Document:-

A/CN.4/SR.1275

Summary record of the 1275th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1974, vol. I

lem, to which the Special Rapporteur had so rightly drawn attention, and seek the formula that would provide the best solution.

52. Mr. KEARNEY, after congratulating the Special Rapporteur on his report, said he had no objections to the method and approach adopted in it, though he was inclined to agree with Mr. Hambro and other speakers that it was unnecessary to repeat, whenever the word "treaty" was used, that it meant a treaty concluded between States and international organizations or between two or more international organizations. He suggested, however, that that matter might best be discussed in connexion with article 2, paragraph 1 (*a*).

53. He did not consider it necessary to distinguish, from the outset, between treaties concluded between States and international organizations and treaties concluded between two or more international organizations. That was a question which could be better settled in the context of each article as it came up for examination.

54. Lastly, he pointed out that the purpose of the second sentence of article 1 was merely to make it clear that the present set of draft articles would apply to the situation dealt with in article 3 (*c*) in the Vienna Convention. But whether the present set of articles would provide a complete substitute for that provision of the Vienna Convention could only be known when the articles lay before the Commission in their entirety. He suggested, therefore, that the logical approach would be to leave the second sentence aside until the contents of the draft were better known.

55. Mr. RAMANGASOAVINA said he had read with great interest the Special Rapporteur's third report, which defined the approach and precise scope of the draft articles on treaties concluded between States and international organizations or between two or more international organizations. The draft was, in his view, the logical sequel to the Vienna Convention on the Law of Treaties. He endorsed the recognition of the principle of consensualism on which the draft had been prepared, and the Special Rapporteur's method of following the Vienna Convention step by step. That method was a very sensible one, not only because the Commission must remain faithful to the Vienna Convention, but also because the draft was the necessary complement to that Convention.

56. With regard to article 1, which defined the scope of the draft articles, he noted that the Vienna Convention already encroached to some extent on the topic of treaties concluded between States and international organizations. The first sentence of the article raised no problem, but he thought the second, excluding the application of article 3 (*c*) of the Vienna Convention, called for clarification. The precise effect of the second sentence did not seem very clear: did it mean that article 3 (*c*) of the Vienna Convention lost its effect, or that it did not apply to the cases dealt with in the draft articles, but continued to apply to other cases of treaties between States and other subjects of international law? Was article 3 (*c*) out of place in the Vienna Convention and would it be more appropriate in the present draft, or did the present draft article 1 cover subject-matter already partly covered by the Vienna Convention? The Commission would have to settle those questions later, in the light of the other draft articles.

57. He thought it desirable that the international organizations should be consulted, since they did have a say in the matter.

The meeting rose at 6.10 p.m.

1275th MEETING

Tuesday, 11 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/277; A/CN.4/279)

[Item 7 of the agenda]

(continued)

ARTICLE 1 (Scope of the present articles) *(continued)*

1. Mr. MARTÍNEZ MORENO said that the Special Rapporteur's report was solid in content and distinguished throughout by its elegance and clarity of style.

2. In article 1, there could be no question about the logical correctness of the first sentence. As to the second sentence, he himself would prefer to retain it, subject to some redrafting, to show that the present set of draft articles did not apply to subjects of international law other than those envisaged in the Vienna Convention on the Law of Treaties.[1]

3. Mr. QUENTIN-BAXTER said that at the last session the Special Rapporteur had made the Commission fully aware of the fact that the topic under discussion was one which would have to be considered on two levels: first, in terms of the need to remain faithful to the central structure of the Vienna Convention, an instrument already completed and adopted; and secondly, in terms of a voyage of discovery in an area with which international lawyers were not yet very familiar. He welcomed the fact that the Special Rapporteur was uniquely qualified as a guide on that voyage of discovery and as a master of the meticulous legal craftsmanship it would necessarily entail.

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

4. With regard to article 1, he thought the Special Rapporteur had been correct in using the word "treaty" and in refusing to allow the language of the Vienna Convention to stand in the way of the use of that word. He agreed, however, with the objections voiced by Mr. Hambro and other speakers to the long, periphrastic expression "treaties concluded between States and international organizations or between two or more international organizations". It would be sufficient to define the word "treaty" for the purposes of the present articles. In his view, the second sentence of article 1 should be understood as a warning by the Special Rapporteur against any unjustified attempt to transpose, even in part, the corresponding provisions of the Vienna Convention. For the time being, the Drafting Committee need not attempt to find a definitive text, but could retain that sentence provisionally, between square brackets.

