

Document:-  
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**Summary record of the 810th meeting**

Topic:  
**Law of Treaties**

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consular law were institutional and should constitute *jus cogens*. But either argument was tenable. The new States had argued that the consular rules should be institutional and should not be at the mercy of governments which wished to impose on others certain changes through reciprocal agreements. On the other hand, countries like Switzerland and the Netherlands had stated that the provision would make it impossible for them to ratify the Convention.

89. Mr. YASSEEN said that article 40 should be dropped, not because there was no *jus cogens* in the draft convention, but because the question should preferably be governed by the general principles of the law of treaties concerning conflicting treaty provisions. The Commission should not take sides in the draft convention, which was of a special kind and covered a field in which bilateral agreements were the rule.

90. Mr. PESSOU said that paragraph 2 of the article covered cases which actually occurred in practice. He had read in "*Le Monde*" a paragraph on a bilateral agreement concluded between the United Kingdom and the USSR concerning the Vienna Convention on Diplomatic Relations. He had sent the article to the Special Rapporteur (Mr. Bartoš), who had replied that it was normal practice for a bilateral agreement to be made for the purpose of confirming the rules established by the Vienna Conference. Should, therefore, article 40 be adopted?

91. Mr. ROSENNE said that he agreed with nearly everything that had been said in favour of dropping article 40. He had difficulty in understanding the corresponding provision in the Vienna Convention on Consular Relations, and it had no place in the present draft. In the light of the comments of governments, the Commission might consider including a clause to the effect that some of the provisions of the draft, particularly those from article 17 onwards, would apply in the absence of any agreement to the contrary between the States concerned.

92. Sir Humphrey WALDOCK said that article 40 should certainly not be retained in a draft concerned with a matter in which bilateral agreements played such a prominent part, even though some of its provisions were of fundamental importance such as the inviolability of members of a special mission and its archives. It would suffice to include a clause of the kind suggested by Mr. Rosenne.

93. The CHAIRMAN, speaking as Special Rapporteur, said that if the majority of the Commission so wished he would be prepared to redraft article 40 in terms stating that the provisions of the articles would apply except as otherwise agreed by the parties, even though he preferred the solution of article 73 of the Vienna Convention on Consular Relations.

94. The final provisions should, he suggested, be drafted by the Secretariat as was customary.

*It was so agreed.*

The meeting rose at 1 p.m.

## 810th MEETING

Thursday, 24 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

### Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(resumed from the 803rd meeting)

[Item 2 of the agenda]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to resume its consideration of item 2 of the agenda and to take up the draft articles proposed by the Drafting Committee.
2. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the definitions contained in paragraphs (b) to (g) and the provision in paragraph 2 of article 1<sup>1</sup> be left aside until the Drafting Committee had considered them.
3. It might also be preferable for the Drafting Committee to examine at a later stage his proposal for the insertion among the general provisions in section I of an article safeguarding the rules of international organizations, taking into account the arguments he had put forward in the section entitled "Article 3 (*bis*)" in his fourth report (A/CN.4/177).<sup>2</sup>
4. At some time the Commission would need to decide whether or not to include an article on the conclusion of treaties by one State on behalf of another, or by an international organization on behalf of a Member State; the matter had been discussed at the sixteenth session<sup>3</sup> and was examined in his fourth report immediately after article 4 (Authority to negotiate . . . a treaty).
5. Consideration of articles 8 and 9, which had given rise to much discussion<sup>4</sup> and were difficult to formulate in a manner which might obtain the support of a substantial majority, should be deferred until the Drafting Committee had put forward fresh proposals and when more members of the Commission were present. He had not yet transmitted any texts to the Drafting Committee, because he had not yet succeeded in devising a compromise that would bridge the gulf between the two opposing schools of thought. As yet, he had not been able to do more than prepare alternative texts for the two articles.

<sup>1</sup> For earlier discussion of article 1, see 777th and 778th meetings.

