

Document:-  
**A/CN.4/SR.640**

**Summary record of the 640th meeting**

Topic:  
**Law of Treaties**

Extract from the Yearbook of the International Law Commission:-  
**1962 , vol. I**

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

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 chair.*

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

essential validity. For most authorities would regard a situation in which a state lacked "capacity" because disabled from entering into a treaty by reason of having concluded prior treaty obligations, as pertaining to "validity" rather than "capacity". Of course, there were special cases, such as the provision in the Charter declaring that, in case of conflict, the obligations in the Charter were to prevail.

6. There might, furthermore, be certain difficulties in referring to the limitations imposed by internal constitutions, since that reference might raise internal questions irrelevant to the larger question of international capacity and the question whether a state which had concluded a treaty might subsequently attempt to elude its consequences by pleading the terms of its internal constitutional law. At least two divergent views existed on that topic. The question arose in the later sections of the Law of Treaties and would then have to be considered thoroughly.

7. It had been proposed that draft article 3 should be referred to the drafting committee in its new form. He had not yet been able to arrive at a really satisfactory formulation, but if the Commission agreed to abandon the attempt to be specific and to follow the line which Mr. Ago had suggested, the main work might be done by the drafting committee.

8. If the reference to internal constitutional law was to be retained, he would suggest that a redrafted paragraph 1 should read as follows:

"1. Capacity under international law to conclude treaties is possessed by every state or other subject of international law. Such capacity may, however, be limited by the provisions of its internal constitution or by the provisions of any international instrument restricting or defining its functions or powers."

9. In the case of confederations such as the European Economic Community, there might be certain areas in which the treaty-making capacity of the member states was controlled by an international instrument in some respects and not in others. He would therefore wish to include a second paragraph, in the following terms:

"2. The capacity of any state or other subject of international law to conclude treaties is exercised through such organ or organs as its constitution, constituent instrument, internal laws or usages may prescribe."

A paragraph of that kind showed that the exercise of capacity was governed by internal law. Admittedly, it did not add a great deal, but the addition was logical because it led on to the draft articles in chapter II, Rules governing the conclusion of treaties by states.

10. He could not endorse the Secretary's suggestion that the expression "other subjects of international law" should not be used, for it would be extremely difficult to find an alternative expression of equivalent meaning. The only difficulty was that some critics might argue that individuals were subjects of international law, but that should not dissuade the Commission from using the term, as the entire context showed that the draft article

could not possibly have any bearing on the status of individuals.

11. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion had shown conclusively that the law concerning international legal persons was not ripe for codification. Proposals had been made for a provision which amounted simply to a reminder that the subject existed; but the new drafts raised very serious questions of substance which were not within the competence of the drafting committee.

12. The limitations of capacity imposed by the provisions of a state's internal constitution had been dealt with very clearly by Sir Gerald Fitzmaurice, the previous special rapporteur, in article 8, paragraph 6, of his third report and in the third sentence of paragraph 29 of the commentary.<sup>1</sup>

13. From a practical point of view, by including such a provision the Commission would be entering a new field—the effects of constitutional limitations on the validity of treaties—and in a very dangerous way, and one contrary to its own earlier decisions, by proposing a rule which in effect might authorize a state to plead its own constitutional limitations for the purpose of evading its obligations under a treaty which it had concluded. That was specifically prohibited by article 13 of the Draft Declaration on the Rights and Duties of States approved by the Commission at its first session.<sup>2</sup>

14. With reference to the limitation imposed by the provisions of other international instruments, Sir Gerald Fitzmaurice's commentary, notably passages in paragraph 28, was very clear. The limitation did not arise from status but from contract. That had also been the view of the late Sir Hersch Lauterpacht.<sup>3</sup> The question had been raised whether the provision covered protectorates. If a state established a protectorate, it was not possible to say that the protected state lost the treaty-making power in general, but it lost the power with regard to certain types of treaties. The draft articles tentatively adopted by the Commission in 1951 contained a provision stating that the capacity of a state to enter into certain treaties might be limited.<sup>4</sup>

