

Document:-
A/CN.4/279 and Corr.1 (E. only)

Third report on treaties concluded between States and International Organizations or between two or more International Organizations, by Mr. Paul Reuter, Special Rapporteur - draft articles with commentaries

Topic:
Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-
1974, vol. II(1)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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

[Agenda item 7]

DOCUMENT A/CN.4/279 *

Third 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

Draft articles with commentaries

[Original: French]
[29 March 1974]

CONTENTS

	<i>Page</i>
<i>Abbreviations</i>	135
	<i>Paragraphs</i>
Preface	1-6 136
Draft articles and commentaries	137
Part I: Introduction	137
Article 1. Scope of the present articles	137
Commentary	137
Article 2. Use of terms	138
Paragraph 1 (a)	138
Commentary	139
Paragraph 1 (d)	141
Commentary	141
Paragraph 1 (e)	141
Commentary	141
Paragraph 1 (f)	141
Commentary	141
Paragraph 1 (i)	142
Commentary	142
Paragraph 2	143
Commentary	143
Article 3. International agreements not within the scope of the present articles	144
Commentary	144
Article 4. Non-retroactivity of the present articles	145
Commentary	145
Article 6. Capacity of international organizations to conclude treaties	145
Commentary	145

ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
WIPO	World Intellectual Property Organization

* Incorporating document A/CN.4/279/Corr.1.

Preface

1. In its report on the work of its twenty-fifth session, the International Law Commission, while expressing its intention to concentrate at its twenty-sixth session on succession of States in respect of treaties and State responsibility, stated that, time permitting, it would also consider the remaining topics in its programme of work, including the question of treaties concluded between States and international organizations or between two or more international organizations.¹

When that report was considered by the Sixth Committee of the General Assembly, many representatives expressed their views on that topic and the way in which it had been dealt with by the Commission. Their observations constitute a valuable guide for the Commission and the Special Rapporteur, which will now make it possible to reach a new stage in the work relating to this question.

2. In addition to comments on specific points, which will be referred to later in the present report, the representatives in the Sixth Committee generally expressed the hope that the work of the Commission in this sphere would be given a new impetus² by the speedy submission of a set of draft articles,³ although the subject was not particularly urgent⁴ and its consideration seemed still to be at the stage of theory.⁵ The prevailing view seems to be reflected in the invitation to begin the preparation of a set of draft articles. If it is objected that more information should be obtained from international organizations, it is easy to reply that substantial information has already been gathered and that it is better to draw the attention of international organizations to a set of draft articles which, perhaps because of their very imperfections, will reattract their attention in a specific way; this will elicit observations more valuable than those which might be obtained in reply to additional questionnaires.⁶ In the communications which they addressed to the Secretary-General of the United Nations on the occasion of the twenty-fifth anniversary of the International Law Commission, some international organizations mentioned the assistance they had already given the Commission in connexion with this topic and their interest in the future draft articles in terms

¹ See *Yearbook . . . 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 178.

² See *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, paras. 81-84, and the statements by the representatives of the following States: United States of America and Byelorussian Soviet Socialist Republic (*ibid.*, *Twenty-eighth Session, Sixth Committee*, 1398th meeting, paras. 7 and 30), German Democratic Republic and Finland (*ibid.*, 1399th meeting, paras. 31 and 38), Ghana (1404th meeting, para. 43), Austria, New Zealand and France (*ibid.*, 1405th meeting, paras. 6, 11 and 43) and Indonesia (*ibid.*, 1406th meeting, para. 38).

³ Statements by the representatives of Kenya, Greece and Brazil (*ibid.*, paras. 15, 44 and 58).

⁴ Statement by the Federal Republic of Germany (*ibid.*, 1402nd meeting, para. 22).

⁵ Statement by Poland (*ibid.*, para. 9).

⁶ A very pertinent observation to this effect was made by the representative of the United States of America with regard to States, but the comment is even more applicable in the case of international organizations (*ibid.*, 1398th meeting, para. 7).

which can only be taken as an encouragement to complete the undertaking.⁷

3. This third report, and those which follow it will therefore be devoted to a set of draft articles prepared according to the traditions of the International Law Commission. The method used has been determined by one basic fact: the essential purpose of the work to be done is to permit, as far as possible, the extension of the provisions of the 1969 Vienna Convention on the Law of Treaties⁸ to agreements concluded between States and international organizations or between two or more international organizations. Of course, this aim does not exclude adaptations which go beyond matters of drafting, nor even substantial additions, as appropriate, but it implies that the International Law Commission should remain as faithful as possible to the Vienna Convention on the Law of Treaties.⁹

4. However, the question whether the draft articles will be submitted to an international conference so that they may become a codification treaty or will take another form has been left open. Without in any way anticipating the decision to be taken at the appropriate time by the General Assembly, the articles have been drafted on the assumption that they will ultimately be submitted to a conference. This provisional solution has the advantage of making for a more effective and economical presentation.¹⁰

5. The work which follows is accordingly based on the articles of the 1969 Convention, and follows the same order. The draft articles have also been given the same numbers as the corresponding articles of the 1969 Convention. When provisions specific to treaties between States and international organizations or between two or more international organizations are necessary, the articles in question will be given a number *bis*, *ter*, *quater* and so on, so as to incorporate them into the draft articles without changing, for the time being, the correspondence established between the numbers of the draft articles and those of the 1969 Convention. When an article of that Convention does not call for a corresponding provision in the draft articles, its number will provisionally be omitted in the numbering of the draft articles. A parallel between the 1969 Convention and the draft articles will thus be maintained as long as possible.

⁷ See A/9159, p. 6 (IBRD), p. 4 (FAO), p. 11 (WIPO).

⁸ 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 is referred to hereafter as "the 1969 Convention".

⁹ This has always been the position of the International Law Commission. See *Yearbook . . . 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 10; *Yearbook . . . 1972*, vol. II, p. 194, document A/CN.4/258, para. 76; *Yearbook . . . 1973*, vol. II, p. 77, document A/CN.4/271, paras. 9-12; *ibid.*, vol. I, pp. 201-202, 1241st meeting, paras. 34 and 43. This point was stressed by some representatives in the Sixth Committee: Brazil (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 58); Australia (*ibid.*, 1404th meeting, para. 29) and Byelorussian Soviet Socialist Republic (*ibid.*, 1398th meeting, para. 30).

¹⁰ *Yearbook . . . 1972*, vol. II, pp. 173, 175, 183, 185 and 191, document A/CN.4/258, paras. 3, 12, 42, 48 and 64.

It will sometimes be necessary to depart provisionally from the order adopted in the 1969 Convention; this will be so in the case of some initial provisions ("Use of terms"), consideration of which cannot be dissociated from other articles placed closer to the beginning in the Convention.

6. One last remark concerning methodology is essential. The Special Rapporteur has noted that during the consideration of the report of the International Law Commission by the Sixth Committee of the General Assembly in 1973, some representatives expressed the wish that the documents of the International Law Commission should be shorter and should omit certain doctrinal or theoretical considerations.¹¹ In the present report an effort has been made to take those wishes into account by reducing to a minimum both discussion and theoretical references, so that reference to this document may be made as easy as possible.

Draft articles and commentaries

PART I. INTRODUCTION

*Article 1. Scope of the present articles*¹²

The present articles apply to treaties concluded between States and international organizations or between two or more international organizations. Article 3 (c) of the Vienna Convention on the Law of Treaties¹³ does not apply to such treaties.

COMMENTARY

(1) Draft article 1 deals with a question of terminology and several substantive questions. With regard to the first aspect, the draft article uses a terminology which has not been called in question since the United Nations Conference on the Law of Treaties and which uses the term "treaty" and not the term "agreement" to designate the conventional acts which are the subject of the present draft articles, and describes these conventional acts by the formula "treaties concluded between States and international organizations or between two or more international organizations". These two points will be considered briefly.

(2) With regard to the use of the term "treaty" rather than the term "agreement", a certain doubt might arise if

¹¹ Statements by the representatives of Nigeria and Israel (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 5 and 1404th meeting, para. 15).

¹² Corresponding provision of the 1969 Convention:

"Article 1. *Scope of the present Convention*

"The present Convention applies to treaties between States."

¹³ "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

"...
"(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties."

one refers to article 2, paragraph 1 (a) of the 1969 Convention. That provision reserves the term "treaty" for conventional acts concluded between States in written form; moreover, article 3 of the same Convention uses the term "international agreement" for all other conventional acts, whether not in written form or concluded between States and other subjects of international law or between two or more subjects of international law. In order to remain faithful to the terminology used in the 1969 Convention, would it not then be necessary to use the term "international agreement" to designate conventional acts concluded between States and international organizations or between two or more international organizations? The Special Rapporteur does not think so, for the following reasons.

(3) The preparation of the present draft articles implies frequent references to the 1969 Convention, and it is obvious that the two texts will be used together both in theory and in practice. It is therefore essential to avoid all ambiguity in the terminology common to the two conventions (on the assumption that the draft articles will become a convention). One point is clear: the term "treaty" used in isolation must have the same meaning in the draft articles as in the 1969 Convention; that is, it must signify a conventional act concluded between States in written form. The term "international agreement" is clearly the most general expression used in the 1969 Convention, and covers all international conventional acts which have no special designation or special régime. In the context of the 1969 Convention, such a designation and régime are applicable to international conventional acts concluded between States in written form, which constitute "treaties". But in the draft articles, international conventional acts concluded in written form between States and international organizations or between two or more international organizations will be subject to a special régime and should have a special designation; it is therefore not logical to use the designation "international agreement" for that purpose. The latter term should retain its wider connotation, even if special régimes gradually make it inappropriate to use that term on many occasions. The designation to be reserved for the conventional acts which are the subject of the present draft articles is thus "treaties concluded between States and international organizations or between two or more international organizations". The disadvantage of this designation is its length and the practical impossibility of replacing it by a shorter expression; its advantage is that it avoids confusion and remains faithful to a usage sanctioned by the authoritative resolution adopted by the United Nations Conference on the Law of Treaties.¹⁴

¹⁴ The reference here is to the well-known resolution of the Conference by which it:

"Recommends to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations." (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285. Resolution relating to Article 1 of the Vienna Convention on the Law of Treaties).