<sup>2</sup> For earlier discussion of the Special Rapporteur's proposal, see 780th meeting, paras. 17-26.

<sup>3</sup> *Yearbook of the International Law Commission, 1964*, Vol. I, 732nd and 733rd meetings.

<sup>4</sup> See 791st meeting, paras. 61 *et seq.*, and 792nd-796th meetings.

6. It should not be necessary for the Commission to consider at the present session the proposal by the Luxembourg Government for the inclusion of a new article on entry into force of treaties within the territory of the parties. He had commented on that proposal in his fourth report (A/CN.4/177/Add.1) after the section dealing with article 23, and it should be taken up in conjunction with article 55, since it was closely linked with the *pacta sunt servanda* rule.

7. Mr. TUNKIN said he supported the Special Rapporteur's suggestions concerning article 3 (*bis*) and articles 8 and 9. Controversial issues, such as those involved in the latter two articles, should be left aside until more members of the Commission were present. At the moment the Commission was only at about half strength and so could not take any decisions on those articles.

8. Mr. ROSENNE said he agreed with the Special Rapporteur that the question of including an article on the conclusion of treaties by one State on behalf of another or by an international organization on behalf of a Member State should be deferred, since the decision would partly depend on the outcome of the discussions on article 4.

9. The CHAIRMAN said the Special Rapporteur's suggestions evidently commended themselves to members and should be followed.

*It was so agreed.*

#### NEW FIRST ARTICLE (The scope of the present articles)<sup>5</sup>

10. The CHAIRMAN invited the Commission to consider the text of a new first article proposed by the Drafting Committee, which read :

The present articles relate to treaties concluded between States.

*The new first article was adopted without comment.*<sup>6</sup>

#### ARTICLE 1 (Use of terms)<sup>5</sup>

11. The CHAIRMAN invited the Commission to consider the revised text of article 1, paragraph 1 (*a*) proposed by the Drafting Committee, which read :

"(a) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

*Article 1, paragraph 1 (a) was adopted without comment.*<sup>7</sup>

#### ARTICLE 2 (Treaties and other international agreements not within the scope of the present articles)<sup>5</sup>

12. The CHAIRMAN invited the Commission to consider the revised text of article 2 proposed by the Drafting Committee, which read :

<sup>5</sup> For earlier discussion, see 777th meeting, in particular paras. 71-73 and 78.

<sup>6</sup> For formal vote on the new first article, see 811th meeting, para. 104.

<sup>7</sup> For formal vote on article 1, paragraph 1 (*a*), see 811th meeting, para. 104. For resumption of discussion on article 1, see 820th meeting, paras. 15-26.

"The fact that the present articles do not relate

(a) To treaties concluded between subjects of international law other than States or between such subjects of international law and States, or

(b) To international agreements not in written form shall not affect the legal force of such treaties or agreements, nor the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles."

13. Mr. ROSENNE said that the Drafting Committee was to be congratulated on solving the difficult problems posed by the first three articles. Article 2 should, however, be transposed to follow the new first article.

14. With regard to the drafting of the article, he considered that sub-paragraph (*a*) should be modified so as to refer to States before the other subjects of international law, as that arrangement would be more consistent with the Commission's decision to limit the scope of the articles to treaties between States. The sub-paragraph would then read : "to treaties concluded between States and subjects of international law other than States or between such other subjects of international law".

15. Stylistically, it would be more correct in sub-paragraph (*b*) to substitute the word "does" for the word "shall" after the words "in written form". The comma should be deleted after the word "agreements" and the word "or" substituted for the word "nor", so as to avoid a double negative. Perhaps an alternative to the overworked word "subject" could be found, though he could not think of one himself.

16. The CHAIRMAN said that Mr. Rosenne had raised two different questions; one related to the arrangement of the three articles, the other to the wording of article 2. So far as the first question was concerned, he (the Chairman) considered that article 2 should follow immediately the new article 1, to which it was the logical sequel. However, that was a matter to be settled by the Drafting Committee.

17. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Rosenne's suggestion for changing the place of article 2, said that the order of the first three articles had been discussed at great length in the Drafting Committee, which had finally concluded that the proposed order, though not entirely satisfactory, was the best possible as well as the most logical. To include article 2 as part of the new article 1 would be inelegant and logically unacceptable. It was an independent article dealing with two separate matters, the second of which was international agreements not in written form; and since such agreements would be mentioned for the first time in article 1, the definitions article—which would be article 2—Mr. Rosenne's suggestion would mean formulating the safeguarding reservation concerning oral agreements before they had been excluded from the scope of the draft articles.

18. Mr. ROSENNE said that one of the reasons which had prompted his suggestion was that the first three articles were closely inter-connected but if, as he feared, article 1 was to contain a long list of definitions, the present continuity would be broken. However, the point

could be left over for consideration when the Commission came to decide the final order of the articles.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he acknowledged that article 2 was connected with the new first article, but still believed that Mr. Rosenne's preoccupation was exaggerated. The title of the article clearly indicated its subject matter.

20. Mr. RUDA said he agreed with Mr. Rosenne that the new first article and article 2 both dealt with the same subject and were similar in scope and so should perhaps be amalgamated.

21. Mr. ELIAS said that any question of the order of articles should be held over until the 1966 summer session.

22. Mr. TUNKIN said he agreed that the Drafting Committee would have to review the general structure of the whole draft later, but in the meantime suggestions about the order of the articles could usefully be made and would be taken into account.

23. The CHAIRMAN said that it was for the Drafting Committee to settle the final presentation of the three articles.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that he had always assumed that the Commission would be free to change the order of the articles until the very last moment.

25. Mr. ELIAS said he was opposed to Mr. Rosenne's first drafting suggestion concerning sub-paragraph (b). The others were acceptable.

26. Sir Humphrey WALDOCK, Special Rapporteur, said he doubted whether Mr. Rosenne's drafting suggestion for sub-paragraph (a) was an improvement.

27. Mr. ROSENNE asked that his drafting suggestions should be referred to the Drafting Committee.

*It was so agreed.*

*Article 2 was referred back to the Drafting Committee.<sup>8</sup>*

#### ARTICLE 3 (Capacity of States to conclude treaties)<sup>9</sup>

28. The CHAIRMAN invited the Commission to consider the new text of article 3 proposed by the Drafting Committee, which read :

" 1. Capacity to conclude treaties is possessed by every State.

2. The capacity of member States of a federal union to conclude treaties depends on the federal constitution. "

29. Mr. VERDROSS said he had two remarks to make on paragraph 2 of article 3. First, a distinction was normally drawn between a federal State and a federation of States, whereas the text referred to a federal union; did that term denote both a federal State and a federation of States? More than a terminological question, a question of substance was involved. Secondly, the capacity of a member State to conclude treaties did

not depend on the federal constitution, but on international law, under which the capacity to conclude treaties was dependent on the effective power to do so.

30. Mr. JIMÉNEZ de ARÉCHAGA said that the rule stated in paragraph 2 of article 3 was dangerous from a political point of view and unsound from a scientific point of view; it meant a complete abdication by international law of one of its main functions, that of determining its own subjects and of recognizing the *ius tractatum* of States.

31. The question whether a member State of a federal union possessed, or did not possess, the capacity to enter into treaties did not depend exclusively on the provisions of the constitution of the federal union; such institutions of international law as recognition had an important influence in the matter.

32. He had already pointed out, during the discussion of article 8,<sup>10</sup> the grave consequences that would result from the combination of the provisions of article 3, paragraph 2, with those of article 8, on accession to general multilateral treaties. A federal State could by amending its constitutional law so as to grant to all its member States the right to enter into treaties, enable those member States to become parties to a treaty; the federal State would thus, without altering its substantial obligations, gain a very large number of votes in the treaty system, thereby acquiring a preponderant voice in the operation of that system. For example, a federal State which was a member of a Customs union could gain control over the operation of the union by amending its constitution so as to allow its member States to become separate members of the union.

