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THE QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey* of the question and a preliminary list* of the relevant treaties published in the United Nations Treaty Series

*/ The present document contains the short bibliography and Chapter I of the historical survey. The remainder of the working paper will be issued as addenda to the document.

71-01656

122 p.

TABLE OF CONTENTS

Page

Page

INTRODUCTION

1. By paragraph 5 of resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that:

> "the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question".

During its twenty-second session, held in 1970, the Commission included [1] in its programme of work the question recommended by the General Assembly, which, for the sake of brevity, will be referred to hereafter as "the question of treaties concluded by international organizations". The Commission also set up a Sub-Committee of thirteen members under the chairmanship of Mr. Reuter, "with the task of considering preliminary problems involved in the study of the new topic". [2]

2. At its 1078th meeting, on 26 June 1970, the Commission adopted a report submitted by the Sub-Committee, which, inter alia, requested the Secretary-General to prepare "as soon as possible (preferably by 1 January 1971) a working paper on the subject, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations Treaty Series". [3]

3. The present working paper has been prepared in pursuance of that request. It is divided into three parts entitled respectively

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1/ Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 10 (A/8010), para. 89.

2/ Ibid.

3/ Ibid.

"Short bibliography", "Historical survey"* and "Preliminary list of relevant treaties published in the United Naticns Treaty Series"*.

*/ See footnote on cover page.

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SECOND PART : HISTORICAL SURVEY

4. In accordance with what appears to have been the wish of the Sub-Committee, as expressed by several of its members, the historical survey is limited to the consideration in United Nations bodies of the question of treaties concluded by international organizations.

5. The question was considered by the International Law Commission from 1950 to 1966, not as an independent subject but within the broader framework of the topic of the law of treaties.[5/] On 18 July 1966, the Commission adopted its final draft articles on the law of treaties and submitted them to the General Assembly in Chapter II of its report on the work of its eighteenth session. By resolutions 2166(XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967, the Assembly convened the United Nations Conference

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5/ In addition, passing references to that question were made during the consideration of the topic of relations between States and international organizations. The Special Rapporteur on the topic, Mr. El-Erian, devoted paragraphs 150 to 159 of his first report to the juridical personality and treaty-making capacity of international organizations (Yearbook of the International Law Commission, 1963, vol. II, A/CN.4/161 and Add.1, pp. 179 - 181; see also ibid., 1963, vol. II, A/CN.4/L.103, p. 186). The matter was briefly discussed by the Commission in 1963 at its 717th and 718th meetings (ibid., 1963, vol. I; for a summary of the discussion see ibid., 1967, vol. II, A/CN.4/195 and Add.1, p. 138, paras. 27 and 28). In 1964, however, the majority of the Commission expressed the view that "for the purpose of the [Commission's] immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority" (ibid., 1964, vol. II, A/5809, p. 227, para. 42). That view is reflected in the title of the draft articles adopted by the Commission on the topic, namely, "Draft articles on representatives of States to international organizations". These draft articles do not deal with the treaty-making capacity of international organizations. They do, however, contain provisions on a distinct although related question: that of the powers of a permanent representative or a permanent observer to represent his State in the conclusion of treaties between that State and the international organization to which he is accredited (see article 14, ibid., 1968, vol. II, A/7209/Rev.1, p. 206 and article 58, A/8010).

on the Law of Treaties and referred to it as the basic proposal the final draft articles adopted by the Commission. The Conference held two sessions in Vienna, in 1968 and 1969 respectively. At the end of the second session, it adopted the Vienna Convention on the Law of Treaties. The scope of the Convention was expressly limited by article 1 to treaties between States. There was, however, some discussion in the Conference of the question of treaties concluded by international organizations. As a result of that discussion the Conference passed a resolution on the basis of which the General Assembly adopted the recommendation to the International Law Commission quoted above.

6. In the light of the foregoing, the Historical Survey is divided into the three following chapters:

I. Consideration by the International Law Commission of the question of treaties concluded by international organizations.

II. Consideration by the United Nations Conference on the Law of Treaties of the question of treaties concluded by international organizations.*

III. Recommendation to the International Law Commission by the General Assembly concerning the question of treaties concluded by international organizations (paragraph 5 of resolution 2501 (XXIV).*

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*/ See footnote on cover page.

Chapter I

CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION OF THE QUESTION OF TREATIES CONCLUDED BY INTERNATIONAL ORGANIZATIONS

7. Article 1 of the final draft articles on the law of treaties submitted by the International Law Commission in 1966 to the General Assembly limited the scope of the articles to treaties concluded between States. The adoption of that provision by the Commission in 1965 was the outcome of a discussion from 1950 onwards of the question whether the draft articles on the law of treaties should also deal with treaties concluded by international organizations. The present chapter reviews that discussion and examines the decisions taken on the question by the Commission as well as the manner in which those decisions were implemented by the Special Rapporteurs on the law of treaties and by the Commission itself in the successive draft articles which it adopted from 1951 to 1966.

8. The study by the Commission of the topic of the law of treaties and hence its treatment of the question dealt with in this Historical Survey may be divided into two phases covering respectively the periods 1950 - 1959 and 1960 - 1966. During the first phase the Commission adopted two sets of draft articles, on which no action was taken by the General Assembly. During the second phase it adopted the provisional draft articles on the law of treaties which, after revision by the Commission in 1965 and 1966, became the final draft articles referred by General Assembly resolution 2166 (XXI) to the Conference on the Law of Treaties "as the basic proposal for consideration by the Conference".

A. THE FIRST PHASE: 1950 - 1959

9. At its first session in 1949 the International Law Commission included the law of treaties on its priority list and appointed Mr. Brierly as Special Rapporteur. On 14 April 1950, Mr. Brierly submitted to the Commission his first report on the topic.

1. Mr. Brierly's first report on the law of treaties and the decisions taken by the Commission on 21 and 22 June 1950

10. Mr. Brierly's first report contained a draft convention on the law of treaties [6] with commentaries. The draft convention consisted of eleven articles. Articles 1 and 2 dealt with the use of terms. They read as follows:

"Article 1

"Use of the term 'treaty'

"As the term is used in this Convention

(a) A 'treaty' is an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto.

(b) A 'treaty' includes an agreement effected by exchange of notes.

(c) The term 'treaty' does not include an agreement to which any entity other than a State or international organization is or may be a party.

"Article 2

"Use of certain other terms

"As the terms are used in this Convention

(a) A 'State' is a member of the community of nations.

(b) An 'international organization' is an association of States with common organs which is established by treaty."

