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Summary record of the 639th meeting

Topic:
Law of Treaties

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unilateral declarations. An exchange of declarations would merely duplicate an exchange of letters or an exchange of notes. The procedure of exchange of notes was part of established state practice; he did not think that states would accept provisons of the draft articles which referred to unilateral declarations.

74. As he had pointed out earlier, the whole of article 2 was superfluous. There was an infinite variety of unwritten agreements, and there could be no doubt that the Commission's codification would not affect such validity as those agreements might possess.

75. Of course, unilateral declarations could constitute an international agreement or amount to or form part of such an agreement, as set forth in article 1, paragraph 3, of the 1959 text.

76. Mr. YASSEEN, replying to Mr. Amado, said that it was the expression of the will of the parties which was the important characteristic of treaties; the form which it took was immaterial. There was therefore no heresy in suggesting that it was possible to conclude a treaty by means of an exchange of unilateral declarations. If those declarations were made in writing, there was no reason why that technique should not come within the scope of the draft article under discussion.

77. Mr. EL-ERIAN, also replying to Mr. Amado, said that there had been no intention on his part to confuse the question of unilateral declarations with that of an exchange of notes, which was clearly a case of a treaty proper. As an instance, just before he left for the session of the General Assembly last autumn, a treaty on cultural matters had been concluded by his country with the United Kingdom. The Under-Secretary of the Ministry of Education of the United Arab Republic had been anxious to leave for London for the purpose of implementing the agreement, but as the British Ambassador had not at that time received full powers to sign the treaty, the possibility had been considered of adopting the form of an exchange of notes, for which the British Ambassador did not require full powers of signature.

78. His remarks had been made in a different context. He had merely wished to learn from the special rapporteur and the secretariat whether, as a matter of long-term planning, a study of the question of unilateral declarations was proposed and he looked forward to receiving a reply on that point.

79. Mr. AGO said that there was no disgreement with regard to substance. Declarations under article 36 (2) of the Statute of the International Court of Justice were certainly covered by the draft articles; in that respect, he fully agreed with the view put forward by the Secretary to the Commission.

80. It was also agreed that, for the purposes of the article, an exchange of related declarations by two states constituted a treaty. That was made clear by the definition of "treaty" in article 1. The relation between the two declarations would result from their subject matter.

81. A different case had been mentioned by Mr. Cadieux, that where one of the declarations was in writing and the other was not; in fact, there might also be only one declaration, followed by the silence of the other party, where silence could be construed as consent. Those forms of tacit agreement were not covered by the draft articles.

82. For those reasons, he supported Mr. Tunkin's proposal that the draft articles should contain a provision reserving the validity of tacit agreements.

83. He proposed that article 2 should be referred to the drafting committee.

84. Sir Humphrey WALDOCK, Special Rapporteur, supported Mr. Ago's proposal; the views of all members had now been made clear and he would have no difficulty in accepting a draft prepared by the drafting committee in the light of the discussion.

85. Mr. BARTOŠ also supported Mr. Ago's proposal. Mr. Cadieux had aptly illustrated the problem of substance arising from the claim made on occasion that certain circumstances could give rise to a treaty. As he had pointed out earlier, the draft articles would not aspire to judge the question whether the rules relating to treaties applied to certain unilateral declarations; the question whether there was any contractual element in such declarations and the applicability of the law of treaties to them were questions for the competent international court or arbitral tribunal in each case.

86. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 2 to the drafting committee, together with the comments made by members during the discussion.

It was so agreed.

The meeting rose at 1 p.m.

639th MEETING

Wednesday, 9 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

ARTICLE 3. CAPACITY TO BECOME A PARTY TO TREATIES

1. The CHAIRMAN invited the special rapporteur to introduce article 3 of his draft.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like first to make some general remarks on the article, which dealt with the international capacity of the parties to the treaty, their treaty-making power from the purely international point of view; he realized that it was a complex and controversial matter but thought that some such provision was necessary. The question of the authority of the representatives to conclude a treaty was dealt with in article 4.

3. Article 3 did not touch on the question of the internal processes of constitutional law relating to the conclusion of treaties; that question belonged to the subject of the

essential validity of treaties and would arise in connexion with the next group of articles.

4. Nor did it deal with restrictions on international capacity, especially restrictions flowing from a treaty which limited the capacity of a state to conclude other treaties. That question also seemed to belong to the next group of articles.