(4) However, this long designation, which juxtaposes two different categories of treaties in order, it might be supposed, to draw a distinction between them as much as to associate them, immediately raises a question of substance. Is it not necessary, *from the outset*, to separate treaties concluded between States and international organizations from treaties concluded between two or more international organizations? Traces of concern about this issue are to be found in the discussion on the work of the Commission.¹⁵ Without anticipating future developments, it can already be stated that in treaties concluded between States and international organizations certain rules of the 1969 Convention relating to the consent of a State, considered in isolation, may be applicable; of course, they are not applicable in the case of treaties concluded between two or more international organizations.

(5) It is therefore possible and even certain that in the case of certain specific problems it will be necessary to draw a distinction between the two categories mentioned above. But in the opinion of the Special Rapporteur, this is not a sufficient reason to separate them *from the outset* as though this were a fundamental distinction on which the International Law Commission ought to base its work. Two substantial considerations militate against such a solution.

(6) Firstly, the very bases of the 1969 Convention are common to treaties between States, treaties between States and international organizations and treaties between two or more international organizations, and to begin by dividing into two fundamentally distinct categories the treaties with which the present draft articles are to deal would be a very disquieting first step towards the basic objective of departing as little as possible from the 1969 Convention. The underlying unity of all these juridical régimes derives from the basic value of consensualism, which is present in all the provisions of the 1969 Convention.

(7) Secondly, careful study of the lengthy debates of the International Law Commission on the law of treaties between States shows that the Commission was on many occasions tempted to introduce traditional distinctions: bilateral and plurilateral treaties (not to mention general multilateral treaties), formal treaties and treaties in simplified form, and so on, and that finally it avoided any *systematic* reference to classifications, confining itself in some articles to drawing, in terms as simple and precise as possible, distinctions whose purpose is always limited to that of the article in question. This attitude of the Commission reflects the desire both to maintain for all treaties the unity of the régime applicable and to avoid any reference to doctrinal concepts: it is essential to remain faithful to that spirit.

(8) We have still not examined the second sentence of the proposed text, which refers to article 3 (c) of the

1969 Convention. It concerns a point which is not essential, but to which the attention of the International Law Commission should be drawn. Mention has already been made of the origin of this text, which was added at the Conference on the initiative of the Drafting Committee, in order to allay the concern of some States which were afraid that the future convention on the law of treaties might not cover so-called "trilateral" treaties,¹⁶ that is, treaties in which two States which have decided to enter into relations involving assistance or the supply of goods associate with that agreement, as a third party, an international organization, which is responsible for carrying out or supervising certain operations (in particular transfers of fissionable materials). In order to avoid excluding such treaties completely from the scope of the codification, the conventional relations arising from a trilateral treaty were divided into two groups: the relations between States bound by virtue of an express provision of the 1969 Convention, and the others, that is, the relations between the States and the organization, which were covered by the customary régime.

(9) This improvised solution, embodied in article 3 (c), is merely a clever but debatable expedient. From the standpoint of principles, it has not been shown that the unity of the conventional régime can be thus disrupted without also disrupting the unity of the treaty, especially in the case of a treaty in which the various parties are not in a symmetrical position in relation to each other: is not the organization almost constantly intervening in the relations between the States? However, whatever view may be held of article 3 (c) within the existing system of the 1969 Convention, it must be acknowledged that such an article no longer has any justification as soon as the rules of the 1969 Convention have been extended as far as possible to treaties between States and international organizations, as is the intention in the present draft articles. It thus becomes quite natural to eliminate the provision contained in article 3 (c) of the 1969 Convention and to restore their unity of régime to conventional relations.

It may be felt that the proposed wording makes the preliminary article too long, and that this article should be concise, like the corresponding provision of the 1969 Convention; in that case, it will be necessary to find a more appropriate place for the second sentence at a later stage.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "Treaty concluded between States and international organizations or between two or more international organizations" means an international agreement concluded between States and international organizations or between two or more international organizations in written form

¹⁵ See the question put by Mr. Ushakov at the twenty-fifth session of the International Law Commission (*Yearbook . . . 1973*, vol. I, p. 189, 1238th meeting, para. 76), or the observation by the representative of Israel in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1404th meeting, para. 14).

¹⁶ See *Yearbook . . . 1973*, vol. I, p. 189, 1238th meeting, para. 75. See also *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 147, 28th meeting of the Committee of the Whole, para. 7.

and governed principally by general international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.¹⁷

COMMENTARY

(1) The wording of the 1969 Convention is followed exactly, except for two new elements introduced into the phrase "governed by international law" by the addition of the words "principally" and "general". As will be explained, these two minor additions—and particularly the first one—are not absolutely essential, but are useful. With regard to the remainder of the text, since the exclusion from the scope of the draft articles of agreements not concluded in written form was originally the subject of a decision by the International Law Commission, no further commentary on it is called for.¹⁸

(2) The use of the term "principally" is intended to resolve a difficulty which may arise in connexion with the distinction between "treaties" and "contracts". It is generally agreed that the distinction between a treaty and a State contract may be drawn on the basis of the law which will govern these instruments: treaties are governed by international law, whereas contracts are governed by any national law chosen by the parties. If the parties have not expressed their intentions in this regard in sufficiently clear terms, the question must be resolved by taking into consideration the *purpose* of the conventional act and the *circumstances* which surrounded its conclusion.¹⁹ No special attention was given to this problem in the preparatory work on the 1969 Convention. Does it involve special aspects in so far as international organizations are concerned?

(3) At first sight, the question arises in the same manner for treaties between States and for treaties between States and international organizations or between two or more international organizations. Certain members of the International Law Commission emphasized, however, that the problem would be more important in the case of international organizations, because of the special functions which some of them perform in the financial, commercial or scientific fields²⁰ or because

in practice certain agreements are governed "in some respects by international law and in other respects by the law of a particular State".²¹ These are extremely interesting and pragmatic questions which are more germane to the law of international and transnational contracts than to the law of treaties, although the body of legal writings on these questions contains works by a number of experts in public international law.²² Indeed, the main issue is thus which specific régime governs certain contracts concluded between States and organizations, on the one hand, and individuals, on the other hand; these would therefore be "international agreements", which would in this case not fall within the sphere of application of either the 1969 Convention or the present draft articles. This may be why the International Law Commission did not consider this question in depth when preparing the draft articles on the law of treaties.²³

(4) In any case, it is quite possible to deal with the problem which arises when a conventional act binding an international organization to a State or to another international organization is subject partly to international law and partly to the national law of a State. This case may not arise very frequently, but it is by no means extraordinary or inconceivable. It often happens that a legal situation is covered as a whole by international law but some of its aspects are subject to rules and concepts of national law; this is a quite common phenomenon of *renvoi*, in the widest sense of the term.²⁴ A treaty governed by international law may legitimately refer to national law for questions which today are normally covered by national law, such as procedure for transfer of ownership, an insurance régime or a monetary definition. On the other hand, a conventional act which, as a contract, is subject to one or more specific national laws may for certain of its elements be subject to international law, not only because such rules of international law are an integral part of a system of applicable national law (which is natural), but also because the

²¹ Mr. Ustor (*ibid.*, p. 204, 1242nd meeting, para. 21).

²² See the references in D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 976 *et seq.*; see also, on the subject of a different but similar problem, A. Broches "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", in *Recueil des Cours de l'Académie de droit international de La Haye, 1972-II* (Leyden, Sijthoff, 1973), vol. 136, p. 330.

²³ See *Yearbook . . . 1965*, vol. I, p. 7, 776th meeting, paras. 49 *et seq.*, and 77th meeting; also *ibid.*, vol. II, p. 12, paragraph 6 of the Special Rapporteur's observations and proposals relating to draft article 1, para. 1 (a) and references.

²⁴ It should, however, be noted that such reference to national law has major disadvantages in certain respects, either because it is difficult to determine what is the applicable national law, or because the unity of the applicable régime breaks down; this is why there is often a tendency for public international law to supersede national law; a recent example is the definition of the régime of the limited liability company, which the International Court of Justice transferred from national law to public international law, when this régime is invoked in connexion with diplomatic protection in the *Barcelona Traction* case (*Barcelona, Traction, Light and Power Company Limited, I.C.J. Reports 1970*, p. 3). See P. Reuter, "L'extension du droit international aux dépens du droit national devant le juge international", in *Mélanges offerts à Marcel Waline — le juge et le droit public* (Paris, Librairie générale de droit et de jurisprudence, 1974), vol. I, p. 241.

¹⁷ Corresponding provision of the 1969 Convention:

"Article 2. *Use of terms*

"1. For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; "

¹⁸ See the report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations (*Yearbook . . . 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 7; See also *Yearbook . . . 1972*, vol. II, p. 149, document A/CN.4/258, para. 80; and *Yearbook . . . 1973*, vol. II, p. 77, document A/CN.4/271, para. 9.

¹⁹ See the arbitral award of 10 June 1955 [between the United Kingdom and Greece] in the diverted cargoes case (United Nations, *Reports of International Arbitral Awards* (United Nations publication, Sales No. 63.V.3), p. 65).

²⁰ Mr. Kearney (*Yearbook . . . 1973*, vol. I, p. 200, 1241st meeting, para. 20).

parties to the contract have expressly so agreed or because a treaty applicable to the question has so provided.²⁵

(5) In principle, however, such cases do not pose problems. There is always a general legal régime which applies "principally" and it is this régime which makes it possible to establish whether the conventional act is a treaty or a contract. Consequently, if the International Law Commission wishes to dispel any doubt on this subject, the term "principally" may be added. This addition does make the text of the 1969 Convention more explicit, but this improvement is not absolutely essential and is not particularly necessitated by features peculiar to the treaties dealt with in the present draft articles. The Commission will therefore have to weigh the advantages and disadvantages of such an addition.