5. Mr. CALLE Y CALLE said that the report which the Special Rapporteur had presented with such lucidity and elegance served to confirm the existence of numerous treaties which had been concluded between States and international organizations or between two or more international organizations. Mr. Tabibi had referred to that important new source of international law, which was already implicitly recognized in Article 38 of the Statute of the International Court of Justice.

6. Article 1 defined the purpose of the draft, which was to extend and complement the provisions of the Vienna Convention on the Law of Treaties, by codifying the rules applicable to treaties concluded between States and international organizations or between two or more international organizations. In dealing with that article, the Drafting Committee would have to make a careful distinction between the two kinds of treaty. In his opinion, that was a problem which could best be dealt with article by article and, where necessary, by amplifying the commentary.

7. Lastly, he thought the somewhat controversial second sentence of article 1 might be more appropriately placed in article 3, which was intended to safeguard the legal force of international agreements not within the scope of the present articles.

8. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those speakers who had pointed out the need to distinguish two categories of treaties, namely, those concluded between States and international organizations and those concluded between two or more international organizations. In that connexion, he noted that the Commission appeared to be unanimously in favour of using the word "treaty" as defined for the purposes of the present draft articles, though he himself considered it important to distinguish between treaties and contracts. That, however, was a question which would be dealt with in connexion with article 2.

9. With regard to the second sentence of article 1, he did not think it possible to decide its ultimate fate at the present stage, although it was quite conceivable that there might later be provisions in the draft articles which would make such a clause necessary.

10. Speaking as Chairman, he invited the Special Rapporteur to reply to the comments made on article 1.

11. Mr. REUTER (Special Rapporteur) thanked the members of the Commission for their comments and for the helpful way in which they had been presented. He accepted the criticisms of his draft and would even like to add one more, which had not been made, but was perhaps the most important of all, since it accounted for the imperfections of the text. That criticism was that by starting with article 1 he had chosen a course contrary to that usually followed in examining the text of a treaty. For it was dangerous to begin a draft of articles with the most general provisions; if possible, the most specific provisions should come first. The reason why he had adopted that method was that there were, nevertheless, initial questions on which a choice had to be made. If that choice proved to be impracticable, the Commission must at least be fully aware of the importance of the problems involved, and starting with the introductory articles would confront it with those problems and those choices.

12. The adoption of numbering corresponding to that of the Vienna Convention was a purely provisional arrangement, open to change.

13. He agreed that the term "treaty" should, if possible, be used without qualification, and intended to submit a proposal to that effect. He could also agree to delete the second sentence of article 1. That sentence had served a purpose, however, as Mr. Ago had observed, since it had alerted the Commission to a basic problem: that of the relationship between the draft articles and the Vienna Convention, which would constantly confront the Commission throughout its work and cause considerable difficulties. The draft convention now being prepared and the Vienna Convention were, of course, two separate, independent instruments; but it was very hard to conceive of States being bound by one without being bound by the other. He therefore wondered whether the most reasonable solution might not be to sacrifice—up to a point, at least—the independence of the draft articles in relation to the Vienna Convention. In a number of cases the texts of the two conventions would clearly be applicable simultaneously, especially the whole section on the formation and expression of consent to be bound, so the Commission would certainly be obliged to refer to the Vienna Convention in its draft articles.

14. It should also be noted that not only the Commission, but also Governments, had for several years been adopting texts of codification conventions containing some provisions that were inapplicable, without causing the slightest comment. For instance, no comment had been made, either in the Commission or at the Vienna Conference, on the provision in article 20, paragraph 3, of the Vienna Convention which provided that "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." That provision could not be applied as treaty law, because a treaty between States could not bind organizations which were not parties to it. Furthermore, the Vienna Convention formally proclaimed that

treaties had no effect for third States. That meant that the rule stated in article 20, paragraph 3, would become a customary rule, since it could not be applied by treaty machinery. It would be remembered that the draft articles on succession of States in respect of treaties had given rise to similar difficulties. Obviously, therefore, the Commission could not hope to solve the problem of the relationship between two independent conventions simply by means of treaty machinery.

