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Sixth 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 (continued)

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

[Agenda item 4]

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*Draft articles, with commentaries (continued) **

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ABBREVIATIONS

AETR	European Agreement concerning the work of crews of vehicles engaged in international road transport
CMEA	Council for Mutual Economic Assistance
ECSC	European Coal and Steel Community
EEC	European Economic Community
IBRD	International Bank for Reconstruction and Development
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum Exporting Countries
UNCTAD	United Nations Conference on Trade and Development

Draft articles with commentaries (*continued*)PART III. OBSERVANCE, APPLICATION
AND INTERPRETATION OF TREATIESSECTION 4. TREATIES AND NON-PARTY STATES
OR INTERNATIONAL ORGANIZATIONS¹*General introduction*

1. Section 4 of part III of the Vienna Convention on the Law of Treaties² contains five articles, the last of which states that a rule set forth in a treaty may become binding upon a third State as a customary rule of international law. This article could be extended to treaties concluded between States and international organizations or between two or more international organizations simply by means of drafting changes. On the other hand, the first four articles represent a coherent whole concerning the effects of treaties on third States. This is a delicate question, on which the Commission spent a great deal of time when it was preparing the draft articles on treaties between States.

2. The transfer of the formulas used by the Vienna Convention in this connexion (which follow very closely those of the Commission's draft articles) to treaties to which international organizations are parties calls for a thorough preliminary investigation. Accordingly, reference will be made first to the spirit of the articles of the Vienna Convention, and then to the background of the Commission's work on treaties to which international organizations are parties; finally, general solutions to the problem will be presented.

A. SPIRIT OF THE ARTICLES OF THE VIENNA
CONVENTION

3. The relevant provisions of the Vienna Convention may be divided into two parts: basic principles and the

¹ Corresponding title in the Vienna Convention on the Law of Treaties: "Treaties and third States". For an explanation of the change, see para. 27 below.

² 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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

technical conditions for their application. These two parts will be discussed in turn.

4. The fundamental principle of the Vienna Convention is absence of effects of treaties between States with respect to third States. This does not exclude the possibility that a treaty will give rise to rights or obligations with respect to a third State, but both rights and obligations may be attributed to the third State only with the consent of that State. The will of the third State remains paramount with respect to both rights and obligations.

5. This position, which is both clear and firm, is based on two arguments. On the one hand, it represents the general law of all conventional régimes, and the entire Vienna Convention is imbued with the spirit of conventional consensus; on the other hand, the subjects of law that are parties to the agreements in question are equal and sovereign and, more than for other subjects of law, this sovereignty requires that they may not be legally committed by the will of a third party. In its commentary on article 30 of the draft articles (articles 34 of the Vienna Convention), the Commission lays great emphasis on these two arguments concerning the absence of effect of treaties with respect to third parties:

The rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known *maxim pacta tertiis nec nocent nec prosunt*—agreements neither impose obligations nor confer rights upon thirds parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States.³

6. As long as only States are involved, these two arguments are indisputable; however, to the extent that this general rule is to be applied to international organizations, that will no longer be true. In the latter case, although the notion of consensus underlying the law of treaties subsists, the other argument does not. International organizations are neither sovereign nor even equal; all their powers are strictly at the service of their member States; it is the function they assume that

³ *Yearbook... 1966*, vol. II, p. 226, document A/6309/Rev.1, part II, chap. II, para. (1) of the commentary to draft article 30. A little further on it is stated, with respect to the rule set out in article 31 of the draft (article 35 of the Vienna Convention): "That rule is one of the bulwarks of the independence and equality of States." (*Ibid.*, p. 227, para. (1) of the commentary to article 31.)

justifies and circumscribes their activities and their very being. It is therefore necessary to establish to what extent this difference in the basis of the rule requires that the rule be modified, or at least rendered more flexible, in respect of international organizations; this point will be reverted to at a later stage.

7. Since reference has been made to the solid arguments positing the absence of effect on third States of treaties between States, reference must also be made to the limits of the position taken both by the Commission and by the United Nations Conference on the Law of Treaties. The fundamental principles of the relative effect of treaties is fully valid in the context of the law of treaties, but only in that context. Cases may well occur in the international community of a State being validly confronted with a legal act or a situation arising from a treaty in which that State did not participate. In such cases, the solution decided upon would not be based on the rules specifically constituting the law of treaties, but on other general rules of international law. Of course, the question whether such cases should be examined in the context of the law of treaties or in some other context raises considerations of method and expediency that might occasion some hesitation. In 1964, when discussing the question of the effects of treaties on third States, the Special Rapporteur, Sir Humphrey Waldock, suggested draft articles concerning "actual rights" or "objective régimes".⁴ The Commission did not endorse these suggestions, but it would be a mistake to deduce from this that some acts or situations are never applicable to a State that has not participated in the treaty from which they arise. The Commission's decision means only that the basis for such cases, if they arise, does not lie in the rules of the law of treaties; the question of their legal validity has not thereby been settled, and remains open.

8. It may be useful to take an example that will clarify this important point. The question involved in this example is precisely whether treaties give rise to the establishment of "actual rights" or "objective régimes" applicable to third States. The Commission set this question aside when discussing the law of treaties, but encountered it again later, in some measure at least, when discussing State succession in respect of treaties. At the time, it accepted a rule providing that State succession as such shall not affect certain territorial situations arising from treaties. This doubtless opens up the theoretical problem whether the argument in this case should be couched in terms of succession to a treaty or succession to a situation;⁵ however that may be, the Commission considered that the problem concerned primarily succession of States and not the law of treaties. It therefore laid down a rule consistent with the Vienna Convention, and it did so for fundamental reasons of much greater import than article 73 of the Convention, under which the provisions of the Convention shall not prejudice any

question that may arise in regard to a treaty from a succession of States.⁶

9. These particulars concerning the Vienna Convention are of course so general in character that they are also valid with respect to draft articles on treaties involving international organizations. Without returning to this point at this stage, it will be agreed that, in respect of treaties between States and international organizations or between two or more international organizations, there would be no justification for departing from the line followed by the Vienna Convention. Thus the fundamental principle of the relative effect of treaties will be adhered to, subject to rules of international law relating primarily to subjects other than the law of treaties.

10. The spirit of the Vienna Convention having thus been defined in very general terms, consideration must now be given to the manner in which that spirit was to be reflected in practice. Two specific issues then arise, which are dealt with in articles 35, 36 and 37 of the Convention. Once it is accepted that a treaty between States may have certain effects on third States subject to the latter's consent, the mechanism and form of consent must be determined; that is the first specific issue. Once this consent has been given and the effect achieved, it is necessary to establish how far and in what way the effects of the treaty can be modified or ended; that is the second specific issue. Several options were now opened, first to the Commission, and then to the Conference on the Law of Treaties. It is not necessary to recall and discuss them all, but it is essential to determine, with respect to the options decided upon, the respective importance of the influence of consensus and of State sovereignty. Any application or consequence designed only to safeguard the sovereignty and independence of States might prove unnecessary in the case of international organizations.

11. It will be recalled that the Vienna Convention makes a fundamental distinction according to whether the treaty may give rise to rights or obligations in respect of third States.⁷ In such a case, the position is simpler and clearer as regards the mechanism and form of consent and the conditions governing modification of the situation thus created. This case will therefore be dealt with first.

12. When the aim of a treaty between States is to create an obligation that a third State will assume, the treaty is only *an offer to enter into a contract*; only acceptance

⁶ Article 73:

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

⁷ The Vienna Convention (article 36, para. 2) covers cases where a treaty establishes rights under specific conditions, that is, by imposing certain obligations on the beneficiary. However, the case could be extended and expressed in its most general form: what will be the régime for a treaty that gives rise to both rights and obligations with respect to third States? Apparently the strictest rules will apply to the whole, if that whole is indivisible. The Vienna Convention does not reply directly to this question. No draft articles will be proposed on this subject, which has hitherto aroused little comment.

⁴ See *Yearbook... 1964*, vol. II, pp. 19 *et seq.*, document A/CN.4/167 and Add.1-3, articles 62 and 63.

⁵ See *Yearbook... 1974*, vol. II (Part One), pp. 197-198 and 201-202, document A/9610/Rev.1, chap. II, D, paras. (2), (5), (18) and (20) of the commentary to articles 11 and 12.

of the offer by the third State will produce the effect. The chosen mechanism is therefore that of a *collateral agreement*. This interpretation involves only the principles of consensus. The same is true with respect to the question of the conditions under which the situation thus created could be modified. Since the legal source of the obligation is the collateral agreement, only an agreement involving all interested parties could modify or revoke the obligation, that is to say, an agreement of the States parties to the treaty (and to the collateral agreement) and of the third State (party to the collateral agreement). It remains to be decided what form the consent of the third State should take. If nothing more than consensus were involved, the consent of the third State could be given in any form, explicitly or implicitly, orally or in writing. Here, however, there arises a specific requirement connected with State sovereignty and the need to protect that sovereignty; in its draft articles, the Commission had provided for "express" acceptance, and the United Nations Conference on The Law of Treaties went further by requiring acceptance in writing. In the case of an international organization, the question clearly arises whether these requirements should be retained or not.