15. The new draft also dealt with subjects of international law other than states. If the component units of a federal state were regarded as states, the Commission would be proposing a rule the consequence of which would be that all federal states would have to enact laws forbidding their component units to conclude treaties, whereas the existing situation was precisely the reverse, in that only those component units authorized to do so could conclude treaties. Trust Territories, considered by many authors to be subjects of inter-

<sup>1</sup> *Yearbook of the International Law Commission, 1958* (Sales No. : 58.V.1, Vol. II), pp. 25-33.

<sup>2</sup> *Yearbook of the International Law Commission, 1949* (Sales No. : 57.V.1), p. 288.

<sup>3</sup> *Yearbook of the International Law Commission, 1953* (Sales No. : 59.V.4, Vol. II), pp. 137-141.

<sup>4</sup> *Yearbook of the International Law Commission, 1951* (Sales No. : 57.V.6, Vol. II), p. 74.

national law, would by the proposed new provision acquire authority to make treaties unless specifically forbidden to do so by treaty or constitutional provision. The rule governing international organizations was that they possessed treaty-making capacity if expressly or implicitly authorized by their charter or constitution, but, under the new proposal, the reverse would obtain. Those were considerations which exceed the competence of the drafting committee.

16. It would certainly be very difficult to incorporate such a provision in the draft. That was why Lauterpacht, when examining that matter in his commentary on article 1 of his first draft,<sup>5</sup> had not proposed any such provision and had dropped the provision tentatively approved by the Commission in 1951. He agreed with Mr. Gros that the total omission of any reference to the capacity to become a party to treaties might give the impression that the Commission had ignored so important a subject, but it might be possible to make the position clear in the commentary. Equally, the reference to the treaty-making power as a necessary element of a treaty in the definition of "international agreement" might be sufficient. That would follow the precedent of the articles on diplomatic intercourse and immunities, in which it was not stated who had *jus legationis*. The treaty-making capacity might well be regarded as postulated.

17. Mr. TUNKIN said that his doubts about the advisability of including a draft article on the capacity to become a party to treaties had increased after hearing the debate, especially the remarks of the special rapporteur and Mr. Jiménez de Aréchaga. Even the shorter formulations suggested by Mr. Ago and the special rapporteur gave rise to many doubts. In suggesting that the draft article should preferably be omitted, he had not meant to deny the existence of the problem of international capacity; he had clearly indicated that it did exist. There were, however, many problems with which the Commission was not obliged to deal, especially when drafting a convention; his view was supported by the Commission's past practice.

18. The theoretical problem whether the impediments to capacity arising from internal constitutional provisions or previous treaties should be reflected in a draft intended to include rules for future international law was a serious one. It was doubtful whether those particular situations which existed and gave rise to problems of capacity should be regarded as governed by general international law. Mr. Jiménez de Aréchaga had rightly pointed out the danger of referring to constitutional problems and to previous treaties. The Commission would be treading very delicate ground if it referred to them even in the form suggested by the special rapporteur. It was doubtful whether any treaty could be regarded as a limitation of sovereignty, since it was itself a manifestation of the exercise of sovereignty. Undoubtedly, there were treaties which created specific situations, but it might be unwise to reflect them in the

draft, for they in turn reflected circumstances prevailing under the colonial system. The Commission might prefer to agree to the suggestion made earlier that it would suffice if the draft provided that every state possessed the capacity to make treaties so far as general international law was concerned; a provision having virtually that effect occurred in draft article 1. It might be wiser to omit draft article 3 for the time being and possibly return to it later when the Commission had a clearer view of what was involved.

