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Summary record of the 779th meeting

Topic:
Law of Treaties

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779th MEETING

Friday, 7 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE 3 (Capacity to conclude treaties)

Article 3

Capacity to conclude treaties

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.

2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.

1. The CHAIRMAN invited the Commission to consider article 3 (Capacity to conclude treaties).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in their comments (A/CN.4/175 and Add.1-3), a number of governments had criticized the provisions of article 3 as inadequate and some had made suggestions for their improvement.

3. Article 3 had given rise to considerable difficulty in the Commission, which had been almost equally divided on the issues it raised ; in the truncated form in which it had finally emerged, it was not very useful and the best course would probably be to drop it altogether. The Commission would then be following the precedent of the 1961 Vienna Convention on Diplomatic Relations which omitted all reference to the question of capacity.

4. In his report, he had formulated elaborate provisions on capacity,[1] because he considered it to be a question more prominent in the law of treaties than in that of diplomatic relations, but article 3 as finally agreed upon did not have sufficient content to justify its inclusion in the draft.

5. The Commission had decided, provisionally at least, to limit the draft articles to treaties between States. In the light of that decision, it was not easy to see how paragraph 1 of article 3 ought now to be drafted. The question that arose was what constituted a State for the purposes of that paragraph. The Commission had purposely avoided qualifying its statement by a reference to " independent " States. The second sentence of paragraph (2) of the commentary [2] contained an explanation of the use of the term " State ", but it had been pointed out by governments that the matter required elucidation in the provisions of the article itself, which must stand on its own.

6. Paragraph 2 of the article dealt with the problem of the treaty-making capacity of member states of a federal union. Paragraph (3) of the commentary dealt with the interesting question whether in some cases the component state concluded the treaty as an organ of the federal State or in its own right. The answer to that question must be sought in the provisions of the federal constitution.

7. Paragraph 3, of the article, which dealt with the capacity of international organizations to conclude treaties, was out of place in a set of draft articles explicitly limited to treaties between States.

8. Mr. YASSEEN said that at a previous meeting he had urged the need to include an article on the capacity to conclude treaties ; but the present text should not be retained as it stood.

9. Paragraph 1 referred to " other subjects of international law " ; since the Commission had decided that the draft related to States, that reference should be deleted. The comments of the United Kingdom and the United States urged the need to refer to the limited capacity of certain dependent territories ; but the system of dependent territories was on the point of disappearing, so it should not be mentioned. Furthermore, the colonial régimes that subsisted were only *de facto* régimes, especially since the General Assembly resolution of 1960.[3] If they had been based on any customary rules, those rules had certainly now lost their psychological element.

10. According to the comments of the Government of Sweden, paragraph 1 added nothing new and was therefore unnecessary. That argument was irrelevant, for not every provision added something new ; it was often necessary to state what existed. Perhaps paragraph 1 could be amended to read simply : " A State possesses the capacity to conclude treaties ".

11. He had not yet made up his mind about paragraph 2, but in view of the importance of federalism in the world, he thought it might be useful to include a provision on the subject.

12. He saw no objection to deleting paragraph 3.

13. Mr. CASTRÉN said that the article had caused the Commission a great deal of difficulty ever since 1962. After long discussions, the Commission had adopted a text which had been rather severely criticized by several governments. To the countries mentioned by the Special Rapporteur in his last report should be added the Netherlands, Ecuador, Colombia and Venezuela, the last three of which had made comments in the Sixth Committee of the General Assembly.

14. Articles 3 said both too much and too little. Paragraph 1, for example, spoke of States and other subjects of international law, though treaty-making capacity belonged, as a general rule, only to independent

[1] *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 35-36.

[2] *Ibid.*, p. 164.

[3] *Official Records of the General Assembly, Fifteenth Session, Supplement No. 16*, p. 66, resolution 1514 (XV).

States and to a few of the other subjects of international law. Paragraph 2 referred only to federal States, and made no mention of other unions of States which might have treaty-making capacity. Paragraph 3 was superfluous, because the Commission had decided that the draft articles would deal with States only.

