirable to adopt a formulation expressing the opinions of Sir Humphrey Waldock in their final stage, it may be recalled that the Commission considered the following formulation:

> In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted.[35]

Again, if one wished to use the formulations devised later in other contexts and finally adopted in the 1969 Convention, the following wording might be suggested:[36]

> In the case of international organizations, the capacity to conclude treaties depends on any relevant rule of the organization.

50. It is obvious that a general rule of this kind merely expressed the idea that the capacity of each organization is determined individually by the terms of its own statutes; and this is tantamount to admitting that, with regard to the capacity of international organizations, there is no general rule. Such a provision might be discussed by the Commission at the appropriate time, but the Special Rapporteur has doubts as regards its usefulness.

51. Still more interesting than the rather negative results obtained by the Commission in its earlier work—as described above—are the positions adopted on the subject by several Governments. The history of international organizations (including those of a pre-federal character) shows that Governments are extremely sensitive in regard to any intervention by international organizations in their foreign affairs, and have often questioned the legitimacy of such interventions even when they are of a minor nature, since experience teaches them that it is intervention in foreign affairs that leads to the development of federative processes in unions of States. Also every international organization may in certain circumstances appear as a technical machinery designed to impose the views of the majority of the States controlling it, and for that reason States are often suspicious of any process which extends the powers of that mechanism. In short, the development of the right of international organizations to conclude international agreements has specific political aspects; and in the circumstances it may be felt that it is not advisable to propose a general formulation, which in some cases would represent a definite retrograde step from what is already possible (or even accepted), and in others might impede a development which is quite possible in the near future.

52. In brief, a justifiable concern for the constitution of international organizations—still fragile, and still unexplicit on so many points—seems to call for a certain caution in the formulation of general rules. This attitude does not imply any pessimistic view of the future of the international organizations but, on the contrary, a basic confidence in their natural and spontaneous development which must be encouraged—and hence, in the first place, respected.

3. *Representation*

53. In reality, the very term "representation" covers a series of problems which differ widely from one another

[32] See *Yearbook ... 1972*, vol. II, p. 174, document A/CN.4/258, paras. 8 *et seq.*

[33] In some cases agreements between member States exist side by side with agreements concluded by the organization with member or non-member States, particularly with the host State. The maintenance of this rivalry of competence between the organization on the one hand and member States on the other is evidence of the great uncertainty which exists in practice with regard to the capacity of international organizations.

[34] *Yearbook ... 1972*, vol. II, pp. 178-182, document A/CN.4/258, paras. 25-36.

[35] *Yearbook ... 1962*, vol. I, p. 193, 658th meeting, para. 87.

[36] See *Yearbook ... 1972*, vol. II, p. 181, document A/CN.4/258, para. 35.

although there are certain links—practical, perhaps, rather than theoretical—between them. The complication arises from the fact that it is necessary to ask "Who is representing whom?". This question is usually a single one, relating to the representation of a clearly defined legal entity (a given State or a given international organization) by a natural person empowered to undertake obligations on its behalf, but it may perhaps sometimes be a double question, relating also to the identification of the entity which is in fact assuming the obligation. This was the case, for instance, in the so-called protectorate systems where it was sometimes uncertain whether the protecting State was negotiating on its own behalf or on that of the protected State, or on behalf of both.

54. In the case of relations between States, existing law does not favour systems of representation in which one State can be represented by another State; such systems, it is said, encourage processes contrary to the sovereign equality of States. Even in cases where the question arises in the context of a developing federalism, it has sometimes given rise to the complaint that it introduces an undesirable lack of clarity into international relations. In any case the International Law Commission, followed in this matter by the United Nations Conference on the Law of Treaties, did not deal with this problem.[37] On the other hand, the Commission did draft a long article, confirmed in the 1969 Convention, concerning the representation of States in the conclusion of treaties (article 7 of the Convention (Full powers)).

55. In the case of international organizations, the determination and proof of capacity to represent an international organization at any stage in the conclusion of a treaty is a problem that arises at least in principle.[38] A question (A.2) on this subject was included in the questionnaire addressed to international organizations. But since, as stated above, the 1969 Convention had nothing to say on the problems of "representation" which relate to the identification of the entity bound by a treaty, it did seem useful to sound out opinions on two problems concerning the question as to who in the case of the organization is really bound by an agreement. Two further questions were therefore asked in the same context, one on agreements concluded by subsidiary organs (A.4) and one on the participation of an organization in a treaty on behalf of a territory it represents (A.1). On these three points, the Special Rapporteur would like to make a few brief comments based on the replies received.

(a) *Determination and proof of capacity to represent an international organization at any stage in the conclusion of a treaty*

56. This problem is, in fact, two-fold since it is necessary to know, first, which *organ* is competent to decide that an act relating to the conclusion of an agreement should be performed and, next, who is the natural person empowered to represent the organization in the performance of the act. The two problems may be reduced to one in the simplest cases, for instance when an act is statutorily the responsibility of the highest official of the international secretariat and when this official performs the act himself. But the situation is much more complicated in certain fairly common cases.

57. In some cases, competence to perform a specific act is statutorily shared between several organs, or certain organs may request another organ of the organization, or even an *ad hoc* organ, to act in their place; does this constitute a "delegation of authority", or representation analogous to a "mandate"? Replies vary widely from one organization to another. The various solutions accepted have often been described and classified, and fall within the scope of the comparative law of international organizations. The information thus collected may in certain cases suggest some ideas for solving a problem of constitutional law concerning a given organization; but although the suggestion has sometimes been made, it seemed to the Special Rapporteur that such problems related to what might be described, as the constitutional law of international organizations. In that capacity, they do not lend themselves to a general solution, even as a means of filling existing lacunae in the constituent charters.

58. Theoretically, and if the same considerations applied to organizations as to States, it should be easy to identify the natural persons empowered to express, in respect to third parties, the organization's will in regard to the performance of one of the acts relating to the conclusion of an agreement. As in the case of States, it would be sufficient to decide which persons have a power of certification similar to that of the Head of State or the Minister for Foreign Affairs in the case of a State, which persons are, by reason of their functions, not required to furnish proof of their powers, and how the documents certifying the legal capacity of other persons to represent the organization are to be drawn up.