13. The case of a treaty intended to confer rights on a third State could have been dealt with in an equally straightforward manner. However, the Commission was divided with respect, first, to the mechanism governing the treaty's effect on third States. Some thought that, as in the preceding case, this mechanism was a collateral agreement, but others referred to the mechanism of *stipulation pour autrui*. Finally, noting that the two mechanisms differed only in terms of doctrine, the Commission drafted article 32 (article 36 of the Vienna Convention) in such a way as to make it compatible with either theoretical explanation, since all the members agreed that the consent of the third State was in any case necessary before a right benefiting that State could be established. Here it was no longer a question of attaching conditions to the form of consent; in addition, to make it easier for all members to agree to the proposed text, a rule was laid down to the effect that the consent of the third State was assumed unless the treaty provided otherwise. With respect to the revocation or modification of the right thus established for a third State, the solution agreed upon with respect to obligations should logically have been adopted. However, in compliance with observations made by States between the first and second readings, it was decided to avoid discouraging the establishment of rights benefiting third States, and a formula was proposed for ratification by the Conference under which it was accepted that the right could be revoked or modified unless it could be shown that the parties intended otherwise.⁸

14. This brief account of the spirit underlying the pertinent articles of the Vienna Convention leads to a fairly simple conclusion: the solutions chosen are generally derived from the basic principles of consensus and

⁸ In connexion with all these points, see *Yearbook... 1966*, vol. II, pp. 227 *et seq.*, document A/6309/Rev.1, part II, chapter II (Draft articles on the law of treaties with commentaries), commentaries on articles 32 and 33.

to this extent they are just as valid for international organizations as for States. However, in the formal expression of consent, there are requirements that arise from the desire to protect the sovereignty and independence of States. These are not valid for international organizations, which are dominated entirely by a different concept: performance of a function. It remains to be seen whether this characteristic has particular consequences.

B. BACKGROUND TO THE COMMISSION'S WORK

15. It may be useful to indicate briefly how the question of the effects on third parties of treaties to which an international organization is a party has so far been dealt with by the Commission. This very brief review will show that the content of the problem before the Commission is no longer the same as it was initially, in particular because the Special Rapporteur has sought from the outset to place the problem in the broadest possible perspective. His initial exploratory investigations, it will be seen, led to the abandonment of a number of questions that proved to be too specific, too difficult or perhaps even, despite appearances, irrelevant.

16. In his third report on the law of treaties, Sir Humphrey Waldock considered several questions relating to the effects of treaties on third parties, including international organizations. In particular, he raised the problem of the *representation* of a State by an international organization in the conclusion of a treaty, the organization acting on behalf either of one of its members or of them all.⁹ At the time, the Commission shelved those questions. The Special Rapporteur considers this a very specific problem; a treaty that commits States remains a treaty between States subject to the Vienna Convention even if an organization has represented one or several States: this is the most certain consequence of simple *representation*.¹⁰ The representation of one State by another State or by an international organization or, more generally, of one subject of law by another subject of law probably gives rise to complex problems of treaty law. However, it will be observed that the Commission refrained, as did the United Nations Conference on the Law of Treaties, from dealing with that question. If the Vienna Convention remained silent on the representation of the corporate body by another corporate body, it is reasonable to adopt the same position as regards treaties to which an international organization is a party. In line with the investigations of the Special Rapporteur, the Secretariat produced an excellent study on a specific aspect of the matter.¹¹ However, the study as a whole does not appear to be sufficiently advanced as yet and somewhat outside the main scope

⁹ *Yearbook... 1964*, vol. II, pp. 15-17, document A/CN.4/167 and Add.1-3, commentaries to articles 59 and 60. See *Yearbook... 1972*, vol. II, p. 183, document A/CN.4/258, para. 41.

¹⁰ P. Cahier, "Le problème des effets des traités à l'égard des Etats tiers", *Recueil des cours de l'Académie de droit international de La Haye, 1974-III* (Leyden, Sijthoff, 1975), vol. 143, p. 721.

¹¹ "Possibilities of participation by the United Nations in international agreements on behalf of a territory: study prepared by the Secretariat" (*Yearbook... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281).

of this report. The Special Rapporteur therefore believes he has correctly interpreted the feeling of the Commission in leaving aside questions that are specifically linked to problems of representation.

17. However, this question of representation was not unrelated to another question that was raised at an early stage in the work of the Commission and that cannot be set aside so easily, namely, the effects of international agreements concluded by an organization on its member States. The two questions are linked to the principle of the reality of the international personality of an organization. For a long time, in traditional international law and in its extension in the legal theory of the socialist countries, international organizations were treated as a means of collective action by States rather than as subjects of law; it was therefore easy to consider both that they represented member States and that they committed those States by the agreements they concluded. These considerations gave rise to practical and very specific problems. In 1964 Mr. Tunkin informed the Commission:

Where an international organization entered into a treaty, there would always be the problem of responsibility for the treaty with regard to both the organization and the member States.¹²

At the same time, the question was beginning to be discussed in the United Nations in relation to space matters, and specific solutions were adopted in the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space,¹³ and especially in the Convention on International Liability for Damage Caused by Space Objects.¹⁴

18. The Commission appointed a Special Rapporteur to deal with the question of treaties concluded between States and international organizations or between two or more international organizations. In his very first report, the Special Rapporteur included among the items meriting study by the Commission several items concerning the effects of such treaties on third parties.¹⁵ He pointed out that, in addition to the aforementioned questions of representation, international organizations were quite often given other functions under treaties concluded after their establishment, and that the organizations often accepted such functions in an implicit manner that was not in conformity with the strict conditions laid down in article 35 of the Vienna Convention.

19. Having established that multilateral treaties among States were almost never opened to international organizations, the Special Rapporteur showed that in practice international organizations could rarely remain unconcerned with certain such treaties. That being so, the question arose whether the distinction between third States and States parties to a treaty might not have to be modified in the case of international organizations. Perhaps an intermediate status might be conceived of

between "party" and "third party" that would involve only some of the elements of the status of "party".

20. Meanwhile a detailed questionnaire, dealing *inter alia* with various aspects of the effect of treaties on third parties, had been sent to a number of international organizations. On the basis of the answers received, the Special Rapporteur had attempted, in his second report, to clarify some of these problems: the concept of "party to a treaty";¹⁶ participation by an organization in a treaty on behalf of a territory;¹⁷ effects of treaties on third parties;¹⁸ and, in particular, attribution by treaty of new functions to an organization without the latter's express consent.¹⁹ He also suggested some new conclusions. With regard to the last point, in particular, he suggested that an international organization should be able to give its assent to an extension of its functions in any form. On the other hand, it seemed impossible that its acceptance should confer on it an acquired right to the maintenance of such an extension against the will of the States that had decided it; the purely functional character of international organizations precluded the constitution of rights of that kind as against States.²⁰ He suggested a solution of principle, on the essential question of the effects of treaties concluded by international organizations in respect of their member States.²¹

21. The Commission discussed the first and second reports at its twenty-fifth session.²² Certain comments by the members of the Commission concerned the question of the effect of treaties on third parties. Mr. Ushakov thought that the Commission should adhere to the concept of "party to a treaty", as defined in the Vienna Convention,²³ that any reference to problems of "representation" should be excluded from the draft articles,²⁴ and that the effects of a treaty to which an international organization was a party were the same for member States as for non-member States of the Organization.²⁵

22. Mr. Kearney agreed that acceptance by an organization of the effects of a treaty to which it was not a party should be governed by less restrictive rules than those laid down for States in the Vienna Convention.²⁶ On the same subject, Mr. Tammes expressed the view that the requirement of written consent by an organization was excessive, since the organization could be considered as implicitly accepting in advance all future obligations that might devolve upon it rather than as cautiously consenting to them in accordance with the rules of the

¹⁶ *Yearbook... 1973*, vol. II, pp. 79-81, document A/CN.4/271, paras. 23-33.

¹⁷ *Ibid.*, pp. 86-88, paras. 69-77.

¹⁸ *Ibid.*, pp. 89-93, paras. 89-107.

¹⁹ *Ibid.*, pp. 90-91, para. 96.

²⁰ *Ibid.*, p. 91, para. 97.

²¹ *Ibid.*, pp. 91-93, paras. 98 *et seq.*

²² See *Yearbook... 1973*, vol. I, pp. 187-189, pp. 198 *et seq.*, 1238th meeting, paras. 63 *et seq.*, 1241st and 1243rd meetings.

²³ *Ibid.*, p. 200, 1241st meeting, para. 10.

²⁴ *Ibid.*, para. 12.

²⁵ *Ibid.*, para. 17.