(6) On the other hand, the reference in the proposed article to "general international law" is designed to clarify a point which is peculiar to agreements concluded by international organizations. A case might exist in which an international organization evolved a highly developed legal system of its own, to which it intended that a conventional act should be subject in its entirety. An example of such a case would be a financial institution which adopted "regulations", "codes" or "guidelines" governing completely any relations between it and a State following a financial transaction embodied in a conventional act between it and that State. This situation could be analysed as an example of a conventional act subject to a special system of international law, entirely defined by the organization concerned. A still more general situation could be envisaged in which it was the relations between the organization and the member States that were removed in their entirety from the sphere of general international law and were subject to a system which was decidedly special and which could be described as an international system, even though in an increasing number of treaties this system would no longer have many of the "traditional" features of public international law. In view of the possibility of situations of this kind, it would perhaps be appropriate for such conventional acts, although not constituting "contracts subject to national law", no longer to be considered as "treaties subject to general public international law"; this would be achieved by the insertion

²⁵ Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States is a good example of this possibility, since it provides that, in a conventional régime subject in principle to a specific national law, certain elements borrowed from international law may also be taken into consideration. Cf. the commentary by A. Broches (*loc. cit.*, pp. 387-391). In the case of an agreement concerning a loan granted to a State by an international banking organization, if the connexion with a legal system is not specified sufficiently clearly, it will be necessary to ascertain with which system the loan is "principally" connected. Neither reference to a system of national law "frozen" at a particular point in time, nor reference to the general principles of law or any other transnational reference, is sufficient to indicate that "it is" public international law which "principally" governs a conventional act or to show that a treaty is involved; nor is it sufficient to include a clause specifying that the rights and obligations of the parties cannot be altered by a unilateral act by one of them. Cf. A. Broches, "International legal aspects of the operations of the World Bank", *Recueil des Cours de l'Académie de droit international de La Haye*, 1959—III, vol. 98 (Leiden, Sijthoff, 1960), p. 301.

of the adjective "general" to qualify "international law", as proposed in the draft article under consideration.

(7) But so far only hypothetical situations have been considered. Does the situation just described currently reflect real problems of international society? On this point, the Special Rapporteur has consulted a number of international organizations, through the Secretary-General of the United Nations, and it would seem that in general the relevance of the hypothesis considered is not for the time being clearly apparent.²⁶ In the opinion of the Special Rapporteur, it should not be forgotten that international organizations are always, despite everything, in the process of developing and that an attempt at codification must take account of a future which is inescapable even if its timing is a matter of uncertainty. It is therefore necessary to take into consideration the possible implications of the fundamental principle underlying the preceding considerations which appears frequently in this work: the fact that each organization has a set of rules which constitute the law peculiar to that organization and which limit the application of the *general* rules of public international law in the matter of treaties. This principle is not the fruit of theoretical imagination; it is formally embodied in article 5 of the 1969 Convention:

The present Convention applies to any treaty which is 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.

(8) This reservation concerning "any relevant rules of the organization" is the expression of the internal autonomy of the organization and, as the Special Rapporteur wrote in 1973:

[This principle] 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.²⁷

In view of prospects for the future and of the importance of these principles, the Special Rapporteur has therefore

²⁶ See *Yearbook . . . 1973*, vol. II, pp. 88-89, document A/CN.4/271, para. 83. It will be noted, however, that—with the exception of information from IBRD—no information has been received from the financial institutions, which might have been most concerned by this question. Nevertheless, more concrete situations could already be imagined on the basis of the analyses just made. For example, for the practical operation of a peace-keeping force, the United Nations may conclude agreements which, rather than being governed by general public international law, will remain strictly subordinate not only to the Charter but also to a complex system of administrative and financial decisions and rules which in fact constitute the special law of the United Nations. The European Communities, which are more similar to a pre-federal system, are only gradually accepting the concept of "internal" agreements of the Communities; cf., however, the decision of the Court of Justice of the European Communities in case 2-68 (*Recueil de la jurisprudence de la Cour*, 1968 (Luxembourg), vol. XIV-V, p. 635); and P. Reuter, *Organisations européennes* (Paris, P.U.F., 1965), pp. 267-268.

²⁷ See *Yearbook . . . 1973*, vol. II, p. 89, document A/CN.4/271, para. 84.

proposed an addition to the text of the 1969 Convention to adapt it to the special case of international organizations.

Article 2, paragraph 1 (d) ²⁸

“Reservation” means a unilateral statement, however phrased or named, made by a State or by an international organization, when signing, ratifying, accepting or approving a treaty concluded between States and international organizations or between two or more international organizations, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

COMMENTARY

There is apparently no theoretical or practical reason to depart from the definition of reservations given in the 1969 Convention. It will be noted, however, that the fact that international organizations are not parties to multilateral treaties would suffice to explain why the practice of reservations does not exist among international organizations.²⁹ The few drafting changes made in the corresponding provision of the 1969 Convention do not call for any special comment.

Article 2, paragraph 1 (e) ³⁰

“Negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty; “negotiating organization” means an organization which took part, as a potential party to the treaty, in the drawing up and adoption of the text of the treaty.

COMMENTARY

It is impossible to place an international organization on the same footing as a State with regard to the definition of participation as a negotiator. It often happens that an international organization takes part in the drawing up and adoption of the text of a treaty to which it is not destined to become a party. In modern practice, international organizations take part in the most varied ways

²⁸ Corresponding provision of the 1969 Convention:

“Article 2: Use of terms

“1. For the purposes of the present Convention:

“...
“(d) “Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

The description of the provisions of the draft articles which may correspond to the definitions given in article 2, paragraphs 1 (b), (c), (g) and (h) of the 1969 Convention will be given in the commentary to the articles dealing with the subject-matter of these definitions.

²⁹ See *Yearbook . . . 1972*, vol. II, pp. 175 and 193, document A/CN.4/258, paras. 12 and 70.

³⁰ Corresponding provision of the 1969 Convention:

“Article 2: Use of terms

“1. For the purposes of the present Convention:

“...
“(e) “negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty;”

in the drawing up and adoption of treaties between States: preparation of a draft treaty by international secretariats or by specialized organs, discussion and amendment of the draft within an organ of the organization, signature, by a high-ranking official of the organization or by the chairman of an organ, of the draft agreed on in the course of deliberations within an organ of the organization and so on. All this does not prevent the treaty from remaining a treaty between States; it does not become a treaty between States and organizations or between two or more organizations. As such, a treaty of this kind remains subject to the provisions of the 1969 Convention; this is the meaning of article 5, which states that the Convention applies, *inter alia*:

to any treaty which is 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.

If this is true of treaties adopted “within an international organization”, it is even more true of those adopted “under the auspices of an organization”, when the organization may have taken part in the drawing up of the treaties.³¹

It seems that, in order to avoid any confusion, it would be sufficient to specify that the present draft article can govern only cases in which the international organization has taken part in the drawing up and adoption of the text in the same conditions as States—in other words, with the idea of becoming a party to the treaty which will result from that text.

Article 2, paragraph 1 (f) ³²

“Contracting State” or “contracting organization” means a State or organization which has consented to be bound by the treaty, whether or not the treaty has entered into force.

COMMENTARY

The change, purely of a drafting nature, made in the corresponding provision of the 1969 Convention calls for no comment.

³¹ See *Yearbook . . . 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51. One incidental comment may be added, to show how the “participation” of international organizations in the history and life of treaties between States may take organic forms without making the treaties lose their character of treaties between States. It is quite common, at least as regards certain secondary provisions, for constituent instruments to provide for a simplified revision procedure which allows the organization itself, by an instrument issued exclusively by one or more of its organs, to undertake the revision. In this case, the whole of the revised constituent instrument remains subject to the 1969 Convention, even with regard to its revised provisions. There could be no question of the revised provisions falling within the scope of these draft articles. Consequently, for example, invalidity which could result from failure to respect the revision procedure would be governed by article 43 of the 1969 Convention, under which invalidity may result from the provisions of the treaty concerned.

³² Corresponding provision of the 1969 Convention:

“Article 2: Use of terms

“1. For the purposes of the present Convention:

“...
“(f) “Contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;”

No useful consideration of the two other definitions given in article 2, paragraph 1 (g) and (h), of the 1969 Convention, with a view to transposition of their provisions to treaties between States and international organizations or between two or more international organizations, can take place pending an examination of the substantive provisions of the 1969 Convention concerning the questions dealt with, which are the concepts of "party" and "third party". This would seem at first sight to be a particularly complicated question.³³

Article 2, paragraph 1 (i) ³⁴

"International organization" means an intergovernmental organization.

COMMENTARY

(1) The exact reproduction, in this draft article, of the definition given in the 1969 Convention does not raise any problems with regard to the exclusion of non-governmental organizations, although it is likely that some non-governmental institutions such as the International Committee of the Red Cross conclude conventional acts similar to those of intergovernmental organizations. On the other hand, as regards its positive aspect, the maintenance of this definition has two consequences which call for comment.

(2) Firstly, this wording refrains from defining the organization by reference to other international institutions, such as the international conference or the elements which within an international organization constitute an entity enjoying a certain degree of autonomy vis-à-vis the organization, whatever their designation ("organization", "subsidiary organs", "connected organs", etc.). In practice, however, it will be seen that there is little confusion as to the concept itself. Similarly, the 1969 Convention refrained from defining the concept of "State", and rightly so: definitions of such general terms almost always raise theoretical issues on which it is difficult to reach a broad consensus and whose usefulness is limited to exceptional cases.