15. With regard to Mr. Ushakov's comment, which had been endorsed by several other members of the Commission, he explained that he had started from the assumption that most of the articles in the future convention would apply both to treaties between States and international organizations and to treaties between international organizations, whereas Mr. Ushakov thought it wiser for the time being to adopt a text that would make it possible to distinguish, where necessary, between those two classes of treaty. He was not changing his position, but in the interests of clarity and precision, and to reserve the future, he submitted to the Commission an amended text for the article, which he hoped would satisfy Mr. Ushakov and those who, like Mr. Hambro, would prefer a simpler text. The amended text read:

The present articles apply

(*a*) to treaties concluded between one or more States and one or more international organizations;

(*b*) to treaties concluded between international organizations.

16. The Commission would thus only need to refer to treaties covered by sub-paragraphs (*a*) and (*b*) of article 1, or by one or other of those sub-paragraphs, depending whether it wished to refer to all treaties covered by the present articles or to one or other of the two classes of treaty covered.

17. The CHAIRMAN said that the discussion on article 1 was concluded and suggested that the article should be referred to the Drafting Committee.

It was so agreed.[2]

18. The CHAIRMAN suggested that, in order to save time, the Special Rapporteur should introduce the remaining four articles of his draft together.

19. Mr. USHAKOV supported that proposal.

20. Mr. KEARNEY said that he would prefer additional meetings to the adoption of procedure that would result in a confused mass of comment being transmitted to the Drafting Committee. He suggested that the Commission should take up the remaining articles one by one, and that members should refrain from making comments unless they were submitting a specific proposal.

21. Mr. TSURUOKA said he would like to hear the Special Rapporteur's views on the matter.

22. Mr. REUTER (Special Rapporteur) reminded members that he had on several occasions advocated a change in the Commission's methods of work and had suggested the possibility of speeding up discussion. He was therefore quite willing to try the experiment suggested by the Chairman, and would leave it to the members of the Commission to judge its success. His own view was that the suggested method could well be applied. Of the four remaining articles, article 6 was the most important and the one that raised most problems; in so far as the other articles were of interest, they simply led up to article 6 and in any case only called for relatively straightforward decisions.

23. The CHAIRMAN asked Mr. Kearney whether he was prepared to agree to the simplified method.

24. Mr. KEARNEY said he was willing to do so.

ARTICLES 2, 3, 4 AND 6

25. The CHAIRMAN invited the Special Rapporteur to introduce the remaining articles of his draft, which read:

Article 2

Use of terms

1. For the purposes of the present articles:

(*a*) "treaty concluded between States and international organizations or between two or more international organizations" means an international agreement concluded between States and international organizations or between two or more international organizations in written form and governed principally by general international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

[(*b*) and (*c*)]*

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

(*e*) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty; "negotiating organization" means an organization which took part, as a potential party to the treaty, in the drawing up and adoption of the text of the treaty;

(*f*) "contracting State" or "contracting organization" means a State or organization which has consented to be bound by the treaty, whether or not the treaty has entered into force;

[(*g*) and (*h*)]*

(*i*) "international organization" means an intergovernmental organization.

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

Article 3

International agreements not within the scope of the present articles

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

(*a*) the legal force of such agreements;

(*b*) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

[2] For resumption of the discussion see 1291st meeting, para. 4.

* No provision corresponding to the Vienna Convention included; see report (A/CN.4/279), preface, para. 5.

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

Article 4

Non-retroactivity of the present articles

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

*[Article 5]**

Article 6

Capacity of international organizations to conclude treaties

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

26. Mr. REUTER (Special Rapporteur) said that paragraph 1 (*a*) of article 2 added two useful, though perhaps not indispensable qualifications to the corresponding wording of the Vienna Convention: the phrase "governed by international law" had been amended to read "governed principally by general international law". The first addition was intended to solve a problem that might arise when a conventional act binding an international organization to a State or to another international organization was subject simultaneously to international law and to the national law of a State. The problem might equally well arise in the case of treaties between States covered by the Vienna Convention. Indeed, it often happened that a legal situation governed as a whole by international law was in some respects subject to rules of national law, through the mechanism of *renvoi*. The question was really very simple: any conventional act whatever must be subject, principally, to a specific legal system—international law or national law. If it was subject to national law, it was a contract; if it was subject to international law, it was an international agreement or a treaty. The practical effect of that distinction might not be very important for treaties between States or between States and international organizations, but it was useful for agreements concluded between international organizations and private persons or other international organizations. Lack of precision on that point could raise difficulties, as in the arbitration case cited in his report. Hence it was essential to determine whether a conventional act was subject principally to national law or to international law.