5. With regard to the question of constitutions which permitted subordinate units of the state to enter into treaties, he had considered the fundamental question to be: Which state or entity was ultimately the real party to the treaty? The subordinate state could well negotiate a treaty but be in fact only an organ of the parent state, which was the real party to the treaty. For example, if the Canton of Vaud concluded a treaty with the United Kingdom, and subsequently failed to carry it out, would the United Kingdom be entitled to institute proceedings against Switzerland in the International Court by reason of that breach?

6. Introducing paragraph 1, he said that the provision was intended to be a general statement of the rule in the matter. The reference to "other subjects of international law" was intended to cover such entities as the Holy See and international organizations. It also covered insurgent communities, which in practice entered into certain forms of agreement with neutral states; in a recent book, Lord McNair had stated that, although there was exceedingly little authority on the matter, there appeared to be no ground of principle which would prevent a neutral state from making agreements with the government of an insurgent community which it had recognized as belligerents.[1] The Commission might perhaps wish to make a separate reference to that question.

7. Mr. VERDROSS said that the special rapporteur had not drawn a clear distinction between a federal state on the one hand and a federation or union of states on the other. The distinction was not a purely academic one; it went to the root of the problem of treaty-making power.

8. In a federal state, the international capacity to become a party to a treaty was vested in principle in the federal state. There were, of course, a few exceptions in which member states were allowed a limited treaty-making capacity.

9. By contrast, in the case of unions or federations of states, the member states retained their sovereignty and, in principle, their international capacity to enter into treaties. They could, of course, delegate certain limited treaty-making powers to the union or federation as such.

10. To take the example of the United States of America, between 1776 and 1783 the thirteen colonies had constituted a union or federation of states of which the constituent entities had remained sovereign states. In 1783, the union had been transformed into a federal state and the United States of America had taken over from the constituent states the international capacity to enter into treaties.

11. To take another example, before 1848 Switzerland had been a confederation of sovereign cantons. The 1848 Constitution had superimposed on the cantons a federal state, although for historical reasons that state had continued to be called the Swiss Confederation. For the same historical reasons, the federal State of America was called the United States of America.

12. For those reasons, he could not accept a formulation which mentioned at the same level federal states and federations or unions of states. The status of unions or federations for the purpose of the law of treaties should be dealt with in subsequent articles.

13. Mr. JIMÉNEZ de ARÉCHAGA said he questioned the need for an article on the capacity to become a party to treaties. As was indicated by the special rapporteur in paragraph 9 of the introduction to his report, the emphasis had been shifted in his draft "from the 'validity' to the 'process' aspect of conclusion of treaties".

14. The Commission was at the moment dealing with the conclusion of treaties as a process; the question of international capacity would find a more appropriate place in the second draft convention, which would deal with the substantive validity of treaties.

15. The Commission had taken a decision on that question at its eleventh session, for article 3, paragraph 3, of the 1959 draft stated: "Validity in its substantial aspect denotes those intrinsic qualities relating to the treaty-making capacity of the parties..." The Commission was being asked to reverse that decision, and he did not consider that there were very convincing reasons for such a reversal.

16. In paragraph 1 of his commentary on article 3, the special rapporteur stated that, since treaties had been defined as agreements between States or other international subjects, it might be convenient to indicate "what kind of legal persons are necessary as parties to an agreement if it is to be considered as a treaty". That approach reflected a desire to cover fully all points which might arise in connexion with the subject. But if that tendency were pursued too far in the particular instance, the Commission would find itself in the position of codifying the whole law of the subjects of international law. It would then have to consider not only the definition of federal states, but also the status of the Holy See, of protectorates, of dependent self-governing territories and even of insurgent communities recognized as belligerents.

17. He therefore suggested that the position should be left as it stood; it would be for states to define what different types of states or organizations of states possessed the right to enter into treaties. There was no fear of abuse in that respect, because treaties were entered into with either one or more states or with an international organization, and those other parties would have to accept the treaty-making power of the entity claiming to have the right to enter into a treaty with them.

18. For those reasons, he urged that the article should

[1] Lord McNair: *The Law of Treaties*, Oxford, 1961, p. 680.

be deferred until a later stage when the Commission would deal with the essential validity of treaties.