33. Mr. TUNKIN said that paragraph 1 stated a general rule. There was no need to define the word " State ", which indeed had never been defined in any international instrument. States themselves had to decide whether or not a particular entity was a State, since no international organ existed that could adjudicate in the matter. On that premise, paragraph 2 could safely be retained, though he agreed with Mr. Verdross that it would be preferable, in the interests of precision and in order to avoid complications, to use the term " federal State " rather than " federal union ".

34. Paragraph 2 was a logical consequence of paragraph 1, because a member State of a federal State—and whether or not it was a State would depend on the written federal constitution—under international law possessed the right to enter into treaties.

35. Mr. ROSENNE said that he had no difficulty in accepting the idea underlying paragraph 1, but it stated the obvious. As Mr. Scelle used to say, although the whole of international law was concerned with States, no one had ever succeeded in defining the concept of " State ".

36. On a drafting point, he suggested that the English version of paragraph 1 should be redrafted on the lines of the French; the words " Every State ", not " capacity ", should be the subject of the sentence.

<sup>8</sup> For resumption of discussion, see 816th meeting, para. 2.

<sup>9</sup> For earlier discussion, see 779th meeting, paras. 1-88, and 780th meeting, paras. 1-16.

<sup>10</sup> 794th meeting, para. 17.

37. On paragraph 2, his views accorded closely with those of Mr. Jiménez de Aréchaga. The failure to resolve the legal issue as to whether or not a unit of a federal State contracted in its own name or in the name of the federal State as a whole, made him seriously doubt whether paragraph 2 was either accurate or useful.

38. Mr. TSURUOKA said that, although not convinced of the usefulness of article 3, he would not oppose the retention of paragraph 1, whatever the wording. On the other hand, he thought that paragraph 2 should be omitted altogether, for, as Mr. Tunkin had shown, it added very little and might even be misleading.

39. Mr. AMADO said that what was in issue was not the capacity of States members of a federal union, but that of States regarded as such for the purposes of international law. Paragraph 2 should therefore be deleted.

40. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion paragraph 2 should stand, but, as Mr. Tunkin had suggested, should follow rather the 1962 text, for two reasons. First, the participation of the members of a federal union in international life was a fact, and secondly, a provision stipulating that the capacity depended on the federal constitution would lay down the criterion for determining that capacity.

41. Mr. PAL said he was in favour of deleting paragraph 2 because if, after federation, member States retained their status as States their capacity to conclude treaties was covered by paragraph 1. But if a political union resulted in the formation of another State, with the consequence of depriving the member States of the status of "State", then their case would be outside the scope of the present set of articles altogether, for those articles related only to treaties between States. Unless, therefore, paragraph 2 was introduced to serve the ulterior purpose of defining the treaty-making capacity of such member States, whether still States or not, the paragraph was not at all pertinent. The present convention nowhere purported to indicate the requirements of statehood. It would therefore be still more surprising if suddenly the status of such member States was thus taken up.

42. Mr. REUTER said he shared Mr. Jiménez de Aréchaga's and Mr. Pal's opinion concerning paragraph 2. So delicate a question could hardly be settled by constitutional law; besides, why should the federal State receive such prominence? The expression "federal union" seemed better. In his view, the right course was simply to delete paragraph 2.

43. Mr. YASSEEN said that, while paragraph 2 was liable to raise many difficulties, those difficulties should not be evaded. The federal phenomenon was a fact and could play an important part. The draft should therefore contain a paragraph providing for the case of States members of a federation. Moreover, to speak of the "federal State" would mean in effect limiting the scope of the text, for in that event only one aspect of the federal phenomenon would be covered. Federation did not always take the form of a federal State; it could also take other forms. Consequently, the expression "federal union", although not entirely satisfactory,

was none the less better, because more general, than the expression "federal State".