27. Unlike the first additional qualification, the second, specifying "general" international law, applied only to agreements involving international organizations. He had considered it useful because, in the case of treaties between States, when the Vienna Convention specified that the term "treaty" meant an international agreement governed by international law, there was no possible ambiguity; it was obviously general international law that was meant. In the case of an international organization, on the other hand, one might be dealing with a specific phenomenon. For each international organization had its own law, which was laid down in its constituent instrument, but also included elements of varying scope depending on the organization—agreements concluded with States or with other international organizations, rules of procedure, or sometimes even quasi-legislative enactments. It was therefore conceivable that an international organization might make some conventional acts subject to the régime of general international law, and it was to those conventional acts that the draft articles applied. But it was also conceivable that an international organization might make a conventional act subject principally to its own legal régime. That would mean that when an organization concluded an agreement with a member State, that act came under a special legal régime which was that of the organization, so that the agreement was subject not only to the constituent instrument, but also to all the rules making up the law of the organization. That was the case in the European Communities, which had their own law—or "derivative law"—and specialists in community law, included the judges of the Court of Justice of the European Communities, accepted that hypothesis. On the other hand, when international organizations were asked whether they were aware of the problem, their replies, on the whole, showed great surprise, if not total incomprehension. He nevertheless believed that that hypothesis would be less surprising in the light of the agreements concluded by the financial agencies with certain States, since those agencies had established a whole body of rules, directives and internal practices which were deemed to govern directly all agreements they concluded. Another example was the agreements concluded between the United Nations and certain States on the operation of an emergency force, which presupposed the application, not only of the Charter, but of a whole body of United Nations law consisting of rules, decisions and various other provisions drawn up by the Secretary-General. He admitted that the concern which had prompted him to add the word "general" to the text of the Vienna Convention perhaps rather anticipated the future, but he considered it important and it was relevant to the case of international organizations.

28. He had no comments to make on paragraph 1 (*d*) of article 2, which had been taken direct from the corresponding provision of the Vienna Convention.

29. Paragraph 1 (*e*) seemed to require explanation. The corresponding provision of the Vienna Convention defined the term "negotiating State"; the definition in the draft articles should therefore include a "negotiating organization". But States took part in the negotiation of treaties to which they were to become parties, whereas organizations took part in the negotiation of treaties which would remain treaties between States and to which they would never be parties. In modern practice, international organizations participated in various ways—through their secretariat, specialized bodies or officials—in the drafting and adoption of treaties between States. That practice was followed not only by the

* No provision corresponding to the Vienna Convention included; see report (A/CN.4/279), preface, para. 5.

United Nations, but by all the specialized agencies, in particular, the International Bank for Reconstruction and Development. In that sense, an organization could be said to take part in the negotiation of a treaty between States. But the case contemplated in the draft articles was solely that of participation by an organization in the preparation of a treaty to which it was to become a party.

30. Paragraph 1 (*f*) required no comment.

31. Paragraph 1 (*i*), which reproduced verbatim the corresponding provision of the Vienna Convention, called for no comments as to drafting, but he wished to draw the Commission's attention to the special importance of the proposed definition in the context of the present draft. Like the Vienna Convention, and for the same reasons, his draft did not attempt to define an international organization. He had also refrained from taking up the problem of entities which formed part of an organization while retaining a certain individuality. Indeed, he preferred not to deal with the problem of subsidiary or connected organs, since the status of such special bodies depended on the internal constitutional law of each organization and it would be very dangerous to lay down general rules on the subject.