(3) Secondly, this definition of "international organization" has one very important consequence: the treaties of all international organizations, both regional and universal, would be governed by the draft articles. On this point, the Special Rapporteur had already in 1972 ³⁵

³³ See *Yearbook* . . . 1972, vol. II, p. 189, document A/CN.4/258, paras. 58-60; *Yearbook* . . . 1973, vol. II, pp. 78-81, document A/CN.4/271, paras. 23-33; comments by the representative of the Federal Republic of Germany (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1402nd meeting, para. 22*); comments by Mr. Pinto (*Yearbook* . . . 1973, vol. I, p. 199, 1241st meeting, para. 6); Mr. Ushakov (*ibid.*, p. 200, paras. 10, 11 and 17); Mr. Kearney, (*ibid.*, p. 201, paras. 26-27); Mr. Tammes (*ibid.*, p. 203, 1242nd meeting, paras. 5-6); Mr. Ustor (*ibid.*, p. 205, para. 25) and Sir Francis Vallat (*ibid.*, p. 207, para. 45).

³⁴ Corresponding provision of the 1969 Convention:

"Article 2: Use of terms

"1. For the purposes of the present Convention:

" . . .

"(i) 'International organization' means in intergovernmental organization;"

³⁵ *Yearbook* . . . 1972, vol. II, p. 195, document A/CN.4/258, para. 77; see also *Yearbook* . . . 1971, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 8.

expressed an opinion confirmed by the prevailing view of the members of the Sub-Committee of the International Law Commission which had been requested to prepare the study on the subject: it is *a priori* highly desirable that the sphere of application of the draft articles should extend to agreements concluded by all international organizations without distinction. That was the position already adopted in the 1969 Convention, which does not deal directly with the question but which contains numerous provisions concerning international organizations and drawing no distinction between them; a departure from the approach of the 1969 Convention would have serious disadvantages. In addition, the goal of codification is the unification of legal rules as well as the stabilization of their development. How much authority with regard to the law of treaties would be carried by codification instruments which disregarded, for example, agreements concluded by regional organizations? ³⁶

(4) Considerable attention has been paid to this problem in the International Law Commission. Some members approached the problem from the very broad standpoint of the law of international organizations and admitted the possibility of limiting the draft articles to certain organizations; some even recommended that solution, referring to the precedent provided by the draft articles on the representation of States in their relations with international organizations,³⁷ which deal only with organizations of universal character.

(5) Accordingly, the Special Rapporteur has reconsidered the question. It is quite obvious that the bulk of the legal rules which concern an international organization are, *de jure* and *de facto*, rules peculiar to that organization; they are essentially the rules contained in its constituent instrument, or in the agreements which it has concluded or which its member States have concluded on the subject of its status, for example with regard to the immunities involved in its operation; this law of the organization also consists of all the rules which it may have formulated itself to regulate its administrative and financial dealings and sometimes even to apply to its member States or to individuals over whom it has authority, when it has been authorized to do so. These rules vary from one organization to another. It may seem desirable to standardize such rules, at least on certain points. A draft convention will then be formulated, as was the case with the International Law Commission's draft articles on the representation of States in their relations with international organizations,³⁸ adopted at its twenty-third session and to be submitted to an international conference scheduled for 1975.

(6) In formulating such a draft, the methods followed are the same as those applied in the search for *uniform law* or, to quote a striking term "comparative organic law".³⁹

³⁶ *Yearbook* . . . 1973, vol. I, p. 188, 1238th meeting, para. 71.

³⁷ *Yearbook* . . . 1971, vol. II (Part One), p. 284, document A/8410/Rev.1, chap. II, D.

³⁸ This is the only aspect of the law of international organizations which has been singled out and made the subject of a uniform law.

³⁹ Term used by the representative of Zaire in the Sixth Committee (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1399th meeting, para. 18*).

It is therefore normal to limit the unification effort to certain particular points from the body of law peculiar to each organization; it is even more normal to limit the undertaking to *certain organizations with comparable features*. Any attempt to abolish by a treaty the differences which inevitably and legitimately differentiate one organization from another would undoubtedly be doomed to failure. For this reason, the draft articles mentioned above were limited to a strictly circumscribed subject and to a group of organizations with common features.

(7) Is this the kind of case which is involved when treaties are concluded between States and international organizations or between two or more international organizations? *Obviously not*: the peculiarity of such treaties is that they bind an organization to one or more States or to one or more organizations; neither their binding force nor their régime can be derived from the law peculiar to an international organization, but only from the rules of general international law binding on States and on international organizations.⁴⁰ This binding force and this régime are indeed already established: thousands of treaties of this kind have been concluded over the years; they exist and have existed because of the profound conviction of States and organizations that they had a definite legal value similar to that of treaties between States. Consequently, since a treaty between a universal organization and a regional organization, for example, has a legal value and since its legal régime cannot depend either on the law of the universal organization or on the law of the regional organization, it must be admitted that the treaty derives this value from general international law.

(8) The sole aim of the work currently being undertaken by the International Law Commission is to examine whether the texts adopted on the subject of treaties between States should be in any way altered and supplemented in order to apply to the treaties of international organizations; the aim is not to unify the law of all the international organizations. There is therefore no reason to exclude from the sphere of application of the draft articles treaties to which organizations in any particular category are parties: to do so would be to confuse general international law with the law peculiar to each organization or, at best, with comparative law. This would be as serious an error as if the authors of the 1969 Convention had sought to limit the Convention to treaties concluded by certain States having similar constitutional or political régimes.

(9) This does not mean that it is possible to ignore the fact that in certain matters the relationship between general international law and the law of each organization may raise delicate problems of terminology and of substance; but the 1969 Convention encountered such problems and solved them with regard to the relationship

between general international law and the constitutional law of States; it encountered them with regard to organizations and stated the general rule which should make it possible to solve them: the reservation concerning the relevant rules of each organization (article 5).

(10) The distinction between general international law and the law peculiar to an organization, which has just been considered at length, not only determines the organizations whose treaties will be subject to the draft articles but also has much broader implications. It is this distinction which should make it possible in all doubtful or controversial cases to determine whether or not a question comes within the scope of the draft articles. The aim of the draft articles is not to formulate a system of uniform law based on a comparative study of the law peculiar to each international organization, but to identify and formulate the rules necessary for the consolidation and development of a solidly based practice recognizing the legal value of the treaties of international organizations, irrespective of the special features which may characterize each organization.

*Article 2, paragraph 2*⁴¹

The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms with the meanings which may be given to them in the internal law of any State or in the law peculiar to any international organization.

COMMENTARY

(1) The adaptation of article 2, paragraph 2, of the 1969 Convention raises a question of terminology, and perhaps also of substance: should the draft articles refer to the "internal law" of an organization, in the same way as the 1969 Convention refers to the "internal law" of the State, or is it preferable, as has been done in the text proposed above, to use the expression "law peculiar to any international organization"? This problem of terminology goes beyond the scope of article 2, paragraph 2, of the 1969 Convention; that Convention also mentions the "internal law" [of States] in its articles 27 and 46; this same question will therefore also arise in connexion with those articles.

(2) In the course of its work, the International Law Commission has on occasion used the term "internal law of an international organization", without this expression having given rise to any objections or even any comments.⁴² Admittedly, however, it may lead to a twofold ambiguity. In the first place, the term "internal" is often used in opposition to the term "international"; this cannot be the case here, since it is applied to a set of rules which constitute "special" international law, "peculiar to

⁴⁰ For a very clear explanation of this distinction, see the statement by the delegation of the United States of America at the United Nations Conference on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 43, eighth meeting of the committee of the Whole, para. 20).

⁴¹ Corresponding provision of the 1969 Convention:
"Article 2: Use of terms

...

"2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

⁴² See *Yearbook . . . 1972*, vol. II, p. 181, document A/CN.4/258, para. 33; and *Yearbook . . . 1973*, vol. II, pp. 88-89, document A/CN.4/271, para. 83.

an international organization", and not "national" law.⁴³ In the second place, since the term "internal law" usually refers to State law, it thereby suggests a stratified legal system which is all-inclusive and unified by a centralized legislature and judiciary; it might be claimed that the terms is inappropriate for the entire system constituted by the law peculiar to an organization. In most cases, the latter system retains the general features of international law, characterized by the lack of real legislative power and of any power of the organization to judge or to compel the States which are members of it. The adjective "internal" is appropriate only for the rules which govern the relationship between the organization and its officials, the rules of procedure of the organization's organs and the "internal" administrative and financial regulations; the description "internal" is sometimes applied to relationships or decisions involving these elements, which do not represent the essential part of the organization's activity. It might therefore be claimed that the term "internal" is ambiguous and that in many cases the relationship between the organization and its member States is too similar to the relationships which are governed by general international law for it to be described as "internal".

These objections to the use of the expression "internal law of any international organization" are not entirely convincing from the point of view of logic. But, since the expression has connotations which are perhaps best avoided, the draft article uses the expression "law peculiar to any international organization", which is more neutral.

**Article 3. International agreements
not within the scope of the present articles⁴⁴**

The fact that the present articles do not apply to international agreements concluded between international organizations and subjects of international law other than States or international organizations, or to agreements between States and international organizations or between two or more international organizations not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

⁴³ Statements by Mr. Tammes and Mr. Quentin-Baxter at the twenty-fifth session of the International Law Commission (*Yearbook . . . 1973*, vol. I, pp. 203 and 206, 1242nd meeting, paras. 7 and 38).

⁴⁴ Corresponding provision of the 1969 Convention:
"Article 3. *International agreements not within the scope of the present Convention*

"The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- "(a) the legal force of such agreements;
- "(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- "(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties".

(c) the application of the articles to the relations between States and organizations or to the relations of organizations as between themselves under international agreements to which subjects of international law other than States or international organizations are also parties.