15. The Special Rapporteur's proposal that the article be deleted would satisfy several governments and save the Commission a great deal of trouble. He thought the Commission should consider that proposal first ; if the majority thought that the whole or part of article 3 should stand, he would propose amendments to paragraphs 1 and 2.

16. Mr. AGO said that some of the Special Rapporteur's comments were fully justified. It was obvious that the article should at least be amended if the Commission wished to abide by its decision to confine the draft to treaties between States. International organizations would have to be excluded, but not, for example, the Holy See and insurgents.

17. The criticisms of governments related mainly to the drafting of the present text, and he hoped that the Special Rapporteur would revert to a more positive proposal, for the article seemed really essential.

18. If the question of capacity were purely theoretical, he would vote for the outright deletion of article 3. But a question of substance was involved : a subject of international law did not automatically have capacity to act and to conclude treaties, and even though certain situations involving incapacity were disappearing, it was essential to take them into account. If it was intended to affirm the capacity of all States to conclude treaties and to preclude situations involving the loss of that capacity, the Commission should say so expressly.

19. Such an affirmation would also have considerable political value. The Commission should affirm that it did not recognize the existence of certain relations between States which involved loss of the capacity to act. Relations of that kind had existed not only under colonial protectorates, but also, and even recently, in Europe.

20. On the other hand, the exclusion of those cases of incapacity did not mean that there could not be certain relations between States whereby one State undertook to entrust its international representation to another, without losing the capacity to conclude treaties itself.

21. The only situation in which it was now recognized that capacity to act and to conclude treaties could be affected—and to cover which he thought a second paragraph was necessary—was that resulting from participation in certain international unions, in particular, in federal States. In such cases there were various possibilities, but certainly the treaty-making capacity of the member States was never unlimited ; it depended on the structure of the union.

22. In short, he was in favour of retaining the first two paragraphs and proposed that they be referred to the Drafting Committee.

23. Mr. LACHS said that paragraph 3 was an inadequate expression of the law. In fact, the *jus tractatuum* or treaty-making power of an international organization could be derived from any of three sources. The first, which was the only one mentioned in paragraph 3, was the constitution of the organization. The second was interpretation and practice, which gave rise to a customary rule ; capacity was in that case acquired by virtue of the development of the law of an international organization, even if there was no constitutional provision on the subject. The third possibility was that the organization could acquire treaty-making power by virtue of a decision of one of its organs. Since paragraph 3 did not reflect the real position, it would in any case have had to be redrafted, but since the Commission had decided to confine the draft articles to treaties between States it had become redundant and should be dropped.

24. He was also in favour of dropping paragraph 2, which had given rise to serious doubts on the part of several members of the Commission. Its provisions dealt with only one of several similar problems and were not indispensable.

25. Paragraph 1 was a most important provision because it touched on a fundamental issue. Its provisions were declaratory ; they reflected the law as it was and did not purport to create new law. He fully shared Mr. Ago's view on the legal and political importance of stating the principle that every State possessed the *jus tractatuum*. A declaration to that effect was essential.

26. He certainly could not accept the comment of the Government of Finland (A/CN.4/175, Section I.8) which suggested that there might be States which were not subjects of international law. Every State possessed *ex definitione* the right to conclude treaties ; no State could suffer such a *capitis diminutio*. The right to conclude treaties could be an inherent right or a delegated right. States had an inherent right ; an international organization could have the right to conclude treaties conferred upon it by States.

27. Paragraph 1 should be retained, but redrafted, particularly the concluding words " and by other subjects of international law ". It might be desirable to include the idea in the article on definitions. The definition of a " treaty " in that article was of an objective character and dealt with the notion of a treaty. The provisions of article 3 were subjective ; they dealt with the subject which made the treaty. It might be possible to combine those two elements in a single provision.

28. Mr. de LUNA said that the Commission had to choose between making an exhaustive study of the question of capacity and deleting article 3 altogether.