6/ Yearbook of the International Law Commission, 1950, vol. II, A/CN.4/23, pp. 223-224.

11. Article 3 of the draft convention submitted by Mr. Brierly was entitled "Capacity in general". It read:

> "All States and international organizations have capacity to make treaties, but the capacity of some States or organizations to enter into certain treaties may be limited."

The other articles of the draft convention dealt with the exercise of the capacity to make treaties, with the authentication, acceptance, and entry into force of treaties and with reservations to treaties. They referred both to treaties concluded by States and to treaties concluded by international organizations.

12. In his commentary Mr. Brierly gave the following explanation for the inclusion in the draft convention of provisions on agreements to which international organizations are parties:

> "This draft differs from any existing draft in recognizing the capacity of international organizations to be parties to treaties. That capacity was not indeed denied by the Harvard Draft Convention which, however, arbitrarily excluded from its scope any agreement to which any entity other than a State was a party. In so far as concerned the agreements of international organizations, this attitude was adopted 'because of their abnormal character and the difficulty of formulating general rules which would be applicable to a class of instruments which are distinctly sui generis'. 7/ It is now, however, impossible to ignore this class of agreements or to regard the existence as an abnormal feature of international relations. For the International Court of Justice has observed, of the United Nations, that 'The Charter has not been content to make the Organization created by it merely "a centre for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 4). It has equipped that centre with organs, and has

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7/ Supplement to the American Journal of International Law, vol. 29, No. 4 (1935), p. 692.

> given it special tasks. It has defined the position of the Members in relation to the organization by ... providing for the conclusion of agreements between the Organization and its Members. Practice -- in particular the conclusion of conventions to which the Organization is a party -- has confirmed this character of the Organization ...' 8/ The difficulty of finding rules common to the treaties of States and to those of international organizations is, moreover, not insuperable." 9/

13. The draft convention contained in Mr. Brierly's report was considered by the Commission at its second session, held in 1950. While the Commission did not at that session adopt a set of articles on the law of treaties, it took several decisions concerning the draft convention. Two of those decisions related to the question of treaties concluded by international organizations.

14. The first decision was taken at the Commission's 51st meeting, on 21 June 1950. At that meeting the Chairman - Mr. Scelle - asked the Commission to pronounce itself on the following question:

> "Is it the sense of the Commission that agreements between an international organization and a State or between two international organizations should be treated in the draft?" 10/

15. Faris Bey el-Khoury recalled 11/ in this connexion that he had earlier expressed the view 12/ that an international

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8/ Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 178-179.

9/ Yearbook of the International Law Commission, 1950, vol. II, A/CN.4/23, p. 228, para. 26. For the commentaries on paragraph b) of article 2 and on article 3, see ibid., p. 229, para. 39 and p. 230.

10/ Yearbook of the International Law Commission, 1950, vol. I, 51st meeting, para. 2.

11/ Ibid., 1950, vol. I, 51st meeting, para. 60.

12/ Ibid., 1950, vol. I, 50th meeting, para. 16.

organization could be a party to a treaty only if it were one of the regional agencies contemplated by the Charter, that is to say a group of States such as the Arab League or the Organization of American States. Mr. Hudson observed that there was little experience of agreements concluded by international organizations. He suggested therefore that the draft articles on the law of treaties should not deal with such agreements. The Commission could state in its report that it recognized that international organizations were capable of making treaties but that it was awaiting future developments before considering the matter. 13/

16. On the other hand, Mr. Yepes saw no reason why the Commission should postpone consideration of the question of agreements to which international organizations were parties. 14/ Mr. Alfaro and Mr. Córdova agreed with that view. Mr. Alfaro said, however, that the Commission should avoid a sweeping statement applicable to all international organizations and should explain that the provisions which it intended to draft would apply to international organizations as far as was feasible. 15/ Mr. Córdova drew a distinction between the various international organizations with regard to their capacity to make treaties. In the case of an organization of private persons that capacity could not possibly be admitted. It could not be questioned, however, in

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13/ Ibid., 1950, vol. I, 51st meeting, para. 55b.

14/ Ibid., 1950, vol. I, 51st meeting, para. 57.

15/ Ibid., 1950, vol. I, 51st meeting, para. 63.

the case of an organization established by a group of States and expressly endowed with the capacity to make treaties. That applied, for example, to the United Nations. The capacity to make treaties depended therefore on the constitution of the organization concerned. Accordingly, Mr. Córdova believed that the question should be dealt with by the Commission in a restricted sense. 16/

17. Mr. Sandström took it for granted that the United Nations had the power to make treaties and felt that other international organizations could have the same power under their respective consitutions. The Commission therefore could not ignore the matter. 17/ Speaking as a member of the Commission Mr. Scelle also expressed the view that the capacity of some international organizations to make treaties was unquestioned. Hence, the draft articles on the law of treaties should deal with agreements to which international organizations were parties. All the provisions of those draft articles, however, would not automatically apply to such agreements and a specific decision should be taken for each particular provision. 18/

18. Speaking as Chairman, Mr. Scelle observed that there was no necessity to put to a vote the question he had submitted to the Commission earlier in the meeting 19/ since the majority of the members had already decided the point by expressing themselves in favour of including international organizations in the

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16/ Ibid., 1950, vol. I, 51st meeting, para. 67.

17/ Ibid., 1950, vol. I, 51st meeting, para. 62.

18/ Ibid., 1950, vol. I, 51st meeting, para. 72.

19/ See above para. 14.

draft convention and continuing the study of the matter. He added, however, that this was "a provisional conclusion like all directives given to the [Special]Rapporteur". 20/

19. The second decision relating to the question of treaties concluded by international organizations was taken by the Commission at its 52nd meeting, on 22 June 1950. The Commission considered at that meeting a proposal by Mr. Hudson that article 3 21/ of the draft convention submitted by Mr. Brierly should be amended to read:

> "1. All States have the capacity to make treaties, but the capacity of a State to enter into certain treaties may be limited (by international regulation). 22/
>
> "2. An international organization may be endowed with the capacity to make treaties." 23/

The Commission postponed consideration of paragraph 1 of Mr. Hudson's amendment and adopted paragraph 2 without objection. 24/

20. The Commission devoted to the law of treaties chapter I of part VI of its report on the work of its second session. Part VI was entitled "Progress of work on topics selected for codification". Chapter I consisted of a summary of the Commission's discussion of Mr. Brierly's report. The passage in the chapter

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20/ Yearbook of the International Law Commission, 1950, vol. I, 51st meeting, para. 75.

21/ See above para. 11.