59. Then, as in the case of States, there would be a clear separation—and this is a point of great practical importance—between the problems and procedures which, in accordance with the organization's own constitution, relate to the formulation of its decision in regard to a specific act, and the problems and procedures relating to the communication of that decision to the other parties to a convention. But, in the case of organizations, the problem may arise in different terms, because organizations have no agents specializing in external relations grouped together under the authority of a senior official

[37] This reluctance to do so may be compared with the position taken by the International Law Commission on the question of the representation of more than one State by a single person, in its draft articles on the representation of States in their relations with international organizations (*Yearbook ... 1971*, vol. II (Part One), pp. 311-312, document A/8410/Rev.1, chap. II, D, para. 3 of the commentary to article 42).

[38] In the report by R. J. Dupuy to the Institute of International Law, the question is examined in all its aspects (*op. cit.*, pp. 64 *et seq.*), and on the subject of powers an article 7, as follows, is proposed: "The person who represents the international organization or expresses its consent to be bound by the agreement shall furnish the other party with proof of his powers, if the latter so requests." (*Op. cit.*, p. 102) (Translation by the Secretariat.)

The conditions on which this authorization is issued are established by each international organization. An act relating to the conclusion of an agreement performed by a person who cannot produce proof of his powers has no legal effect, unless it is subsequently confirmed by the international organization.

who is himself a specialist and is in turn subordinate to a supreme head, who, like a Head of State, has general powers of representation. Not only are there radical differences between the general structures of the international organizations themselves; this absence of specialized representatives means that there is also a difference between the case of organizations and the case of the State.

60. The most direct consequence of this situation might be that the entity concluding an agreement with an international organization should, in theory, ask for a much more extensive proof of the involvement of all the organs competent to assume a commitment on behalf of the organization, and should then require the natural person finally expressing the will of the organization to furnish proof that he is duly authorized to perform the acts he is proposing to perform. In other words, the distinction between the "internal" and the "international" phases of the conclusion of agreements could not, in the present state of international relations, be as clear-cut as it is in the case of States.

61. However, it appears from the information given by international organizations that in practice the difficulties are not as serious as might be feared. In the first place, by force of circumstances, the most senior official of international secretariats enjoys a privileged situation; the permanence of his position, the weight of the international responsibilities he bears and his relative independence combine to give him a privileged situation in external relations; in all organizations he seems in fact to acquire a power of certification which is accepted as such by the partners of the organization, and by reason of his rank no certification is required for his own acts. Though in certain organizations the situation of the head of the secretariat may be extended to include some officials of a rank approaching or similar to his, and though in some other organizations there are specifically executive organs which act in a comparable manner, the basic fact remains the same. There is a tendency in each organization to create a privileged situation in external relations and in the procedure for concluding agreements, particularly with regard to the certification of the will of the organization to perform one of the acts relating to the conclusion of an agreement.

62. Secondly, all the organizations stressed the practical importance of the correspondence exchanged prior to the conclusion of an agreement. In fact, all the stages—constitutional stages, internal stages, authorizations, delegations of authority, and approvals—are mentioned and described in this correspondence; and in addition copies of the documents and records of the discussions concerning them are generally included in this exchange of correspondence. The partner of an organization is thus informed regularly, and often from day to day, of the development of a situation affecting any stage in the conclusion of an agreement. The final certification relating to the natural person authorized to perform the act—if he is not one of the senior officials or high-ranking representatives for whom by reason of their functions no certification is required—will generally be conveyed in a letter from these senior officials or high-ranking representatives designating the official who is authorized to express the will of the organization.

63. Thus, the situation as it seems to emerge from the information received may be summed up, rather surprisingly perhaps but nevertheless accurately, by saying that it is not radically different from that of relations between States. As in the case of States, the internal procedure of each organization remains the affair of each organization, but the partner to the agreements of the organization is generally informed of it by administrative correspondence. The organizations determine by their practice the high-ranking officials or representatives who have a doubly privileged position in the conclusion of agreements, in the sense that their own acts require no certification and that they themselves authenticate the acts of others. Though there are no "powers" in the formal sense of the term, the production of administrative correspondence is generally accepted instead.

64. If the foregoing analysis is correct, it is obviously permissible to consider the possibility and desirability of drafting texts which would correspond to article 7 of the 1969 Convention, on full powers. Is it necessary to state the principle that each partner in an agreement may demand proof of the capacity of an official to assume a commitment on behalf of the organization? Is this affirmation necessary? Is it in fact true, when the partner in the agreement is a member of the organization, and must in that capacity must be able to verify directly the validity of all expressions of consent and all forms of representation? [39] Is it necessary to refer in precise terms to the existence of high-ranking officials or representatives who, in principle, have a privileged power of representation? These are a few of the questions which may be raised at the present stage, even if they are not solved.

(b) *Agreements concluded by subsidiary organs*

65. As a result of the decentralization of the activities of the international organizations, the need to seek extra-budgetary means of finance, and the involvement in increasingly specialized technical sectors, the international organizations and especially the United Nations have been obliged to multiply the organs—based entirely on a unilateral act of the organization, entrusted with a wide range of different functions, and sometimes enjoying extensive powers—which are generally known as "subsidiary organs". Some of these organs conclude international agreements. Are these agreements binding on the subsidiary organ or on the organization to which they belong, or on both? The question is not purely theoretical and may have very important implications, particularly from the financial standpoint.

66. The organizations consulted deserve great credit for replying to the relevant question (A.4), since—in the case of some of them at least—the matter has clearly not yet been decided. What is most surprising in the variety of replies received is that not all organizations adopt the

[39] It will have to be considered later whether this comment has any implications with regard to the adaptation of the provisions of the 1969 Convention, concerning the constitutionality of agreements (article 46).

solution of *subsidiary organ*; some resort to it in certain cases only. For the majority of organizations the problem does not yet seem to have had any practical aspects at all. Though some organizations have specifically provided for the possibility of giving subsidiary organs a capacity to conclude international agreements, that capacity has not yet apparently been exercised. Two organizations definitely consider agreements concluded by the subsidiary organ as agreements of the international organization itself. Another organization states that, although as a general rule an act of the subsidiary organ is binding on the organization itself, registration practice reveals some uncertainty in the designation of the party to the agreement; moreover, under the actual terms of the agreement, the organization may be bound by it only in part.