19. Mr. de LUNA said that although the article was extremely difficult to draft, the Commission should make every effort to do so and to settle outstanding questions before referring it to the drafting committee. In his opinion, an article on the *jus contrahendi* should be included in the draft convention. It was not pleonastic to say that the state had the capacity to conclude treaties, since that right was an attribute of state sovereignty. The Permanent Court of International Justice had used those identical terms, if his memory served him, in its judgement in the s.s. *Wimbledon* case.<sup>6</sup>

20. At the same time, the Commission should beware of a confusion between the treaty-making capacity of a subject of international law and the competence of the state's organ to declare internationally the will of the state to enter into a treaty.

21. Nor should the Commission confuse the limitations imposed on the state's treaty-making capacity by internal constitutional law with the limitations on the *jus contrahendi* which were the consequence of earlier treaties.

22. The special rapporteur had said it would be evident from the context that "other subjects of international law" could not be construed as meaning individuals. Nevertheless, he (Mr. de Luna) considered that a practical problem existed. For instance, individuals could be subjects of international law without *jus contrahendi* and belligerent insurgents did not in principle possess the international *jus contrahendi*, though treaties made with insurgents had been recognized by virtue of customary international law.

23. Mr. AGO said that, in his earlier remarks concerning the limitations placed on a state's treaty-making capacity, by internal constitutional law, he had not meant to refer to the case where a state might be debarred by its own constitution from concluding certain treaties. That case fell outside the Commission's scope. He agreed with Mr. Jiménez de Aréchaga that a state could not plead its constitution or changes in its constitution for the purpose of evading the consequences of a treaty which it had entered into. What he had been referring to had been the position of a subject of international law which was a member of a federal state or of a federation. That question should probably be determined more clearly than it had been in either the draft suggested by himself or that proposed by the special rapporteur.

<sup>5</sup> Yearbook of the International Law Commission, 1953 (Sales No. : 59.V.4, Vol. II), p. 95.

<sup>6</sup> Publications of the Permanent Court of International Justice, Series A, No. 1, Collection of Judgments, 1923, p. 25.

24. With regard to the limitation of a state's treaty-making power in consequence of a previous treaty, that limitation was rather exceptional. More frequently a treaty imposed on a state only an obligation to refrain from concluding certain other treaties, and in such cases a treaty in breach of such an obligation was valid, even if it involved a responsibility of the state towards the other state with which it had assumed the said obligation.

25. In a very few cases the capacity itself of a state to conclude treaties was affected by a treaty, and then the subsequent treaty was not valid. He had thought that the idea was clear because, when he had referred to the limitation of capacity, he had not been speaking in general and had not been referring to treaties which only imposed on a state the obligation not to conclude certain types of treaties. The text submitted by the special rapporteur covered much the same ground. The Commission could not go further, since in each case the treaty had to be interpreted to see whether it imposed obligations it might or might not respect or had the effect of depriving it of capacity.

26. The special rapporteur's revised text was very effective. It was impossible to avoid using the term "subject of international law", since there was no other way of expressing the idea. In passing, he agreed with Mr. de Luna that not all insurgents had treaty-making capacity; but he wished to point out that they possessed it if they were subjects of international law. Thus the term "any other subject of international law" would include such insurgents.

27. The draft should include some provision dealing with treaty-making capacity. The definition of "treaty" raised the question of who possessed capacity to be a party to a treaty. If any states or other subjects of international law did not possess it, that should be stated, even if only one such case existed. The analogies with the establishment of diplomatic relations which had been suggested were too facile. The consequences of incapacity to establish diplomatic relations were relatively trifling in comparison with the consequences of incapacity to conclude treaties, for a treaty with a state which did not possess such capacity would be null and void, and that would be evident if the case were brought before the International Court of Justice or some other international tribunal.

28. Mr. VERDROSS explained that some of his earlier remarks on article 3 had been based on a misunderstanding of the special rapporteur's use of the term "federation of states".

29. As regards substance, he accepted Mr. Ago's suggested shorter form of article 3, but drew attention to the need to cover three different situations.

30. The first was that of two or more sovereign states setting up, by treaty, a new subject of international law on which they conferred competence to enter into treaties on their behalf in respect of certain matters; such was the case of the European Economic Community.