22/ Yearbook of the International Law Commission, 1950, vol. I, 52nd meeting, para. 50a.

23/ Ibid., 1950, vol. I, 52nd meeting, para. 72.

24/ Ibid., 1950, vol. I, 52nd meeting, paras. 70-72a.

relating to the question under consideration in this Survey read as follows:

> "A majority of the Commission were . . . in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration." 25/

21. When the Commission's report was considered by the Sixth Committee at the General Assembly's fifth session, the Committee decided

> "not to proceed with a debate on parts V 26/ and VI [of the report], as these parts were intended merely to give information regarding the progress of the work of the International Law Commission on subjects on which final reports would be submitted to the General Assembly at a future session". 27/

2. Mr. Brierly's second report on the law of treaties and the decision taken by the Commission on 7 June 1951

22. On 10 April 1951 Mr. Brierly submitted to the Commission a second report on the law of treaties. 28/ The report contained a revised text of articles 6 to 10 of the draft convention appearing

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25/ Yearbook of the International Law Commission, 1950, vol. II, A/1316, p. 381, para. 162.

26/ Part V of the Commission's report was entitled: "Preparation of a draft code of offences against the peace and security of mankind".

27/ General Assembly, Official Records, Fifth Session, Annexes, agenda item 52, A/1639, para. 2.

28/ Yearbook of the International Law Commission, 1951, vol. II, A/CN.4/43, pp. 70 and ff.

in his first report. While the articles in the first report dealt both with treaties concluded by States and with treaties concluded by international organizations, the revised text was drafted with reference to treaties concluded exclusively by States.

23. Mr. Brierly's second report was considered by the Commission at its third session. In the course of that consideration, on 7 June 1951, Mr. Brierly, who had been elected Chairman of the Commission, put forward a proposal which flowed from the basic principle underlying the revised text contained in that report. The proposal is set out as follows in the summary record of the 98th meeting:

> "The CHAIRMAN [Mr. Brierly] recalled that, the previous year, articles 3, 4 and 5 of the draft Convention on the Law of Treaties, which he had submitted in his report on that subject (A/CN.4/23), had been discussed at length by the Commission but no final conclusion 29/ had been reached. He would like the Commission to adopt the suggestion put forward the previous year by Mr. Hudson, 30/ and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification." 31/

The Commission adopted Mr. Brierly's proposal without discussion. 32/

29/ It will be recalled that the Chairman had specified that the decision taken by the Commission on 21 June 1950 was provisional. (See above para. 18)

30/ See above para. 15.

31/ Yearbook of the International Law Commission, 1951, vol. I, 98th meeting, para. 1.

32/ Ibid., 1951, vol. I, 98th meeting, para. 1.

In so doing, it in effect reversed the provisional decision which it had taken on the matter on 21 June 1950. 33/

24. After the adoption of Mr. Brierly's proposal, Mr. Kerno, Assistant Secretary-General, expressed the hope that the new decision taken by the Commission would not be interpreted as casting doubt on the capacity of certain international organizations to make treaties. He recalled that at its previous session the Commission had agreed that some international organizations, in particular the United Nations, undoubtedly possessed such a capacity. 34/

3. The draft articles on the law of treaties tentatively adopted by the Commission in 1951

25. As a result of its consideration of the law of treaties at the third session, the Commission adopted tentatively ten articles on the topic. 35/ None contained a definition of the term "treaty". The first eight articles dealt with the establishment of the text of treaties, the assumption of treaty obligations, the ratification, entry into force and acceptance of treaties, and accession to treaties. They were based on the revised text contained in Mr. Brierly's second report. 36/ The other two articles dealt with the capacity to make treaties. They were based on articles 3 and 4 of the draft convention contained in

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33/ See above paras. 14 to 18.

34/ Yearbook of the International Law Commission, 1951, vol. I, 98th meeting, para. 2.

35/ Ibid., 1951, vol. II, A/CN.4/L.28, pp. 73-74.

36/ See above para. 22.

Mr. Brierly's first report. [37]

26. In accordance with the decision taken on 7 June 1951 [38] all the articles adopted by the Commission at its third session were drafted for application in the context of treaties concluded between States only. Thus, for instance, article 3, concerning the capacity to make treaties, referred only to States and did not contain the second paragraph relating to the capacity of international organizations which the Commission had adopted at its previous session. [39]

27. The report of the Commission on the work of its third session contained a brief summary of the proceedings concerning the law of treaties. It did not contain, however, the text of the draft articles adopted at that session and made no reference to the question of treaties concluded by international organizations. [40] In particular, it did not mention the decision taken by the Commission on 7 June 1951.

4. Mr. Brierly's third report on the law of treaties

28. On 10 April 1952 Mr. Brierly submitted to the Commission a third report on the law of treaties. [41] The report contained

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37/ See above paras. 10 and 11.

38/ See above para. 23.

39/ See above para. 19.

40/ Yearbook of the International Law Commission, 1951, vol. II, A/1858, p. 139, para. 75. At its 99th meeting, on 8 June 1951, the Commission had expressly decided to omit from the report the text of the articles in question since they "had been only tentatively adopted". (Yearbook of the International Law Commission, 1951, vol. I, 99th meeting, paras. 22 and 23.)

41/ Yearbook of the International Law Commission, 1952, vol. II, A/CN.4/54, pp. 50-56.

a revised version of the draft articles tentatively adopted by the Commission at its third session. In pursuance of the decision taken on 7 June 1951, [42] the revised version referred exclusively to treaties concluded by States. The report was not considered by the Commission because, shortly before the opening of the fourth session, Mr. Brierly resigned from membership. [43]

5. Mr. Lauterpacht's reports on the law of treaties

29. On 4 August 1952 the Commission elected Mr. (later Sir Hersch) Lauterpacht Special Rapporteur on the law of treaties to succeed Mr. Brierly. [44] Mr. Lauterpacht submitted two reports on the topic.

30. The first report [45] was dated 24 March 1953. It contained a set of draft articles divided into three parts entitled respectively "I. Definition and nature of treaties", "II. Conclusion of treaties" and "III. Conditions of validity of treaties". Two of the provisions contained in those draft articles referred to "organizations of States". [46] The first provision appeared in article 1, which read:

"Essential requirements of a treaty

"Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties." [47]

31. Paragraph 3 of Mr. Lauterpacht's commentary on article 1

42/ See above para. 23.

43/ Yearbook of the International Law Commission, 1952, vol. II, A/2163, p. 69, paras. 49 and 50.

44/ Ibid., 1952, vol. II, A/2163, p. 69, para. 51.