²⁶ *Ibid.*, p. 201, para. 28.

¹² *Yearbook... 1964*, vol. I, p. 62, 733rd meeting, para. 21.

¹³ General Assembly resolution 2345 (XXII), annex.

¹⁴ General Assembly resolution 2777 (XXVI), annex.

¹⁵ *Yearbook... 1972*, vol. II, pp. 189 *et seq.*, document A/CN.4/258, paras. 58 *et seq.*

Vienna Convention.²⁷ Mr. Ustor agreed that an organization was not a third party in respect of a treaty between States that concerned it directly, and he cited the example of an agreement between two economic associations and the position of the member States of those associations.²⁸ Sir Francis Vallat expressed a similar idea:

... article 2, paragraph 1 (h), of the Vienna Convention was inappropriate in the case of international organizations, since there was a special relationship between the organization and its members; hence treaties concluded by the organization might have some effect on its members without their necessarily being parties thereto.²⁹

23. Among the Special Rapporteur's conclusions on this exchange of views, only one specific point will be dealt with here, concerning the problem under study. The question of treaties between States was the subject of the Vienna Convention and there is no question of amending that instrument or even of adding to it. At first sight, therefore, it might be considered that the Commission had now to deal only with the effects of treaties between States and international organizations or between two or more international organizations and that, consequently, it might leave aside the question of the effects on an international organization of treaties concluded with regard to it between States. However, it must be concluded that, at least in the case of a treaty that assigns new functions to an existing organization and that does not entail an amendment of the constituent charter of that organization, acceptance by the organization is the subject of a collateral agreement between the organization and the States parties to the treaty assigning new functions to it. This treaty is therefore clearly a treaty between States and an international organization and is of such a nature as to fall within the purview of the provisions that will be covered by the draft articles.³⁰

C. THE PROBLEM AND GENERAL SOLUTIONS TO IT

24. At the present stage in the progress of the Commission's work in this area, it seems that the situation may be summed up broadly by distinguishing four questions of varying importance and considering them one after the other:

(1) The question of principle: whether to revise or adapt the provisions of the Vienna Convention;

(2) Third parties: vocabulary and question of substance;

²⁷ *Ibid.*, p. 203, paras. 5-6.

²⁸ *Ibid.*, p. 205, para. 25.

²⁹ *Ibid.*, p. 207, para. 48.

³⁰ *Ibid.*, pp. 209-210, 1243rd meeting, para. 17. In his comments, the Special Rapporteur did not fully reply to the observation of Mr. Ushakov. The collateral agreement will indeed come within the purview of the future draft articles (provided it may be considered as taking the form of a written agreement), but the treaty between States and its effects will continue to be governed by the Vienna Convention in general; however, its effects on an international organization are not covered by article 34 of the Convention, which concerns only the absence of effects on third States. There are therefore logical reasons for including this question in the draft articles. See para. 41 below.

- (3) Treaties of an organization and its member States,;
 (4) Marginal questions: representation and assignment of new functions to an organization.

1. *The question of principle: whether to revise or adapt the provisions of the Vienna Convention*

25. The answer to the question of principle is simple and quite unambiguous: there can be no revision, but only adaptation, of the principles embodied in articles 34 to 38 of the Vienna Convention. As has been seen, these principles, concerning which no objections or reservations were expressed at the United Nations Conference on the Law of Treaties, simply reflect the notion of consensus that prevails with respect to conventions in international relations as in private relations. At most, two points might be borne in mind: certain secondary aspects of the articles of the Vienna Convention derive from the fact that the effects in question are to operate with respect to *sovereign* subjects of law, namely, States, whose sovereignty must be carefully respected, whereas in the draft articles consideration must also be given to the effects that would operate with respect not to sovereign States but to subjects of law that are wholly at the service of a *function* that has been internationally defined in relation to States.

26. This position of principle has important consequences as regards method. The effects of treaty instruments whose régime is the subject of the draft articles are likely to operate with respect to both States and international organizations, and a distinction must be made between the two cases. With respect to the effects on States, there is, generally speaking, no sound *a priori* reason for departing from the solutions set forth in the articles of the Vienna Convention, but the same is not true of the effects on international organizations; in the latter case, the question arises whether different procedures are required. On the other hand, there is no *a priori* substantive reason for distinguishing between the effects of treaties between States and international organizations, and the effects of treaties between two or more international organizations. Both types of treaties may be required to produce certain effects for both international organizations and States. The only reason for distinguishing between the two types would be for drafting purposes.

2. *Third parties: vocabulary and question of substance*

27. The relevant articles of the Vienna Convention make abundant use of the term "third State". But if it is considered that article 2, paragraph 1 (g) and (h), defines "party" and "third State" simply by taking one term as the negation of the other ("third State" means a State not a party to the treaty"), it is clear that there is nothing original about the term "third State" as used in a treaty. However, its use in, or at least its transposition to, the draft articles gives rise to two difficulties, one linguistic and the other substantive.

28. As regards the linguistic difficulty, the use in French of the term "third organization" is possible, although it would cause some astonishment, and the same would seem to apply to other languages. This is not simply

because the term is not commonly used, but also because "third" normally qualifies a subject of law solely within a group formed of subjects of like nature: a third State is distinguished in a group of States from States that are bound by a given convention. In relation to organizations that are bound to each other by an agreement, an organization that is not a party to that agreement indeed appears to be a third organization, but it would perhaps be somewhat unusual to say that this organization was a third party in relation to the parties to a treaty if such parties consisted of international organizations and States. No problem of vocabulary would arise if "third" were replaced by "non-party", since in the Vienna Convention "third" is strictly defined as one that is not a party.

29. In addition to the question of appropriate vocabulary, there is perhaps a substantive reason precluding use of the word "third". Admittedly, the Vienna Convention considered the terms "third" and "non-party" to be identical and was fully entitled to do so because every convention may select its own vocabulary. Nevertheless, the two terms are not wholly equivalent. No to be a party to a treaty is to be foreign to a conventional *legal instrument*, to be deprived of the powers inherent in the status of party with respect to the duration of the instrument when new parties emerge, in cases of amendment etc.³¹ It also means, but only inferentially, not to be bound, or at least not to be directly bound, by obligations arising from the instrument. However, it is possible, through various mechanisms, to derive rights from a treaty and to be bound by virtue of it to perform obligations without ever becoming a party to it, as, for example, the United Nations in relation to the Charter and to other inter-State agreements concerning it. Necessarily, the term "third" has a technically less precise, yet substantively more radical meaning: a "third party" is foreign to an instrument, its consequences and all the rules deriving therefrom.

30. It was as a result of similar reflections that the Special Rapporteur earlier felt authorized to propose such formulas as the following:

One would be tempted to say that the States members of an organization may be "more or less" third States in relation to the treaties concluded by the organization ...³²

Other authors dealing with the same case have considered member States as "false third parties".³³ This argument has been questioned, as has the one advanced by the Special Rapporteur, to the effect that it was indeed

³¹ It is sometimes said that a body is either a party to a treaty or it is not, which is true. However, that does not mean that it is not possible to determine in each treaty that certain subjects of law will enjoy a particular status of "party" under its provisions and have only some of the rights of a "party". It means only that, *generally speaking*, only two types of status can be determined, namely, party and non-party, and that it is in relation to one or other of these two types of status that, in doubtful cases, the rights and obligations of any subject of law enjoying a particular status in relation to a treaty will be considered.

³² *Yearbook... 1972*, vol. II, p. 197, document A/CN.4/258, para. 85); elsewhere (*ibid.*, p. 194, foot-note 178) he examined the case of organizations that were "more or less parties" to a treaty.

³³ H. J. Geiser, *Les effets des accords conclus par les organisations internationales* [thesis] (Berne, Lang, 1977), p. 139.

difficult to say that an international organization was a third party in relation to its constituent charter.³⁴ However, in another context, as has also been recalled, the Secretary-General of the United Nations has consistently maintained that the United Nations is a party to the 1946 Convention on the Privileges and Immunities of the United Nations,³⁵ thus going even further than saying that it is not a third party.

31. These analyses certainly demonstrate that it is the basic definitions that diverge and that explain the differences of opinion. It seems advisable in the circumstances no longer to use the term "third party" in relation to a treaty and instead merely to differentiate between parties and non-parties. All "non-parties" to a treaty remain foreign to the mechanisms of the conventional legal instrument as regards the development and modification of conventional ties (for example, amendment); nearly always, although not quite always, the effects of the treaty are not operative for "non-parties" without the latter's assent. The appearance of international organizations on the scene of international legal relations gives rise to some exceptions to this relative effect of treaties. Such exceptions as have been indicated do not challenge the validity of the principle itself but derive basically from the structure and limits of the legal person itself.

32. In concluding the examination of this point, the Special Rapporteur wishes to observe that, if the Commission agrees with him and avoids the term "third party", it will be unnecessary to insert in the draft articles a provision parallel to article 2, paragraph 1 (*h*), of the Vienna Convention, which defines the term "third State".