19. From the point of view of essential validity, it might be legitimate to draft provisions covering certain aspects of international capacity to enter into treaties, since that capacity was a necessary condition of the validity of a treaty. Another reason for that course was that the subject was closely connected with that of treaties concluded in violation of prior treaties, a question which could only be dealt with in the second draft convention.

20. Mr. BRIGGS said he supported the special rapporteur's proposal that the draft should include an article on international treaty-making capacity. He would suggest a provision differing little from that proposed by the special rapporteur, and embodying the following propositions: first, that the international juridical capacity to become a party to a treaty was determined by international law; second, that every independent state possessed the capacity to become a party to treaties; third, that the treaty-making capacity of not fully independent entities depended upon the recognition of that international capacity by the state which conducted its international relations and by the other contracting parties; and fourth, the substance of the special rapporteur's paragraph 4.

21. With regard to paragraph 1, he suggested that the first sentence should end with the words "is possessed by every independent state"; the words "whether a unitary state, a federation or other form of union of states" should be deleted. He made that suggestion because he was largely in agreement with the remarks of Mr. Verdross. He did not believe there existed a division of states into unitary states and federal states: all states were unitary, but some states had a federal form of government and others had a unitary form of government.

22. For the same reasons, he suggested the deletion of sub-paragraphs 2 (*a*) and 3 (*a*), which contained descriptive statements. It was a fact that a state with a federal form of government normally conducted its foreign relations through the central government, but the question was not one of international law but of constitutional law or even of policy.

23. If it were intended to refer not to a state but to a confederation of states, then he would say that the members of a confederation were independent states and under article 3, paragraph 1, had the capacity to enter into treaties; they might, of course, have delegated that capacity to the confederation to some extent.

24. He thought that the useful reference to "other subjects of international law invested with such capacity by treaty or by international custom" should, however, be retained. For that purpose he suggested that an additional paragraph should be introduced into article 3 to read:

> "Subjects of international law other than states may be invested with the capacity to become a party to treaties by treaty or by international custom."

25. That redrafting avoided the inelegance of defining capacity in terms of itself, as was done in the special rapporteur's paragraph 1.

26. Lastly, he thought that the substance of sub-paragraphs 2 (*b*) and 3 (*b*) should be retained, but could be contained in a single paragraph to read:

> "The international capacity of an entity which is not fully independent to become a party to treaties depends upon: (1) the recognition of that capacity by the state or union of states of which it forms a part, or by the state which conducts its international relations; and (2) the acceptance by the other contracting parties of its possession of that international capacity."

27. Mr. TUNKIN said that he had not reached a definite view on article 3, but had some doubts as to the advisability of including its provisions in the draft.

28. The rules of traditional international law on the subject of international capacity reflected a structure of international society in which such entities as colonies and protectorates had the status of dependent territories.

29. By contrast, one of the leading principles of modern international law was that of the self-determination of peoples, which had been embodied and elaborated in the formal "Declaration on the granting of independence to colonial countries and peoples", adopted by the General Assembly of the United Nations on 14 December 1960 as its resolution 1514 (XV).

30. The consequence of the recognition of the principle of self-determination was that every nation had the right to determine its own legal status; if it chose to become part of a unitary state, it would not be a subject of international law. If it decided to become an independent state, it had the international capacity to enter into treaties.

31. The contemporary rules of general international law did not impose on any nation or state any restrictions regarding its capacity to conclude treaties; nor did they sanction directly or indirectly the state of affairs which had so frequently existed under the old rules of international law regarding colonies and protectorates. Of course, some limitations existed: a state which was a member of a federation might not possess, under the federal constitution, the capacity to enter into treaties with other countries. As had been pointed out by Mr. Briggs, that was a problem not of international law but of constitutional law.

32. Limitations on a state's treaty-making capacity could, on the other hand, be imposed by an international treaty. Such limitations were valid in international law because states were free to enter into such treaties. In most instances, the limitation took the form of an undertaking by a state that it would not enter into certain types of treaty.

33. However, a limitation of that type was imposed, not by general international law but by the special agreement entered into by the country concerned. Since the draft articles were intended to become a convention and to express general rules of international law, there

was no reason why they should reflect limitations which were laid down either by constitutional law or by special international law.

34. When preparing its draft articles on diplomatic relations, which had formed the basis of the Vienna Convention of 1961 on Diplomatic Relations, the Commission had discussed the question whether a provision should be included on the right of legation or, as Mr. Ago had termed it, the capacity to establish diplomatic relations and to set up diplomatic missions. After considerable discussion, the Commission had decided not to include an article on that subject. A similar course had been adopted in the draft on consular relations. The position with regard to the international capacity to conclude treaties was similar in many respects to that of the right of legation.