45/ Ibid., 1953, vol. II, A/CN.4/63, pp. 90-162.

46/ For the meaning of this expression see below para. 32.

47/ Yearbook of the International Law Commission, 1953, vol. II, A/CN.4/63, p. 93.

related to the words "including organizations of States". The paragraph reads:

> " 'Treaties are agreements between States, including organizations of States, . . . ' States can exercise their capacity to conclude treaties either individually or when acting collectively as organizations created by a treaty. It follows that agreements concluded by international organizations with States or other international organizations must be regarded as treaties provided that they otherwise qualify as treaties under the terms of this article. These include treaties concluded by the United Nations 48/ with members of the United Nations (such as the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations: United Nations, Treaty Series, vol. II, p. 11), and with States which are not members of the United Nations (such as those with Switzerland on the Privileges and Immunities of the United Nations: ibid., vol. I, p. 163; concerning the Ariana Site, ibid., p. 153; and concerning postage stamps for the Geneva Office of the United Nations: ibid., vol. 43, p. 327); and a number of agreements with specialized agencies and other international organizations. They also include agreements concluded between or by international organizations other than the United Nations such as those concluded by the specialized agencies between themselves (such as the agreement of 1948 between the Food and Agriculture Organization and the World Health Organization providing for close co-operation and consultation in matters of common concern: ibid., vol. 76, p. 172), or with States (for instance, the agreement and accompanying instruments between the International Labour Organization and Switzerland of 27 May 1948: ibid., vol. 15, p. 377.) These agreements to which the United Nations or a specialized agency are parties have been properly registered under the provision of Article 102 of the Charter which requires the registration of treaties and international agreements. It has been suggested that the circumstance which makes them registrable is not that the United

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48/ "See generally C. Parry, Treaty Making Power of the United Nations in British Year Book of International Law, vol. 26 (1949), pp. 108-149." (Mr. Lauterpacht's footnote)

Nations or a specialized agency are a party but that at least one party is a member of the United Nations. However, a considerable number of agreements have been properly registered to which only the United Nations and specialized agencies are parties. 49/ Neither has the use of the instrumentality of registered agreements been limited, among organizations of States, to specialized agencies as may be seen from the agreement of 25 January 1951 between the United Nations International Children's Emergency Fund and the Government of Paraguay concerning the activities of the former in Paraguay (ibid., vol. 79, p. 10). On occasions a number of international organizations appear as a contracting party on the one side and a State on the other. 50/ International practice shows examples, even prior to the establishment of the United Nations, of agreements concluded between States and international organizations or international organs. Thus on 28 June 1932 an agreement, registered with the League of Nations, was concluded between Yugoslavia, Romania and the International Commission of the Danube concerning the setting up of special services at the Iron Gates (League of Nations, Treaty Series, vol. 140, p. 191; M. Hudson, International Legislation, 6, p. 47). On 4 August 1924, the Reparations Commission concluded a comprehensive agreement with Germany (League of Nations, Treaty Series, vol. 41, p. 432; M. Hudson, op. cit., vol. 2, p. 1301). There are other examples of such treaties.

49/ "The reasons which, it may be assumed, have prompted the Secretary-General to register these and other international agreements to which specialized agencies are parties are cogently stated in an article contributed to the British Year Book of International Law, vol. 25 (1948), by Mr. O. Schachter, a member of the Secretariat of the United Nations (pp. 130-132)." (Mr. Lauterpacht's footnote)

50/ "For instance, in the Basic Agreement of 15 December 1950 between the United Nations, the Food and Agriculture Organization, the International Civil Aviation Organisation, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organisation, and the United Kingdom being the Administrative Power of Cyrenaica and Tripolitania, for the provision of technical assistance: United Nations, Treaty Series, vol. 76, p. 122." (Mr. Lauterpacht's footnote)

"There appears to be no decisive reason why, subject to any modification as examined in Part VII 51/ of this draft of a Code of the Law of Treaties, the rules otherwise applicable to treaties should not apply to those concluded by or between international organizations created by and composed of States. On the contrary, it would seem desirable to direct political and juristic effort to making available, in the interest of the progressive integration of international society on a functional basis, the experience of the law of treaties to the collective activities of States in their manifold manifestations. 52/ This is so also for the additional reason that the part of multilateral treaties is likely to grow on a world of growing interdependence — not only because of the emergence of new interests calling for international regulation of general character, but also because in many cases the essential uniformity or identity of the subject matter of questions regulated in the past by bilateral agreements may increasingly call for the adoption of the machinery of multilateral treaties as being best suited to give effect to such uniformity or identity. The achievement of that object will not be facilitated by questioning the fundamental quality of treaties in relation to the instruments in question." 53/

32. In paragraphs 2 and 3 of a note appended to the commentary on article 1, Mr. Lauterpacht explained the meaning of the expression "organization of States" and reverted to the question

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51/ Part VII was one of the parts of the draft which Mr. Lauterpacht would have submitted at a later stage if he had not resigned his membership in the Commission in 1954. It would have been entitled "Rules and principles applicable to particular types of treaties" (See Yearbook of the International Law Commission, 1953, vol. II, A/CN.4/63, p. 90, para. 1.)

52/ "Article 748 of Fiore's International Law Codified lays down, in the fifth edition which appeared in 1915, that the capacity to conclude treaties may be 'possessed by associations to which international personality has been attributed'. " (Mr. Lauterpacht's footnote)

53/ Yearbook of the International Law Commission, 1953, vol. II, A/CN.4/63, p. 96.

of treaties concluded by international organizations. The paragraphs read:

> "2. Treaties as agreements to which organizations of States are parties. The expression 'organizations of States' is here intended as synonymous with the expression 'international organizations' conceived as entities which are created by treaty between States, whose membership is composed primarily of States, which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or in virtue of express recognition by a treaty concluded by them with a State.
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> "The question, already referred to in the comment, whether the Code on the Law of Treaties to be drafted by the Commission should concern itself with treaties concluded by international organizations was discussed by the Commission during its sessions in 1950 and 1951. The view which it provisionally adopted was that agreements by or between organizations of States do not fall within the province of the law of treaties to be formulated by the Commission. 54/ That view, it is submitted, needs revision. The fact of the existence of the very great number of agreements concluded by and between the various international organizations would render incomplete and deficient any codification of the law of treaties which would leave such agreements out of account. Numerous agreements of this type have been entered into by the United Nations as such. A substantial number of them have been concluded by the Economic and Social Council in pursuance of Article 63 of the Charter which provides that the Economic and Social Council may enter into agreements with specialized agencies defining the terms on which the agency concerned should be brought into relationship with the United Nations. 55/ A large number of agreements

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54/ See above para. 23.