3. *Treaties of an organization and its member States*

33. The wealth of commentaries and expositions presented on this subject clearly show that a fundamental practical problem is at issue. It can certainly be argued that, logically, the problem should not exist. Indeed, it is pertinent to ask whether, in a specific case, a given organization has the right to negotiate; but if it is recognized that it has such a right, the organization commits itself alone, and its partners deal with it alone. This is indeed one of the more indisputable consequences of legal personality. It in no way prejudices the obligations that member States may incur under the constituent charter of the organization; it will be prudent to provide in that constituent charter not only that States must assist the organization in the performance of all its functions but also that they will be bound by all the agreements it concludes. Such rules, when inserted in the constituent charters, bind member States among themselves and in relation to the organization. Do they, however, bind entities, other States or other organizations with which the organization concludes a treaty?

³⁴ P. Cahier, *op. cit.*, p. 698. The author seems to adhere strictly to the definitions of the Vienna Convention and attributes the direct effect of the constituent charter on the organization that it creates to the lack of sovereignty of the organization. In reality, in any legal system a legal person created by an agreement is not a third party in relation to that agreement.

³⁵ See *Yearbook... 1973*, vol. II, p. 80, document A/CN.4/271, paras. 30-31.

As far as these partners are concerned, are they *res inter alios acta*? If the answer is no, the problem has no legal substance.

34. The Special Rapporteur has consistently recognized the validity of this analysis, which he submitted four years ago³⁶ and which was approved by some members of the Commission. He considers only that it fails to deal with all the problems that arise in practice and that consequently, although it provides the essence of the solution, it must be supplemented, at least briefly.

35. The premise on which the whole argument is based, namely, the affirmation of the legal personality of the organization, must be modified by factual considerations. There is no need to dwell once again on the fact that a number of Governments waited a long time before recognizing the international capacity of at least some international organizations; it will suffice to indicate the weaknesses of such capacity when it exists. The competence of an international organization to conclude treaties is often uncertain, extending only to elementary matters or, if covering more important subjects, extremely ill-defined compared with the competence of its member States; in addition, more often than not, the organization lacks the financial and human resources to ensure the effective performance of its own obligations. In the circumstances, it is fairly natural that both the partners of the organization and the member States should want member States to be associated with the obligations of the organization.

36. There are technical mechanisms for obtaining this result. The simplest is the mechanism whereby the organization and its member States act side by side as parties to a treaty. The formula was established in the association agreements of EEC and was later extended to other agreements relating to customs relations, economic co-operation and other matters. Even the agreements worked out within the Council of Europe have been adapted to this formula, although it has its disadvantages, which there is no point in expounding and discussing here.³⁷ Other less elaborate solutions may show even greater flexibility.³⁸

³⁶ *Ibid.*, p. 92, document A/CN.4/271, para. 102.

³⁷ This type of agreement has entered into general practice with regard to all economic issues involving the European Communities and all international organizations, from the UNCTAD commodity agreements to the OECD agreements. In the Council of Europe, the formula was employed for the European Convention on the Protection of Animals kept for Farming Purposes of 10 March 1976 and the Additional Protocol to the European Agreement on the Exchange of Tissue-typing Reagents of 24 June 1976. See R. Kovar, "La participation des Communautés européennes aux conventions multilatérales", *Annuaire français de droit international*, 1975, vol. XXI (Paris, 1976), p. 903; also J.-P. Jacqué, "La participation de la Communauté économique européenne aux organisations internationales universelles", *ibid.*, p. 924.

³⁸ According to the translation given by *International Affairs*, No. 10 (Moscow, October 1973), p. 122, the treaty concluded between CMEA and Finland in May 1973, although signed and ratified by CMEA, had received the prior approval of the States members of CMEA, and its provisions concerning the regulations applying to the organs entrusted with economic co-operation refer throughout to the member States as responsible for performing the obligations, although formally they are not parties to the treaty with Finland.

37. Although it might be interesting to point out some of the general problems raised for example by mixed agreements, the Special Rapporteur does not consider that it is part of his task to analyse this subject, much less to attempt to embody certain practices in draft articles. However, having noted the need arising in practice to associate member States with agreements concluded by international organizations, the question arises as to how far it is possible to go in taking that into account while at the same time remaining faithful to the fundamental principle of the relative effect of treaty undertakings as viewed in the light of the distinctive legal personality of international organizations. An examination for this purpose of the technical machinery created by articles 35 and 36 shows that the Vienna Convention succeeded in introducing a measure of flexibility into the fundamental principle set out in article 34 by specifying the form the consent of the third State must take if the treaty is to produce certain effects in relation to that State. In addition to *written* consent, there is non-explicit consent, that is, not only *express* but also *tacit* or *implicit* consent; beyond that still, there is *presumed* consent. Nothing prevents recourse to a form of consent that is not only tacit but also presumed in defining the effects of treaties concluded by international organizations in respect of their member States.

38. The Special Rapporteur is therefore proposing to the Commission a new article 36*bis*, which appears below. While remaining within the basic framework of consensus and of the relativism characterizing it, the new article envisages two cases. In the first case, it is assumed that the States parties to a treaty that is the constituent instrument of an organization have included in the treaty a provision to the effect that any treaties concluded by the organization will give rise to obligations and rights as between the treaty partners of the international organization and the latter's member States. Such a provision will produce effects as soon as the organization and a co-contractor conclude a treaty; the treaty will automatically produce effects in relation to the organization's member States. The singular feature of this mechanism is that the foundation for a collateral agreement has in part been laid even before the conclusion of the main agreement. The main agreement is indeed concluded between the organization and various co-contractors, but the collateral agreement results from a conjunction of will on the part of the organization and its treaty partners on the one hand, and of the member States on the other hand, and in that agreement the will of the organization and of its member States is partly predetermined by the constituent instrument of the organization.

39. In the second case, a certain assumption is made. Some treaties deal with matters that fall in some respects within the competence of an international organization and in others within that of the organization's member States. It is reasonable to assume that, when an organization concludes a treaty dealing with such matters, the treaty also gives rise to rights and obligations on the part of the organization's member States. The consent of the member States is presumed to exist, but evidence to the contrary may be adduced.

40. The various considerations relating to these cases will be examined further in connexion with these propositions. For the moment, it is sufficient to note that they remain in conformity with the general principles embodied in the Vienna Convention. It is only through discussion in the Commission that the merits of these propositions can be thoroughly assessed.

4. *Marginal questions: representation and assignment of new functions to the organization*

41. It is unnecessary to deal further with certain marginal questions that have previously been considered at length and will therefore not be the subject of a draft article. One of these is the question of representation, which has already been commented upon.³⁹ The same applies to two other questions that have been referred to several times namely, the position of an international organization in relation to a treaty whereby it was established,⁴⁰ and the broadening of an organization's functions under a treaty between States other than one that amends its constituent instrument.⁴¹ In the latter case, the primary legal instrument is a treaty between States and only the collateral instrument of acceptance constitutes an agreement to which the organization is a party. However, it may be asked whether it is really useful to endorse a practice whereby international organizations often implicitly accept new functions entrusted to them by treaties between States that are often binding on only some of their member States.⁴² In the former case, concerning the organization's legal status in relation to its constituent instrument or other similar instrument (e.g. treaties on immunities), it will also be argued with some validity that the treaty is covered by the Vienna Convention, that the relationship between an organization and its constituent instrument has never given rise to any practical problems (and is of deep concern only to theoreticians) and, finally, that the relations between an organization and treaties between States concerning its privileges and immunities have been regulated in practice without any difficulty.⁴³ It has accordingly seemed advisable to leave these questions aside completely for the present.

³⁹ See para. 16 above.

⁴⁰ See paras. 29 and 30 above.

⁴¹ See paras. 18, 20 and 23 above.

⁴² The financial aspects of this question in particular, deserve more careful study by organizations. Some organizations require all member States to pay the costs of implementing a convention (while at the same levying an assessment for the purpose on non-member States parties); in other cases, a separate budget is created for purposes of the implementation of conventions, but the same organization will sometimes assess only States parties and sometimes all members of the organization for that purpose.

⁴³ The procedure provided for in article X of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (United Nations, *Treaty Series*, vol. 33, p. 261) has long been taken as a model (see *Yearbook... 1972*, vol. II, p. 192, A/CN.4/258, para. 68). The recent Convention on the Representation of States in their Relations with International Organizations of a Universal Character (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 223), adopted a similar solution in its article 90:

After the entry into force of the present Convention, the competent organ of an international organization of a universal

Article 34. General rule regarding non-party States or international organizations⁴⁴

A treaty does not create either obligations or rights for a State or organization not party to the treaty without its consent.

Commentary

An effort has been made to follow the concise wording of the Vienna Convention as closely as possible. The word "third" has been replaced by "not party" for the formal and substantive reasons indicated above.⁴⁵

Article 35. Treaties providing for obligations for non-party States or international organizations⁴⁶

1. Without prejudice to article 36bis, an obligation arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the non-party State expressly accepts that obligation in writing.