44. Mr. PESSOU said that the modern trend was towards association, as was illustrated by the example of the African countries. His own country had at one time been a member of the French-African Community, whose President, General de Gaulle, had then been responsible for settling certain questions of common interest. The deletion of paragraph 2 would not do away with reality; on the contrary, the Commission should endeavour to devise a formula corresponding to reality. On that point, he shared Mr. Yasseen's opinion.

45. Mr. JIMÉNEZ de ARÉCHAGA said that the suggestion to return to the 1962 text would not solve the problem, since that formulation was open to the same criticism as the text newly proposed. It was not accurate to say that the capacity of a member State of a Federal Union to enter into treaties depended only on the federal constitution; the community of States, and the other individual States, had to accept the entity as a member of the international community. That point was particularly important in modern times, when relations between States were conducted not just on a bilateral basis but also on a multilateral basis. It would be extremely dangerous to say that it was a matter to be determined exclusively by the federal constitution whether a member State of the federal union could become a party to an international treaty; to be able to do so, it had to be recognized as an independent State, capable of maintaining relations with other States and of fulfilling its international obligations.

46. Reference had been made to the case of States which joined a union inaccurately termed "federal" but nevertheless retained their separate treaty-making capacity to the full extent. That case was not relevant to the discussion because a State which retained its full treaty-making capacity would be covered by the provisions of paragraph 1, not by those of paragraph 2.

47. Nor did he believe that any strong argument could be derived from the very limited treaty-making capacity of Swiss cantons and German *Länder* in local matters. Those examples were of minor importance and had an historical explanation. Moreover, it would be a misreading of the Swiss practice to say that the cantons had an independent treaty-making capacity; there was every indication that the consent of the federal authorities was required for treaties made by cantons.

48. Mr. VERDROSS said that if a member State of a federal union was a State within the meaning of international law, its treaty-making capacity was governed by paragraph 1, and paragraph 2 was therefore redundant.

49. If paragraph 2 meant anything, the expression "member States" could only be taken to have the meaning it had in internal law, not the meaning it had in international law. That being so, the paragraph spoke of the decentralization of the treaty-making capacity. It was only in that respect that the treaty-making capacity of member States depended on the federal constitution, but in such a case the subject really concluding treaties was the federal State acting through a decentralized organ. He could not accept paragraph 2

unless it was interpreted in the sense which he had just indicated.

50. Mr. RUDA said that the treaty-making capacity of a member State of a federal union depended on whether it fulfilled the requirements for being regarded as a State under international law. It was for international law to determine whether the entity constituted a State or not and, if it did, what was its treaty-making capacity. That capacity would not depend on the terms of the federal constitution; it was determined by international law, which took the constitution into account. He considered that paragraph 2 should be deleted.

51. Mr. AGO said he did not consider that the distinction between "a State under international law" and some other category of States was capable of solving the problem. The international personality of a subject was evidenced in the first place by the fact that it possessed treaty-making capacity, and consequently the question of capacity could not be settled by reference to international personality.

52. Federation was a historical phenomenon, instances of which occurred in modern times and would continue to do so; it was not therefore sufficient to look at existing cases for the purpose of laying down a rule.

53. In some cases federations were the result of a desire for association. Several States, each of which was a subject of international law and possessed full capacity to conclude treaties, might decide to form an association; they gave the federal State an international personality and a capacity to conclude treaties distinct from that which they had previously possessed. In extreme cases, the member States lost their treaty-making capacity entirely and consequently ceased to exist as subjects of international law. Cases arose, however, where member States retained part of their treaty-making capacity. For example, in the German Empire, which had been largely a centralized State, Bavaria had to some extent retained its own treaty-making capacity; in exercising that capacity it had in no way acted as an organ of the German Empire. In other cases, federations were the result of a tendency towards dissociation or decentralization. When decentralization transcended purely internal matters and affected foreign policy, the States members of the federation possessed a limited capacity to conclude treaties.