67. Two conclusions seem to emerge at present from the information received. First, there is no hard-and-fast concept concerning the legal status of the subsidiary organ; practice seems to be still developing. Also, there is nothing to indicate that there should be a set of rules on the subject, common to all international organizations. Lastly, the question is part of the law peculiar to each international organization.[40] On reflexion, there is nothing surprising in this: the freedom to establish organs and to confer upon them varying degrees of decentralization is an important feature of the constitutional law of each organization. The question of subsidiary organs, seen in this light, does not lend itself to codification applicable to all international organizations—not even to codification confined to the special topic of the agreements of international organizations.

68. Secondly, there is in practice some uncertainty regarding the identification of the party to an agreement concluded by a subsidiary organ. Is it possible and necessary to try to remedy this situation by a general rule ? An affirmative answer would be based on the idea that the party to an international agreement must always be clearly designated and, if it is not so designated, it is best to adopt the solution which offers the greatest security to the other parties to the agreement. This would be tantamount to stating as a general rule that the organization itself is in principle party to the agreement, but that the contrary solution is possible in certain cases which should be studied and defined. This solution seems technically possible but the Special Rapporteur cannot decide, in the light of information available to him, whether it is useful and expedient.

(c) *Participation of an international organization in a treaty on behalf of a territory it represents*

69. Some constituent charters and certain international treaties state, in terms which vary considerably from one case to another, that an organization can participate in a treaty on behalf of a territory it represents. The question arises whether this situation is sufficiently important and clearly defined for the Special Rapporteur to study it and submit proposals on it.

70. The replies given by the organizations consulted are generally of a negative character, either because they do not have the capacity necessary for this purpose or because the capacity has been provided for in certain conventions but has never been exercised. The Special Rapporteur would have been reduced to abandoning the subject altogether if the Secretary-General of the United Nations had not carried out a very extensive and remarkable piece of research on it, which would appear worthy of immediate publication and would serve as a basis for considering the problem in detail. The Special Rapporteur cannot claim to cover immediately, in a few observations, all aspects of the information he has thus received; but there are, it seems, some general comments he can submit to the Commission forthwith.

71. The cases in which an international organization may, with respect to a treaty, be exercising a certain participation in this treaty *on behalf* of a territory in regard to which it performs certain functions are *in principle* fairly numerous. Such a situation might have arisen under Article 81 of the Charter in connexion with the Trusteeship System; but this possibility has hitherto had no practical application, not even in the case of the measures taken in 1947 with regard to the Italian colonies or solutions considered at about the same time with regard to Jerusalem and the Holy Places.

72. Similarly, in a relatively large number of treaties (which are either the constituent charters of international organizations or open multilateral treaties), there are provisions covering the case in which the United Nations is the Administering Authority of a Trust Territory or any other territory, or the more general case of any authority responsible for the administration of a territory or for its international relations. Among the most important instances, may be mentioned the constituent instruments of WMO [41] (articles 3 and 34), IMCO [42] (articles 9, 58 and 59), ITU [43] (articles 1 and 21), FAO [44] (article II), WHO [45] (article 8), UNESCO [46] (article II, amended 11 July 1951), and the ILO [47] (article 35, amended 9 October 1946), as well as the following conventions: the Convention on Road Traffic of 19 September 1949 [48] (article 27), the Protocol on Road Signs and Signals of 19 September 1949 [49] (article 56), the International Convention for the Safety of Life at Sea of 17 June 1960 [50] (article XIII), the International Convention of 12 May 1954 for the Prevention of Pollution of the Sea by Oil (article XVIII, amended 11 April

[40] In a short study published some years ago, the Special Rapporteur may perhaps have fostered certain illusions on this score (P. Reuter: "Les organes subsidiaires des organisations internationales", in *Hommage d'une génération de juristes au Président Basdevant* (Paris, Pédone, 1960), pp. 415 *et seq.*).

[41] United Nations, *Treaty Series*, vol. 77, p. 143.

[42] *Ibid.*, vol. 289, p. 48.

[43] United Nations, *Juridical Yearbook, 1965* (United Nations publication, Sales No. E.67.V.3), p. 173.

[44] FAO, *Basic Texts*, vols. I. and II (1970 edition), 1970, p. 3.

[45] United Nations, *Treaty Series*, vol. 4, p. 185.

[46] *Ibid.*, vol. 575, p. 260.

[47] *Ibid.*, vol. 15, p. 135.

[48] *Ibid.*, vol. 125, p. 22.

[49] *Ibid.*, vol. 182, p. 228.

[50] *Ibid.*. vol. 536, p. 27.

1962 [51]), the Convention of 9 April 1965 on Facilitation of International Maritime Traffic [52] (article XIII), the International Convention of 5 April 1966 on Load Lines [53] (article 32), the International Convention of 29 November 1969 Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties [54] (article XIII), and the International Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage [55] (article XVII).

73. The provisions relating to such participation have not so far been applied in the case of an international organization, so that there is no precedent relating to them. It should also be pointed out that they are very varied. In cases involving participation in the constituent charter of an international organization, the effects of the participation of the territory generally entail lesser rights than those enjoyed by members. Moreover, where open multilateral conventions are concerned, there are cases in which the United Nations would seem to participate as a "party" on behalf of the territory in question; on the other hand, there are cases in which provision is made only for an "extension" of the convention to the territory administered by the organization, or even "application" of the convention to the territory concerned. This makes it necessary to consider a number of difficult problems. Assuming that it is really the organization which becomes a "party" to the treaty, it acquires that status only on behalf of a territory, and this is a procedure for representation; but what precisely are its conditions and effects ? When it is not expressly provided that the organization or the territory become "parties" to the treaty, but there is rather an "extension" or "application" of the treaty, it may be asked whether that is one of the situations which were briefly examined at the beginning of this report.[56]

74. The question of agreements concluded by an organization on behalf of a territory may, however, also be raised in a more specific context in connexion with West New Guinea (West Irian) and Namibia.

75. The administration of West New Guinea (West Irian) by the United Nations from 1 October 1962 to 1 May 1963, on the basis of an agreement concluded on 15 August 1962 between Indonesia and the Netherlands and of General Assembly resolution 1752 (XVII) of 21 September 1962, has interesting features as regards the practice relating to agreements concluded by international organizations, although no agreement was concluded on behalf of the territory during this brief period. In the few agreements which it concluded with Indonesia and the Netherlands for the performance of the basic agreement [57] and in a formal agreement with Pakistan concerning the United Nations Security Force in West New Guinea (West Irian), [58] the United Nations adopted the position that it did not "represent" the territory in the strict sense of that term.