2. An obligation arises for an organization not party to the treaty from a provision of that treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the non-party organization accepts that obligation in an unambiguous manner and in accordance with the relevant rules of the organization.

Commentary

(1) The reservation concerning article 36bis, which is a new article dealing with the particular case of the effects of treaties concluded by international organizations on States *members* of such organizations, is essen-

character may adopt a decision to implement the relevant provisions of the Convention. The Organization shall communicate the decision to the host State and to the depositary of the Convention.

Quite apart from the persistent tendency to deny international organizations access (as parties) to multilateral conventions, it will be noted that a curious device is employed here. The international treaty between States, considered in isolation, is intended solely as an offer, and it is the decision of an international organization that in effect implies consent to the conclusion of a second treaty between the organization, on the one hand, and the States parties to the first treaty, on the other hand. This second, "collateral", treaty is the one that actually gives effect to the first treaty, which is merely preparatory to the second. It is not customary that *all* the provisions of treaties creating rights and obligations for third parties should depend for their validity on acceptance by a third party. In the face of an example like this one, it may be wondered whether such associations of two conventional instruments do not give rise to many problems other than those envisaged in the Vienna Convention; it will be noted that the treaties that have been referred to as "trilateral" came about precisely by joining in a single instrument two conventions that could have been kept separate while remaining closely interlinked (see *Yearbook... 1972*, vol. II, p. 190, document A/CN.4/258, para. 61).

⁴⁴ Corresponding provision of the Vienna Convention:

"Article 34. General rule regarding third States

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

⁴⁵ See paras. 27 *et seq.* above.

⁴⁶ Corresponding provision of the Vienna Convention:

"Article 35. Treaties providing for obligations for third States

"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

tial. This is because article 36*bis* provides that, in such cases, the consent of member States may be given under much less rigorous conditions, even when the effect is to impose an obligation on them.

(2) It seemed essential to distinguish between cases involving States and those involving international organizations and to deal with them in separate paragraphs. In the case of consent by States, there is no reason—except in the special case of States members of an organization, which is dealt with in article 36*bis*—to depart from the rules designed to protect their independence, which have been formulated by the Commission in respect of treaties between States and further strengthened by the Conference on the Law of Treaties. Apart from the reservation concerning article 36*bis*, paragraph 1 of the draft article thus reproduces the wording of article 35 of the Vienna Convention.

(3) On the other hand, as the need to protect State sovereignty does not arise with respect to international organizations, the latter are dealt with in a separate paragraph. The paragraph could have referred simply to the “consent” of the organization without otherwise specifying the nature of such consent. One reflection, however, it seemed reasonable to state explicitly that the consent must be given in an “unambiguous” manner. It also seemed useful, however self-evident it might appear, to provide that the consent must be given “in accordance with the relevant rules of the organization”, for the ultimate impact of the organization’s consent will fall on its member States, and it is proper to point out that the latter enjoy this guarantee. Reference is made in draft article 35 to “the relevant rules of the organization” rather than to the constituent instrument of the organization because this phrase is used throughout the draft articles, and particularly in article 6 (Capacity of international organizations to conclude treaties),⁴⁷ to designate the entire body of rules constituting the statute of the organization. It should also be noted that such consent will very often have financial implications for the organization; from that standpoint as well, therefore, it is desirable that all the relevant rules of the organization should be complied with.

Article 36. Treaties providing for rights for non-party States or international organizations⁴⁸

1. Without prejudice to article 36*bis*, a right arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to

⁴⁷ For the text of the articles thus far adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 171 *et seq.*, document A/10010/Rev.1, chap. V, sect. B, subsect. 1.

⁴⁸ Corresponding provision of the Vienna Convention:

“Article 36. *Treaties providing for rights for third States*

“1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

“2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

accord that right either to the non-party State or to a group of States to which it belongs, or to all States, and the non-party State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for an international organization not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to accord that right to the organization and the organization assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

3. A State or an organization exercising a right in accordance with the preceding paragraphs shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

(1) Unlike the régime governing the establishment of obligations set out in draft article 35, the proposed régime governing rights conferred by a treaty on entities that are not parties to that treaty is the same whether the entity is a State or an organization and is the one provided for in the Vienna Convention in respect of States. This régime is a liberal one; it is hard to see how it could be made more liberal and there is no reason to distinguish between the régime provided for in respect of organizations and that provided for in respect of States. It would therefore have been possible to keep the same structure in the draft article as in the Vienna Convention and to deal with both States and organizations in the same paragraph 1.

(2) For minor considerations only, particularly drafting considerations, it seemed preferable to devote a separate paragraph to each case. The reservation in article 36*bis* applies only to States, and it appeared difficult to transpose the reference to a group of States, or to all States, so as to make it applicable to international organizations. With the possible exception of the question of privileges and immunities, in connexion with which the group of international organizations of a universal character has now been identified (Convention on the Representation of States in Their Relations with International Organizations of a Universal Character),⁴⁹ the characteristics of an international organization vary from one organization to another and are hardly a matter for generalization. In any event, for reasons of stylistic elegance alone, it is preferable to devote two sentences, and thus two separate paragraphs, to the matter.

Article 36 bis. Effects of a treaty to which an international organization is party with respect to States members of that organization⁵⁰

1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effects to the treaty.

⁴⁹ For reference, see foot-note 43 above.

⁵⁰ New article in relation to the Vienna Convention.

2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to:

- (i) rights which the member State is presumed to accept, in the absence of any indication of intention to the contrary;
- (ii) obligations when the member State accepts them, even implicitly.

Commentary

(1) Paragraph 1 of article 36*bis* deals with the case where the constituent instrument of an international organization contains provisions concerning the effects of treaties concluded by an organization in respect of the States members of that organization. There is at least one known example of such a situation, that of EEC.⁵¹ It is undeniable that an article of the constituent instrument of an international organization may bind member States *with regard to the organization itself*. This means that States are bound in their relations with the organization to respect those treaties, that those treaties form an integral part of the organization's own legal order and, at least in the case of organizations that have integrated their legal order and the national legal orders of member States, that treaties concluded by organizations are binding on States in their internal order.⁵² However, an altogether different question is being considered here, which the two paragraphs of article 36*bis* attempt to resolve, namely, can the parties to a treaty concluded by an organization directly demand of States members of the organization that their actions respect the treaty concluded by the organization? Can

⁵¹ Article 228, para. 2, of the Treaty establishing EEC (United Nations, *Treaty Series*, vol. 298, p. 11):

"Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States."

Article 5 of the same Treaty:

"Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

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

⁵² It is not the intention in this report to express any opinion on the exact scope to be attributed to the texts cited in the preceding note with regard to EEC. The importance of the problem has been highlighted by P. Pescatore, "Les Communautés en tant que personnes de droit international" (in W. J. Ganshof van der Meersch, *Droit des Communautés européennes* (Brussels, Larcier, 1969), pp. 118 *et seq.*). Attention may be drawn to the author's argument that the term "community" applies both to the institutions and to the States members (*ibid.*, p. 119). In a recent commentary on the articles of the Treaty (H. Smit and P. Herzog, *The Law of the European Economic Community—a Commentary on the EEC Treaty* (New York, Bender, 1976), vol. 5, part VI, p. 232), the problem is again clearly stated. Moreover, setting aside the textual argument concerning article 228 of the Treaty, attention may also be drawn to the considerations that will be examined in connexion with paragraph 2 of draft article 36*bis*, which will be discussed later (see para. (12) below).

States members take advantage directly of the provisions of a treaty concluded by the organization in their dealings with the parties to that treaty?

(2) To these questions, the provision in paragraph 1 of article 36*bis* gives an affirmative reply in cases where a provision of the constituent instrument itself clearly gives such a reply. Nothing in this solution derogates from the rules of consensus; to establish a consensus, the problem must be considered from the standpoint both of States members of the organization and of the organization's co-contractors. First, as regards member States, they are parties by definition to the constituent instrument of the organization and, by the relevant provisions of that instrument, they express consent to having the effects of agreements concluded by the organization extended to them. Thus they consent in advance to the extension of the effects of those agreements—and it is hard to see under what legal principle they could fail to do so. The question whether such advance consent entails risks for them is a political question, and it is up to them to determine, in the light of the organization's institutions and powers, whether or not they wish to run that risk. The situation of the organization's co-contractors is a little less simple; there would be no difficulty if the treaty concluded by the organization also stated *expressis verbis* that, although member States were not formally parties to the treaty, the effects of the treaty would also extend to member States, thus giving rise to rights and obligations on their part. In such a case the treaty would give rise to effects with regard to non-party States, but with their advance agreement.