31. The second was that of a subordinate unit of a

sovereign state, upon which the capacity to enter into treaties had been conferred, either by the constitution of the sovereign state or by an international treaty; the Swiss Constitution for instance, gave a limited treaty-making capacity to the cantons, while the Covenant of the League of Nations had recognized the treaty-making capacity of certain dominions and former British colonies. Those two situations had no connexion with colonial problems.

32. The third was that of two states entering into a treaty by virtue of which one of them renounced its treaty-making capacity in whole or in part and delegated its competence in that respect to the other party. Protectorates of the colonial type were fast disappearing, but the protectorate phenomenon was not confined to relations between European states on the one hand and African or Asian states on the other; Bhutan, for example, was linked by treaty with India as a protectorate. Again, it would not be true to suggest, as was done in paragraph 3 of the special rapporteur's draft, that the third situation arose only in regard to a state dependent upon another state. Liechtenstein's relationship with Switzerland and Luxembourg's relationship with Belgium were examples of such a situation between two states which were absolutely equal in law.

33. If, therefore, a formulation valid for all cases was to be drawn up, the drafting committee would have to take into consideration all the three situations he had described.

34. Mr. TUNKIN, replying to Mr. Verdross, said that he had never disputed that the problem of treaty-making capacity could arise otherwise than in the context of colonial relations. But under traditional international law, such instances had been the exception; the main preoccupation of writers who had dealt with the problem had been the colonial system. In practice also, under traditional international law, it was protectorates, colonies and dependent territories which had given rise to discussion of that problem.

35. Mr. AMADO said that Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice had endeavoured to cover very thoroughly every problem which might arise in connexion with the law of treaties, in the light both of history and of theoretical and practical considerations. Both had nevertheless managed to draft concise articles on treaty-making capacity.

36. It was therefore with some concern that he saw the special rapporteur, who had otherwise shown a more practical approach to the subject than his predecessors, put forward an elaborate draft article on the question.

37. Since the draft articles were intended to serve as a basis for a convention, and in view of the clear and concise terms of the Havana Convention on Treaties of 20 February 1928,<sup>7</sup> he preferred a formulation which would confine itself to the essential points.

38. He was not convinced by the arguments for introducing article 3 put forward by the special rapporteur

<sup>7</sup> Supplement to the *American Journal of International Law*, Vol. 29, No. 4, 1935, p. 1205.

in his commentary. Examining the writings on the subject of the law of treaties, he had not found any chapter on the treaty-making capacity of states. All sovereign states, by virtue of their sovereignty, enjoyed that capacity. Nor did he find a reference by any writer to the subject of the capacity to exercise treaty-making powers.

39. When two parties negotiated a treaty, the negotiators took care to verify the full powers of those with whom they were dealing; one of their foremost preoccupations was to avoid all possible grounds of nullity of the treaty they were negotiating.

40. The introduction of an article on treaty-making capacity raised far too many issues. If such an article were to be included in the draft, it would be necessary to deal with the status of dependent states, semi-sovereign states [états incomplets] and also of constituent states forming part of a sovereign state. He saw no need whatsoever to enter into such considerations. Those who negotiated a treaty would always be careful not to deal with an entity which was not a state or other subject of international law.

41. If article 3 were omitted, there would be nothing lost. Regardless of the absence in the draft of a reference to treaty-making capacity, an independent sovereign state enjoyed *jus contrahendi* by virtue of that very independence.

42. Mr. YASSEEN urged the need to include in the draft an article on the capacity of subjects of international law to enter into treaties. A provision on the matter was needed in the articles dealing with the conclusion of treaties; it was essential to make clear whether or not a prospective party to a treaty had the capacity to enter into a treaty.

43. He had, however, certain doubts regarding the so-called incapacity to enter into treaties, though the discussion appeared to have narrowed considerably the area of disagreement.

44. First, it was clear that a limitation imposed by a state's own constitution did not involve any incapacity to enter into treaties, in the sense indicated by Mr. Jiménez de Aréchaga.