76. The taking over of the administration of South West Africa by the United Nations through the agency of a subsidiary organ of the General Assembly—the United Nations Council for South West Africa—and the United Nations Commissioner for South West Africa, the confirmation of the personality of the territory by giving it the new name "Namibia", and the extension of the responsibilities of the United Nations Council for Namibia were to lead to the broadest possible development, for the benefit of Namibia, of a certain form of international personality represented by the organs established for that purpose within the United Nations itself. This has raised the question of the international agreements concluded by the authorities responsible for representing Namibia in the United Nations. The six agreements concluded so far concern the issue of travel documents by the United Nations Council for Namibia. But the General Assembly resolutions which affirm the fully representative character of the Council ask it to perform a treaty-making function in very general terms. As regards form, the existing agreements were concluded in the name of the Council for Namibia;[59] it would therefore seem that the conclusion of these agreements conforms to the procedure adopted for many agreements concluded by subsidiary organs,[60] and it is not yet possible to establish the extent to which they are concluded by the United Nations as such. They are not drawn up in the form of agreements concluded by the United Nations on behalf of a territory, but rather as agreements directly committing the territory. In any event, it is not possible to draw very precise conclusions from this precedent and it will be necessary to await further developments before presenting a final analysis—and especially before proposing any generalization.

77. Thus the studies undertaken by the United Nations Secretariat show, in conclusion, that this is a matter which has very varied aspects and that it has been the subject of recent developments, especially within the framework of the United Nations. But specific applications are few in number and practice is little developed. Hence it does not seem possible, for the moment, to devote specific provisions to this case. Its examination, however, has been far from useless. As in the case of subsidiary organs in general, it reveals some uncertainty. When an organization assumes international responsibilities with respect to a territory, it is almost inevitable that it should have specialized organs and even some local administration. Where there is an agreement, it is important to clarify the respective positions of the organization and the territory, and to specify whether or not the organization has the status of a "party" to the agreement, on its own account or on behalf of the territory. As the real problem is to identify the parties to an agreement, it

[51] *Ibid.*, vol. 600, p. 346.

[52] *Ibid.*, vol. 591, p. 265.

[53] *Ibid.*, vol. 640, p. 133.

[54] United Nations, *Juridical Yearbook, 1969* (United Nations publication, Sales No. E.71.V.4), p. 166.

[55] *Ibid.*, p. 174.

[56] Paras. 25 *et seq.*

[57] The agreement actually took the form of understandings concluded by an exchange of notes on a trilateral basis (United Nations, *Treaty Series*, vol. 437, p. 304).

[58] United Nations, *Treaty Series*, vol. 503, p. 25.

[59] Cf. documents A/AC.131/20, A/AC.131/24, A/AC.131/25, A/AC.131/26 and A/AC.131/29.

[60] See above paras. 65 *et seq.*

might be imagined that the aim is to establish a residuary rule on this point, under which, in the absence of specific provisions, an organization is presumed to be party to an agreement on behalf of the territory. For the time being, however, it does not seem certain that it would be advisable to propose provisions of this kind.[61]

C. Part III (Observance, application and interpretation of treaties) of the 1969 Convention

78. Two questions put to organizations in the questionnaire have already been raised [62] in connexion with the conclusion of treaties; they also have certain consequences with regard to the rules embodied in part III of the 1969 Convention. We shall examine them again briefly; they relate to agreements concluded with a view to applying other agreements (question A.5) and the characterization as "internal" of certain rules binding organizations (question A.3). We shall then take up the fundamental principles relating to the situation of third parties in regard to agreements concerning international organizations; this difficult question will have to be examined at greater length.

1. *Agreements concluded with a view to applying other agreements*

79. In many cases, an international treaty constitutes an act of execution of another treaty, whether the basic treaty is concluded between the same parties or between different parties. The main consequence of such a situation is clearly stated in article 30, paragraph 2, of the 1969 Convention, which reads:

> When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

80. The replies received on this subject show that the importance of the question varies from one organization to another: some organizations seem to be unaware of it, while others acknowledge that it often arises. The latter organizations cite as an example agreements concluded for the application of a headquarters agreement and agreements concluded in application of a basic agreement concerning assistance. All these organizations deduced legal consequences from the "derivative" nature of an agreement: in general the "derivative" agreement can be concluded by officials of a lower rank than those who concluded the basic agreement and, in principle, the derivative agreement is subordinate to the main agreement as regards its interpretation and legal régime. Although the first consequence follows from the constitutional law of the organization itself, this is not true of the second, which constitutes an interesting application of the above-mentioned article 30, paragraph 2, of the 1969 Convention.[63]

81. We shall add a final consideration which relates to the registration of agreements (or their classification and recording). The questionnaire asked what criteria had been applied for the registration of agreement concluded by the organization (question A.8). Although registration constitutes only a secondary formality in the conclusion of treaties, it is well known that this formality sometimes brings to light some of the most characteristic features of treaties.[64] The organizations' replies once again confirm what was already well known from the practice, [65] namely, that agreements of minor importance, of short duration or subject to frequent changes are not registered. Agreements whose purpose is the application of another agreement are frequently treated in this way.

82. Despite certain very interesting features, agreements which constitute an act of execution of another agreement do not for the moment, in the opinion of the Special Rapporteur, call for separate general provisions.

2. *"Internal agreements" with respect to an international organization*

83. Cases might conceivably arise where certain international agreements, instead of being governed solely by general international law are subject to the law peculiar to an organization. These agreements would include, in particular, but not exclusively, agreements concluded between different organs of an organization, and agreements concluded between an organization and member States. The effects of such subjection to the law of the organization may vary in extent according to the content and development of the law peculiar to each organization.