35. Mr. CASTRÉN said that, although he had at first thought that the provisions of article 3 might be useful, after listening to the discussion he now had doubts. He was a strong believer in the principle of self-determination within reasonable limits. It could not be denied, however, that there still existed unions of states and states which had accepted, on a purely voluntary basis, a status of dependency. Such was, for example, the relationship between Liechtenstein and Switzerland.

36. With reference to the remarks of Mr. Verdross and Mr. Briggs, he said that the special rapporteur's formulation was correct, in that it drew a perfectly valid distinction between unitary states on the one hand and federations or other forms of unions of states on the other.

37. Mr. PAREDES said that article 3 dealt with the purely formal question of international capacity to become a party to a treaty.

38. He thought that the Commission should explore other and more fundamental questions. As he understood it, it was the aim of the Commission that treaties which were valid in international law should not only be observed by the parties, but should also enjoy a measure of international guarantee of their observance. It should, therefore, not be left to the parties to decide whether a matter was governed by international law or by municipal law. The answer to that question should depend on the nature of the subject-matter.

39. The reference to unitary states on the one hand and to federations or other forms of unions of states on the other did not cover the whole ground; there was also the question of protectorates. It had happened in the past that the protected state had given its consent to a treaty in circumstances which made the reality of that consent doubtful.

40. There were, moreover, the recently formed associations of states, such as the European Economic Community. Did those associations possess international personality and the capacity to enter into treaties? One interesting feature of those associations was that they could comprise states which had very different political systems, such as republics and kingdoms.

41. The draft should not only define what was a treaty in the formal sense, but should also go deeper into the essential questions of the determination of the relations which could be governed by a treaty and of the nature of the acts to which a treaty could refer.

42. Mr. BARTOŠ said that, if the Commission proceeded on the premise that general principles should find no place in a draft dealing with a limited topic, there would be little left to include. It was often urged to refrain from academic philosophizing, but should nevertheless start with the constituent elements of the law of treaties even if they were embodied in rules which came under the heading of general principles. A draft on treaties should state not only the general principles but also the particular and specific rules by which they were to be applied.

43. The question of treaty-making capacity or, perhaps better, of capacity to conclude treaties, arose naturally out of the question who could be a party to a treaty, and that was a question which had to be dealt with when speaking of the constituent elements in any draft on the law of treaties. And as the question was a fundamental one, it should be dealt with in the present draft rather than in the draft on the validity of treaties, since under that heading the Commission would be primarily concerned with the problem of lack of capacity.

44. He agreed with Mr. Verdross that the phrase "federation or other form of union of states" was open to misinterpretation. It would probably be necessary to specify in the draft that, for the purpose of determining the treaty-making capacity of certain types of state, the provisions of the constitution were decisive.

45. Without expressing any final opinion on the special rapporteur's conception of the manner in which the position of so-called dependent states should be treated in the draft, he shared the doubts, both legal and political, expressed by Mr. Tunkin. There were two aspects to the problem. A dependent state which possessed treaty-making capacity should be regarded as a subject of international law, at least in embryo; but the other question was whether treaties concluded on behalf of such a state before it had acquired independence retained their validity after its emancipation. The problem would require very careful thought; for the time being there were very grave objections to the proposition that treaties concluded by the protecting power bound the protected state when it became independent. To illustrate the difficulty of the subject, he said that there were four schools of thought on the question of the fate of treaties concluded by the former territorial sovereign where the state acquired independence — namely, the *tabula rasa* theory; the theory of absolute succession; the theory of optional succession at the option of the emancipated state; and the recent theory, created by the statement in connexion with Tanganyika's independence, that treaties would remain in force for two years after the date of the proclamation of independence, during which the new state would decide which treaties would continue to be binding.

46. Another question to be decided was whether the expression "other subjects of international law" was

intended to cover dependent states. What did that expression mean? Did it refer to those subjects of international law known as "irregular persons" such as, for example, the Order of Malta? The point should be clarified.