55/ "These agreements are now in force between the United Nations and ten specialized agencies, namely, the International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, Food and Agriculture Organization, International Civil Aviation Organization, the Fund, the Bank, World Health Organization, the Universal Postal Union, International Telecommunication Union and World Meteorological Organization. A detailed study of the history of these agreements and an analysis of their provisions is contained in the Report of Action taken in pursuance of the Agreements between the United Nations and the Specialized Agencies (Official Records of the Economic and Social Council, ninth Session, E/1317). See also Sharp, International Organization, vol. 1 (1947), pp. 460-474 and 2 (1948), pp. 247-267." (Mr. Lauterpacht's footnote)

have been concluded between the various specialized agencies such as the International Labour Organisation, the Food and Agriculture Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization. These agreements are what has been described as 'essentially treaties of amity and goodwill' 56/ inasmuch as they provide for close co-operation and consultation in matters of common concern. That feature does not deprive them of the character of treaties. The same applies, more conspicuously, to the great number of agreements concluded between the specialized agencies with various States concerning the legal status and the immunities of these organizations, as well as in other matters, within the territories of the States concerned. These include agreements between the United Nations and the United States of America, the United Nations and Switzerland, the United Nations Educational, Scientific and Cultural Organization and France, the Internaticnal Labour Organization and Switzerland, the World Health Organization and Switzerland, the Food and Agriculture Organization and Italy, the International Civil Aviation Organization and Canada, the International Refugee Organization and Switzerland, the International Telecommunication Union and Switzerland, and Universal Postal Union and Switzerland. An analysis of any of these treaties will show how closely they approach the traditional type of treaty. Thus the final clauses of the agreement concluded between the Swiss Federal Council and the World Health Organization on 12 January 1949 and regulating the legal status of the World Health Organization in Switzerland read like the final clauses of most other treaties with regard to settlement of disputes as to the interpretation and application of the agreement, entry into force, approval by the competent constitutional authorities, modification and denunciation of the agreement, and the like (United Nations, Treaty Series, vol. 26, p. 333). The degree to which agreements concluded by international organizations exhibit and have been judicially treated as exhibiting the common characteristics of treaties may be gauged from the manner in which Judge Read in his opinion in the case concerning the international status of South West Africa

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56/ "C.W. Jenks, British Year Book of International Law, vol. 28 (1951), p. 68." (Mr. Lauterpacht's footnote)

considered the question whether as the result of a series of acts and declarations of the Government of South Africa an agreement had been brought about between the United Nations and South Africa. He said: 'It is unnecessary to discuss the juridical nature of an international agreement. It is sufficient, for the present purposes, to state that an "arrangement agreed between" the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of minds; and an intention to constitute a legal obligation.' (I.C.J. Reports 1950, p. 170)

"Agreements by and between international organizations have now become a prominent feature of international relations. The international personality of international organizations - i.e., of organizations of States - is becoming generally recognized. The capacity to conclude treaties is both a corollary of international personality and a condition of the effective fulfilment of their functions on the part of the international organizations. It is, for instance, with the help, inter alia, of some such chain of reasoning that the International Court of Justice in the advisory opinion on Reparation for injuries suffered in the service of the United Nations affirmed the international personality of the United Nations. After referring to the Convention on the Privileges and Immunities of the United Nations of 1946 which 'creates rights and duties between each of the signatories and the Organization', it said: 'It must be acknowledged that the Members [of the United Nations], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.' (I.C.J. Reports 1949, p. 179.) The treaty-making power of international organizations is one of the significant instruments for their proper functioning and it seems desirable that that instrument should receive adequate recognition and elaboration. In fact, there would appear to be no reason why, in the sphere of the treaty-making power, States acting collectively should not be in the position to do what they can do individually. Quite apart from the function of the International Law Commission to develop international law, the treaty-making power of international organizations has become so much part of international practice that the inclusion, within the category of treaties, of the agreements made by and between them will

come in fact within the function of the Commission concerned with the codification of existing law. It would be unsatisfactory, it is submitted, to adopt the position that although agreements made by internaticnal organizations are treaties they ought, for one reason or another, somehow to be left out of the orbit of the Law of Treaties as codified by the International Law Commission. Any such limitation of the codification of the law of treaties is probably as open to objection as the exclusion, from its purview, of exchanges of notes - a subject discussed, from this point of view, in the comment to article 2. Reasoning of that character might lead to the exclusion of what some consider to be legislative treaties - which, in their opinion, differ radically from the traditional type of contractual treaties. The result might be to reduce to inconspicuous dimensions the entire task of codification of the law of treaties. The work of the Commission on the subject ought to be complete both as a matter of principle and as a matter of assisting in the development of what is becoming a growing and beneficient aspect of relations of States. For these reasons although at its session of 1951 the Commission seems to have decided not to include in the codification of the law of treaties agreements made by and between internaticnal organizations, it is submitted that that decision ought not to be adhered to. In so far as, in particular matters, specific types of treaties require regulation differing from that applying to treaties generally, the consideration and formulation of such modifications falls properly within the purview of codification.

"3. The wording 'agreements between States, including organizations of States' has not been adopted without a previous consideration of alternative formulations. The purpose of the wording as formulated is to lay down, in the first instance, that only States or organizations of States can be parties to treaties. The present formulation is also intended to exclude the inference that it is sufficient if an instrument is concluded, <u>on the one part</u>, by a State or an organization of States and that the other party need not be a State or an organization of States. The wording 'agreements between States and (or) organizations of States' might equally lend itself to a wrong interpretation. In fact there are three kinds of agreements, from the point of view of the parties thereto, contemplated

in the present article: (1) agreements between States; (2) agreements between States and organizations of States; (3) agreements between organizations of States. It is believed that the present wording includes all three categories." 57/

33. A second provision in the draft articles submitted by Mr. Lauterpacht in his first report used the expression "organization of States". That provision appeared in paragraph 1 of article 7, entitled "Accession". The paragraph read:

"1. A State or organization of States may accede to a treaty, which it has not signed or ratified, by formally declaring in a written instrument that the treaty is binding upon it."

34. In his commentary on article 7 Mr. Lauterpacht observed that:

"The article as formulated provides for the possibility of accession by international organizations. This is in accordance with the scheme of the present draft which recognizes the treaty-making power both of States and of organizations of States. Obviously the practical possibility of international organizations becoming parties to multilateral treaties is limited. The World Meteorological Organization cannot, consistently with its purpose, aspire to participate in the convention concerning, say, the regulation of whaling. However, any limitation of the right of international organizations to become parties, by accession, to multilateral conventions must take place, by reference to the above considerations, in accordance with paragraph 2 of the article, 58/ in which the right of accession is dependent upon the parties to the treaty." 59/

57/ Yearbook of the International Law Commission, 1953, vol. II, A/CN.4/63, pp. 99-100.