32. He reminded the Commission, however, that, in the draft articles on the representation of States in their relations with international organizations, which was to be submitted to an international conference in 1975, it had adopted a different solution by deciding to confine its draft to certain organizations of a universal character[3]—mainly the organizations of the United Nations system. He had been aware of the problem which that difference in approach might create and had taken up a very categorical position on the matter in the light of the debate at the Commission's twenty-fifth session.[4] In his opinion, two entirely different situations were involved. In the case of the draft articles on the representation of States, the Commission had tried, by choosing a clearly-defined group of international organizations, to establish a kind of uniform law for a group of organizations which had common features, although each had its own law. In the case of treaties between international organizations, however, the situation was entirely different, since no treaty to which an international organization was a party could derive its régime from the law peculiar to that organization. To assert that it could do so would be to deny the international character of the treaty. For whether it was a treaty between an international organization and a State or one between two international organizations, the ultimate source of the treaty's binding force and of its régime was foreign to the law peculiar to each organization, except in regard to rules such as those concerned with the formation and expression of consent to be bound.

33. Paragraph 2 of article 2 simply reproduced the corresponding provision of the Vienna Convention and therefore raised no difficulties, except perhaps one of vocabulary. Could one speak of the "internal law" of an international organization, as the Vienna Convention spoke of the "internal law" of a State, or was it preferable to use the expression "law peculiar to any international organization"? In its work, the Commission had occasionally used the expression "internal law of an international organization", but the word "internal" had a certain meaning and applied rather to the law of States. He had therefore chosen the expression "law peculiar to any international organization". That choice was the logical outcome of his initial position that general international law must be distinguished from the special international law of an organization.

34. Article 3 raised some rather difficult drafting problems and he hoped that the Drafting Committee would approach them in the light of the new text proposed for article 1. Article 3 raised the problem of subjects of international law other than States, referred to in article 3 of the Vienna Convention, which were also not international organizations. For as the Vienna Convention dealt only with agreements between States to the exclusion of other subjects of international law, and the draft articles dealt only with agreements between international organizations or between States and international organizations, there remained another class of agreements: those involving subjects of international law which were neither States nor international organizations. Would such agreement be governed by the Vienna Convention or by the draft articles? He had decided to bring some of those agreements under the draft articles and some under the Vienna Convention. That solution seemed the most logical, as the Vienna Convention would enter into force before the draft articles and would have a wider application.

35. Draft article 4 called for no comment.

36. Article 5 of the Vienna Convention could obviously have no equivalent in the present draft. It was on that article, however, that he had based the wording used in article 6.

37. The comments of members of the Commission showed that draft article 6 was the most important article. He had not expressed his personal opinion in the text, but had tried to find a wording that would reconcile the two trends of opinion in the Commission, both of which were perfectly tenable.

38. The position he had taken in article 6 was justified on theoretical grounds. For whereas States were equal from the point of view of international law and all, without exception, had the same capacity to conclude treaties, the same was not true of international organizations, which were creations resulting from a discretionary act by States and, consequently, were highly individual entities characterized by a fundamental inequality; each was shaped individually by the will of its founders and then of its members, and entirely governed in regard to its structure and powers by its constituent instrument. Thus the relevant rules of each organization might or might not include, depending on their character, a "practice" which could complement or modify its constituent instrument. In fact, however, it would be difficult to find an instance of an international organization which excluded "practice" from the sources of its

[3] See *Yearbook ... 1971*, vol. II, Part One, p. 286, article 2.

[4] See *Yearbook ... 1973*, vol. I, pp. 187-189 and 198-210.

law. In attempting to define the capacity of international organizations to conclude treaties, it was therefore necessary to take into account, not only established practice at the time of the entry into force of the draft articles, but also potential practices. It would be wrong to accept past practice and exclude future practice, as that would exclude custom.