29. The comments of governments showed that a partial formulation was not advisable and that it would be better to deal with each problem of capacity as it arose, according to the practice of sovereign States in the light of the circumstances. That solution was the more desirable because international law was in process of transition from a liberal, European-centred law to a social and universal law. His own position in the matter was agnostic and he thought that if the article was to be retained, in whole or in part, its drafting would be so difficult that the result would hardly justify the effort. If the Commission had been drafting a code, it would have been necessary to deal with the question of capacity ; but in a draft convention, the pragmatic should prevail over the systematic approach. If article 3 were dropped, the draft would be no

less effective and would prove more acceptable to a conference of plenipotentiaries.

30. Mr. ROSENNE said that the proposal to delete article 3 had been put forward in 1962, but had not then attracted much support.[4] Now, however, after listening to the discussion, he agreed with Mr. de Luna that deletion was desirable. It would not affect the validity of the codification, which the Commission had decided to confine to the rules governing treaties concluded by States.

31. He had always had great difficulty in understanding the concept of *capacité d'agir* (capacity to act), which seemed to him a highly abstract generalization. It really needed to be given concrete expression according to the different circumstances in which it arose. In the codification of the law on diplomatic relations,[5] for example, its concrete expression had assumed a different form from that to be found in the Statute of the International Court of Justice. So far as the law of treaties was concerned, any attempt to give it concrete expression would lead the Commission into a subsidiary codification of the whole question of international personality other than that of international organizations. The Commission was hardly in a position to attempt such a task at that stage and whatever form article 3 might now take, it was bound to be incomplete and misleading.

32. At the same time, he had been impressed by Mr. Lachs' remarks and agreed that it would be useful to incorporate the idea of paragraph 1 in an objective definition of a " treaty ", if that were possible.

33. Mr. REUTER said he thought that after the discussions at the previous meeting and that morning, the Commission must decide whether its purpose was to lay down rules of general international law or, going even further, rules of *jus cogens* in certain cases, or to state rules of special international law or even rules of internal law. That was the fundamental question which was causing concern to governments.

34. Article 3 as it stood was quite unacceptable. He fully agreed with what the Special Rapporteur had said, particularly with regard to paragraphs 2 and 3, because paragraph 2 stated a rule of internal law and paragraph 3 a rule of special international law.

35. But Mr. Yasseen and Mr. Ago had upheld another idea which, if it were adopted, would have to be expressed in a different form : the idea of a rule of *jus cogens*. He himself had on several occasions made reservations concerning *jus cogens;* but as he wished to co-operate with the majority, if they wished to draft a rule of *jus cogens*, he would submit, merely as a suggestion, the following text : " The capacity to conclude treaties is an essential attribute of State sovereignty which a State cannot surrender except on the basis of the equality of States and of reciprocity ". A provision of that kind would condemn colonialism and unequal treaties, but would not reflect on federalism or on the system of an international organization.

36. Mr. TUNKIN said that in 1962, he had been rather against including an article on capacity. On further reflection, however, he had now reached the conclusion that article 3 contained some useful elements which should be retained. With regard to paragraph 1, he had been impressed by Mr. Ago's arguments, particularly his argument that the statement that all States possessed the capacity to conclude treaties was of great legal and political importance at the present day.

37. He wished to add that such a statement would reflect one of the aspects of the new international law, in contradistinction to the old international law, which had recognized the existence of States that were not fully independent ; that situation had been the expression of colonial dependence. Contemporary international law condemned and prohibited any form of subjugation of one State by another. That prohibition followed from the United Nations Charter, as developed in 1960 by General Assembly resolution 1514 (XV) embodying the " Declaration on the granting of independence to colonial countries and peoples ".

38. There was now a new rule of international law to the effect that all States possessed the capacity to conclude treaties—a rule which did not exclude the possibility of a relationship based on equality and compatible with the requirements of contemporary international law. He therefore urged that paragraph 1 of article 3 should be retained, but reworded so as to state clearly that all States possessed the capacity under international law to conclude treaties. That statement, in the light of the Commission's decision to confine the draft to treaties between States, would not imply in any way that other subjects of international law did not have the capacity to conclude treaties.