58/ Paragraph 2 of article 7 read:
"2. Accession is admissible only subject to the provisions of the treaty."

59/ Yearbook of the International Law Commission, 1953, vol. II, A/CN.4/63, p. 18, para. 3.

35. Mr. Lauterpacht's second report on the law of treaties [60] was dated 8 July 1954. It contained additions to and revisions of some of the provisions appearing in the draft articles submitted the previous year. None of those additions or revisions were relevant to the question of treaties concluded by international organizations.

36. Mr. Lauterpacht's reports were not discussed by the Commission since, upon his election to the International Court of Justice in 1954, he resigned from membership in the Commission before it resumed consideration of the law of treaties.

6. Sir Gerald Fitzmaurice's reports on the law of treaties and the decision taken by the Commission on 22 April 1959

a) Sir Gerald Fitzmaurice's reports

37. In 1955, during its seventh session, the Commission appointed Sir Gerald Fitzmaurice Special Rapporteur on the Law of Treaties to succeed Mr. Lauterpacht. [61] At the next five sessions of the Commission, from 1956 to 1960, Sir Gerald Fitzmaurice presented five reports on the topic. Each report contained a set of articles forming part of a draft code [62] on the law of treaties. The code covered the following matters:

60/ Ibid., 1954, vol. II, A/CN.4/87, pp. 123-139.

61/ Yearbook of the International Law Commission, 1955, vol. II, A/2934, p. 42, para. 32.

62/ In his first report, Sir Gerald Fitzmaurice set out the reasons why he believed that the codification of the law of treaties should take the form of a code and not of a draft convention. (Yearbook of the International Law Commission, 1956, vol. II, A/CN.4/101, p. 106, para. 9 and p. 107.)

i) scope of the code, definitions, general principles, framing, conclusion and entry into force of treaties (first report); 63/

ii) termination and suspension of treaties (second report); 64/

iii) essential validity of treaties (third report); 65/

iv) effects of treaties as between parties (fourth report); 66/

v) effects of treaties in relation to third States (fifth report). 67/

38. As will be seen below, only the first of the five reports was discussed by the Commission. That report included four articles - articles 1, 2, 3 and 9 - which contained provisions relevant to the question of treaties concluded by international organizations.

39. Article 1, entitled "Scope" included a paragraph 3 relating to treaties entered into by international organizations. The paragraph, which was placed in square brackets, read:

> "[3. The provisions of the present Code relating to the powers, faculties, rights and obligations of States relative to treaties, are applicable, mutatis mutandis, to international organizations, and to treaties made between them, or between one of them and a State, unless the contrary is indicated or results necessarily from the context.]" 68/

In his commentary on the article, Sir Gerald explained that:

63/ Yearbook of the International Law Commission, 1956, vol. II, A/CN.4/101, pp. 104-128.

64/ Ibid., 1957, vol. II, A/CN.4/107, pp. 16-70.

65/ Ibid., 1958, vol. II, A/CN.4/115, pp. 20-46.

66/ Ibid., 1959, vol. II, A/CN.4/120, pp. 37-81.

67/ Ibid., 1960, vol. II, A/CN.4/130, pp. 69-107.

68/ Ibid., 1956, vol. II, A/CN.4/101, p. 107.

"Paragraph 3 has been placed in square brackets, the decision to include treaties entered into by international organizations being provisional." 69/

40. Article 2 was entitled "Definition of treaty". Paragraph 1 of the article read:

"1. For the purposes of the application of the present Code, a treaty is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law." 70/

The commentary on the paragraph contained the following passage relating to the words "made between . . . subjects of international law possessed of international personality and treaty-making capacity".

"This formula, it is believed, includes States, and the types of international organizations that would be covered by the judgement of the International Court in the case of injuries suffered in the service of the United Nations; 71/ but it would exclude individuals . . . Since the Commission has not excluded the idea of covering treaty-making by international organizations in the present Code, 72/ this general formula may be acceptable." 73/

69/ Ibid., 1956, vol. II, A/CN.4/101, p. 117. Sir Gerald was apparently referring to the decision taken by the Commission on 21 June 1950 (see above paras. 14 to 18.) It will be recalled that one year later, on 7 June 1951, the Commission reversed that decision (see above para. 23). That action, however, was not recorded in the Commission's 1951 report (see above para. 27).

70/ Ibid., 1956, vol. II, A/CN.4/101, p. 107.

71/ Reparation for Injuries suffered in the Service of the United Nations, Advisory opinion, I.C.J. Reports, 1949, p. 174.

72/ See above footnote 69.

73/ Yearbook of the International Law Commission, 1956, vol. II, A/CN.4/101, p. 117.

It should be noted that the words in question were not placed in square brackets.

41. Article 3 defined certain terms used in the draft Code. Paragraphs a) iii and b) referred to international organizations. They were placed in square brackets "for reasons already indicated". 74/ The paragraphs read:

> "For the purposes of the present Code:
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> (a) In addition to the case of entities recognized as being States on special grounds, the term 'State':
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> . . . . . .
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> [(iii) Subject to article 1, paragraph 3, 75/ includes international organizations;]
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> [(b) The term 'international organization' means a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity;]" 76/

42. Article 9 was entitled "The exercise of the treaty-making power". Paragraph 2,b) related to the treaty-making power of international organizations. The paragraph was placed in square brackets. It read:

> "2. On the international plane . . . the treaty-making power is exercised:
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> . . . . . .
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> [(b) In the case of an international organization, by such methods as are provided for in its consitution, or decided upon by its competent organs acting within the limits of their functions; but, if nothing else is indicated or decided on, by the Secretary-General of the organization.]" 77/

74/ Ibid., 1956, vol. II, A/CN.4/101, Commentary on article 3, p. 118.

75/ See above para. 39.

76/ Yearbook of the International Law Commission, 1956, vol. II, A/CN.4/101, pp. 107-108.

77/ Ibid., 1956, vol. II, A/CN.4/101, p. 108.

b) The preliminary exchange of views held in 1956

43. During its eighth session, in 1956, the Commission held a preliminary exchange of views on Sir Gerald Fitzmaurice's first report on the law of treaties. That exchange of views took place at the 368th, 369th and 370th meetings.