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[61] If it were possible to reason by analogy with what happened under the international mandates system of the League of Nations, the conclusion would be reached that it is easy for an international organization to establish flexible and evolutive systems. For although, in the case of B and C mandates, the mandatory confined itself either to extending the effect of the treaties it had concluded to the mandated territories, or to concluding, albeit in its own name, treaties relating to those territories, the situation was quite different where A mandates were concerned. In the latter case, certain treaties directly designated the mandated territory as a "party", so that it possessed a certain international personality, although, as Lissitzyn observes, "the ultimate responsibility for their foreign relations remained with the mandatories" (O. J. Lissitzyn, "Territorial entities in the law of treaties", *Recueil des cours de l'Académie de droit international de* La Haye, 1968-III (Leyden, Sijthoff, 1970), vol. 125, pp. 54 *et seq.*) same writer admits that such "territories assume, should the occasion arise, a responsibility of their own which does not exclude that of the mandatory. Such solutions could be applied to the case of agreements concluded by a territory or on behalf of a territory under United Nations administration, or even, more generally, to the problem of subsidiary organs. What is to be hoped is that for every agreement the solution adopted will be as clear as possible.

[62] See above note 13.

[63] One organization rightly drew attention to the particular significance of the following case: State A places funds at the disposal of an organization to be used for the benefit of third States B, C, D, etc., though it reserves certain rights relating to the conclusion and execution of the agreements which the organization will conclude with States B, C, and D. It may be said that the agreements between the organization and the beneficiaries B, C, and D are agreements applying the agreement between State A and the organization. This is a complex legal situation in which two agreements concluded at different times can perform the same function as a trilateral agreement (*Yearbook ... 1972*, vol. II, pp. 190-191, document A/CN.4/258, paras. 61-63) but have an original legal character.

[64] For observations on the conclusion of treaties by subsidiary organs, see para. 66 above.

[65] United Nations, *Repertory of United Nations Practice*, vol. V, *Articles 92-111 of the Charter* (United Nations publication, Sales No. 1955.V.2 (Vol. V)), pp. 307-309, Article 102, paras. 29-31.

In the simplest cases, the agreements would be subject to the constituent treaty of the organization. In more complex cases, the subjection could be extended to instruments other than constituent treaties, and the agreements could be subject to precise rules governing their conditions of application and their rank in the legal system of the organization.

84. There is nothing revolutionary in raising this problem. When the 1969 Convention specified, in article 5, that it applied to the constituent instrument of an international organization and to any treaty adopted within an international organization "without prejudice to any relevant rules of the organization", it recognized the fundamental principle which, at the same time, affirms the existence of a law peculiar to each organization and recognizes, with respect to treaties, its precedence over the general rules of the law of treaties. As we have already said, but must repeat, what is true of treaties between States "adopted within an international organization" should be even more true of agreements concluded "within" an international organization to which either the international organization itself or some of its organs are parties.

85. As already indicated, the question asked on this subject did not arouse great interest among the organizations consulted. There are several reasons for this. First of all, the organizations have hardly any agreements concluded between their organs; agreements between subsidiary organs of the same organization do exist, but this situation does not seem to have caused any problems. Moreover, the relevant rules of each organization are perhaps not so rich in substance as to constitute a special régime for international agreements which might be assumed to come under those rules.

86. That does not mean, however, that to transfer the rules of the 1969 Convention does not introduce the problem just mentioned. We shall give here only one example relating to articles 27 and 46.[66] There is obviously no *a priori* reason for not applying the rules set out in these articles in the case of international organizations. Their transfer does, however, create some difficulties.

87. First of all, a question of terminology arises. Can one speak of the "internal law" of an international organization ? Not only would the corresponding English term "municipal law" have to be changed, but it is open to question whether it would be found acceptable to call the "relevant rules" of an organization "internal law".[67] It could, indeed, be maintained that such rules are special international law rather than internal law.

88. It may also be wondered whether the rule patiently drawn up and established by article 46 is valid in all cases for international organizations. It finally achieves a delicate balance between the rights and interests of third States acting in good faith and those of the party which may demand, up to a certain point, compliance with the statute which determines how its will to be bound must be legally formed. But, if this rule can be transferred as it stands, to apply to an agreement between two international organizations or an agreement between an organization and a third State, does the same hold good for an agreement between an organization *and one of its members?* [68] The fact is that, as we shall have occasion to say later, the member State is not a third party in relation to the organization. Not only must it be supposed to know the constitution of the organization in its entirety, but it has the duty to know it. One must go further; through its representatives in the organization, the member State contributes to the formation of the will of the organization. To maintain for its own advantage an agreement irregularly concluded by the organization would not be justified for reasons of security; such an agreement should therefore be void unless the other members of the organization bear as much responsibility as the State party to the agreement for the breach of the organization's law. Is it possible to reason on these lines ? There is some merit in the foregoing analysis, but it is not entirely convincing in the last resort, because it leaves the organization's own existence out of account and reduces the problem to the situation of its members in relation to one another. It therefore seems that article 46 of the 1969 Convention should be modified slightly, if at all.

3. *The effects of agreements with respect to third parties*

89. The 1969 Convention provided a rigorous solution of the problems relating to the position of third States with respect to treaties, though it tried to avoid taking any dogmatic position. The rules laid down in the Convention on this subject did not take the agreements of international organizations into consideration; but it is possible to go further and say that, even in the case of *treaties* between States, those rules did not consider the particular situation in which an international organization might be place when it was not a party to such treaties, but was directly interested in them. It is therefore necessary to examine here not only the problems peculiar to the agreements of international organizations, but also those relating to certain treaties between States which closely concern the position of an international organization.

90. Reference has already been made to the link between these two categories of agreement. They appear to be

[66] These provisions read as follows:

"*Article 27. Internal law and observance of treaties*

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

"*Article 46. Provisions of internal law regarding competence to conclude treaties*

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

"2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

[67] In its work the Commission has occasionally used this term, but without specifying its scope (*Yearbook . . . 1972*, vol. II, p. 181, document A/CN.4/258, para. 33, foot-note 85).

[68] See above, para. 64, note 39.

quite distinct: on the one hand, there are the agreements to which only States are parties and to which the 1969 Convention applies; on the other, there are the agreements to which one or more international organizations are parties and which are the subject of the present report. The distinction holds good so long as one does not question a very simple postulate, i.e., that a State or an organization either is or is not a party to a treaty, and that there is no other alternative. On the other hand, as soon as this postulate is questioned, the distinction between treaties to which only States are parties and those to which one or more international organizations are parties may no longer be sufficient to cover all the facts.