45. Secondly, any limitations that might arise from a prior treaty signed by a state were foreign to the issue of that state's treaty-making capacity; the problem was simply one of conflict between two treaties.

46. There remained the question of a treaty which determined the status [status] of a state. A treaty of that type sometimes imposed limitations on the treaty-making capacity of the state concerned.

47. Mr. Ago, at the previous meeting, had said that it was difficult to imagine how a treaty could establish the treaty-making capacity of a state. He (Mr. Yasseen) would add that a treaty was not an appropriate instrument whereby to deprive a state of the capacity to enter into treaties — in other words, to determine its international incapacity.

48. States possessed the right to enter into treaties by virtue of general international law; in fact, the provi-

sions of international law which conferred that right were in a sense constitutional in character. Therefore, neither a bilateral treaty nor even a so-called "pluralateral treaty" could, in conferring a particular status on a state, impose upon it an international incapacity.

49. In fact, the so-called status [statut] was simply the consequence of international obligations derived from a treaty. There was no difference between international obligations of that type and those that might result from any other treaty. Most treaties limited in some way the freedom of action of the signatory states in respect of some field of international activity.

50. There could therefore be no doubt that obligations of that type could not impose an international incapacity in defiance of the principles of general international law. If, accordingly, the state which had been made subject to a particular status entered into a treaty with a third state in disregard of the status imposed upon it, the treaty thus signed would not be null and void. In fact, the treaty in question would not even be voidable [annulable]. The treaty was valid, although of course it conflicted with the earlier treaty which had imposed a particular status upon one of its signatories; the problem should be dealt with in the light of the principle of the relative effects or binding force of treaties. The question to be determined was the effect or force of the earlier treaty vis-à-vis third parties.

51. The CHAIRMAN said that the Commission had before it four proposals. The first was the special rapporteur's redraft of article 3, introduced at the opening of the present meeting. The second was Mr. Ago's proposal which, so far as paragraph 1 was concerned, coincided in substance with that of the special rapporteur. The third was Mr. Briggs' proposal from the previous meeting, which he had since revised to read:

"1. Capacity in international law to become a party to treaties is possessed by every independent state.

"2. 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.

"3. The international capacity of an entity which is not fully independent to become a party to treaties depends upon:

"(i) The recognition of such international capacity by the state or union of states of which it forms a part or which conducts its foreign relations; and

"(ii) The acceptance by other contracting parties of its possession of this international capacity."

The fourth was Mr. Tunkin's proposal that consideration of the subject-matter of article 3 should be deferred.

52. There were two courses open to the Commission. The first was to refer the special rapporteur's redraft to the drafting committee, together with the observations made during the discussion; in the light of that discussion, the Committee would submit to the Commission a

text covering only the essential points. A text of that kind would enable the Commission to continue its study of the question of principle, whether the draft should or should not contain a provision on international capacity to conclude treaties.

53. The second course was for the Commission to consider the four proposals itself.

54. Speaking as a member of the Commission, he said he favoured the first course, because it seemed likely to facilitate the work of the Commission.

55. Mr. LIU said that the special rapporteur, in an endeavour to take into account the various suggestions made during the discussion, had departed so far from his original text that the proposed redraft was less satisfactory.

56. He had no comment to make on paragraph 2 of the special rapporteur's redraft, which was similar to article 1 of the Havana Convention. Paragraph 1, however, introduced a fresh complication; it actually enlarged the scope of the Commission's work by entering the field of constitutional law.

57. The terms of paragraph 1 suggested that a state might invoke its own constitutional limitations in order to evade certain international obligations: also, that the contracting parties to a treaty could inquire into each other's constitutional provisions in order to ascertain the treaty-making capacity of their prospective partners to the treaty. That type of provision would give rise to complications in the negotiation of treaties.