54. In either case, it was obviously necessary to refer to the federal constitution in order to ascertain how the treaty-making capacity was apportioned. He could understand the concern expressed by Mr. Jiménez de Aréchaga and Mr. Ruda: they were thinking of cases where, in consequence of a change of constitution, a member State of a federation had the right to participate in an international conference and to become a party to a treaty. It was precisely for that reason that he had always thought it necessary to draw a clear distinction between the capacity to conclude a treaty and the so-called right, which every State should possess, to participate in a multilateral treaty; capacity was a matter affecting only the State concerned, whereas participation in a treaty was one affecting all the parties.

55. He did not think there was the slightest risk in including in article 3 a paragraph on the question of

federal unions. There was no great difference of substance between paragraph 2 as adopted in 1962, and paragraph 2 of the new text submitted by the Drafting Committee. Since, however, a member State's treaty-making capacity was nearly always limited, it would be advisable to use some such language as "The capacity of member States of a Federal union to conclude treaties and the limits of that capacity depend on the federal constitution".

56. If the Commission was reluctant to adopt such a rule and decided to delete paragraph 2, he would then prefer to see the whole article dropped, because paragraph 1 by itself was ambiguous and would in certain circumstances be inaccurate.

57. Mr. TUNKIN said that the problem was a real one, in view of the existence of federal unions with member States having the capacity to conclude treaties. Paragraph 1 by itself would not therefore be sufficient, since it would not cover a certain field of treaty-making. The development of various types of unions of States, on the basis of the self-determination of peoples, was a modern phenomenon. The formation of such a union usually involved some limitation on the freedom of action of its members but did not deprive them of their essential characteristics as States; hence the practical importance of the problem under discussion. A State which entered into negotiations with a member State of a federal union would wish to know what was the capacity of that member State and what limitations were imposed upon it under constitutional law.

58. He could accept the introduction of the additional words proposed by Mr. Ago, which would bring into the provision a special reference to the limits set by constitutional law on the treaty-making capacity of the members States of a union.

59. Mr. AMADO said that the State referred to in paragraph 1 was the State which was the subject of international law. A State's treaty-making capacity was determined by its status as a subject of international law. It was self-evident that the States members of a federation possessed or acquired that capacity if they were, or became, subjects of international law. Paragraph 2 was therefore only an extension of paragraph 1.

60. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Ago's proposal would not solve the problem. Paragraph 2 would still have the effect, when taken in conjunction with the provisions of article 8, of making an important change in international law by enabling a member State of a federal union to become a full member of the international community: independence would no longer be a requirement for participation in general multilateral treaties and in the conferences which adopted such treaties.

61. It had been pointed out by Mr. Ago that a State was always free not to enter into treaty relations with an entity which it did not wish to recognize as a full member of the international community; but that remedy would only apply to bilateral treaties, whereas the problem under discussion was connected with that of participation in multilateral treaties.

62. Mr. TSURUOKA said he still thought that article 3 should be deleted altogether, though he would

not oppose paragraph 1 if the Commission wished to retain it. If it was retained, paragraph 2 might be drafted to read: "In cases where the capacity of a member State of a federal union to conclude treaties is recognized by international law, the scope of this capacity shall be defined by the federal constitution".

63. Mr. AGO asked Mr. Amado how he would determine whether a member State of a federal union was or was not a subject of international law. In his (Mr. Ago's) opinion, the only way was to inquire whether the State had the treaty-making capacity, and that question had to be answered by reference to the federal constitution.

64. There was nothing new about the rule proposed in paragraph 2. If, for example, Brazil adopted another constitution recognizing each member State's treaty-making capacity, then clearly each of the member States would have that capacity. The rule providing for *renvoi* to internal law in such matters already existed in international law.

65. He could support Mr. Tsuruoka's suggested redraft, but like him thought that it would be better to delete the whole article.