91. It has already been said [69] that the problem of determining the exact position of an international organization with respect to a treaty between States arises in many cases. This question must be re-examined in the light of the specific provisions of the 1969 Convention; in particular, it must be established whether those provisions are not open to objection when compared with international practice, if it is attempted to extend them to the case of international organizations. This will be the subject of a first investigation. The problem will then be examined in relation to agreements to which international organizations are unquestionably parties. The question then arises whether the provisions of the 1969 Convention, while remaining generally valid, do not require complementing as regards the effects of such agreements on States members of the organizations concerned. This will be the subject of a second investigation.

(a) *Is the international organization a third party in relation to certain treaties between States?*

92. We must begin by stating the problem in relation to a special treaty which, in principle, is unique for each organization. Is the organization a third party in relation to its constituent charter? It does not appear to be a party to that instrument; moreover, the organization does not in principle come into existence until after its charter has entered into force. To say that it is a third party does not seem readily acceptable either, since the organization derives rights and obligations from its constituent charter, but to say that these rights and obligations are attributed to it because it has accepted them seems hardly satisfactory, since it is in fact from the constituent charter that the organization derives its existence—before it can ask itself any question the organization must first exist, that is to say, it must refer to its constituent charter. In the opinion of the Special Rapporteur, therefore, no organization can be said to be in the position of a third party in relation to its constituent charter.

93. The same applies to a treaty amending the constituent charter. It may even be pointed out that very frequently the organization participates, through its organs, in the revision of its constituent charter. Thus it exercises, at least in part, one of the most specific prerogatives of the "parties" to a treaty: the right to administer the treaty and to participate in determining its future substance.[70] But it may perhaps be said that these comments are so obvious they go without saying, and that they have never been challenged or caused any difficulty. Thus the 1969 Convention, which followed general principles and could not deal with special cases, would not call for any supplementary provision on this point.

94. The question becomes more difficult in the case of treaties to which a certain number of States members of the organization, but not all, are parties, usually, with a few States which are not members of the organizations, and when, in addition, the treaty assigns to the organization or one of its organs new functions and hence rights and obligations. That is a very frequent case: it enables the organization to develop in a rational way, avoiding the onerous solution of setting up a separate organization for each treaty.[71] But here it must be accepted that initially the organization is manifestly a third party in relation to the treaty; the relationship of the organization to the treaty could to thus normally come within the scope of rules based on articles 34 to 38 of the 1969 Convention. To examine the merits of such a solution, it is necessary to refer to the very essence of the régime established by the Convention, to describe briefly the practice of organizations and, finally, to draw the conclusions which follow.

95. Where the purpose of a treaty is to confer rights and obligations on a third party, in this case the organization or one of its organs, the strictest régime applies and in principle (article 35) the organization must *expressly accept its obligations in writing*. The exact interpretation of such a rule in the case of an organization is debatable, but it excludes any tacit or implicit acceptance. Once the situation of the organization is thus established in relation to the treaty, the question arises whether it can be unilaterally modified by the parties to the original treaty. The 1969 Convention deals with this question in article 37; it naturally allows the parties to the original treaty and the third State, or in this case the organization, to settle the question as they see fit; but in addition, article 37 establishes presumptions for the case in which the will of those concerned is not established. Where an obligation has arisen for the third State, it is presumed that its consent is necessary if the obligation is to be revoked or modified. Conversely, in the case of rights it is presumed that the consent of the third State is not required.

96. In their replies to the questionnaire, the organizations consulted reported abundant practice which is sufficient to show that this is an important point. Some of the replies merely noted that the organization is obliged to comply with such treaties in so far as they do not conflict with its constituent charter; others pointed out that some conventions have created rights for certain organizations without those organizations having expressly given their consent (for instance, article 6 *ter* of the Convention of

[69] Paras. 23 *et seq.*

[70] Consequently, organizations which are not the depositaries of their original constituent charter claim, and generally obtain, deposit of the acts revising those charters.

[71] *See Yearbook ... 1972*, vol. II, pp. 189-190, document A/CN.4/258, paras. 58-60.

Paris for the Protection of Industrial Property as revised at Lisbon in 1958 [72]), which is, moreover, in conformity with article 36 of the 1969 Convention. But the dominant feeling, though not elaborated by writers, is certainly that the consent of the organization is necessary, though it can be given in the most diverse forms. As one organization observed, the actual *principle* of the need for consent need not be questioned: this view is confirmed by the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, which is an important precedent. Many other examples are given in the replies; they establish the formal character of the acceptance by the organization of certain functions provided for in multilateral or bilateral treaties between States.[73] It is also possible, however, to give numerous examples of implicit acceptance; this is recognized, for example, in the case of treaties whose text is adopted within one of the principal organs of the organization.[74] Similarly, it may be considered that when an organization urges States to become parties to a convention, that implies that the organization, for its part, accepts the functions and obligations assigned to it by the convention.[75] Finally, there are innumerable examples in which acceptance of a function such as that of depositary is effected simply by performing the function when the time comes.

97. It can therefore be said that in all these cases the consent of the organization is always required, but that it is not subject to any condition as to form. On the other hand, there is nothing in the practice to suggest that an organization can oppose the abolition of functions entrusted to it; if such functions are to be modified, it is normal for the organization to be consulted and its consent required. These procedures thus depart considerably from the provisions of the 1969 Convention, and this is easy to understand. A State has sovereign power of which the law of treaties must take account; an organization, on the contrary, is entirely concerned with the service to be rendered to the human communities which may appeal to it. It is therefore natural that no condition as to form should be attached to the consent of the organization, and that it should not be able to invoke any "subjective right" to retain a function which all the States that instituted that function have decided to abolish. On the other hand, consent to accept new functions is always necessary, for several reasons. First of all, the organization must be able to verify that it is legally competent under its constituent charter to perform the functions to be assigned to it, and that it has the material means to perform them. Secondly, the group of States bound by the constituent charter is practically never identical with the group of States parties to a convention extending the powers of the organization; [76] if this difference is not to lead to distortions, it is necessary to take certain precautions, particularly in financial matters. In practice, the cost of executing the convention is so distributed that States which are not members of the organization, but are parties to the convention, bear their part; this individualization of the financial burden of the convention also makes it possible, though the practice is not uniform, to exempt from payment States which are members of the organization, but not parties to the convention.