47. While he was ready to accept paragraph 1, he hoped the drafting committee would consider the possibility of explaining in the commentary what was meant by the phrase "subjects of international law invested with such capacity by treaty or by international custom". He was personally of the opinion that the word "custom" could only be taken to mean rules of general customary law, including even regional custom of general scope, but he was absolutely opposed to custom of particular scope being taken into consideration. Furthermore, what was meant by "invested with such capacity by treaty"? Did it mean that every treaty between any subjects of international law whatever could create a status which had to be recognized by all states, or did it apply only to those states which were bound by the treaty in question? Did it mean, for example, that if the Holy See or the Order of Malta signed a treaty with a particular state, therefore the treaty-making capacity of the Holy See or of the Order of Malta was recognized by all states or just by that particular state? He thought that, in order to apply generally, such capacity could be conferred on an entity in that category only by some act which was universally recognized in international law as the source of the rule establishing the legal status of the entity in question — a kind of collective recognition.

48. Mr. AMADO said that Mr. Jiménez de Aréchaga had covered many of the points he had wished to raise. It was a pleonasm to say that any independent state had the capacity to conclude a treaty, for without that attribute it would not be a state in the accepted sense of the word.

49. Article 3 as proposed by the special rapporteur was too broad. There was no need to go into matters belonging to the realm of constitutional law. If a provision on treaty-making capacity was to be retained — a course he did not particularly favour — it should be in the form proposed by Mr. Briggs.

50. Mr. YASSEEN said he saw no objection to including in the draft an article on the capacity to become a party to treaties. From both the theoretical and the practical points of view, the moment for determining whether a party had such capacity was at the conclusion of a treaty. The consequences of lack of capacity could be discussed by the Commission in connexion with the articles concerning the validity of treaties.

51. It seemed hardly appropriate, at a time when the colonial system was disappearing, to draft provisions dealing with the position of dependent states; the Commission should not legislate for a state of affairs which would soon belong to the past.

52. Furthermore, in those cases where a state entrusted the conduct of its foreign affairs to another, the arrangement could never be regarded as definitive and as depriving the former for all times of the possibility of exercising its essential rights as an entity possessing international personality.

53. Mr. TABIBI said that, in the light of the commentary on article 3 and of the discussion, he thought that paragraph 1 should be retained, since it stated a fundamental and generally accepted principle of the law of treaties. On the other hand, he shared the doubts expressed by other members about the rest of the article, which dealt with matters that pertained either to constitutional law or to bilateral or multilateral agreements not governed by general rules of international law. The points covered in paragraphs 2 to 4 should be dealt with in the commentary.

54. The provision in sub-paragraph 3 (*a*) concerning the position of dependent states seemed to be at variance with that in paragraph 1, concerning the treaty-making capacity vested in independent states. A provision which implied that treaties entered into on behalf of newly independent states by the former colonial powers still retained their validity would undoubtedly create difficulties, particularly for African and Asian countries.

55. Mr. AGO said that a careful reading of the special rapporteur's text, notwithstanding that he approved generally the principles stated in it, left him with an indefinable feeling of dissatisfaction.

56. Perhaps some of his objections to article 3 were due to the approach adopted by the special rapporteur, but he considered Mr. Tunkin's suggestion that the article should be deleted would be altogether too radical a step. Capacity to become a party to treaties was an essential expression of international personality. For the purpose of determining whether certain entities were or were not subjects of international law, one of the tests applied was: Did they possess the capacity, whether limited or not, to become parties to a treaty? Incidentally, the expression "capacity to conclude a treaty" was to be preferred to the expression "international capacity", which some authorities equated with international personality.

57. According to existing law, all subjects of international law had, as a rule, the capacity to become parties to a treaty. If the rule was stated in that way, it then became simpler to specify the cases in which that capacity was restricted. For example, certain limitations could derive from internal rules, as in the case of some federal states whose constituent states, although possessing the status of autonomous subjects of international law, could conclude certain types of treaty only. In other cases, for example, those of states in territories under trusteeship, the limitations might have their source in an international treaty. Yet another case was exemplified by the relationship between Luxembourg and Belgium: though Luxembourg was indisputably an independent state, Belgium negotiated commercial treaties on behalf of both, and from that it might be inferred that a limitation on the capacity of Luxembourg to negotiate treaties was established by an international treaty.

58. If article 3 were redrafted in terms providing that each state and any other subject of international law

had the capacity to conclude treaties, subject to the limitations imposed by the constitutional law of certain unions of states or by international treaties in force, the ground would have been covered: the practical effect would be the same as that of the special rapporteur's draft article 3, and the particular political and legal stumbling blocks mentioned during the discussion would have been avoided.