39. The provisions of paragraph 2 could usefully be retained, for they were a logical consequence of those of paragraph 1. Since paragraph 1 meant that general international law placed no limitations on the capacity of States to conclude treaties, such limitations could only result from the provisions of municipal law. If member states so constituted their federation as to retain the whole or part of the treaty-making power for themselves, there was nothing in general international law to prevent it. Paragraph 2 should therefore be retained and he favoured its present formulation, to which the Drafting Committee had devoted much time and effort.

40. With regard to paragraph 3, he agreed with the majority that it had no place in a draft dealing with treaties concluded by States and not with those concluded by international organizations.

41. Mr. ELIAS said he fully agreed with those members who favoured dropping paragraph 3.

42. He realized the need to proclaim the capacity of States to enter into treaties, but had some doubts about the placing of such a provision. He had been interested by the suggestion of Mr. Lachs that the idea might be incorporated in the definition of a " treaty " ; it could also be introduced into the new opening article, which was to limit the draft to treaties between States. In stating the rule, however, the Commission should be careful not to give the impression that it had confined its draft to

[4] *Yearbook of the International Law Commission, 1962*, Vol. I, 639th and 640th meetings.

[5] *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records*, Vol. II, p. 82 *et seq.*

treaties between States because only States had the capacity to conclude treaties.

43. Some of the ideas in paragraph 2 should be retained, because they followed logically on the provisions of paragraph 1. At a previous meeting, he had mentioned Quebec's claim that a province of Canada had the right to enter into international agreements with foreign States, whereas only the Federal Government could conclude actual treaties ; [6] that strengthened the argument for providing, as in paragraph 2, that such matters should be settled on the basis of constitutional provisions.

44. Perhaps the simplest course was to delete article 3 altogether, since its provisions seemed to create more problems than they solved. The idea contained in paragraph 1 and some of the elements of paragraph 2 could be incorporated in a new article 1.

45. Mr. PAREDES urged that article 3 should be retained ; its provisions were among the most important in the whole draft. In a draft that dealt with contractual rights, it was essential to make it clear what subjects of law had the capacity to contract.

46. He saw no reason systematically to leave aside theoretical questions ; all practical achievements proceeded from some established theory. In any case, the issue in the present article was not just a theoretical one ; it was one of immediate practical application and could in no circumstances be ignored. To omit such an article would be comparable to omitting from the provisions on the law of contract, in a code of private law, all reference to the capacity to enter into contracts.

47. It was true, and that was a source of anxiety for the Special Rapporteur, that the text of article 3, especially paragraph 1, was not sufficiently broad. Paragraph 1 declared that States had the capacity to conclude treaties, but it was necessary to draw a distinction, as indicated by Mr. Ago, between legal capacity and capacity to act, as was done in civil law. The colonial mandates of the League of Nations clearly showed the difference, in that some subject States could conclude certain kinds of treaty, whereas others could not do so except through the Mandatory Powers. It was clear that there were States which had full capacity and States which had only a limited capacity.

48. In those circumstances, the formulation of the rule that all States had the capacity to conclude treaties, which related to general legal capacity, ought to be supplemented by provisions on the manner in which the treaty-making power was exercised. It was necessary to deal with the question which State organ had the capacity to conclude treaties, a matter that depended on the constitution of the State. If a treaty was concluded by a State organ which was not constitutionally competent to do so, the treaty would be void by reason of that organ's lack of capacity.

49. The third question of capacity which should be dealt with was that of the capacity of the negotiator under the laws of his country. Like the capacity of a State organ to conclude treaties, that question should be referred to municipal law.

[6] 777th meeting, para. 35.

50. It was disappointing to see the Commission discard, one after another, texts whose formulation had required a great deal of work. Article 3 should be retained because of the importance of its provisions with regard to the expression of the free will of the parties to a treaty. He agreed, however, with those members who favoured the deletion of paragraph 3. Apart from the reasons already given, there were some jurists—he was not among them —who considered that an individual could be a subject of international law.