98. Subject to further study of the problem later, the Special Rapporteur therefore concludes that this is a frequent and important case for which solution identical with those of the 1969 Convention would not be adequate; the text of that Convention would therefore need fairly extensive adaptation.

(b) *Are States members of an international organization third parties in relation to the agreements concluded by that organization?*

99. Before answering this question, the form of which has deliberately been made rather provocative, we should consider its practical scope. In the case of a treaty concluded by an international organization and providing only for rights for its member States, for instance a headquarters agreement, the principle laid down by the 1969 Convention in article 36 could be applied without great disadvantage: member States could normally invoke such rights since their consent would be presumed; the organization, with the agreement of the State with which it had contracted, could amend or abrogate the agreement without the specific consent of the member States (article 37, paragraph 2 of the 1969 Convention), but that situation would not present any great dis-

[72] WIPO, Manual of Industrial Property Conventions, First Volume (Geneva, n.d.), section F 1.

[73] For instance, the resolution of 30 September 1968 of the General Conference of IAEA (IAEA, *General Conference, Twelfth Regular Session, 24-30 September 1968, Resolutions and other decisions* (GC (XII)/Resolutions (1968) (Vienna, 1969), p. 7.) authorizing that organization to assume the role envisaged in the Treaty on the Non-Proliferation of Nuclear Weapons (General Assembly resolution 2373 (XXII), annex); the signature of IBRD to certain agreements (Articles of Agreement of IFC (United Nations, *Treaty Series*, vol. 264, p. 117) and of IDA (*ibid.*, vol. 439, p. 249); the Indus Waters Treaty 1960 (*ibid.*, vol. 419, p. 215); the 1965 Convention on the settlement of investment disputes between States and nationals of other States (*ibid.*, vol. 575, p. 259); in the case of the 1969 Convention, the General Assembly expressly approved (resolution 2534 (XXIV) of 8 December 1969), paragraph 7 of the annex to the Convention after the representative of the Secretary-General had explained to the Conference that such approval was necessary (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. 149-150, 26th plenary meeting, paras. 71-72). For the Convention of 21 February 1971 on Psychotropic Substances (United Nations publication, Sales No. E.73.XI.3), the Economic and Social Council, by its resolution 1576 (L), of 20 May 1971, formally accepted the functions assigned to it by that Convention.

[74] For example, the International Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly by resolution 2106A (XX) of 21 December 1965; the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights adopted by the General Assembly by resolution 2200A (XXI) of 16 December 1966.

[75] Economic and Social Council resolution 833B (XXXII) of 3 August 1961 and General Assembly resolution 1774 (XVII) of 7 December 1962, relating to the Single Convention on Narcotic Drugs of 30 March 1961 (United Nations, *Treaty Series*, vol. 520, p. 204).

[76] If the groups of States were identical, could it be considered, at least in certain cases, that the problem was simplified and the consent of the organization rendered unnecessary, at least formally? The answer is debatable.

avantages, since it is obvious that the member States are represented in the organization and collectivity determine its will; in other words, the member States would not have to consent individually in a manner which might be described as external, to the modification of their rights under the Convention, but they would in fact consent collectively through the organization itself, by its internal procedures. Thus the case of the headquarters agreement seems relatively simple, as certain organizations have pointed out.

100. The difficulties begin when obligations are created for the States members of an organization by an agreement concluded by that organization. The problem is all the more serious because there are very few agreements which create only rights for the States members of an organization without providing, in one way another, for some obligation, and because, as has already been said, where there is a mixture of rights and obligations it is the strictest rules which should in principle prevail.[77]

101. On the basis of purely formal reasoning, does it not follow from a rule similar to that of the 1969 Convention that, failing express consent, the agreements of international organizations will have no legal effect on the member States without their explicit consent ? Is not such a solution in conflict with practical requirements and even with the necessities of the proper functioning of international organizations ? If these two questions are answered affirmatively, one is tempted to propose a rule different from that deriving from the 1969 Convention.[78]

102. It is difficult to draw from the practice a conclusion which cannot be contested. At the very least, before referring to a few date, it is necessary to make a distinction which seems to follow from the general principles of the law of treaties. Before determining what might be the content of the obligation of a member State, it is, indeed, necessary to determine *with respect to whom* the obligation of the member State would exist. For it may be imagined that the obligations assumed by the organization under an agreement with a State A are directly binding on the member States with respect to State A; in that case, the agreement would have a direct effect on the members of the organization. It may also be imagined that, in accordance with the most classical rules, an agreement between the organization and State A *as such* would have no effect on the member States, but that they would have an obligation to respect, or even to execute, such an agreement by virtue of the rules of the constituent charter of the organization, though they would have that obligation *only with respect to the organization itself, not with respect to State A.*

103. These two situations are legally very different. In the first, the organization negotiates both on its own behalf and on that of the member States; legally, it represents the member States in all agreements. In the second situation, the organization commits only itself, but in its relations with its own members it has *statutorily* a strong position which enables it to fulfil its undertakings under the best possible conditions. It will also be noted that the legal personality of the organization is established more strongly and independently in this latter case: for State A deals only with the organization, which is solely responsible for executing the treaty. The above distinction may perhaps help to clarify the practice.

104. The practice contains some indications which at first sight seem favourable to a classical analysis and to respect for the principle of the relativity of treaties, even with regard to the members of an international organization in relation to an agreement concluded by the organization. In principle, to deal with an international organization is not the same thing as to deal with its members: one need only refer to all the agreements concluded by international organizations on questions of finance and development: it is clear that only the organization and not its member States as such have the status of "parties" to these agreements.[79] What proves the reality of this situation is that State A, which concludes an agreement with an organization, can demand, and in fact sometimes does demand, that the States members of the organization, or some of them, shall intervene as "parties" to the agreement, either by undertaking to guarantee the obligations of the organization or by committing themselves "for matters within their competence".[80]

105. The practice also shows that within each organization there prevails a general principle according to which member States co-operate in all the measures decided on by the organization, and assist it in the accomplishment of its task and the attainment of its purposes. To establish the general content of such an obligation it is necessary to refer to all the relevant rules of the organization, that is to say, first of all to its constituent charter, but also to duly established practices. Sometimes these obligations are expressed in very general terms [81] sometimes they are more precise and occasionally they take account of particular agreements concluded by the organization.[82] But it is clear that in every international organization the member States commit themselves with respect to the organization by general obligations to

[77] This is true, at least, of the forms of consent required; the Special Rapporteur recognizes that where the rules concerning revocation or modification are concerned the problem is less simple, but this is not the place to discuss it.