59. Mr. ROSENNE said that he, too, had some doubts about the special rapporteur's draft for article 3. The question arose whether, in international law and international relations, international capacity was a matter of concern to the parties to a treaty alone, or whether it was also of concern to the international community as a whole. In his opinion, it was primarily of concern to the parties, including in the case of certain multilateral treaties those states which might become parties subsequently. International personality had many facets and consequences, of which the treaty-making power was only one. He had been much struck by the way in which state responsibility, for example, and diplomatic and consular intercourse and immunities, were connected in the literature and in practice with international personality. He had therefore been impressed by Mr. Tunkin's remark drawing attention to the solution reached in the 1959 draft, *mutatis mutandis*, and in article 2 of the Vienna Convention on Diplomatic Relations, in which the treaty-making capacity was simply postulated. The topic of international personality was a vast subject, which the Commission might eventually investigate, but at that stage it might simply be taken as existent.

60. Another question was, for what purpose the Commission was concerned with international capacity. Some international lawyers might be subconsciously influenced by legal concepts that flowed initially from domestic law, where capacity served quite a different purpose from that which it served in international law. In domestic law, the question of capacity arose in connexion with contracts made with a person not *sui juris*, such as a lunatic or infant. In such cases, the notion of capacity had an economic function which was irrelevant to international law. The International Court of Justice had on several occasions issued a warning against drawing too close analogies with notions of domestic law: a general warning in connexion with its Advisory Opinion on the International Status of South-West Africa,[2] and a warning connected specifically with the law of treaties in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[3]

61. It might also be asked whether the possession of international capacity was not implicit in the definition of "treaty" already provisionally adopted. In the last resort the answer would depend on the facts and circumstances of each case, including the intentions of the parties, which themselves constituted a fact. For instance, in that part of the judgement of the International Court of Justice in the Anglo-Iranian Oil Company case which dealt with the question whether the concession contract of 1931 was or was not a treaty — a treaty binding on the United Kingdom and on Iran, not the oil company — the Court had not said that a transaction concluded in that particular form might not ultimately create an international treaty, but it had said that, in the particular circumstances of that case, it had not in fact brought into being an international treaty.[4] The solution depended not so much on a notion as on the facts; it might very well be similar to that reached by the Commission in 1959 and be expressed by inserting in the definition of the term "international agreement" the phrase "possessing international capacity".

62. The possession of treaty-making power was inherent in the very conception of the state for the purposes of international law, whether the state was independent or dependent. For extrinsic reasons there might be limitations on the power to make treaties in the case of dependent states, either imposed on those states or sometimes deriving from the treaty by which another state became responsible for the conduct of the dependent state's foreign relations. Under the Mandates System of the League of Nations, for example, it had been possible for mandated territories themselves to be parties to international treaties, but the Mandatory Power might also in some cases conclude treaties in their name or extend its own treaties to theirs. Thus the limitation might work both ways. An account of the situation drawing attention to some of the subsequent difficulties that had arisen had been given by the Israel Government in its reply to an earlier questionnaire by the Commission.[5]

63. Mr. Briggs had referred to the recognition of the treaty-making power by the other party concerned. That might be a pleonasm, because the treaty itself was surely evidence that the parties recognized each other's capacity. It might well be that the problem raised by Mr. Briggs was solved by the provisions in draft article 4 relating to the acceptance of a representative's full powers, although that might be a rather pragmatic solution.

64. He was inclined to agree that sub-paragraph 2 (*a*) might not be wholly relevant to the topic before the Commission, which was the conclusion, entry into force and registration of treaties. The question of who had capacity to make treaties differed somewhat from the questions of who had authority under domestic constitutional law to make treaties on behalf of the state and what part of a federal state was bound by a treaty made by a component unit of the federation. He was not at all sure that such questions could be regulated by general international law.

65. In all those questions the individuals actually engaged in the negotiations would always have to satisfy themselves whether the negotiations were intended to

[2] *I.C.J. Reports*, 1950, p. 128.

[3] *I.C.J. Reports*, 1951, p. 15.

[4] *I.C.J. Reports*, 1952, p. 93.

[5] Document A/CN.4/19, paras. 5-13 and 19-28.

become an international treaty, and on whom that treaty would be binding, and whether they, as individuals, were empowered to perform the acts in question.