39. He was aware that the wording he proposed would not entirely satisfy those who wished to give international organizations more importance and prestige. While it was true that it was the relevant rules of each organization that conferred treaty-making capacity upon it, it was equally true that, if the law peculiar to each organization had that effect, it was by virtue of a general rule of international law authorizing it. The bald statement in draft article 6 might therefore be softened by adopting the alternative he had proposed in paragraph (20) of his commentary to the article (A/CN.4/279). That wording would emphasize that the international community now recognized that States considered themselves to be vested with a new power: that of creating other subjects of international law. He must warn the Commission, however, that the alternative text might cause many practical as well as theoretical difficulties. The participants in the Vienna Conference had been unable to agree whether it was international law or federal constitutions that gave the member states of federal unions the right to conclude treaties, and the relevant provision had been deleted.[5]

40. Mr. USHAKOV said that following the example of the draft articles on the representation of States in their relations with international organizations, the present draft might perhaps define the expression "Organization" as meaning "the international organization in question".[6]

41. In draft article 2, paragraph 1 (*a*), treaties concluded between States and international organizations and treaties concluded between international organizations were included in the same definition, whereas they were two quite distinct categories of treaty which it would have been better to define separately. As to the expression "general international law", the Special Rapporteur had explained that it related only to treaties concluded between international organizations. That explanation was necessary, since the provision in question, which had been drafted by the method of synthesis, gave the impression that both treaties concluded between States and international organizations and treaties concluded between international organizations were governed by general international law. That was one of the many drawbacks of that method.

42. As he had done in the case of article 1, he suggested that the words "two or more international organizations" should be replaced by the words "international organizations".

43. In saying that the treaties referred to in article 2, paragraph 1 (*a*) were governed "principally" by general international law, the Special Rapporteur seemed to have been trying to remove a doubt which might arise not only in regard to those treaties, but also in regard to treaties between States, to which the Vienna Convention applied. In his (Mr. Ushakov's) view, treaties could only be governed by international law. On the other hand, certain situations resulting from treaties could be governed by other branches of law. For instance, situations governed by the law of the air were sometimes subject to rules of public international law and sometimes to rules of private international law, in other words—through the mechanism of *renvoi*—to internal law. It was by a legal fiction that it was possible to speak of the law of the air as a single whole, even though the rules of public international law and of internal law, of which it was composed, were quite separate. Although certain situations deriving from treaties could be governed either by public international law or by internal law, treaties themselves could not be governed "principally" by international law: they were governed entirely by international law. The addition proposed by the Special Rapporteur was not acceptable, especially as it would have the indirect effect of modifying the Vienna Convention on a point on which that Convention was perfectly clear.

44. With regard to the words "general international law", which the Special Rapporteur considered to be applicable only to treaties between international organizations, it should be remembered that regional international law might perfectly well be applied to such treaties if it was not in conflict with general international law. For example, the States members of the Common Market or of the Council for Mutual Economic Assistance might well draw up rules of regional international law that were more detailed than the rules of general international law. Hence there was no reason why treaties between international organizations should be made subject to general international law only.

45. The methode of synthesis gave rise to some particularly thorny problems in paragraph 1 (*d*). There, the words "signing, ratifying, ..." etc., applied both to a State and to an international organization. While it was possible to say that States signed, ratified, accepted or approved a treaty, the same was not true of international organizations. It should first be established how international organizations could become bound by international treaties, and then the distinctions to be made in that respect between States and international organizations should be introduced into the provision. That suggested formidable difficulties, which were not brought out either in the text or in the commentary on it. Perhaps the Commission should leave paragraph 1 (*d*) aside provisionally, and await suggestions from the Special Rapporteur on the question how an international organization could become a party to a treaty.

46. In defining the expression "negotiating organization" in paragraph 1 (*e*), the Special Rapporteur had introduced the notion of a "potential party" to a treaty. He did not think that was necessary, since it must be presumed that any organization which had taken part in both the drawing up and the adoption of the text of a treaty intended to become a party to that treaty. In

[5] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (1969), Summary Records (United Nations publication, Sales No. E.70.V.6) pp. 6-15.

[6] See *Yearbook ... 1971*, vol. II, Part One, p. 284.

those circumstances, it had participated in the negotiation of the treaty on the same footing as a State. When an organization took part only in drawing up the text of a treaty, as the Commission did, it was not normally expected to participate in negotiating the treaty and to become a party to it.

47. With regard to paragraph 1 (*f*), which closely followed the corresponding provision in the Vienna Convention, he wondered whether an error had not crept into both of those provisions. He could not agree that a State or an international organization bound by a treaty already in force could be a "contracting State" or a "contracting organization"; they could only be parties to such a treaty. Moreover, article 2, paragraph 1 (*g*) of the Vienna Convention provided that "party" meant "a State which has consented to be bound by the treaty and for which the treaty is in force". That point needed clarification. As he interpreted them, the terms defined in the paragraph 1 (*f*) should apply only in the case of a treaty that was not yet in force.