51. Paragraph 2 referred to the treaty-making capacity of a component state of a federal union under the constitutional provisions of the union and he saw no harm in retaining it.

52. Mr. TSURUOKA observed that while no one wished to deny independent and sovereign States the right to conclude treaties and no one denied the desirability, at least in theory, of retaining an article of that kind, no one was satisfied with the formulation of article 3 as it stood. If the Commission could possibly work out a formula that would satisfy the majority of its members and of the international community, as Mr. Ago had believed, it should try to do so ; but if it could not, that would not be of much practical importance. After all, if an international conference met to negotiate, sign and ratify a treaty such as a treaty on the law of treaties that proved, by the mere fact that the conference met, that it was known who would negotiate, sign and ratify. Consequently, in the case of the convention which the Commission was preparing, the text would still be applicable even if there were no article such as article 3 on the capacity to conclude treaties. As he had not made up his mind which of the two possible solutions he preferred, he would ask the Drafting Committee to do its best to work out an acceptable formula on which the Commission could come to a decision.

53. Mr. EL-ERIAN said he would confine his comments to the general principle of the article, leaving aside the special questions that arose in connexion with federal States and international organizations.

54. He agreed with the Special Rapporteur that the question of capacity had a prominent place in the law of treaties. Capacity to establish diplomatic relations had not been regulated in the draft articles on diplomatic relations because of the different context in which it had been raised ; there had been a controversy as to whether the establishment of diplomatic relations was a right or an attribute of international personality. The majority of the Commission had decided that it would not be appropriate to refer to the establishment of diplomatic relations in terms of a right, and agreement had been reached on an article which stated that the establishment of diplomatic relations took place by mutual accord.

55. Then there was the question of the basic purpose of the article. It would have to be drafted in a manner consistent with the realities and requirements of contemporary international relations. It was desirable and indeed necessary that there should be a general statement on the capacity of all States to conclude treaties as an attribute of sovereignty. Mr. Reuter's proposal was useful and should be considered by the Drafting Committee. As Mr. Tunkin had rightly said, special arrangements of a limited

character, which were compatible with the sovereign equality of States and were designed to serve a practical need or take account of a special relationship between two States, would not be affected in any way.

56. It had been suggested that if article 3 were retained, it would be necessary to define the term " State ". He did not agree : the term was used without any attempt at a definition in Article 4 of the Charter and in Article 34 of the Statute of the International Court of Justice. The Commission itself, when drafting the Declaration on Rights and Duties of States,[7] had not deemed it opportune to provide a definition.

57. If it were agreed that it was desirable to have an article on capacity to conclude treaties as a basic attribute of national sovereignty, the question of the best way of formulating it would arise. It had been objected that if the article did not go into detail it would be useless. He must point out, however, that the Commission had decided that it would be useful to include an article on *pacta sunt servanda*—the present draft article 55—because it was considered important to enunciate that principle ; but that article did not go into detail.

58. Another problem was whether there should be a reference to restrictions on capacity. There could be no general restriction on the capacity to conclude a treaty ; to recognize such a restriction would be incompatible with the facts and with the requirements of contemporary international relations. The comments of some governments had dwelt on the capacity of certain other subjects of international law ; but since the Commission had decided that the draft should be mainly applicable to States, the question could be viewed in a different perspective.

59. The United States Government had commented that paragraph 1 might affect certain treaties entered into by entities that were not fully independent (A/CN.4/175, Section I.21). He did not think that the article prejudiced the question of the status of those entities, since that was covered by the development of international law, the Charter and the General Assembly resolution on the granting of independence to colonial countries and peoples.

60. His view was that there should be an article 3 incorporating a statement in general terms, not going into details on questions of restriction or of the capacity of subjects of international law other than States ; it should be an article reflecting the principle of the equality of States in law.