66. Certainly, some mention of international capacity should appear in the draft, even at that stage, but the Commission should not concern itself for the time being with the many variations in the structure of states which might influence their treaty-making power. Mr. Ago's suggestion for simplification commended itself as a method of dealing with the draft article.

67. Mr. GROS said he considered that draft article 3 was essential. He shared the special rapporteur's view that some provision relating to capacity to conclude treaties should be included in the draft articles. The Commission should examine the subject in all its aspects and it was essential to state who could conclude treaties. Mr. Rosenne had suggested that the question settled itself, but as the commentary pointed out, difficulties would arise if a person lacking international capacity concluded an agreement described as an international treaty. The Commission should therefore establish a rule. In every textbook on international law there was a chapter on the treaty-making power from the aspect of international law, not merely of domestic law.

68. The draft article should, however, be simplified, since it contained elements too nearly relating to comparative constitutional law to be included in a draft convention, and those elements should be transferred to the commentary. He agreed with Mr. Ago and supported the formulation he had suggested, as it was a perfect description of the situation in law. It was true that only a subject of international law could conclude a treaty, but it was not sufficient just to say that, because it was equally true that limitations were recognized by international law in certain cases for certain subjects of international law. Any jurist perusing the draft articles and failing to find any reference to capacity to conclude treaties would think that the Commission had overlooked a question which was entirely a matter of international law. When the general discussion had been concluded, the Commission should accept Mr. Ago's suggestion in principle and refer draft article 3 to the drafting committee.

69. Mr. LIANG, Secretary to the Commission, said that in his opinion it was of importance that the draft articles should include an article on capacity to make treaties. He agreed with Mr. Bartoš that it should not be placed under the heading of validity of treaties, which dealt rather with the consequences of its lack of capacity.

70. Since the Commission had made at least a tentative decision that the draft should be presented in the form of a convention, the method of drafting the articles would necessarily differ from that of the code drafted in 1959. Greater latitude was possible with a draft code, but if the convention form was used, he would hesitate to subscribe to the use of terms that were theoretically valid but might be unacceptable to states, such as "international personality" and "subject of international law", whose connotations were much debated even in scientific circles. States would be reluctant to adopt those terms in treaties. The 1928 Havana Convention,[6] the Harvard draft[7] and the draft worked out by the Commission itself in 1951[8] might suggest more appropriate terminology.

70. He agreed with the criticism of paragraph 1, that it was difficult to speak of treaties that invested a state with treaty-making capacity. However, it was doubtful whether the capacity of international organizations to make treaties could be based on international custom instead of on express provisions in the constitutions of those organizations, which were international treaties in themselves, or on implied powers granted in those constitutions.

71. Dependent states raised wider constitutional questions within the realm of the United Nations family. The question whether they could make treaties was a part of the general question connected with their effort to achieve statehood, and that general question was now in a state of flux.

72. Mr. BRIGGS said that Mr. Rosenne had argued that only the parties to a treaty were concerned with international capacity and had seemed to doubt whether capacity could be regulated under general international law; but an analogous remark could be made about the subjects of most of the draft articles. The Commission should give guidance on the law of treaties, and therefore it was very important to include an article on international capacity. Mr. Ago's suggestion was ingenious, but might not provide sufficient guidance.

73. The CHAIRMAN, speaking as a member of the Commission, noted that, in the definitions article, states were mentioned without qualification, while other subjects of international law were qualified by the phrase "having capacity to enter into treaties"; states were presumed to possess the capacity. It was unnecessary to repeat in article 3 the self-evident proposition that states possessed international capacity, though in the case of "other subjects of international law", such a phrase might be appropriate.

74. Speaking as Chairman, he said that if the Commission decided to accept the proposals made by Mr. Jiménez de Aréchaga and Mr. Tunkin, no further discussion would be needed. Mr. Jiménez de Aréchaga had suggested that article 3 should be removed from the draft and placed in a second convention, while Mr. Tunkin had suggested that it might be omitted altogether; for immediate purposes, the two suggestions were practically the same.

75. Mr. JIMÉNEZ de ARÉCHAGA replied that members who had spoken after him had suggested a simpler formulation of the article. As a consequence

[6] Supplement to the *American Journal of International Law*, Vol. 29, No. 4, 1935, p. 1205.

[7] *ibid.*, p. 686.