COMMENTARY

(1) The adoption of a text corresponding to that of article 3 of the 1969 Convention raises problems more difficult than would appear at first sight. It is not in fact sufficient to replace some terms by others: the effects which would result from combining article 3 of the 1969 Convention with article 3 of the draft articles must also be taken into account. The fact that a set of draft articles will henceforth deal with agreements between States and international organizations or between two or more international organizations makes it necessary to break down the simple concept mentioned in article 3 of the 1969 Convention—"subjects of international law other than States"—into two elements: "international organizations", on the one hand, and "subjects of international law other than States or international organizations", on the other.

(2) According to this analysis, it is possible to distinguish the following categories among the agreements to which the 1969 Convention does not apply:⁴⁵

In the case of agreements in written form: (1) agreements between States and international organizations; (2) agreements between two or more international organizations; (3) agreements between States and subjects of international law other than States or international organizations; (4) agreements between international organizations and subjects of international law other than States or international organizations; (5) agreements between two or more subjects of international law other than States or international organizations;

In the case of agreements not in written form, those corresponding to the five categories mentioned above, and unwritten agreements between States.

(3) The problem is to distribute between the 1969 Convention and the draft articles those agreements to which neither the Convention nor the draft articles apply directly but to which the provisions of both might possibly be extended under article 3. The draft articles apply by hypothesis to the following groups: (1) written agreements between States and international organizations; (2) written agreements between two or more international organizations. It is quite natural to think that the provisions of the draft articles, more than those of the 1969 Convention, can, if necessary, be applied to unwritten agreements corresponding to these groups (1) and (2), and one might be tempted to say the same of agreements in group (4), agreements between international organizations and subjects of international law other than States or international organizations, whether in written form or not.

⁴⁵ To the categories mentioned might be added international agreements to which States, international organizations and subjects of international law other than States or international organizations are simultaneously parties, but it might be considered that draft article 3 (c) does apply to such agreements.

This leaves two groups about which there might be some hesitation: group (3), agreements between States and subjects of international law other than States or international organizations, and group (5), agreements between two or more subjects of international law other than States or international organizations.

(4) The reply concerning this question may depend on what entities it is felt might be placed in this residuary category of subjects of international law: international institutions such as the Holy See,⁴⁶ the International Committee of the Red Cross, or the Bank for International Settlements? Insurgents after they have been recognized? Even individuals? In order to avoid the necessity of a discussion on which it would be very difficult to achieve unanimity, another consideration might be taken into account. The Vienna Convention will certainly enter into force before the draft articles; moreover, the Vienna Convention is the convention which will in fact be applied most extensively: it would therefore be natural to attach to it cases as uncertain as those which might fall within the category: "Subjects of international law other than States or international organizations". The problem would, of course, be greatly simplified if it could be shown that that category is void of any content and that the provisions concerning it could disappear; however, the use of the term in the 1969 Convention makes it difficult to uphold the thesis that States and international organizations are the only subjects of international law.⁴⁷

*Article 4. Non-retroactivity of the present articles*⁴⁸

Without prejudice to the application of any rules set forth in the present articles to which treaties between States and international organizations or between two or more international organizations would be subject under international law independently of the articles the articles apply only to such treaties which are concluded after the entry into force of the present articles with regard to such States and organizations.

COMMENTARY

The adoption of a draft article 4 corresponding to that of the 1969 Convention rests on the hypothesis that the draft articles are destined to become an international convention to which States and, in a manner to be discussed, international organizations, can become parties, otherwise the article would have no meaning or would have to be given a different formulation. Since the

⁴⁶ Supposing, of course, that one holds that the Vatican City is not a State, or that it is not a party to the treaty under consideration, but that it is the "Holy See" which has the status of a party.

⁴⁷ See *Yearbook . . . 1962*, vol. II, pp. 36 *et seq.*, document A/CN.4/144, paras. 2 *et seq.* of the commentary to article 3.

⁴⁸ Corresponding provision of the 1969 Convention:

"Article 4: *Non-retroactivity of the present Convention*

"Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

outset of his work,⁴⁹ the Special Rapporteur has drawn attention to the important problem thus raised; it is not for him to resolve it and it is not the intention that this article should prejudge the question for the future.

* * *

It is obvious that there can be no article in the draft articles similar to article 5 of the 1969 Convention.⁵⁰

*Article 6. Capacity of international organizations to conclude treaties*⁵¹

In the case of international organizations, capacity to conclude treaties is determined by the relevant rules of each organization.

COMMENTARY

(1) The Special Rapporteur has already substantially developed the question of the capacity of international organizations to conclude treaties in his previous reports;⁵² on the basis of both theoretical and practical considerations, he placed before the Commission his doubts as to the advisability and possibility of proposing an article on the capacity of international organizations to conclude treaties. Following a debate on this question in the International Law Commission at its twenty-fifth session, in view of the importance attached, to the matter and the diversity of opinions expressed, he was able to conclude, on 6 July 1973:

The conclusion he drew from the discussion, therefore, was that he should propose one or more draft articles on capacity. He would accordingly abandon the opinion he had expressed in his second report, propose a choice of wording accompanied by commentaries, and try to work out solutions acceptable to as many members of the Commission as possible.⁵³

(2) The debates which took place in 1973 in the Sixth Committee of the General Assembly confirmed those of the International Law Commission; despite the purely preliminary nature of the statements dealing with treaties concluded between States and international organizations or between two or more international organizations, eight out of the eleven States which touched on that subject during the consideration of the report of the International Law Commission made observations on the question of the capacity of international organizations

⁴⁹ See *Yearbook . . . 1972*, vol. II, pp. 191 and 192, document A/CN.4/258, paras. 64-67; *Yearbook . . . 1973*, vol. II, pp. 81-83, document A/CN.4/271, paras. 38-52.

⁵⁰ Article 5:

"The present Convention applies to any treaty which is 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."

⁵¹ Corresponding provision of the 1969 Convention,

"Article 6: *Capacity of States to conclude treaties*

"Every State possesses capacity to conclude treaties."

⁵² See *Yearbook . . . 1972*, vol. II, pp. 178-182, document A/CN.4/258, paras. 25-36; *Yearbook . . . 1973*, vol. II, pp. 81-83, document A/CN.4/271, paras. 38-52.

⁵³ *Yearbook . . . 1973*, vol. I, p. 209, 1243rd meeting, para. 16.

to conclude treaties.⁵⁴ On that occasion, it was observed, quite rightly, that whatever the final position taken in a future set of draft articles, it was essential to elicit the observations of governments and international organizations on this point and that it was therefore important to submit draft articles dealing with the capacity of organizations to conclude treaties.⁵⁵

(3) It is in these circumstances that the Special Rapporteur proposes to the International Law Commission draft article 6 set out above. Before commenting on the elements of that draft article and showing how it can meet the various, and sometimes conflicting, concerns expressed during the debates, it is important to sum up the broad outlines of the situation in which the Special Rapporteur found himself.

(4) Two trends emerged during the debate in the International Law Commission, both inspired by equally respectable concerns: one in favour of the growing extension of the capacity of international organizations to conclude treaties,⁵⁶ and the other concerned over the need to respect the will of the States members of an organization, a will manifested above all by the constituent instrument of the organization. It is inevitable that divergent views should persist on this point when it is a question of resolving a specific problem relating to a given organization. But the Special Rapporteur has great hopes that these trends will converge and that agreement will be reached on the general wording to be included in the draft articles, because such wording should in fact possess the great flexibility essential if it is to be adapted to the different situations of the various international organizations.

(5) The most important question, in fact, is whether all international organizations—both universal and regional, serving a general or a specific purpose—have the *same* capacity to conclude treaties. On that point, a firm negative reply can be given at once. As far as its capacity to perform legal acts, of whatever kind, is concerned, any international organization is a highly individualized entity which cannot *a priori* be assimilated to any other. An intergovernmental organization, the only international organization which needs to be considered here, is based on a treaty between States; each intergovernmental organization is shaped individually by the will of its founders, and subsequently of its members. This is one of the points on which the clearest distinction can be made between States and international organizations. States can *all*, without any exception, perform the same legal acts: *a sovereign equality* prevails among them.

⁵⁴ Iraq (*Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1397th meeting, para. 10*); United States of America (*ibid.*, 1398th meeting, para. 7); Byelorussian Soviet Socialist Republic (*ibid.*, para. 30); German Democratic Republic (*ibid.*, 1399th meeting, para. 31); Kenya (*ibid.*, 1401st meeting, para. 15); Greece (*ibid.*, para. 44); Brazil (*ibid.*, para. 58); Philippines (*ibid.*, 1402nd meeting, para. 42); USSR (*ibid.*, 1406th meeting, para. 20).

⁵⁵ United States of America (*ibid.*, 1398th meeting, para. 7). The same thought was expressed in a more general way by Austria (*ibid.*, 1405th meeting, para. 7).

⁵⁶ For example, the position expressed by Mr. E. Hambro at the twenty-fifth session of the International Law Commission (*Yearbook . . . 1973*, vol. I, p. 201, 1241st meeting, para. 30).

Organizations are, on the contrary, fundamentally unequal: the structure and powers of each organization are entirely dominated by its constituent instrument, which itself has been drawn up essentially with a view to serving functions which vary from one organization to another.