[78] This certainly appears to follow from the provisional report of Mr. R. J. Dupuy which proposes the following formula: "An agreement lawfully concluded by an international organization is legally binding on all its members." (*op. cit.*, p. 108.) (Translation by the Secretariat.)

[79] Excepting, of course, the case in which *some* member States intervene expressly as parties and the case—which need not be considered here—in which an organization being terminated examines the question of succession to its obligations.

[80] The European Economic Community has had extensive recourse to mixed agreements in which, on the Community side, the Community as such and each of its member States appear as "parties".

[81] For the United Nations, see Article 1, paragraph 4, Article 36 and Article 73 *d* of the Charter.

[82] The Treaty establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 11) contains wording which has often been commented on by writers and referred to in judicial decisions, in particular article 228, paragraph 2, which provides that the agreements of the Community "shall be binding on the institutions of the Community and on Member States" (P. Pescatore, "Les relations extérieures des Communautés euro-

co-operate and that, even in the absence of any express reference, that obligation imposes duties on them with respect to the agreements of the organization: the passive obligation to respect those agreements and not to hinder their execution and the active obligation to facilitate the execution of the agreements within the limits of their general undertakings. In no case does it seem possible for a member State to ignore agreements regularly concluded by an organization.

106. From the foregoing, it seem possible to draw a few conclusions:

(*a*) Nothing in the practice precludes the idea that an organization concluding an agreement with a third State (or with another organization) wishes to create a direct obligation for one or more or all of its member States with respect to its co-contractor. In that case a mechanism similar to that of article 35 and 37 of the 1969 Convention may be imagined. It would then appear normal not only that the consent of the member States should be required, but that it should be express and in writing, and that these direct relations with a partner of the organization should not be capable of being modified or revoked without their consent, since obligations of the member States are involved.[83] But it appears that this possibility has so far remained theoretical; if the partners of the organization wish to enter into other commitments, it is in their interests that the member States should become "parties", alongside the organization.

(*b*) The agreements concluded by the organization cannot be ignored by the member States in their relations with the organization. These agreements create obligations which are more or less limited, depending on the organization, the subject of the agreements and how they touch on the competence of the member States. They create *at least* a general obligation of conduct involving the duty of every member State to respect the undertakings of the organization and co-operate with it. In this sense it might be said, though not entirely correctly, that the member States, though not "parties" to the agreements of the organization, are not third parties with respect to them.

107. These are the observations which the Special Rapporteur submits to the International Law Commission, on an entirely provisional basis, regarding the problem of the effect of treaties on third parties in the case of international organizations.

péennes", *Recueil des cours de l'Académie de droit international de La Haye, 1961-II*, vol. 103 (Leyden, Sijthoff, 1962), pp. 133 *et seq.*) and article 5 which reads: "Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

They shall abstain from any measures likely to jeopardize the attainment of the objectives of this Treaty".

[83] It may also be imagined that this express written consent is given, not with regard to a particular agreement, but *en bloc* for a more or less extensive variety of agreements, in the constituent charter of the organization. In that case the precise position of the members with respect to agreements of this kind concluded by the organization would have to be defined according to the precise provisions of the constituent charter.

ANNEX

Questionnaire prepared by the Special Rapporteur

A. QUESTIONS INTENDED FOR ALL THE INTERNATIONAL ORGANIZATIONS TO WHICH THE QUESTIONNAIRE HAS BEEN ADDRESSED

1. *Possibilities that may be open to an international organization, by virtue of treaties concluded under the auspices of your organization, of participating in an agreement on behalf of a territory it represents*

This question was raised by the United States of America in its written statement submitted to the International Court of Justice in connexion with the advisory opinion on Namibia in 1971.[a]

In addition, two Conventions sponsored by IMCO—the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (article XIII) and the International Convention on Civil Liability for Oil Pollution Damage (article XVII)—both published in the *Juridical Yearbook*[b]—also contain some interesting provisions on this point.

2. *Recourse in the conclusion of agreements to "powers", to other documents proving the capacity to represent or to documents establishing a delegation*

This is an important practical question. It should be broadened to include the problem of "delegations" of one organ to another and to a subsidiary organ.

3. *Distinction between internal agreements having an internal character as regards the organization and those which have an external character. Is this distinction recognized? Is anything known about the problems it covers?*

Internal agreements would include all the agreements between principal organs or between subsidiary organs. It is not so sure that agreements between the organization and a member State would also be internal agreements, even if the State signs in its capacity as a State member.

4. *The organization's practice with regard to agreements concluded by its subsidiary organs: are these agreements of the organization or not?*

5. *Does the organization know of any agreement it has concluded with a view to applying other international agreements or treaties? Does the fact that these agreements are governed by the instruments they are intended to execute have legal consequences (power to conclude the agreements, legal status)?*

6. *With regard to multilateral treaties between States, is the organization in the position of "a party to these treaties", "an associate", or "a person bound to respect these treaties"?*

7. *Are there any actual cases in which the position of the States members of an organization in connexion with an agreement concluded by the organization—an agreement to which those States are not parties* stricto sensu*—has been questioned? In other words, do you know of any cases where an agreement concluded by an organization has had certain consequences for the member States of the organization which are not parties* stricto sensu *to the agreement?*

[a] *I.C.J. Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, vol. I, pp. 884-887.

[b] United Nations, *Juridical Yearbook, 1969* (United Nations publication, Sales No. E.71.V.4), pp. 169 and 180 respectively.

8. *What criteria have been applied by the organization for the registration of the agreements to which it is a party?*

B. Question intended only for the United Nations

Exact position of the United Nations with regard to the 1946 Convention on the Privileges and Immunities of the United Nations

I have several references to statements by representatives of the Secretary-General on this point; I do not wish to have an official statement on the subject, but only the most up-to-date references to positions already taken.

C. Question intended only for the specialized agencies and IAEA

Statements setting out: (1) the position of the specialized agencies with regard to the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies; (2) the position of IAEA with regard to the Convention on the Privileges and Immunitities of IAEA

What I want to know is whether the agencies consider themselves to be parties to these agreements and if any specific legal problems in connexion with them have been discussed.