61. Mr. AMADO said he had come to the meeting with the firm intention of supporting the Special Rapporteur who, after studying the comments of governments, had proposed the deletion of article 3. In supporting the Special Rapporteur's proposal, he had the satisfaction of knowing that he was being entirely consistent with the views he had expressed during the fourteenth session of the Commission at the 639th meeting, when he had said that " 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 ".[8] He had at that time linked capacity with validity, since the validity of the treaty depended on the capacity of the contracting party. The concern to define capacity, to verify the personality and legal status of the contracting party, seemed to him to be reminiscent of internal law. Besides, he had qualified the word " State " by the adjective " independent ".

62. Some members of the Commission were now taking the view that such a rule should appear in the draft and, as Mr. Reuter had said, it would be a rule of *jus cogens*. It was true that there were contemporary examples of States at an intermediate stage of evolution whose contractual capacity was relative ; the question was whether their voices could be heard and whether they were capable of expressing a will approximating to a sovereign will ? He was perplexed, for he recognized that the existence of such States should influence the drafting adopted by the Commission. He had been struck by Mr. El-Erian's remarks on the drafting ; very often what appeared easy and simple proved most difficult and required the greatest effort. The Commission should find a formula which was not pleonastic but which took the new aspects of international life into account.

63. In speaking of capacity to act Mr. Ago was entering the realm of psychology. It was understandable, however, that he should be concerned over the case of States which were now concluding treaties without really having the capacity to do so in the sense understood by the Commission.

64. Mr. PESSOU said that, after hearing the brilliant expositions by Mr. Ago, Mr. Reuter and Mr. Tunkin, he was convinced of the need to retain article 3 as it stood, except of course, for paragraph 3, which would be deleted. If the whole article were deleted, all the work accomplished at the cost of so much effort would be rendered unintelligible. Other members of the Commission had said that the rule stated was pleonastic ; but if all the articles were examined from the grammatical standpoint, how many more pleonasms might not be discovered ? Mr. Paredes had made many of the points he had intended to make himself, and he would not repeat the same arguments.

65. At first sight Mr. Reuter's position might seem opposed to that of Mr. Ago, but in reality the two were complementary. Mr. Reuter's text reproduced elements of the draft article, with the addition of the idea contained in the phrase " on the basis of reciprocity ", which corresponded to current practice. In spite of some hesitation, Mr. Tunkin had also finally opted for retaining the article. In his (Mr. Pessou's) opinion, it was perfectly right and natural to try to define the personality of those who concluded treaties at the international level and according to international law.

66. He suggested that Mr. Ago and Mr. Reuter should work out an agreed minimum text reconciling all demands, which could be approved by the Commission.

67. Mr. BRIGGS said the question was what would constitute an adequate content for article 3. At the fourteenth session he had suggested that the international

[7] *Yearbook of the International Law Commission, 1949*, pp. 287-288.

[8] *Yearbook of the International Law Commission, 1962*, Vol. I, p. 61, para. 48.

juridical capacity to become a party to a treaty was determined by international law, that every independent State possessed the capacity to become a party to treaties, and that, in the case of entities that were not fully independent, the treaty-making capacity depended on the recognition of that international capacity by the State or union of States of which the entity formed a part or which conducted its foreign relations, and on the acceptance by the other contracting parties of the possession of that capacity by the entity concerned.[9] Those views had not been accepted in their entirety, and the article now before the Commission was the result of a compromise. As it stood, it was quite unacceptable, and he was sceptical as to the Commission's ability to adopt a text that would be acceptable.

68. The position was that, for political reasons, the Commission could not discuss the treaty-making capacity of entities that were not fully independent, and that for reasons of a rather rigid logic it was expected not to discuss the capacity of subjects of international law other than States or the capacity of international organizations. It followed that all that could be said was the first part of paragraph 1, namely, " Capacity to conclude treaties under international law is possessed by States ". That seemed hardly sufficient.

69. As he understood it, the United States Government's comment on the article was intended to be a criticism not so much of the drafting of paragraph 1, as of the examples given in the commentary. The assumption of the United States Government was that the entities to which it referred would necessarily be subjects of international law for the purposes of the article. That might suggest that, if the Commission decided on a vague formula, it could adopt some such language as " Capacity to conclude treaties under international law is possessed by States and by other subjects of international law ". It might be possible to deal with the problem when the Commission came to consider article 1, but there had been considerable objection in the Commission to retaining the phrase " other subjects of international law " in the definitions.