(6) It necessarily results that, if we consider the specific content of the capacity of an international organization, this capacity depends essentially on the law peculiar to each organization.⁵⁷ In theory, admittedly, it is conceivable that it might be wished to subject a limited number of selected organizations to uniform rules on this point, as has been attempted on other points. But that would no longer be an important practical question; it would be a very minor one, like that of the immunities of representatives of States, and not an essential question touching on the very existence of organizations; the usefulness of the undertaking is *a priori* doubtful since organizations meet highly individualized needs and situations. If governments shape the legal physiognomy of the organizations which they create, case by case, there would appear to be no reason why they should subsequently attempt to reshape that physiognomy into a single mould in some cases, even where the organizations are related. There are striking examples which prove how disinclined Governments are to unify existing organizations, especially with regard to their capacity in matters relating to international relations.⁵⁸

⁵⁷ Statement by the representative of Iraq in the Sixth Committee: "... such capacity existed only if it was recognized by the law peculiar to the organization concerned" *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee, 1397th meeting, para. 10*. It appears that the same conclusion can be deduced from the observations made by Mr. Ushakov in the debate in the International Law Commission at its twenty-fifth session (*Yearbook . . . 1973*, vol. I, p. 200, 1241st meeting, paras. 10 *et seq.*) to the effect that the question of the capacity of international organizations to conclude treaties was outside the scope of the topic of the draft articles.

⁵⁸ There is no more conclusive example than that of the European Communities. The first to be established, the European Coal and Steel Community, has a capacity broadly defined by the first and second paragraphs of article 6 of its constituent instrument:^a

"The Community shall have juridical personality.

"In its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends."

However, the same instrument denies the Community the capacity to conclude trade agreements relating to coal and steel (art. 71). The European Economic Community, whose capacity in the matter of treaties is defined more narrowly, has, however, been given the capacity to conclude tariff or trade agreements (art. 113).^b The member States unified the institutions of the three Communities to a large extent by a new treaty of 8 April 1965,^c without however thereby changing the arrangements with regard to the law peculiar to each Community, particularly in the matter of external relationships. Thus, at present, the three Communities which have the same States members and the same organs have three régimes relating to capacity in the matter of external relationships, and in particular the conclusion of treaties, which are clearly different, despite an attempt by the Court of Justice of the European Communities, under cover of a functional interpretation of the Treaty of Rome, to extend the capacity of the European Economic Community. When, therefore, extensive tariff negotiations are undertaken, such as those generally known as the Kennedy Round (Final Act of 30 June 1967),^d the bargaining is carried out and the conclusion reached according to rules of competence which are

(7) In any event, the very fact that the task entrusted to the Special Rapporteur must take the 1969 Convention as a starting-point, and that its purpose is to propose adaptations and modifications which will enable the provisions of the Convention to be extended to treaties to which international organizations are parties means that the present articles cannot be intended to standardize the law relating to the capacity of international organizations. As has been shown above⁵⁹ that task could, moreover, be conceived only in relation to a group of similar organizations presenting such similarities that it might be possible to envisage common provisions relating to their capacity. If such a group exists, it is not easy to identify and it would probably include only minor organizations. In any event, this group would not include the organizations of the United Nations family; even the specialized agencies and the International Atomic Energy Agency present differences in relation to each other which are so considerable that there can be no question of submitting them to a "uniform law" in the matter of their external relations; as for the United Nations, it is obviously a special case and it is impossible even to imagine assimilating its situation to that of any other international organization.⁶⁰

(8) The foregoing analyses show clearly the possible purpose of a draft article on the capacity of international organizations: it must be to point out the fundamental rule of the constitutional autonomy of each organization; since each organization has a law peculiar to it, its capacity is determined by the relevant rules of the organization.

(9) The preceding considerations have not, however, exhausted the problem and they call for further study in two directions: first of all, in that of the functional competence of international organizations, and secondly, that of determining the possible role of general public international law in the capacity of international organizations to conclude treaties.

(10) In the first place, it can be said that it is by no means a question of defining the capacity of international organizations at an identical level by seeking to establish a uniform law, but of affirming the value of a principle applicable to all international organizations while respecting their diversity; this principle is that of the functional competence of organizations: organizations would have in the matter of treaties the necessary capacity to conclude any treaties essential to the performance of their "functions" and their "missions", or, more simply, to the attainment of their "purposes"; this is what is sometimes

called the theory of the functional competence of organizations. Such a concept necessarily goes beyond the scope of external relations and the law of treaties and extends to all the powers, to all the areas of competence of the organisation. It pertains to this analysis to use the concepts of "purpose", "objective" and "mission", not in order to limit the exercise of the competence of the organization, which is generally acknowledged, but to provide a *source* of *new* areas of competence: organizations would be automatically competent to conclude any treaties which corresponded to their functions and their purposes and the constituent instrument of the organization would have to include an explicit prohibition in order to limit the capacity of the organization.⁶¹

(11) This concept calls for several observations. Both the precedents in legal practice which it invokes (which will be taken up later) and the literature on which it is based⁶² relate above all to the question of the interpretation of treaties. In this case, the question is whether these individual treaties which constitute the constituents charters of international organizations call for an interpretation governed by specific rules. This manner of posing the question, even if it does not cover all the aspects, is essential in the elaboration of a set of draft articles designed to extend the sphere of application of the rules of the 1969 Convention.

(12) The 1969 Convention applies, under article 5, "to any treaty which is the constituent instrument of an international organization" and contains two articles (articles 31 and 32) relating to the interpretation of treaties. At no time, neither during the proceedings of the International Law Commission, nor during those of the United Nations Conference on the Law of Treaties, was it envisaged that special rules of interpretation should be established with regard to the constituent instruments of international organizations. If it is accepted, therefore, in accordance with legal practice and the literature, that the question of the capacity of international organizations to conclude treaties depends on the interpretation of the constituent instruments, it should be noted that the 1969 Convention contains no provision on this point relating specifically to problems of interpretation raised by the constituent instruments of international organizations. Some people might criticize this silence and even assert that, since the 1969 Convention is not yet in force, it in no way precludes claiming that there is a specific rule on this matter, or wishing to state such a rule. It is nevertheless true that to proceed in this manner, would be to modify

different in the case of coal and steel from those applicable to other products.

^a For the text of the Treaty instituting the European Coal and Steel Community, see United Nations, *Treaty Series*, vol. 261, p. 140.

^b For the text of the Treaty establishing the European Economic Community (known as the "Treaty of Rome"), see United Nations, *Treaty Series*, vol. 298, p. 3.

^c Treaty establishing a single Council and a single Commission of the European Communities.

^d See GATT, *Basic instruments and selected documents, Supplement No. 15* (Sales No. GATT/1968-1), p. 4.

⁵⁹ See above, para. 6 of the commentary to article 2, para. 1 (i).

⁶⁰ It is also important to take into account the fact that the International Law Commission is not competent to discuss individual legal situations, nor to interpret individual constituent instruments.

⁶¹ See *Yearbook . . . 1973*, vol. II, p. 82, document A/CN.4/271, para. 39.

⁶² It is indeed on the level of the interpretation of treaties that the International Court of Justice has placed the consideration of several problems relating to the competence of the United Nations, in particular its opinion on "Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)" (Advisory Opinion of 20 July 1962: *I.C.J. Reports 1962*, p. 157). It is also on this level that the problem has been considered on several occasions by Charles de Visscher, in particular in *Problèmes d'interprétation judiciaire en droit international public* (Paris, Pédone, 1963), p. 140. Attention should be drawn to the restraint with which the eminent author has dealt with these questions and the limits which he has assigned to teleological interpretation.

the 1969 Convention. It is difficult, within the framework of the work of the International Law Commission, to embark at present on this course, which is contrary to the guidelines so far followed.

(13) But study of the 1969 Convention gives rise to still more interesting, and above all more constructive, comments. The Convention in no way rules out the possibility that, through the interpretation of constituent instruments, an international organization may be made to appear to have the capacity to conclude treaties, even where such capacity is not explicitly specified in the constituent instrument. But such capacity would then derive, not from the text or the context, but from the fact that there shall be taken into account (art. 31, para. 3 (b)):

any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

If reference is made to the commentary of the International Law Commission on that provision in its report to the General Assembly of the United Nations, it will be noted that:

the phrase "the understanding of the parties" necessarily means "the parties as a whole". It [the International Law Commission] omitted the word "all" merely to avoid any possible misconception that every party must . . . have engaged in the practice where it suffices that it should have accepted the practice.⁶³

(14) Such formulas open the door to a certain amount of discussion,⁶⁴ particularly when they are applied to the constituent instruments of international organizations,⁶⁵ but they establish two essential facts concerning the question of the capacity of international organizations to conclude treaties: the individual character, peculiar to each organization, of the capacity to conclude treaties and the variety of possible solutions. The individual character peculiar to each organization results not only from the character of the constituent instrument of each organization, but also from the particular character of

⁶³ See *Yearbook . . . 1966*, vol. II, p. 222, document A/6309/Rev.1, part II, chap. II, para. 15 of the commentary to article 27.

⁶⁴ Does not "practice" thus defined go beyond the limits of interpretation and become a modification of the treaty in question? Does it refer to explicit or tacit agreements, or also to custom?

⁶⁵ To take the formula in article 31, paragraph 3 (b) of the 1969 Convention literally, it would never be a question of anything but practice emanating from the Parties, in other words from States. But when it is a question of practice relating to the constituent instrument of an international organization, the practice also emanates from the acts of organs of the organization. Even leaving aside those organs which are not composed of representatives of States, nevertheless a certain number of such acts could be performed by majority decisions. Would a series of majority decisions make it possible to establish a "practice" which, on the very vague basis of a teleological principle, would develop the capacity of an international organization to conclude treaties? This precise point has been discussed in connexion with a judgement of the Court of Justice of the European Communities handed down in case 22-70, known as the A.E.T.R. Case, cf. R. Kovar, "L'affaire de l'A.E.T.R. devant la Cour de justice des Communautés européennes et la compétence internationale de la C.E.E. (Communauté économique européenne)", *Annuaire français de droit international*, 1971 (Paris), vol. XVII (1972), p. 386. On the more general level of the competence of international organizations, cf. the divergent points of view of Sir Gerald Fitzmaurice and Sir Percy Spender in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962*, *I.C.J. Reports 1962*, pp. 191 and 201.

the "practice" relating to the interpretation of the constituent instrument within the meaning of article 31 of the 1969 Convention. The diversity of possible solutions derives directly from this. In the case of certain organizations, the practice with regard to the conclusion of treaties by the organization is negative: the very character of the organization, or quite simply the policy of the member States, rules out such capacity of the organization apart from cases specified in the constituent instrument. In other cases, practice proves to be very liberal with regard to certain types of agreement relating mainly to the administrative aspects of the life of the organization, but very restrictive with regard to all other agreements. In the case of other organizations, practice proves to be liberal even with regard to agreements of the greatest importance. Thus, while there is indeed a general principle common to all organizations, whatever the diversity of the constituent instruments, this principle which can be attached to the interpretation of treaties in the end only confirms the diversity of the organizations, since it concerns the autonomy of the *practice* of each one of them.