44. At the 368th meeting, on 15 June 1956, Sir Gerald Fitzmaurice requested members of the Commission to express views on five questions of which the last concerned treaties concluded by international organizations. His statement relating to that question is reported as follows in the summary record of the 368th meeting:

> "Sir Gerald FITZMAURICE, Special Rapporteur, said . . . [that] the questions on which he would be grateful for an expression of views on the part of members of the Commission were as follows:
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> . . . . . .
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> "(v) At its third session, the Commission had decided to leave aside the question whether the code should cover treaties made by and with international organizations. It had decided that the code should be drafted in the first place so as to cover States only. 78/ The question whether the articles so drafted could be applied to international organizations as they stood, or would require modification, could be decided later. Sir Hersch Lauterpacht in his reports 79/ had definitely included international organizations. He himself had mentioned the matter in his report in the commentary on articles 1(3) and 2(1) 80/ . . . He felt it would be desirable to take a final decision as to whether international

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78/ See above para. 23.

79/ See above paras. 30 to 34.

80/ See above paras. 39 and 40.

organizations should be covered, and if so in what form." 81/

45. In reply to Sir Gerald Fitzmaurice's fifth question, Messrs. Hsu 82/ and Krylov 83/ said that Mr. (by then Sir Hersch) Lauterpacht had acted wisely in departing from the decision taken by the Commission on 7 June 1951 84/ and in dealing in his draft articles 85/ with treaties to which international organizations were parties. On the other hand, Messrs. Edmonds, 86/ François, 87/ Pal, 88/ Sandström 89/, Spiropoulos, 90/ and Zourek 91/ expressed the belief that, for the time being, the code on the law of treaties should be drafted with reference to States only. The question of treaties to which international organizations were parties was relatively new and required further study. Accordingly, the decision taken by the Commission on 7 June 1951 should be maintained. Faris Bey el-Khoury 92/ was opposed to the application of the code to treaties to which international organizations were parties since the International Court of Justice could not pronounce on the validity of such

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81/ Yearbook of the International Law Commission, 1956, vol.I, 368th meeting, para. 47. At the same meeting, Sir Gerald recalled the previous decisions taken by the Commission on the matter and the views expressed by Mr. (by then Sir Hersch) Lauterpacht in his first report (paras. 54 to 57 of the summary record).

82/ Yearbook of the International Law Commission, 1956, vol. I, 369th meeting, para. 23.

83/ Ibid., 1956, vol. I, 369th meeting, para. 6.

84/ See above para. 23.

85/ See above paras. 30 to 34.

86/ Yearbook of the International Law Commission, 1956, vol. I, 369th meeting, para. 43.

87/ Ibid., 1956, vol. I, 369th meeting, para. 27.

88/ Ibid., 1956, vol. I, 369th meeting, para. 16.

89/ Ibid., 1956, vol. I, 369th meeting, para. 48.

90/ Ibid., 1956, vol. I, 368th meeting, para. 72.

91/ Ibid., 1956, vol. I, 369th meeting, para. 57.

92/ Ibid., 1956, vol. I, 369th meeting, para. 32.

treaties. Mr. Liang, 93/ Secretary of the Commission, observed, however, that international organizations were a part of international life and should be covered by the code on the law of treaties. The only question was how to cover them. He was not in favour of the formula suggested by Mr. Lauterpacht of referring to "States, including organizations of States". 94/ The two entities could not be dealt with as if they were identical. The best course might be to draft the code with reference to treaties concluded between States and then see what changes were required to apply it to treaties to which international organizations were parties.

46. At the Commission's 370th meeting, on 19 June 1956, Sir Gerald Fitzmaurice summarized the debate on the fifth question he had submitted. His statement is reported as follows in the summary record of the meeting:

> "On the question whether the code should cover treaties made by and with international organizations, the general feeling of the Commission appeared to be that it should. That international organizations possessed of international personality had treaty-making capacity was beyond question. Agreements such as those between the United Nations and most of its Members on privileges and immunities were undoubtedly international instruments and should be covered by the code. But, as Mr. François had pointed out, the question was relatively young. He accordingly proposed to draft the code with reference to States only, but bearing constantly in mind the question of its application to international organizations. The Commission could then judge whether the various articles might be adapted to apply to international organizations, or whether a special section would be required." 95/

93/ Ibid., 1956, vol. I, 369th meeting, para. 66.

94/ See above para. 30.

95/ Yearbook of the International Law Commission, 1956, vol. I, 370th meeting, para. 12.

c) The decision taken by the Commission on 22 April 1959

47. The Commission resumed consideration of the topic of the law of treaties at its eleventh session in 1959. The discussion of the topic centered on the draft articles submitted by Sir Gerald Fitzmaurice in his first report. 96/ At the outset of that discussion, during the Commission's 480th meeting on 21 April 1959, Sir Gerald, who had been elected Chairman for the eleventh session, suggested that paragraph 3 of article 1 97/ of those draft articles should be left aside for the time being in view of the decision taken by the Commission on 7 June 1951. 98/ No action was taken on that suggestion at the 480th meeting.

48. At the 481st meeting, on 22 April 1959, Mr. Yokota asked for "an explanation of the status of article 1, paragraph 3". 99/ Sir Gerald's reply to Mr. Yokota's question is set out as follows in the summary record of the meeting:

> ". . . The Commission had entertained no doubts that international organizations such as the United Nations possessed treaty-making capacity, an advisory opinion which had been confirmed by the International Court of Justice in the case concerning the reparation for injuries suffered in the service of the United Nations 100/

96/ See above paras. 37 to 42.

97/ See above para. 39.

98/ Yearbook of the International Law Commission, 1959, vol. I, 480th meeting, para. 9. For the decision of 7 June 1951 see above para. 23.

99/ Ibid., 1959, vol. I, 481st meeting, para. 24.