70. Personally, he thought that article 3 as at present worded should be deleted, though he would be prepared to co-operate in preparing a fresh draft. It might perhaps be better to adopt Mr. Lachs' suggestion that any attempt to draft article 3 be abandoned and that the Commission consider whether the topic could not be dealt with in connexion with the definition of a treaty.

71. Mr. AGO said he wished to clear up some misunderstandings to which his first statement seemed to have given rise. In speaking of " capacity to act " he had employed an expression that was in very general use in Latin language countries, and merely meant " contractual capacity " or, in international law, " treaty-making capacity ". In future he would try to use the latter term.

72. Moreover, what he had wished to recommend to the Commission in his first statement was not the idea that only States had the capacity to conclude treaties, but that all States should possess that capacity and that there could be no States which were deprived of it, except the members of a federal union—a special case to which he would revert later.

73. Some speakers had objected that the rule proposed was pleonastic. Yet even Mr. Amado had been prudent enough to say " all independent States ". That was the essential point. The Commission should say whether or not it recognized that there could be States which were not independent—that there could be relationships of dependence between States involving loss of the capacity to conclude treaties. That was by no means a purely theoretical issue. On the contrary, it was a matter of substance, since capacity was the prime condition for the validity of treaties. For example, two States A and B might enter into a relationship whereby State B agreed that State A should manage its international relations, which meant that State B gave State A an undertaking not to conclude treaties directly on its own behalf. What would happen if, in spite of that undertaking, State B concluded a treaty with a State C? If, as a result of the relationship between A and B, State B had lost its treaty-making capacity, it followed that the treaty between B and C would be void. On the other hand, if State B had retained its treaty-making capacity, it was probably acting in breach of its undertaking to A, but the treaty between B and C would be valid. By stating a rule that every State possessed the capacity to conclude treaties, the Commission would make it possible to settle the problem in favour of validity of the treaty between B and C. The rule was therefore of practical importance, and the Commission could not avoid taking a stand on the matter.

74. With regard to Mr. Pessou's suggestion, he thought it would be better for the whole Drafting Committee to try to work out a satisfactory formula.

75. It was not advisable to insert such a provision in the definitions. It was not a definition at all. Mr. Lachs had perhaps been misunderstood, for he had not been speaking of the definitions, but of article 1 as the Comission intended to draft it.

76. He did not think that paragraph 2 could be dropped so easily. Without expressing any preference for one formula rather than another, he believed that if paragraph 1 stated the rule that every State had the capacity to conclude international treaties, it would be necessary to add a saving clause concerning federal States ; in the absence of such a clause, the first rule would imply that in a federal union each member automatically had the capacity to conclude treaties. The difficulty arose from the double meaning of the word " State ", which designated both a State which was a subject of international law and a State which had personality for internal purposes only.

77. Mr. de LUNA said he remained unconvinced. Since the Commission was not defining the term " State " except indirectly, he did not think that much was to be gained by a more or less detailed reference to the capacity possessed by any State to conclude a treaty. After all, if the international community had recognized a given political and territorial entity with the power of self-determination as a State, that State possessed treaty-making capacity.

78. Mr. Tunkin had maintained that every State had the capacity to conclude treaties. That was true ; but he had

[9] *Ibid.*, p. 59, para. 20.

felt uneasy when Mr. Tunkin had gone on to propose that paragraph 2 of the article should be retained, for that paragraph provided that such capacity could be limited by internal law. Triepel had maintained that federal law was a hybrid, part international law and part internal law ;[10] but could a State which had wholly lost its capacity to conclude treaties be considered a State in international law, whatever its status might be in internal law? He thought not. Sovereignty was made up of two elements : *summa potestas* and *plenitudo potestatis*. A State could surrender part of its *plenitudo potestatis* and still remain a State with the power to conclude treaties dealing with some matters, but not with all. But if it surrendered all of its *plenitudo potestatis*, it could not conclude any sort of treaty and had ceased to be a State.