66. Mr. JIMÉNEZ de ARÉCHAGA said that, if the Constitution of Brazil were so amended as to enable the member States to conclude treaties, the other States of the international community would not be obliged to respect the literal terms of the new Brazilian Constitution; they would have the power and the duty to determine whether, under international law, the letter of the Constitution corresponded to reality and would consider whether the member State were truly independent States.

67. Mr. AMADO said that it was utopian to claim that, because a federal constitution recognized the treaty-making capacity of member States, those member States were States within the meaning of international law.

68. The CHAIRMAN, speaking as a member of the Commission, said that the question was in no way utopian, nor was it new. It concerned a matter of actual fact. The treaty-making capacity of member States of a federation had been recognized; that had happened in the case of Bavaria under the German Constitution established at Versailles in 1871, in order to enable Bavaria to make a Concordat with the Vatican. At the moment, the Province of Quebec, relying on its own interpretation of the Canadian Constitution, was proposing to conclude a cultural agreement with France. Such a claim by a member State was sometimes disputed by the central government. If, despite the fact that the claim was disputed, the treaty-making capacity of the State member of a federation was recognized by another contracting State, the latter might be accused of interference in the internal affairs of a State.

69. Mr. AMADO said that the best way to reconcile the different views which had been expressed would be to delete the whole article, for the Commission would gain little credit by simply stating the obvious.

70. Mr. PESSOU urged the Commission to take account of current trends, particularly in Africa, and to lay down a flexible rule concerning the treaty-making capacity of member States of a federal union. For that reason, he supported the formula proposed by Mr. Ago.

71. Mr. ROSENNE said that the question under discussion would become more than an academic issue, if, for example, a doubtful treaty was presented to the Secretary-General for registration. So far as he was aware, no such request had been made or was ever likely to be made with respect to the so-called cultural "agreement" between the Canadian Province of Quebec and France, which neither party regarded as an international treaty. In fact, the Secretary-General's practice as registrar of treaties, following on the previous practice of the Secretary-General of the League of Nations, had shown a commendable capacity for adaptation to changing situations.

72. In the light of the discussion, he had arrived at the conclusion that paragraph 1 possibly said a little more than the merely obvious; as pointed out by Mr. Pal, it would serve to cover some aspects of the problem of the federal State, and he would accordingly favour its retention.

73. As far as paragraph 2 was concerned, he had been impressed by Mr. Ago's remark that the real problem to be solved concerned not so much capacity itself as the extent of such capacity. The problem of drafting such a provision was a difficult one, and he therefore proposed that the whole of article 3 should be referred to the Drafting Committee for reconsideration in the light of the discussion.

74. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, in his fourth report, he had suggested the deletion of article 3.<sup>11</sup> The question of capacity was much more complex than the provisions of that article might suggest. He considered therefore that the problem should be either dealt with thoroughly or not at all. However, he was prepared to accept the important, if self-evident, provision embodied in paragraph 1.

75. With regard to paragraph 2, he said there was some uncertainty as to who was the party to the treaty in the case of a treaty concluded by a member State of a federal union. He suspected that in Switzerland there might be more than one view on that point, according to whether the jurist concerned took a federalist approach or an approach favourable to "States' rights". There was undoubtedly a danger that paragraph 2 might be interpreted as an acknowledgement by the Commission that, under international law, member States of a federal union had in principle the capacity to conclude treaties. Paragraph 2 would not give rise to much objection if, as suggested by Mr. Ago, it was amended to emphasize the limits of the treaty-making capacity of the member State of a federal union which was a State within the meaning of paragraph 1.

76. Reference had been made to the danger of a federal State encouraging its component elements to exercise their capacity to enter into general multilateral treaties, thereby multiplying the number of parties and the number of votes. He believed that any attempt of that kind would inevitably meet with opposition.

77. If the Commission decided to retain paragraph 2, it would be desirable to keep to the expression "federal

<sup>11</sup> A/CN.4/177, para. 3 of the Special Rapporteur's observations *ad* article 3.

union". There would also be a great advantage in introducing, as suggested by Mr. Ago, a reference to the limits of capacity; such a reference would help to make it clear that the Commission was not working on the assumption that the capacity of the entities in question to conclude treaties existed in all cases.