[8] *Yearbook of the International Law Commission 1952*, Vol. II (United Nations publication, Sales No.: 58.V.5, Vol. II), pp. 50-56.

the matter appeared in a different light, and he would appreciate further discussion of those suggestions after they had been circulated in writing.

76. Mr. AMADO said that his reply to Mr. Gros had already been given by Mr. Rosenne with his reference to negotiators of treaties and to article 2 of the Vienna Convention on Diplomatic Relations.

77. In his usual conciliatory spirit, he was perfectly willing to entertain Mr. Ago's suggestion.

78. Mr. AGO said that he could not agree with the Chairman's interpretation of the phrase in article 3 concerning capacity to enter into treaties. The Chairman had evidently assumed that the phrase applied only to "other subjects of international law", not to states. He (Mr. Ago) had assumed that it also applied to states, for there were some states which might not possess the capacity. The question therefore remained open.

79. He suggested that the special rapporteur should produce a simplified text for draft article 3 and submit it to the next meeting.

It was so agreed.

The meeting rose at 12.55 p.m.

640th MEETING

Thursday, 10 May 1962, at 10 a.m.

Chairman: Mr. GROS

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

In the absence of Mr. Pal, the Chairman, who was indisposed, Mr. Gros, first vice-chairman, took the clair.

1. The CHAIRMAN invited the Commission to continue its discussion of article 3.

ARTICLE 3. CAPACITY TO BECOME A PARTY TO TREATIES (*continued*)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he was still of the view, shared by a number of members, that an article on capacity to become a party to treaties should be included in the draft. He appreciated the argument that there was a certain analogy between the establishment of diplomatic relations and that of treaty relations, but the question of capacity assumed a far greater prominence in connexion with the law of treaties than with diplomatic intercourse and immunities. That was clear from almost every textbook on the subject, as Mr. Gros had pointed out, and even from almost every course of lectures. Mr. Lachs had included it in his series of lectures at The Hague in 1957 on the development of multilateral treaties. It was not merely an academic point. In the case of a federal state, the other contracting state would want to know to whom it could look for the observance of the treaty. He had illustrated the point by posing the question whether it would be possible to bring Switzerland before the Court in connexion with a treaty concluded by one of the Swiss cantons. But the same question could equally arise before any organ of the United Nations. To take a theoretical and perhaps absurd example, if a province or state of a federation was a party to the Genocide Convention, would it alone be responsible before the General Assembly for a violation of the Convention or would the federal state also be responsible? Another practical aspect of the question of capacity was state succession, as Mr. Bartoš had emphasized.

3. He had attempted in draft article 3 to deal with what appeared to be the existing situation. He had not merely followed the textbooks, but had based himself on the great mass of treaties published in the United Nations *Treaty Series*. He agreed that the wording might be simplified and improved, but he did not wish to delay the Commission by commenting on all the suggestions made, for it was evident that the draft would have to be recast, not merely amended. He wished, however, to explain that he had not confused confederations and federations, as Mr. Verdross had suggested. In the English language, "federal state" and "federation" were interchangeable terms. The reference in paragraph 1 to a union of states was intended to cover such classical unions as those between Norway and Sweden and between Denmark and Iceland, in which the component states had the capacity to make treaties, but some treaties had been concluded on behalf of both states. New forms of union had arisen more recently, notably the European Economic Community. If the Commission could have reached agreement on rules giving rather more guidance on some of those specific problems of capacity, it would have been helpful, and Mr. Briggs seemed to be of the same opinion. However, it was clear that there was going to be the greatest difficulty in arriving at an agreement on some of the specific problems of capacity. Accordingly, he agreed with Mr. Ago that the provision should be drafted in more general, if less informative, terms.

4. What Mr. Ago was suggesting was, in effect, that the article should state that the capacity under international law to conclude treaties was possessed by every state or other subject of international law save for the limitations imposed by internal constitutional provisions or by treaties in force. He (Sir Humphrey) could not quite accept that; he considered that the article should retain, if possible, some indication of the distinction between the capacity of a state or subject of international law as such, under international law, to conclude treaties and the exercise of such capacity through constitutional organs.

5. A more substantial point was that the words "apart from the limitations which may result from an international treaty in force" contained an ambiguity. If they referred simply to treaties like the European Community Treaty, which were constitutional in character and affected the status of the several member states in particular spheres, there was no objection. But if they referred to any treaty, they were too wide; there was then a confusion between capacity and