79. Mr. AMADO said that he, too, was not convinced by the example cited by Mr. Ago, which irresistibly called to mind intervention " in matters which are essentially within the domestic jurisdiction of any State ", in other words, an act contrary to Article 2, paragraph 7, of the Charter. That example, suggested that there were some States which were of inferior status. He believed in the sovereign equality of independent States. The term " State " implied the qualification " independent ", and " independent " implied " treaty-making capacity ". To try to state a rule on the subject would result in a pleonasm and would mean transferring to international law the principles of Roman law on which internal law was based.

80. Mr. CASTRÉN said that to avoid any misunderstanding, he must emphasize that he was not in favour of imposing restrictions on the ability or right of States to conclude treaties. It could not be denied, however, that States which did not possess that faculty or right had existed and still existed : for example, the self-governing provinces sometimes called " states ". There was also the problem of unions of States, the position of their member States, etc. As Mr. Elias had said, if the Commission wished to introduce into its draft a rule on the treaty-making capacity of States, it would probably first have to define the concept of a " State ", which was no easy task. It was also necessary to take account of the possibility of a State's waiving its right to conclude treaties. He would be the first to vote in favour of a new formula for article 3 if all those problems could be solved.

81. The CHAIRMAN, speaking as a member of the Commission, said he had not intended to take part in the discussion, but it had become so important that he felt obliged to state his position.

82. With regard to paragraph 1, all the members of the Commission agreed that there was a positive rule of public international law on the capacity of States to conclude treaties. Since that rule existed, it must be codified. But the rule had also been contested in certain cases, to which Mr. Tsuruoka had alluded. Consequently, for the purposes of progressive development of international law, the Commission should state the present position regarding the rule. The position was that all States now had the capacity to conclude treaties. It was therefore important to retain the idea of paragraph 1, and the Drafting Committee would be able to find suitable wording to express it.

83. With regard to paragraph 2, contrary to the opinion expressed by some members of the Commission, he considered that it also related to general international law. It did not seek to define the position of the members of a federal union, but stated the rule concerning competence, by specifying that capacity depended on the federal constitution. The question was too controversial and the practice differed too widely for the Commission to be able to lay down a general rule ; but it should show how the problem ought to be solved. By so doing it would forestall disputes and provide a criterion that was needed in international life.

84. The problems raised by the expression " and by other subjects of international law " and by the reference to international organizations had already been settled in principle by the Commission's decision on article 1, paragraph 1 (*a*), and by its acceptance in principle of the rule in article 2. He was therefore in favour of retaining article 3, perhaps in a modified form which the Drafting Committee would propose.

85. The article was neither unnecessary nor tautological. The State had not always been what it was today, and everyone did not have the same conception of it. As evidence of that, it was sufficient to refer to the comment by the United Kingdom, quoted by the Special Rapporteur in his fourth report (A/CN.4/177), that certain States did not possess capacity to conclude treaties. That comment clearly referred to protectorates and was politically exemplified by the position of the Middle-East sultanates. The Commission should take a position on the development of international law, bearing in mind that the state of public international law was indissolubly bound up with the stage reached in the world's historical and political development.

86. Mr. ROSENNE said that in view of the trend of the discussion, he still took the view that the Special Rapporteur's proposal was the more prudent ; it would be very difficult to draft an article that would be sufficiently complete.

87. If the Special Rapporteur agreed, however, he would have no objection to the Drafting Committee's making an attempt. The last sentence of paragraph (3) of the Commission's 1962 commentary on the article had gone to the heart of the matter.[11] Who were the parties to a treaty concluded by one of the member states of a federal union? That was the real problem, at the international level, of the case referred to by Mr. Elias. If the Commission could not find a solution, it might be better not to include paragraph 2.

88. The matter was also connected with the question whether the term " party " should be defined in the draft articles.

The meeting rose at 1 p.m.

[10] H. Triepel, *Droit international et droit interne* (trans. R. Brunet), Paris, 1920.

[11] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 164.