78. Mr. AGO said he agreed with the Special Rapporteur that the text proposed might create the impression that the Commission was inclined to recognize the existence of the treaty-making capacity in the case of member States of a federal union. To avoid that impression paragraph 2 might perhaps be drafted to read: "The existence of the capacity of member States of a federal union to conclude treaties and the limits of this capacity depend on the federal constitution". But he suggested that the matter should receive further thought in order that the most satisfactory formula could be worked out.

The meeting rose at 1 p.m.

### 811th MEETING

*Friday, 25 June 1965, at 10 a.m.*

*Chairman: Mr. Milan BARTOŠ*

*Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen*

#### Composition of the Drafting Committee

1. The CHAIRMAN suggested that, in order to relieve Sir Humphrey Waldoock, whose time would be entirely absorbed during the rest of the session by work on the topic of the law of treaties, Mr. Rosenne should be appointed to serve on the Drafting Committee to assist in preparing the draft on special missions. If there was no objection, he would consider that the Commission agreed to that suggestion.

*It was so agreed.*

#### Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

*(resumed from the previous meeting)*

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
*(continued)*

ARTICLE 3 (Capacity of States to conclude treaties)  
*(continued)*<sup>1</sup>

2. The CHAIRMAN invited the Commission to continue its consideration of article 3 as proposed by the Drafting Committee.

3. Mr. PAL said that the article should be confined to paragraph 1; paragraph 2 should be deleted. The draft articles dealt with treaties between States, and article 3 dealt with the treaty-making capacity of States as such; the Commission had nowhere attempted to define "State" or to lay down, in general terms, the requisites for an entity to be regarded as a State.

4. If a number of States entered into a federation but still retained their statehood, paragraph 1 would apply. If, on the other hand, the federated entities did not amount to States, they would be beyond the scope of the draft convention, unless paragraph 2 was intended to provide that, notwithstanding federation, the federated entities would retain statehood if the federal constitution so allowed. He was opposed to paragraph 2, because the Commission was not dealing with the question of what constituted a State. The provisions of paragraph 1 dealt with all the matters with which the Commission was concerned in that context.

5. Mr. VERDROSS proposed as a compromise that paragraph 2 should be deleted and the following sentence added to paragraph 1: "This capacity may be limited by an international convention or by the constitution of a federal State". That formula took into account the problem of federalism to which several speakers, notably Mr. Yasseen, had referred. It made it clear, furthermore, that international capacity flowed not from domestic law as such but only from international law. Moreover, it indicated that the capacity recognized by international law might also be limited by international law, either by an international convention or by the fact that a State became part of a federal State, a case likewise governed by international law.

6. It was a formula which applied just as much to historic federalism—the Swiss cantons, or Bavaria from the establishment of the Empire until the fall of the German monarchy—as to modern federalism—the League of Arab States or the European Economic Community, where the capacity to conclude commercial treaties would one day be vested not in the member States but in the Community. It also covered the case of member States of a federation whose international capacity had been recognized by the Covenant of the League of Nations or by the Charter of the United Nations.

7. On the other hand, it excluded member States of a federation whose capacity was based solely on internal law, and which were in fact organs of the federal State, in cases where the treaty-making capacity had simply been decentralized, a situation with which the Commission should not concern itself.

8. If the Commission adopted that formula, it might indicate in the commentary that the problem dealt with in paragraph 2 of the Drafting Committee's text was a problem of internal law, and that any State could decentralise the treaty-making capacity, but that in that case the subject which concluded the treaties was the federal State, for a new subject of international law could not be brought into existence by means of internal law.

9. Sir Humphrey WALDOCK, Special Rapporteur, said he feared that Mr. Verdross's proposed text would

<sup>1</sup> For text see 810th meeting, para. 28.