58. He was inclined to agree with Mr. Rosenne that capacity was largely a matter of constitutional law. In international law the conclusion of a treaty was itself evidence of treaty-making capacity. He was not, however, necessarily of the opinion that the whole subject should be left out of the draft articles.

59. What really mattered in the treaty-making process was the recognition of capacity by the other party or parties to the treaty.

60. Mr. AGO said he favoured the second of the two courses indicated by the Chairman. The special rapporteur's new text was still in need of improvement; a formula would have to be worked out to express what the members of the Commission had in mind.

61. The reference to the "internal constitution" had been introduced in order to cover the case of constituent states. He recalled that, between 1776 and 1783, a member state of the United States like Virginia had retained the right to enter into treaties, and serious complications for the Federation had arisen as a consequence. Under the 1783 Constitution of the United States, the constituent States of the Union no longer had treaty-making capacity. In other cases, for instance in Switzerland, the constituent states, or cantons, retained a limited treaty-making capacity.

62. He agreed with Mr. Yasseen that a treaty could not of itself either confer or take away a state's treaty-making capacity. A treaty could, however, give rise to a situation the effect of which would be to affect and

limit that capacity. For example, the treaty setting up the Belgium-Luxembourg Union had created a situation in which one member state of the Union probably no longer had the capacity to enter into treaties with other countries in respect of certain matters. There could therefore be cases in which an incapacity to enter into treaties could arise from the terms of a treaty.

63. It was accordingly essential that, without prejudice to the Commission's final decision, the drafting committee should be instructed to work out a formula accurately reflecting the concept which the members had in mind.

64. He urged, however, that the drafting committee's task should be limited to the consideration of paragraph 1 of the special rapporteur's redraft of article 3. Paragraph 2 did not deal so much with treaty-making capacity as with the powers of the organs which negotiated the treaty; it was therefore desirable to keep the discussion of that proposed provision separate from that of paragraph 1. In any event, the subject-matter of that provision had not been sufficiently discussed, whereas that of paragraph 1 was ripe for consideration by the drafting committee.

65. Mr. TABIBI and Mr. CADIEUX said they agreed with the Chairman that article 3 should be referred to the drafting committee.

66. Mr. TSURUOKA, also agreeing, said that members would have another opportunity to comment on article 3 in the new version to be prepared by the drafting committee.

67. He felt some hesitation in expounding his own point of view because it was so simple, namely, that a draft of the kind under consideration should state existing law in the form of systematic rules. Having defined a treaty at the beginning of the draft, it would seem logical then to indicate by what entities treaties could be concluded. While convinced of the need for a general rule on treaty-making capacity, he was not at all sure that the Commission should enter into the details mentioned in the special rapporteur's original text of article 3, some of which related to situations which were becoming more and more exceptional.

68. Mr. TUNKIN, also agreeing that the article should be referred to the drafting committee, said that that course would have the advantage of allowing members time for further reflection.

69. The general view seemed to be in favour of a somewhat brief provision, and his tentative conclusion was that paragraph 1 in the special rapporteur's redraft might be recast in shorter form on the lines of the suggestion made by Mr. Ago at the previous meeting, to the effect that capacity under international law to conclude treaties was possessed by every subject of international law.

70. He disliked the reference to internal constitutions in the second sentence of paragraph 1 of the special rapporteur's redraft, for they might conceivably conflict with basic principles of *jus cogens*. Similarly, there might be serious objection to referring to international instru-

ments, because they too could be at variance with basic principles of international law.

71. He agreed with Mr. Ago that the subject matter of paragraph 2 of the special rapporteur's redraft should not be dealt with in the same article as the subject matter of paragraph 1.

72. Mr. BARTOŠ said that, as he had indicated at the previous meeting, it was indispensable to include in a draft convention on the law of treaties a provision on the capacity to conclude treaties. However, even though he had been in favour of a shortened version of article 3, the special rapporteur's redraft did not give him satisfaction, for the reasons given by Mr. Verdross and Mr. Ago. It was essential to insert a proviso to the effect that the capacity of independent states to conclude treaties might in exceptional cases be restricted.