(15) But all these conclusions can be set aside by rejecting the principle on which they are based: if the capacity of international organizations to conclude treaties does not depend on methods of interpreting treaties but, rather, directly on a law of international organizations which has its basis in customary law, it is permissible to reach other solutions. Within the very specific framework assigned to his work, the Special Rapporteur feels that, for reasons both of principle and of expediency, it is unnecessary for him to explore all the possibilities which might derive from this concept.

(16) As far as principles are concerned, there is little doubt that the formulas used by the International Court of Justice in its practice have been taken as a basis by all those who, in one way or another, consider that *by its very nature* the capacity of international organizations to conclude treaties necessarily extends to what is necessary in the discharge of their functions. It is to the opinion of the International Court of Justice on reparation for injuries suffered in the service of the United Nations, to the opinion on the Effect of awards of compensation made by the United Nations Administrative Tribunal,⁶⁶ and to the opinion on "Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)" that reference is most frequently made by citing formulas such as the following:

It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.⁶⁷

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁶⁸

⁶⁶ Effect of awards of compensation made by the U.N. Administrative Tribunal, *Advisory Opinion of 13 July 1954: I.C.J. Reports 1954*, p. 47.

⁶⁷ Reparation for injuries suffered in the service of the United Nations, *Advisory Opinion of 11 April 1949: I.C.J. Reports 1949*, p. 179.

⁶⁸ *Ibid.*, p. 182.

But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.⁶⁹

(17) But if the text of these advisory opinions is read attentively, it will be noted that their scope is more limited than the isolated quotations would imply. In the first place, it will be noted that the Court has never proceeded to an arbitrary construction, detached from the behaviour of those concerned. On the contrary, it has based its opinions essentially on the facts of an existing situation, emphasizing the *practice* in various ways. Among other examples, the following passage, in particular, may be noted:

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁷⁰

It seems therefore that these opinions attach a certain importance to practice; in reality, they appear to be more a justification of a practice which at a certain moment is disputed rather than an innovation on which a court of justice has suddenly taken the initiative. The least that can be said, therefore, is that they do not depart radically from the analyses which have just been presented on the importance of *practice* in the interpretation of treaties.

(18) Moreover, the International Court of Justice has always argued on the case of a given organization, which presents characteristics that would preclude its being assimilated to any other organization, on account of both the universality of its membership and the broad scope of its functions.⁷¹ In the most general opinion and the one in which the greatest number of reasons for the decision are stated, that relating to "Reparation for injuries suffered in the service of the United Nations", the Court indeed makes a discreet allusion to "instances of action upon the international plane by certain entities

⁶⁹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 168.

⁷⁰ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949: I.C.J. Reports 1949*, p. 180. "Practice" is also mentioned in several passages in the opinion on certain expenses of the United Nations (Article 17, para. 2, of the Charter) (*Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, pp. 160 and 165), and, as certain individual opinions show, has been at the centre of the Court's preoccupations (cf. footnote 65 above); while the opinion on the "Effect of awards of compensation made by the U.N. Administrative Tribunal" does not mention practice, it should not be forgotten that what the Court had been asked to do was to say that a tribunal which had been functioning for several years was really a tribunal. Even the judgement of the Court of Justice of the European Communities handed down in the case known as the A.E.T.R. Case (Case 22-70) (*Recueil de la jurisprudence de la Cour 1971-3 (Luxembourg)*, vol. XVII, p. 263) pointed out (paragraph 29) that practice at the level of an organ composed of representatives of member States had confirmed the solution adopted by the Court, although, as far as principles are concerned, the Court adopts a concept of the competence of the Community based on a clearly teleological analysis.

⁷¹ It goes without saying that the Court of Justice of the European Communities has only argued cases for the European Communities, regarded as original entities which cannot be assimilated to any other type.

which are not States" and to the multiplicity of "subjects of law" which are not identical "in any legal system". The Court does not therefore disregard the fact that there are international organizations other than the United Nations. However, throughout the text of the opinion, the term "international organization" is constantly used in the singular, to designate the United Nations, never in the plural. It would certainly be a mistake to hold that none of the principles defined by the Court apply to any international organization other than the United Nations; but it would be just as incorrect to conclude from this opinion that the principles defined apply to all international organizations. What is certain is that the Court in this opinion did not establish a set of rules on the capacity of *all* international organizations, in particular with regard to the conclusion of treaties.⁷² This does not mean that the wealth of substance in these opinions cannot be used for the purposes of theoretical elaboration, but that on this subject the restraint shown by the most authoritative commentators should be observed.⁷³

(19) The Special Rapporteur remains firmly convinced that a general formula relating to the capacity of international organizations to conclude treaties must be flexible enough to cover all possible solutions and respect the great diversity of a phenomenon which is at present too much subject to the wishes of States for limitations to be placed on the free choice of those States. Whatever the validity of the reasons given for departing from that position, objections would be encountered which would impede the work of codification. Mention has already been made of the difficulties encountered by the International Law Commission when, at an earlier stage, it took up the question of the capacity of international organizations to conclude treaties;⁷⁴ it is worth pointing out that, of the observations made on that subject by representatives of Governments in the Sixth Committee of the General Assembly in 1973, observations which must be regarded as being altogether of a preliminary nature, a fairly large number will be found to be rather in favour of formulas emphasizing the law peculiar to each organization and even the importance of the constituent instruments of each organization.⁷⁵

⁷² In the opinion on "Reparation for injuries suffered in the Service of the United Nations", the Court does not proceed from a general concept to the capacity to conclude treaties—rather the reverse:

"[The Charter] has defined the position of the Members in relation to the Organization . . . by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members . . ." *I.C.J. Reports 1949*, pp. 178 and 179.

⁷³ Ch. de Visscher, *op. cit.*, p. 150: "Out of an equal concern for institutional purposes and principles and for respect for texts, a sound interpretation ensures a balance between the wills of which treaties are the expression".

⁷⁴ See *Yearbook . . . 1972*, vol. II, pp. 178-182, document A/CN.4/258, paras. 25-38.

⁷⁵ ". . . the capacity . . . to conclude agreements depended on the law peculiar to the organization concerned" (Iraq (*Official Records*

(20) Nevertheless, it will perhaps be regretted that the proposed article 6, while stating a precise rule, remains silent on the role of general international law in the very establishment of the capacity of international organizations to conclude treaties. Admitting that it is the relevant rules of each organization which determine whether a given organization has capacity to conclude a given treaty, it must be pointed out that if this effect of the law peculiar to each organization exists, it exists by virtue of a general rule of international law authorizing it. In other words, the very fact that organizations can be "subjects of international law" implies a radical—and to some extent a structural—change in the international community; this change would result from a general rule of public international law which would be permissive in character and would make this particular effect of constituent instruments possible. If such an analysis prevailed, draft article 6 might be worded as follows:

The extent of the capacity of international organizations to conclude treaties, a capacity acknowledged in principle by international law, is determined by the relevant rules of each organization.

(21) An article so worded would differ from the draft article prepared by the Special Rapporteur at the theoretical rather than the practical level. Indeed, it would be understood that this alternative wording would not prevent some international organizations from possessing, according to the case, a capacity to conclude treaties which might be non-existent, limited or broad, and the solution peculiar to each organization would remain highly individualized. This new wording might therefore be criticized on the grounds that it complicated article 6 unnecessarily. Even its necessity from the theoretical standpoint may be questioned; it can be argued that the general principle of public international law which authorizes the attribution of capacity to international organizations is well known: it is the principle *pacta sunt servanda*. The capacity of international organizations to conclude treaties (like all their other capacities) is merely the result of the creative power of treaties embodied in the constituent instrument. There is thus a risk that a number of differences of opinion may arise on this point, which may not be as theoretical as they seem.

(Foot-note 75 continued)

of the General Assembly, Twenty-eighth Session, Sixth Committee, 1397th meeting, para 10)); the representative of the German Democratic Republic "attached great importance to constitutional documents... In most cases, such documents expressed very clearly the extent to which States had granted legal and treaty-making capacity to the international organizations concerned" (*ibid.*, 1399th meeting, para. 31); "an international organization did not have the inherent capacity to conclude international agreements and could only do so if authorized by its constituent instrument" (Kenya (*ibid.*, 1401st meeting, para. 15); "the extent of [the] capacity [of international organizations] depended basically on the constitution of each international organization" (Greece (*ibid.*, para. 44)); "The capacity of international organizations to conclude treaties should be governed by the their respective statutes" (Brazil (*ibid.*, para. 58)); "It seemed advisable to leave the question of determining the capacity of representation of an international organization to the charter of that organization" (Philippines (*ibid.*, 1402nd meeting, para. 42)); "In particular, the limited competence of international organizations to conclude international treaties should be noted" (USSR (*ibid.*, 1406th meeting, para. 20)).