(3) The case of a treaty with the organization that does not state *expressis verbis* that its effects also extend to member States remains to be discussed. In this case, the proposed text of paragraph 1 of article 36*bis* gives an equally affirmative reply. The idea on which that solution is based is that an international organization's co-contractors must be regarded as being cognizant of the organization's constituent instrument and thus fully aware of the conditions under which a given international organization may enter into international commitments. In the opinion of the Special Rapporteur, this affirmation itself is based on the essential fact that no general rule exists in the matter of the capacity of international organizations; the Commission has admitted as much by stating in article 6 of the draft articles⁵³ that "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization". Since these rules vary from one organization to another, it is essential that the parties contracting with an organization should be fully cognizant of its capacity, and this presupposes full knowledge of its constituent charter. The situation is thus radically different from that of States, whose capacity is uniform because it is unlimited. There is therefore justification for stipulating in principle that States (or organizations) that are to conclude a treaty with an organization should be cognizant of the latter's constituent instrument, and should know that the treaty binding them to the organization will also

⁵³ See foot-note 47 above.

confer rights on them in relation to States members of the organization and impose obligations on them in respect of such States. If they have been alerted to this situation, their acceptance of the consequences results from their consent to be bound by the treaty they conclude with the organization.⁵⁴

(4) From a purely technical point of view, the originality of this mechanism lies in the timing and the manner in which the consent required for a treaty to produce effects with regard to those that are not parties to it is obtained. As regards States members of the organization, their acceptance of the effects of treaties concluded by the organization is given *en bloc* and in advance by the relevant clause of the constituent instrument of the organization. As regards the parties that contract with the organization, their acceptance is given by the very fact that they conclude a treaty with the organization. In the case of the former, acceptance is given in two stages separated by intervals of varying length: the over-all acceptance in principle of the constituent charter, and the specific implementation of the effects of that charter through the conclusion of a treaty by the organization. In the case of the latter, acceptance is given by a single act, namely, the conclusion of a treaty with the organization, but even in this case the primary source of the effects that are to be applied to them is the constituent instrument of the international organization.

(5) From a practical point of view, the solution proposed is of great importance: it safeguards the general principles, in particular that of the relativity of the effects of treaties, and it gives States outside the organization and other organizations greater security in their commitments. States members of the organization are bound, just as the organization itself is bound, without reason to fear uncertainties regarding the assignment of areas of competence between the organization and its members, the slenderness of the means available to the organization at any given time, or any unforeseen developments that might arise. All these advantages, which will be discussed later, are obtained without recourse to the much more cumbersome technique of mixed agreements. Not only are the negotiations leading to the latter type of agreement much more arduous, but the need to obtain ratifications from all States that are also parties to the agreement delays its entry into force, sometimes to a dangerous extent.

(6) The question therefore remains whether paragraph 1 of article 36*bis* is technically necessary, in other

⁵⁴ It might be observed that it would be simpler to stipulate in a treaty concluded by the organization that the treaty produces effects with regard to States members of the organization. It is in fact possible to do so, but in that case the States members of the organization are subject to the conditions of ordinary law provided for in draft articles 35 and 36, which means that member States will be expressly required to give their consent in writing in the case of obligations, and that they may waive the rights that they would enjoy under the treaty. Accordingly, the treaty concluded by the organization would have effects that might vary from one State to another. This consequence may be accepted in certain cases; however, there are, or may be, situations in which States members of an organization wish the effects of the organization's agreements to extend to each of them under identical conditions, and it is to cover this case that paragraph 1 of draft article 36*bis* is proposed.

words whether the result it seeks to achieve could not be obtained without the inclusion of any such provision. Let it be supposed, then, that the Commission does not endorse this proposal by the Special Rapporteur, but that it accepts draft articles 35 and 36. In the treaty concluded by the organization, it would then be necessary not only to refer to the article of the organization's constituent instrument relating to the effects of treaties concluded by the organization, but also expressly to stipulate that the co-contractors accept the benefits and, above all, the obligations deriving from that article of the organization's constituent instrument. With a stipulation of this kind, the desired result would undoubtedly be obtained. Is this not an argument against the adoption of paragraph 1? Would it not be sufficient to mention in the commentary the case covered by paragraph 1? The Special Rapporteur thinks not. It is possible that, if the foregoing remarks are correct, the proposition made by this provision may result in the general inclusion of a specific conventional provision in the agreements concluded, but the affirmation of a general rule is nevertheless useful because it is based on an important principle, namely, that the co-contractors of an international organization are assumed to know and accept the provisions of its constituent instrument concerning its international commitments. In addition, it must be recognized that most of the provisions in the Vienna Convention are purely *suppletive*, that is, they are valid only in the absence of an explicit provision in the treaties to which they apply, and it has never been proposed that these provisions should be eliminated on the ground that it is the responsibility of the parties to settle by special provisions in each treaty any questions that may arise in connexion with a treaty.

(7) One last remark must be made. If paragraph 1 is accepted, it may be said that it is too narrow in scope since it refers only to the constituent instrument and not, as is the case in the Vienna Convention and in the earlier articles of this draft, to the "relevant rules of the organization". This means that it would be necessary to take into account not only the explicit provisions of the constituent instrument but also all the rules derived from established practice. It would, of course, be possible to take this viewpoint into account and to broaden the scope of paragraph 1. A broader wording, however, might dispose too liberally of the right of States, whether they are States members of the organization or co-contracting States of the organization. Should not the rules of the organization be of a somewhat formal nature (that of the organization's constituent instrument), if they are to be invoked against third parties? In addition, paragraph 2 of article 36*bis* goes further than paragraph 1 and it was thought that it might cover some of the situations not resolved by paragraph 1 in its existing wording.

(8) In paragraph 2 of the article, the starting-point of the legal construction is quite different from that of paragraph 1. In the latter paragraph, the conventional instrument that is at the origin of the effects with regard to non-party States or organizations is the constituent instrument of an organization; in paragraph 2 this instrument is the treaty concluded by the organization. Moreover, whereas paragraph 1 concerns exclusively

conventional instruments concluded by only certain organizations, namely, those whose constituent charters contain a clause providing that treaties concluded by the organization should have certain specific effects, paragraph 2—or at least the terms thereof—relates to all organizations. On the other hand, paragraph 2 concerns only certain specific treaties. There is another difference between paragraphs 1 and 2: the former provides for an effect that is automatic, whereas the latter has conditional effects and simply states an assumption with regard to rights and the possibility of implicit acceptance in the case of an obligation.

(9) If the rule stated in paragraph 2 is to be applicable, the treaty concluded by the organization must have certain characteristics that justify the assumption that the parties thereto wanted the treaty to have certain effects with regard to the States members of the organization and wanted those States to enjoy certain rights and incur certain obligations. What criteria should be adopted in this connexion? The proposed criterion refers to the subject-matter of the treaty; more specifically, although still in general terms, certain aspects of this subject-matter must relate to an area of competence of the organization and certain others to an area of competence of the member States.

(10) It may be useful at this stage to give certain examples. To start with, the case may be considered of an international organization that borrows a sum of money from a State under a treaty. This treaty does not involve its member States;⁵⁵ the loan will run its entire course without committing the member States at any time. It is true that the member States may have an obligation vis-à-vis the organization to provide it with resources to enable it to execute its budget and thus meet its obligations, but there is no direct legal tie between the organization's creditors and the member States. Next, the case of a customs union administered by an international organization may be considered. This organization has the power (exclusive of its member States) to conclude treaties on customs matters; it has not, however, assumed responsibility for establishing the authorities that impose and collect customs duties, since this duty is still left to the member States. A dispute may arise at the initiative of a State A, which has concluded a tariff agreement with the customs union, if one of its nationals has had to pay customs duties, assessed and collected by the authorities of a State B, which is a member of the organization responsible for the customs union, State A may submit a complaint to the customs union organization if it believes that the tariff agreement has been violated. But it may also—or at least it would be able to do so under paragraph 2 of draft article 36*bis*—submit a complaint to State B, whose authorities assessed and collected the duties. It may have a considerable interest in proceeding in this manner in exercise of diplomatic protection, if for example it is bound by an agreement with State B that provides

⁵⁵ This is the assumption that is made. It is true in many cases when the organization has its own resources (IBRD, ECSC) or when its credit is good; if this is not the case, cautious creditors require a joint undertaking by the member States.

for arbitration or recourse to the International Court of Justice, whereas its tariff agreement with the customs union does not contain such a provision. Can it seriously be imagined that the accused State B could dismiss a request of this kind by simply maintaining that the basis of the complaint was a violation of an agreement to which it was not a party and that it had never accepted, explicitly and in writing, the obligations allegedly created for it by the agreement?⁵⁶