73. He also shared Mr. Ago's views about the second sentence in paragraph 1, on which Mr. Yasseen had made some pertinent observations.

74. With regard to "other subjects of international law", he said the question to be settled in the draft was whether all other subjects possessed treaty-making capacity *a priori*—a view he could not accept—or whether some indication should be given of the limitations which were peculiar to the capacity of persons in that category, seeing that their capacity was habitually limited. Those limitations arose out of the functional theory that such persons possessed only the degree of capacity necessary to allow them to fulfil the purpose of their existence.

75. The subject of paragraph 2 was extraneous to the problem of capacity and should be dealt with in another article.

76. The wording proposed by Mr. Briggs seemed more consonant with the general line taken by Mr. Ago, Mr. Verdross, and himself.

77. The Chairman's procedural suggestion was acceptable.

78. Mr. CASTRÉN said he agreed that the special rapporteur's redraft, and that of Mr. Briggs, could be referred to the drafting committee for consideration in the light of the discussion.

79. The first sentence in paragraph 1 of the special rapporteur's redraft would be acceptable with the change suggested by Mr. Tunkin; it was preferable to speak of subjects of international law rather than states as possessing capacity to conclude treaties, for not all states had that capacity. Paragraph 1 of Mr. Briggs' text was not entirely satisfactory, since dependent states might also have treaty-making capacity, but of a limited nature.

80. The second sentence in paragraph 1 of the special rapporteur's redraft had given rise to a number of problems which suggested that it would be wiser to adopt a more general formula to the effect that the capacity to conclude treaties might be limited in different ways. Such a text would not say much, but would have the virtue of being unobjectionable.

81. Mr. JIMÉNEZ de ARÉCHAGA explained that he was not opposed to a provision on the capacity to become a party to treaties, provided an acceptable text could be worked out by the drafting committee.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that as members would realize from his introductory remarks on article 3, he had envisaged a somewhat more extensive provision and had prepared the redraft in response to the Commission's request; it should not therefore be regarded as his own. Some of the criticism it had provoked was justified, particularly in regard to the reference to internal constitutional rules.

83. Consideration of paragraph 2 might with advantage be deferred until later in the discussion.

84. He had no objection to the procedure suggested by the Chairman.

85. Mr. VERDROSS pointed out that the second sentence in paragraph 1 of the special rapporteur's redraft failed to cover the case where some degree of capacity to become a party to treaties was conferred upon the subdivisions of a state, either by the sovereign state or by an international treaty.

86. The first two paragraphs suggested by Mr. Briggs should be acceptable to all members. The first stated a general rule of law and the second covered such cases as that of the United Nations, which had become a subject of international law by virtue of the Charter.

87. He recognized that paragraph 3 in Mr. Briggs' text might provoke difficulties.

88. Mr. de LUNA said that, like Mr. Verdross, he preferred paragraphs 1 and 2, as formulated by Mr. Briggs, to the special rapporteur's redraft of paragraph 1, because it might be inferred from the latter that all subjects of international law, other than states, possessed treaty-making capacity, which clearly was not the case. For example, in certain circumstances and for certain purposes, individuals might be regarded as subjects of international law, but they had no treaty-making powers.

89. It should be stated clearly that, whereas normally it was states that possessed capacity to enter into international contractual obligations, other subjects of international law could, by way of exception, also possess treaty-making capacity.

90. Mr. EL-ERIAN said that at that stage he wished to advance only two considerations. First, the provision should lay down general principles without going into detail, and secondly, the epithet "independent" should be avoided; it did not appear either in articles 3 and 4 of the United Nations Charter, or in the Commission's draft declaration on the rights and duties of states.<sup>8</sup> There had been cases where a state, though under the suzerainty of another, like Egypt during its subjection to the Ottoman Empire from 1841 to 1914, had nevertheless enjoyed a considerable measure of autonomy

<sup>8</sup> *Yearbook of the International Law Commission, 1949* (Sales No. : 57.V.1, Vol. I), p. 286.

enabling it to enter into treaties. But such cases were mostly a thing of the past, as a result of the attainment of independence of so many countries in Asia and Africa. Remaining cases were few or in process of disappearance. There would consequently appear to be little ground for specific reference to such cases, which would raise controversial issues of a theoretical as well as a political character.