(22) The Special Rapporteur, whose task is to explore every possibility with a view to reaching a broad consensus, feels obliged to point out that a similar, indeed a related, question gave rise to much discussion in the International Law Commission and especially at the United Nations Conference on the Law of Treaties.⁷⁶ Does the treaty-making capacity of members of federal unions derive solely from the federal constitutions? Does it derive from the federal constitutions by *renvoi* from international law? Does it derive from international law itself? These questions, which might have seemed somewhat academic, provoked a lively discussion at the Conference when it became clear that the final formulations submitted by the International Law Commission might have certain consequences with regard to current political problems. Thus, at the second session of the Conference, after an animated discussion, all reference to federal questions was deleted from what became article 6 of the 1969 Convention.⁷⁷

(23) In any case, the Special Rapporteur feels that if a text which refers to general international law in connexion with the *principle* of the capacity of international organizations to conclude treaties is retained, it will be understood that it in no way prejudices questions relating to the *recognition* of that capacity by other subjects of international law.⁷⁸ The 1969 Convention at no point touches on the questions relating to recognition in the case of States, and there is no reason why it should be otherwise in the case of international organizations in this draft article. It is true that the International Court of Justice has, on two occasions, expressed the view that the Charter of the United Nations could have effects with regard to States which were not parties to it,⁷⁹ but

⁷⁶ For the original text, which dealt simultaneously with the capacity of States, of international organizations and of federal structures, see report on the law of treaties, see *Yearbook . . . 1962*, vol. II, pp. 36 *et seq.*, document A/CN.4/144, commentary to article 3 and for the debates, *ibid.*, vol. I, pp. 57 *et seq.*, 639th and 640th meetings, pp. 187 *et seq.*, 658th meeting and pp. 239 *et seq.*, 666th meeting. The discussion was resumed in 1965 on the basis of a simplified text: see *Yearbook . . . 1965*, vol. I, pp. 23 *et seq.*, 777th and 778th meetings, pp. 239 *et seq.*, 810th and 811th meetings and pp. 280 *et seq.*, 816th meeting. See also P. Reuter, "Confédération et fédération: vetera et nova", *Mélanges offerts à Charles Rousseau — La communauté internationale* (Paris, Pédone, 1974), p. 199.

⁷⁷ See *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 58 *et seq.*, eleventh and twelfth meetings of the Committee of the Whole (in particular, the statement of Mr. Jiménez de Aréchaga (*ibid.*, p. 67, twelfth meeting of the Committee of the Whole, para. 22)), and *ibid.*, *Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 12, eighth plenary meeting, para. 22.

⁷⁸ See *Yearbook . . . 1972*, vol. II, p. 179, document A/CN.4/258, para. 26, with the references to the debates in the International Law Commission and the position taken by the Japanese Government.

⁷⁹ In its advisory opinion on "Reparation for injuries suffered in the service of the United Nations", the Court decided unanimously that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone" (*I.C.J. Reports 1949*, p. 185). In its advisory opinion on the "Legal consequences for States of

that is a solution which is irrelevant to the question of recognition and cannot be dissociated from the quite exceptional character of the organization and whose general application is not justified by current international practice.

(24) The International Law Commission will have to decide, in the light of the preceding explanations, whether it considers it preferable to retain the text of the draft article in its original form or in the completed form.⁸⁰ Whatever its choice, however, the basic provision, namely the reference to the "relevant rules of each organization" will remain unchanged. Some comments on the latter expression are now called for.

(25) In 1972, the Special Rapporteur described the evolution of the vocabulary which the International Law Commission had used in the course of its work to designate what was also called "the law peculiar to each international organization".⁸¹ Starting with the term "constituent treaty" or even "constituent instrument", the Commission considered the expression "constitution" in the sense of the "constitution as a whole—the constituent treaty together with the rules in force in the organization" and finally decided to use, in what was to become article 5 of the 1969 Convention, "any relevant rules of the organization", an expression whose very wide scope has never been questioned and which is to be found in the draft articles on the representation of States in their relations with international organizations (article 3).⁸² For all these reasons, which are too obvious to need emphasis, the Special Rapporteur considers it advisable to retain the proposed wording.

(26) He feels it necessary, however, to revert once again to the exact scope of this formula, by specifying what is to be understood by "the relevant rules of each organization".⁸³ The most important point is to bear constantly in mind that these terms do not necessarily cover the same sources for each organization; this is a basic constitutional fact which in itself derives from the law of each organization. It may happen that in the case of a given organization this expression covers only the constituent instrument interpreted as an ordinary treaty: this will be the case when the member States have chosen for it what might be called a "rigid constitution". It has sometimes

the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)" (*I.C.J. Reports 1971*, p. 56, para. 126), the Court decided by 11 votes to 4, that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law". It should be observed, however, that in both cases the Court did not give explicit reasons for its opinions, which may have been based on different grounds.

⁸⁰ See para. 20 above *in fine*.

⁸¹ *Yearbook . . . 1972*, vol. II, pp. 178 *et seq.*, document A/CN.4/258, paras. 25 *et seq.*

⁸² See *Yearbook . . . 1971*, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chap. II, D, article 3 and commentary.

⁸³ Of course, the two expressions "any relevant rules of the organization" (article 5 of the 1969 Convention) and "the relevant rules of each organization" express the same concept and the differences in wording have no substantive implications.

been suggested that this should be so when the machinery for the revision of the constituent instrument involves procedures sufficiently flexible to justify the conclusion that they have excluded extensive interpretations or constructive "practices" which are tantamount to *de facto* revisions.⁸⁴ However, this formula does not exclude the case of an organization whose constitution could be said to be "semi-customary", either because the constituent charter is drafted in such a way as to open the door to extensive developments,⁸⁵ or because the existence within the organization of a judicial organ has given rise to a particularly constructive judicial practice. It should be understood that the expression "the relevant rules of each organization" is as neutral as possible: it imposes nothing but excludes nothing, and leaves the question of determining the solution chosen for a given organization to the principles and procedures of each organization.

(27) The sources of the capacity of international organizations which are not excluded by the expression "the relevant rules of each organization" include the *practice* of international organizations. This is an idea which must be developed briefly. The concern of international organizations regarding the scope of their *practice* has already been noted.⁸⁶ The statements made at the United Nations Conference on the Law of Treaties show clearly that "the relevant rules of international organizations" include "established practices", that is, the practices which must be considered equivalent to legal rules.⁸⁷ However, in the context of the 1969 Convention, although the question

⁸⁴ This theory has been advanced several times in connexion with the European Coal and Steel Community, notably to make the theory of "implicit powers" inapplicable to that Community (M. Lagrange, "Les pouvoirs de la Haute Autorité et l'application du Traité de Paris", *Revue du droit public et de la science politique en France* (Paris), No. 1 (January-February 1961), p. 40). It could also be applied, with even greater justification, to the European Economic Community: article 235 of the constituent instrument of the Community establishes a particularly flexible procedure designed to complete the "gaps" in the treaty, but although the member States of that Community have for some time had extensive recourse to article 235, the Court of Justice of the European Communities has developed a particularly "constructive" judicial practice which evokes the federal dynamism of implicit powers.

⁸⁵ To the Special Rapporteur's knowledge, the only example of an international organization possessing a capacity to conclude international agreements defined in a purely functional way in its constituent instrument is the European Coal and Steel Community, in accordance with article 6 of the Treaty of Paris (see foot-note 58 above). However, the practice which has developed since 1954 in the case of that Community has sterilized the possibilities of that article, thus demonstrating the importance of *practice*, which generally tends to extend the capacity of international organizations but may have the opposite effect.

⁸⁶ See *Yearbook . . . 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 251.

⁸⁷ See the statement by Sir Humphrey Waldock, Expert Consultant of the United Nations Conference on the Law of Treaties: "With regard to the established practices of international organizations, the International Law Commission had considered that the words 'any relevant rules' covered that aspect of the matter. That phrase was intended to include both rules laid down in the constituent instrument and rules established in the practice of the organization as binding. (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 57, tenth meeting of the Committee of the Whole, para. 40); and the statement

was not formally settled, it may be wondered whether a practice which is in the process of being established, that is, which is not yet established, is or is not covered by article 5 of the 1969 Convention. This is a very serious question. If it is assumed that that Convention is binding on international organizations and that only "established" practices can derogate from its rules with regard to the constituent instruments of international organizations and the treaties adopted within an international organization (article 5 of the 1969 Convention), it would follow that the entry into force of the 1969 Convention would prohibit any *new* customary development of the law of international organizations that was contrary to the 1969 Convention.⁸⁸

(28) It is the view of the Special Rapporteur that—without infringing in any way upon the interpretation of other conventions, such as the 1969 Convention—it must

(Foot-note 87 continued)

by the Chairman of the Drafting Committee: "... article 4 did not apply to mere procedures which had not reached the stage of mandatory legal rules" (*ibid.*, p. 147, twenty-eighth meeting of the Committee of the Whole, para. 15).

⁸⁸ This explains the fairly sharp reactions of international organizations to the draft articles on the representation of States in their relations with international organizations (see *Yearbook . . . 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51, foot-note 131).

be acknowledged without hesitation that the expression "the relevant rules of each organization" covers practices which are not yet established but are liable to become so. This expression basically reserves the constitutional régime of each organization: it is this régime, and not the draft articles, which will determine the scope of the "practice". If, therefore, under this régime, the constitution of the organization is partly customary in origin and practice may in that connexion play a role going beyond that provided for in article 31, paragraph 3 (b) of the 1969 Convention, it is this régime which will be applicable. To adopt any other solution would be to give written conventional law precedence over unwritten law as a source of the law peculiar to each organization, prevent the progressive development of the law of each organization and give rise to an unacceptable infringement of the constitutional autonomy of each organization; this, in the final analysis, is the meaning of draft article 6.⁸⁹

⁸⁹ Although in theory it may very well be acknowledged that the States members of an international organization may give the latter a very rigid constitution, it must be acknowledged that such cases are relatively rare: in fact, the law peculiar to each organization is almost always flexible and evolves according to processes whose analysis and description (custom, consensus, unwritten agreements) may be debatable but which often take a form other than that of a written agreement.