(11) In the last example, the respective areas of competence of the organization and the member State are distributed according to a pattern that might be encountered quite frequently: the organization retains the legislative function (here mainly in the form of treaties) and leaves the responsibility for material performance to the member States. Yet the two cannot be separated: material performance must respect the rules applicable to it, and the rules are enacted in order to be materially applied. It is therefore clear that for a treaty such as the one just mentioned (tariff agreement), which is quite a common type, it is inconceivable that the respective areas of competence of the member State and of the organization should operate independently of each other. It is therefore normal to assume that, when the organization concludes a treaty with such an object, the intention of the organization and of its co-contractors is to give rise directly to effects in respect of the member States. This intention is a natural one, deriving from the very principle of good faith, since treaties are concluded not in order to provide material for academic dissertations but to be conveniently applied. It is normal that the organization should have such an intention, but such will also be the intention of the organization's co-contractors. Their aim is to conclude a treaty that will be applied; the question whether the competence to do so is vested in the organization or in the member States or in both is not essential, provided that the member States can also guarantee performance. It is even likely that the organization's co-contractors wish as far as possible to remain aloof from this question of the distribution of areas of competence,⁵⁷ but it is quite usual to assume in a case of

⁵⁶ The exercise of diplomatic protection in situations created by the development of international organizations possessing real powers, for example in economic matters, poses many problems, which have so far been given only scant attention (see, however, J. P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962, vol. VIII (Paris, 1963), p. 467). For example, the extension of the competence of EEC to questions concerning the 200-mile exclusive fishing zone will undoubtedly result in the conclusion of international treaties. However, such treaties are not likely in the near future to preclude intervention by member States in matters involving primarily questions of registration, boarding, inspection and supervision of the shipping of foreign countries.

⁵⁷ This desire of the organization's co-contractors to escape the consequences of the sharing of competence between the organization and the member States is apparent in various arrangements evolved in practice. For example, in anticipation of participation by EEC in the draft European Convention for the Protection of International Watercourses against Pollution, it was agreed between the competent bodies of the Council of Europe and of the European Communities that the adoption of the amended text of the draft Convention should be accompanied by a declaration to the effect that, with regard to the signature of the European Economic Community, the Committee of Ministers took note of the fact that,

(Continued on next page.)

this kind that their intention in concluding a treaty with the organization is that this treaty should extend its effects to the member States.

(12) Is it possible to establish a more precise criterion for determining the treaties affected by the presumption laid down in article 36bis, paragraph 2? The Special Rapporteur considers that it is neither possible (except, of course, from a drafting point of view) nor necessary.⁵⁸ The criterion of distribution of competence is definitely correct. When an international organization concludes a treaty on a subject that is indisputably within its competence, and when the full implementation of that treaty depends on the deployment of the organization's powers, the treaty should have no particular effect on member States. On the other hand, if the competence of member States is sure to be involved, or if there is simply a possibility that it might be, it is usually assumed that the parties to the treaty intend that the treaty's effects be extended to member States. This idea of possible extension calls for some explanation. It involves two aspects of the competence of international organizations, one static and the other dynamic. First, at any given moment the distribution of competence between member States and the organization of which they are members is often uncertain.⁵⁹ Such is already the case with federations,

(Foot-note 57 continued.)

in the European Economic Community, the competence necessary for the implementation of the European Convention for the Protection of International Watercourses against Pollution might, depending on the circumstances, be vested either in its member States or in the said Community, which was responsible for deciding on the distribution of such competence in accordance with its internal procedures. Even more typical are the arrangements evolved in practice for the resolution of disputes in cases where the organization and its member States are separate parties to a multilateral convention (see, for example, the new paragraph 3 added to annex A of the above-mentioned draft convention). That paragraph stated that, in the event of a dispute between two contracting parties, one of which was a State member of the European Economic Community, which was itself a Contracting Party, the other Party should address the petition both to that member State and to the Community and the two should jointly inform it, within two months following receipt of the petition, whether the member State or the Community or the member State and the Community jointly were a party to the dispute. Failing such notification within the prescribed period, the member State and the Community were considered to be one and the same party to the dispute for the purpose of the application of the provisions of the said annex. They were also so considered when the member State and the Community were jointly party to the dispute.

Numerous examples could be given in this connexion, although certain conventions prefer to take no account of these difficulties, which are nevertheless very real (for example, the Convention for the Prevention of Marine Pollution from Land-based Sources of 4 June 1974 (*Official Journal of the European Communities*, vol. 18, No. L 194 (Luxembourg, 25 July 1975), p. 6).

⁵⁸ The Rapporteur examined this problem from an academic point of view several years ago. At the time he was satisfied with an even vaguer criterion: the existence of "real and substantial corporate relations" between the organization and its member States (P. Reuter, *Introduction au droit des traités* (Paris, Colin, 1972), pp. 124 and 125, para. 183).

⁵⁹ This question, or at least its general principles, is almost ignored in the treaties establishing the European Communities, but since then attempts to establish some order have been made in the writings of jurists. Governments, for their part, do not seem to have a very clear understanding of the matter, and one of the advantages of mixed agreements is precisely that they apparently dispose of the problem, both the Community and its member

particularly with respect to economic questions. It is therefore not surprising, and it must be recognized, that third parties need protection against such uncertainty. Moreover, in addition to the original uncertainty, it must be emphasized that this distribution of competence is subject to change, particularly when the question is submitted to a court of justice for its consideration; this is also the case with federal States. It will be pointed out, certainly, that such decisions generally have a highly centralizing effect and therefore tend to eliminate difficulties through the progressive extension of the organization's competence. This is correct, but legal decisions may change and, in any case, leave situations that are often highly confused.⁶⁰

States being parties to them; however, the way such agreements are written clearly shows that Governments are themselves somewhat uncertain. An example may be found in the agreement of 14 May 1973 between the States members of ECSC and ECSC on the one hand and Norway on the other, and in the agreement of 5 October 1973 between the same member States and ECSC and Finland, both relating to ECSC products (*Official Journal of the European Communities*, vol. 17, No. L 348 (Luxembourg, 27 December 1974), pp. 17 and 1 respectively). In a declaration annexed to the Final Act, the signatories recognize that, in the agreement to which the States members are also parties, the term "contracting parties" includes, where appropriate and apart from Norway (or Finland), the member States of ECSC, the Community, or both the Community and its member States—the only guideline for choosing among these three interpretations is the agreement itself and the treaty establishing ECSC.

⁶⁰ In a case that aroused considerable interest at the time (case 22/70, "European Agreement concerning road transport" [AETR], judgment of 31 March 1971 [Court of Justice of the European Communities, *Reports of Cases before the Court, 1971, Part I* (Luxembourg), p. 263], the Court laid down the principle of parallelism between the Community's external and internal competence and accepted that States remained competent in so far as, internally, the Community had not exercised its competence in any specific way. Since, in the case in point, negotiations with third countries had begun before the competence of the Community became effective, in the opinion of the Court it had to be accepted that the States had "acted and continued to act ... on behalf of the Community" and that, seen in this light, their position became lawful. Accepting the implications of this decision in a proposal presented to the Council for a regulation concerning implementation of the AETR agreement (*Official Journal of the European Communities*, vol. 18, No. C 123 (Luxembourg, 3 June 1975), p. 2), the Commission devised a procedure that would accommodate the Court's decision while accepting the fact that in the final analysis the treaty was concluded by States: a final date would be set for the ratification of the agreement by States; the instruments of ratification of the States would be transmitted to the Council of Ministers (a community organ), and the State whose representative was presiding over the Council would register the instruments of ratification jointly and on behalf of the Community. The Community has applied this decision on several occasions in connexion with the extension of its competence, particularly with respect to maritime transport and the agreement prepared by UNCTAD. Then, in a judgment of 14 July 1976 (Joined cases 3, 4 and 6/76, "Cornelis Kramer and others" (Court of Justice of the European Communities, *Reports of Cases before the Court, 1976-6* (Luxembourg), p. 1279), the Court applied the legal precedent of case 22/70 to the protection of marine biological resources by making of it an absolutely general theory: it permitted States to exercise their competence for a transitional period, full competence ending with the expiry of certain time-limits within which the Community must take internal measures. As the activities of the States concerned were themselves taking place in the context of a North-East Atlantic Fisheries Convention of 24 January 1959, the question can in fact be resolved only through the participation of the Community in this Commission. On this point, the Court confined itself to stating that "the Community institutions ... and the member States will be under a duty to use all the political and legal means at their disposal in order to ensure

(13) It therefore seems possible to retain a relatively flexible criterion for determining those treaties of the organization that are subject to the régime set out in draft article 36*bis*, paragraph 2. This conclusion is further justified if the effects of the presumption of intention thus established are considered. This presumption has only relative effects. In the case of both rights and obligations, the member State can remove the basis for this presumption by demonstrating its opposition to it. There is, however, a difference, or rather a nuance, between rights and obligations. In the case of a right, it is presumed that the member State accepts, and nothing has to be proved. In the case of an obligation, on the other hand, acceptance by the member State is necessary; this acceptance can be deduced, if need be, from actions or silence, but in principle the acceptance must be established. The spirit of the provisions of the Vienna Convention is thus maintained even in this draft article.