48. As to paragraph 1 (*i*), it might be advisable to explain in the commentary that the expression "international organization" meant a lawful intergovernmental organization. Whereas the question of lawfulness did not arise in the case of States, an international organization must be lawful in order to be regarded as a subject of international law. It must have been constituted in accordance with the peremptory norms of general international law, or *jus cogens*.

49. Draft article 3 was entirely acceptable, but its wording should be changed so as to cover every conceivable case. In particular, provision ought to be made for the possibility of an international agreement concluded between a State and an international organization, in which yet another subject of international law, such as a belligerent party, participated.

50. He had no comments to make on article 4, except that the changes he had suggested in article 1, should also be made in it.[7]

51. It followed from article 6 that an international organization might not have the capacity to conclude treaties, since that capacity was determined by the relevant rules of each organization. In his view, every international organization had that capacity, and could not exist without it; for international organizations were necessarily attached to the territory of a State and had to conclude a headquarters agreement with that State, which might, of course, be a tacit agreement, not a written treaty. Hence it was not the treaty-making capacity as such that was in question, but the exercise of that capacity, and that was determined by the nature of the activities of the organization concerned. For example, the United Nations Educational, Scientific and Cultural Organization (UNESCO) could not conclude a commercial treaty. He therefore doubted whether article 6 was necessary. If it was retained, it should perhaps stipulate that every international organization possessed capacity to conclude treaties, but that the exercise of that capacity had limitations.

52. Mr. TAMMES said that he would have liked to have given his views on several of the articles, but would confine his remarks to article 6 because of the shortage of time and his own inability to attend the 1277th meeting, at which the present discussion was to be continued. He had been confirmed in his impression that the confrontation with the Vienna Convention on the Law of Treaties would face the Commission with a number of problems which it would have preferred to postpone until the practical need for a clear answer arose.

53. He was inclined to agree with Mr. Ushakov's approach. Article 6 of the Vienna Convention had not raised any fundamental problems at the Vienna Conference on the Law of Treaties, but it did raise some important issues in the present context, as was shown by the long commentary in the Special Rapporteur's third report. In particular, the origin or source of capacity and the whole question of the hierarchical structure of international law had attracted the attention both of the Commission itself and of the Sixth Committee of the General Assembly. There could be little doubt that those problems had not been in the minds of the negotiators of the agreement concluded in 1875 by the International Bureau of Weights and Measures with its host country, France, which was mentioned in the Special Rapporteur's admirable first report (A/CN.4/258, para. 6).[8] Those responsible for that agreement had simply taken action in the matter. The lesson to be drawn from such situations was that the action of concluding a treaty always preceded any recognition of the capacity of the organization concerned. The main point, however, was that the capacity of the organization could not be provided for by the internal law of the organization itself.

54. For those reasons, he had difficulty in accepting the proposed text of article 6, which entirely ignored the external element implicit in any general reference to international law like that on which article 6 of the Vienna Convention was clearly based. The text was thus incomplete as it stood and could not be accepted as a true statement of the position. In all legal systems, capacity was conferred by an outside source. A legal entity could never invest itself with general capacity; it could only limit that capacity. In the case of an international organization, that meant that the organization determined, by its own rules, its own competence and that of its organs.

55. It was significant that the opinions of the International Court of Justice cited in paragraph (16) of the commentary spoke of the "competence" required to discharge certain functions and of the "powers" conferred upon an organization, but did not refer to "capacity".

56. He therefore preferred the alternative language for draft article 6 submitted by the Special Rapporteur in paragraph (20) of the commentary. He had some misgivings, however, even about that wording, and thought the Commission might once again be entering the

[7] See previous meeting, para. 32.

[8] Reproduced in *Yearbook ... 1972*, vol. II.

treacherous field of semantics by attempting to deal, in one and the same article, with the two problems of capacity and competence. Perhaps it would be desirable to omit the last part of the text, which was not strictly necessary and for which there was no parallel in article 6 of the Vienna Convention.