91. The CHAIRMAN proposed that the two texts should be referred to the drafting committee, which would be requested to prepare a new version in the light of the discussion.

*It was so agreed.*

The meeting rose at 12.45 p.m.

### 641st MEETING

Friday, 11 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)

1. The CHAIRMAN invited the special rapporteur to introduce article 4 of his draft.

#### ARTICLE 4. AUTHORITY TO NEGOTIATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he had brought together in one article, with some modifications and additions, the provisions discussed by the Commission at its eleventh session and incorporated in articles 6 and 15 of its 1959 draft.<sup>1</sup> As he explained in the commentary, the question of authority arose not only in connexion with signature but also in connexion with ratification, and for that reason he had decided in favour of a composite article. He had introduced a reference in sub-paragraph 2 (c) to the important modern practice under which permanent representatives to international organizations might issue "full-powers".

3. Mr. CASTRÉN said that on the whole he found the article acceptable, but thought it might be amplified to cover not only states but also other subjects of international law possessing capacity to participate in the negotiation of a treaty.

4. It was not necessary to mention ratification in paragraph 2, for ratification was governed by internal constitutional law; only the exchange of instruments of ratification was governed by international law. Indeed, a ratification was revocable so long as it had not yet been notified to the other parties.

5. The order of sub-paragraphs 3 (a) and (b) should be

reversed so as to deal with the more important organs of state first.

6. Mr. TUNKIN asked why the special rapporteur had thought it necessary to include the second sentence in sub-paragraph 2 (c). It seemed that the permanent representative to an international organization was considered as issuing full powers.

7. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Castrén's first question, said that chapter II of the draft had been restricted to states advisedly. Considerable drafting difficulties would arise if it were extended to cover other subjects of international law, such as the Holy See. Certain problems of applying such rules to international organizations might require special treatment.

8. Reference to ratification anywhere in the draft should be understood to mean ratification in the international sense as defined in article 1 (i).

9. In reply to Mr. Tunkin, he said that he had been unable to learn from the secretariat document, "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7) what was the form of full-powers issued by permanent representatives. Perhaps they were the same kind of instrument as that mentioned in the first sentence of sub-paragraph 2 (c), or they might be more in the nature of a letter of authority.

10. Mr. CASTRÉN, while thanking the special rapporteur for his reply, said he still maintained that the article should deal also with other subjects of international law.

11. Mr. CADIEUX said he agreed in general with the draft, on which he wished to offer some comments relating more to form than to substance. It might be inferred from sub-paragraph 3 (a), which stated that heads of a diplomatic mission had authority *ex officio* to negotiate but not to sign or ratify a bilateral treaty, if read in conjunction with sub-paragraph 2 (c), that a head of mission could give to another person by means of a letter authority to sign or ratify which he did not himself possess. Presumably the special rapporteur had in mind negotiations with an international organization or at an international conference rather than a bilateral agreement negotiated by an ambassador, but the inference gave rise to problems that ought to be faced.

12. It also seemed undesirable to suggest, as did sub-paragraph 3 (b), that Heads of State, Heads of Government or Foreign Ministers might need to provide some other kind of evidence of their authority to execute the acts in question. That construction could be avoided by substituting the word "additional" for the word "specific".

13. Finally, since no definition had been given of what was meant by an instrument of full-powers, it might be preferable to use the term "written authorization" instead.

14. Mr. LACHS said that the special rapporteur had been right to cover in article 4 all the possible ways by which a state could become party to a treaty.

<sup>1</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No. : 59.V.1, Vol. II), pp. 98 and 105.