(14) The solution proposed in draft article 36*bis*, paragraph 2, must therefore be regarded as extremely moderate;⁶¹ it does not depart from the fundamental principles of the relative effect of treaties, and it respects State sovereignty. It is merely an attempt to accommodate certain facts peculiar to the development of international organizations. No doubt the most typical examples are those involving ECSC and EEC. However, if it is considered that these facts originate, essentially, in the still uncertain contours of the personality of international organizations, in the shaky distinction between the powers exercised by States and those proper to the organization itself, and in the fact that an organization and member States often see their legally distinct spheres of competence severally and even sometimes jointly involved, it must be recognized that it is already possible

the participation of the Community in the Convention and in other similar agreements". However, in this new decision, while stating that States have an obligation to act in accordance with certain Community rules, the Court seems to have avoided describing the activities of these States in terms that would imply that the States are acting "on behalf" of the Community or in any other way that would give the Community a legal role *with respect to third States*.

⁶¹ Comparing the proposed solutions and the successive positions taken on this subject within the Institute of International Law, it will be noted that the Special Rapporteur on this subject initially proposed the following formula (*Annuaire de l'Institut de droit international*, vol. 55 (Basel, 1973), p. 316):

"An agreement legally concluded by an international organization legally binds all its members."

In order to take account of certain objections (*ibid.*, p. 382), he then adopted the following formula:

"1. Unless the provisions of its legal statute provide otherwise, an agreement concluded by an organization cannot, without the consent of its member States, impose on those member States obligations which could not be imposed upon them in the organization's regular exercise of its competence.

"2. The conclusion of an agreement by an international organization normally prohibits its member States from taking any action the aim or result of which would be to prevent the implementation of the agreement."

Finally, after lengthy discussions and after accepting that an agreement concluded by an organization bound the organization as such, the Institute confined itself to pointing out: "This applies without prejudice to any obligation that may arise from such agreement for member States either under the relevant rules of the organization or under any general rule of international law" [*ibid.*, p. 798]. It would be difficult for the Commission not to attempt to clarify this last formula.

to distinguish some of these characteristics elsewhere than in Western Europe.⁶² This situation will probably last a long time, and the Special Rapporteur did not think it possible to ignore it. The over-all aim of article 36*bis* as proposed is to take some account of the situation as it exists without sacrificing principles.

Article 37. Revocation or modification of obligations or rights of non-party States or international organizations⁶³

1. When an obligation has arisen for a State not a party to a treaty in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the non-party State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for an international organization not a party to a treaty in conformity with article 35, the obligation may be revoked or modified with the consent of the parties to the treaty, except if it is established that the obligation was intended not to be revocable or subject to modification without the consent of the organization.

3. When a right has arisen for a State not a party to a treaty in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the State not a party to the treaty.

4. When a right has arisen for an international organization not a party to a treaty in conformity with article 36, the right may be revoked or modified by the parties except if it is established that the right was intended not to be revocable or subject to modification without the consent of the international organization.

⁶² Reference has already been made to the treaty concluded between CMEA and Finland (see foot-note 38 above) which, although it was formally concluded only by CMEA, was approved by the member States and is concerned mainly with rules affecting those States. Article 3 of the 1968 Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries states:

"The provisions of this agreement shall not be deemed to affect those of the Agreement of the Organization of Petroleum Exporting Countries (OPEC), and especially in so far as the rights and obligations of OPEC members in respect of that organization are concerned.

"The parties to this agreement shall be bound by the ratified resolutions of OPEC, and shall abide by them even if they are not members of OPEC."

This provision gives rise to some delicate problems. For the purposes of this report, it will be enough to note that member States of OPEC are therefore bound by certain resolutions of OPEC without the above-mentioned article 3 stating that OPEC itself is so bound.

⁶³ Corresponding provision of the Vienna Convention:

"Article 37. *Revocation or modification of obligations or rights of third States*

"1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

"2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State."

5. An obligation or a right which has arisen for States members of an international organization under the conditions laid down in paragraph 1 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty unless the constituent instrument of the organization provides otherwise or unless it is established that the parties to the treaty had agreed otherwise.

6. An obligation or a right which has arisen for member States of an international organization under the conditions laid down in paragraph 2 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty and of the member State of the organization, unless it is established that they had agreed otherwise.

Commentary

(1) Whereas article 37 of the Vienna Convention has only two paragraphs, draft article 37 has six. First, it was necessary to devote two paragraphs to obligations and two paragraphs to rights depending on whether the treaty was to produce effects in respect of a State or in respect of an organization. Second, it was necessary to devote two separate provisions to the cases covered in the two paragraphs of article 36*bis*.

(2) Paragraph 1 of the draft article therefore concerns cases where a treaty gives rise to an obligation for a State that is not a party; such cases are covered in draft article 35. For the revocation or modification of the obligation, there is no reason for not retaining the rules laid down in article 37, paragraph 1, of the Vienna Convention. The latter text has therefore been adapted, by means of drafting charges, to the specific purposes of the draft article.

(3) On the other hand, paragraph 2 of the draft article, concerning the creation of an obligation for an international organization, endorses the idea that an international organization is not subject to what might be called "acquired effects". For the obligation to be incumbent on the organization, the latter must have accepted it (draft article 35, paragraph 2), but its acceptance is not binding on the parties to the treaty. The parties may revoke or even modify the obligation without the consent of the organization, it being understood that such modification can only diminish the obligation of the organization; otherwise the modification would in fact impose a new obligation. The organization cannot, without an express stipulation, oppose the elimination or diminution of its obligations by the parties to the main treaty. The justification for this solution is that, unlike States, international organizations have only *functional* powers; they cannot create for themselves acquired rights to exercise a function that has been assigned to them by a treaty. It is for the parties to that treaty, which in principle are States, to maintain or diminish its functions. This is a matter on which considerable emphasis was laid in the introduction to this report,⁶⁴ and on which it is not necessary to dwell further.

(4) Paragraph 3 concerns the creation of rights in favour of a non-party State. It therefore relates to the situation governed by article 37, paragraph 2, of the Vienna Con-

vention, and differs from the latter text only in respect of drafting.

(5) Paragraph 4 concerns the creation of rights for an international organization. The solution it proposes for the revocation or modification of these rights is in fact the same as that adopted for the creation of rights for States, but expressed differently, since the proposed text lays down clearly *as a principle* that the consent of the organization is not required for the modification or revocation of its rights, while admitting the possibility of a contrary solution if the parties have so agreed. The wording of the rule proposed in this paragraph is different from that adopted in the previous paragraph because it is necessary to recall the aforementioned principle that international organizations are not entitled to attempt to maintain powers against the collective will of the States that entrusted the organization with such powers.

(6) Paragraphs 5 and 6 are devoted to the special cases covered in paragraphs 1 and 2 of draft article 36*bis*. Paragraph 5 deals with the case envisaged in paragraph 1 of that draft article. In this case, the effect of the treaty concluded by the organization depends, first, on the constituent instrument of the organization and, second, on the fact that the co-contractors of the organization have taken cognizance of and accepted that constituent instrument by virtue of the treaty concluded with the organization. It is therefore logical to decide that neither the obligations nor the rights of member States can be modified or revoked except to the extent that provision therefor is made in the constituent instrument of the organization, or in the treaty to which the organization is a party, or in any other agreement between the same parties.

(7) Finally, paragraph 6 of draft article 37 covers the case evoked in paragraph 2 of draft article 36*bis*, which establishes for the rights of member States a presumption and for their obligations a mechanism of acceptance, possibly implicit. This means that, if the rights and obligations have effectively arisen, the member State has accepted them; consequently, these rights and obligations are based on consensus. Furthermore, the practical considerations justifying the solution proposed in paragraph 2 of article 36*bis* also give rise to the rule that, in this particular case, both rights and obligations are revocable only by agreement between the parties to the treaty on the one hand and member States on the other. These are protective provisions whose legal validity postulates stability.

Article 38. Rules in a treaty becoming binding on non-party States or international organizations through international custom⁶⁵

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a State or an organ-

⁶⁵ Corresponding provision of the Vienna Convention:

"Article 38. Rules in a treaty becoming binding on third States through international custom

"Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

⁶⁴ See paras. 18, 20, 22, 23 and 41 above.

ization not a party to that treaty as a customary rule of international law, recognized as such.

Commentary

The indisputable rule set forth in article 38 of the Vienna Convention is adapted with purely formal changes to the specific subject of the draft article. Attention may however be drawn to the practical importance of draft article 38. Since international organizations are generally excluded from multilateral treaties, they do not partici-

pate as parties in these treaties and particularly in treaties of codification, which play an important role in the evolution and development of international custom. International organizations have to apply the rules contained in such treaties, and among the technical mechanisms that may explain that organizations are not third parties with respect to such rules, a mechanism that maintains, in spite of conventional codifications, the existence of a customary rule is particularly useful in the light of the problems raised by the existence of international organizations.