57. Mr. TSURUOKA said that, generally speaking, he approved of all the provisions of the draft, subject to certain drafting amendments. In particular, he was in favour of retaining article 6, despite the practical difficulties it might cause with regard to the recognition, by States or international organizations parties to the future convention, of the capacity of international organizations to conclude treaties. But as the article in no way prejudged questions relating to the recognition of that capacity by other subjects of international law, it should not give rise to insuperable difficulties.

58. Mr. CALLE Y CALLE said it was essential to retain the key article 6 in the draft. It did, however, raise the problem of the origin or source of capacity. There could be no doubt that an organization, when it entered into an agreement, acted in virtue of an existing capacity, even though that capacity was not set forth in any rule. The question that arose was whether article 6 should purport to attribute capacity to international organizations or simply recognize an existing capacity and possibly limit its scope. On that point, he was strongly of the opinion that international organizations had the capacity to conclude treaties; it was only the exercise of that capacity which was subject to regulation or limitation.

59. Consequently, it was not sufficient for article 6 to refer to the "relevant rules" of the organization; he suggested an expanded formula such as "the constituent instrument and the other relevant rules of the organization". To ascertain the source of the capacity, it was necessary to refer to the constituent instrument of the organization. The other rules related to the exercise of the capacity, the limits of which would depend on the nature and purposes of the organization.

60. In conclusion, he suggested that the Drafting Committee should frame a more elaborate rule for inclusion in draft article 6, introducing the idea of the "extent of the capacity" of international organizations, which was to be found in the Special Rapporteur's alternative text.

The meeting rose at 1 p.m.

1276th MEETING

Wednesday, 12 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

Tributes to the memory of Mr. Milan Bartoš

1. The CHAIRMAN declared open the special meeting which the Commission had decided to hold to honour the memory of its dear friend and distinguished colleague, the late Milan Bartoš. He reminded members that eloquent tributes had already been paid to Mr. Bartoš at the first meeting of the present session by Mr. Castañeda, the Chairman of the Commission's twenty-fifth session, and by the Legal Counsel, representing the Secretary-General, who had conveyed to the Commission not only his own and the Secretary-General's condolences, but also those of the whole Secretariat of the United Nations. On the proposal of the Senior Legal Officer in charge of the Seminar on International Law, the tenth session of that Seminar had been entitled the Milan Bartoš Session. He wished to take that opportunity of expressing his own sorrow at the loss of one who had been a close personal friend of his and indeed of all the members of the Commission.

2. Milan Bartoš had been born at Belgrade in 1901, and had graduated from the Faculty of Law of Belgrade University in 1924. In 1927, he had taken the French Degree of Doctor of Law (*Diplôme d'Etat*) at Paris. He had returned to Belgrade University in 1928, and in 1933 had risen to the position of Associate Professor of the Faculty of Law, becoming a Professor in 1940 and the Dean of the Faculty in 1945. He had personally suffered the horrors of the Second World War as a prisoner of war in a concentration camp—a dreadful experience which had left an indelible mark on him and which helped to explain his intense and unrelenting hostility to all forms of fascism, nazism and tyranny. His high dedication to the service of his country was exemplified by the many distinguished posts he had held. He had joined the Yugoslav Foreign Service in 1946 and been appointed Ambassador in 1950. He had been in charge of many missions and had served his country on numerous delegations, including the Yugoslav delegation to the United Nations from 1946 to 1958. He had held the office of Chief Legal Adviser to the Yugoslav Secretariat of State for Foreign Affairs from 1949 to 1962.

3. His great patriotism, and his devotion to the ideas of socialism and to the Socialist Federal Republic of Yugoslavia had been admired by all his countrymen, and Yugoslavia had honoured him with some of its highest decorations and prizes for his outstanding services. He had been a member of the Permanent Court of Arbitration, of several Academies and of many learned and scientific bodies, including the Institute of International Law, and had been made Honorary President of the International Law Association in 1956. His many learned books, articles and studies were familiar to all.

4. It was, however, as a dedicated and forceful advocate of the codification and progressive development of international law that Milan Bartoš had been best known. He had been one of the "founding fathers" of the Commission, having served on the Committee on the Progressive Development of International Law and its Codification in 1947. His long and dedicated service to the Commission, which had begun in 1957, would