100/ There is an obvious mistake in the summary record. The relevant part of the sentence quoted above should be corrected to read: ". . . treaty-making capacity - a capacity which had been confirmed by an advisory opinion rendered by the International Court of Justice in the case concerning the reparation for injuries suffered in the service of the United Nations - and had agreed . . .". For the advisory opinion above, see above footnote 71.

and had agreed that they should be covered by the code. [101] Complications would, however, be introduced if an attempt were made to deal simultaneously both with treaties between States and with treaties between international organizations. It had therefore been thought preferable that the code should be drafted in the first place to cover treaties between States and that subsequently the Commission might see whether the code would apply, with some modifications, to international organizations or whether they must be dealt with in a separate section. Article 2, paragraph 1, [102] as it stood would cover both matters, since the reference to the State had been deliberately omitted, though many articles might not readily cover both cases in the form of words." [103]

49. Again according to the summary record of the 481st meeting:

"Mr. Tunkin, supported by Mr. Yokota, proposed that the Commission decide first to deal with treaties among States and then to examine to what extent the articles were applicable to treaties concluded between international organizations and between them and States." [104]

The Commission adopted that proposal without discussion. It thus confirmed the decision it had taken on 7 June 1951. [105]

7. The articles of the draft code on the law of treaties adopted by the Commission in 1959

50. As a result of its consideration of Sir Gerald Fitzmaurice's first report, the Commission at its eleventh session adopted fourteen articles - numbered respectively 1 to 10 and

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101/ See above paras. 14 to 18.

102/ See above para. 40.

103/ Yearbook of the International Law Commission, 1959, vol. I, 481st meeting, para. 27.

104/ Ibid., 1959, vol. I, 481st meeting, para. 28.

105/ See above para. 23.

14 [106] to 17 - of a draft code on the law of treaties. It included the text of the fourteen articles with commentaries in Chapter II of its report on the work of the eleventh session.[107]

51. Articles 1 and 2 were grouped under the heading "Introductory articles". The remaining articles formed part of the first chapter of the draft code, entitled "The validity of treaties". They dealt with the negotiation, drawing up and authentification of the text of the treaty and with the conclusion of and participation in the treaty and its entry into force.

52. It will be recalled [108] that the draft articles submitted by Sir Gerald Fitzmaurice in his first report contained several provisions which were relevant to the question of treaties concluded by international organizations. The provisions in question were omitted from the draft code, with the exception of those appearing in paragraph 1 of article 2. [109] The Commission incorporated that paragraph, in a modified form, in the text of article 2 of the draft code. As adopted by the Commission, article 2 read:

106/ The Commission inserted in its report the following note before the text of article 14:

"[articles 14 to 17] would be preceded by certain articles not yet taken up by the Commission".

Yearbook of the International Law Commission, 1959, vol. II, A/4169, p. 105.

107/ Yearbook of the International Law Commission, 1959, vol. II, A/4169, pp. 92-109.

108/ See above paras. 38 to 42.

109/ See above para. 40.

"Meaning of an international agreement

"For the purposes of the present Code, an international agreement (irrespective of its form or designation) means an agreement in written form governed by international law and concluded between two or more States, or other subjects of international law, possessed of treaty-making capacity. This agreement may be embodied either:

(a) In a single formal instrument; or

(b) In two or more related instruments constituting an integral whole." 110/

The international agreements defined in article 2 came under the scope of the draft code in pursuance of paragraphs 1 and 2 of article 1, which read:

"Article 1

"Scope of the Code

"1. The present Code relates to all forms of international agreements comprised by the definition given in article 2, irrespective of their particular form or designation or of whether they are embodied in a single instrument or in two or more related instruments.

"2. Unless the context otherwise requires, the term 'treaty', for the purposes of the present Code, covers all forms of international agreements to which the Code relates. This does not, however, affect the characterization or classification of particular instruments under the internal law of any State, for the purposes of its domestic constitutional processes." 111/

53. Article 2 contained the only provision in the draft code referring to agreements concluded by "subjects of international law" other than States. In this connexion the Commission stated in its commentary on article 2:

110/ Yearbook of the International Law Commission, 1959, vol. II, A/4169, p. 95.

111/ Ibid., 1959, vol. II, A/4169, p. 92.

"[The words in article 2:] 'between States, or other subjects of international law, possessed of treaty-making capacity'. Who are these other subjects of international law? The obvious case is that of international organizations, such as the United Nations, whose international personality and treaty-making capacity was affirmed by the International Court of Justice in the case of 'Reparations for injuries suffered in the service of the United Nations'. 112/ It will be recollected however, that . . . the Commission had decided in 1951 to 'leave aside, for the moment, the question of . . . international organizations'; to 'draft the articles with reference to States only'; and to 'examine later whether they could be applied to international organizations as they stood or whether they required modification'. 113/ It was implied by this decision that the case of treaties concluded with or between international organizations must be covered by a code on the law of treaties, but that this should be done at a later stage of the work. At its present session, the Commission again considered this matter. It had no hesitation in confirming the view that the case of treaties concluded with or between international organizations was of the first importance and must be covered. At the same time it reaffirmed the view that it would be preferable to defer the matter to a later stage. The topic of the law of treaties is a difficult and complex one. The Commission feels that its main principles and rules can most effectively and certainly be established on the basis of the traditional case of treaties between States. The case of international organizations will in any event require a separate study. Thereafter, either the existing articles of the Code must be modified to cover it, or a separate chapter to deal with that case can be added.

"It follows that, in the immediate context, the phrase 'or other subjects of international law, possessed of treaty-making capacity' was not included for the express purpose of covering international organizations, though it would in fact do so. It was inserted because, in the opinion of the Commission, it always has been a principle of international law that entities other than States might possess international personality and treaty-making capacity. An example is afforded by the case of

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112/ See above footnote 71.

113/ See above para. 23.

> the Papacy, particularly in the period immediately preceding the Lateran Treaty of 1929, when the Papacy exercised no territorial sovereignty. The Holy See was nevertheless regarded as possessing international treaty-making capacity. Even now, although there is a Vatican State which is under the territorial sovereignty of the Holy See, treaties entered into by the Papacy are, in general, entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State." 114/

54. The Commission's report on the work of its eleventh session was considered by the Sixth Committee during the fourteenth session of the General Assembly, in 1959. Most of the discussion on chapter II of the report - which, it will be recalled, 115/ contained the draft code on the law of treaties - centered on the question whether the draft articles on the topic should remain in the form of a code, or should take the form of a convention. Only passing references were made to the problem of treaties to which international organizations are parties. 116/

114/ Yearbook of the International Law Commission, 1959, vol. II, A/4169, p. 96, paras. (6) and (7).

115/ See above para. 50.

116/ At the 604th meeting of the Sixth Committee, on 30 September 1959, the representative of Italy observed that "agreements emanating directly from international organizations were a new field which should be given special study by the Commission". (General Assembly Official Records, Fourteenth Session, Sixth Committee, 604th meeting, para. 5). At the following meeting of the Committee, on 1 October 1959, the representative of the Ukrainian Soviet Socialist Republic stated:

> "article 2 of the proposed code on the law of treaties was somewhat confusing because it referred to an international agreement as being an agreement concluded between two or more States, or other subjects of international law, possessed of treaty-making capacity. It was explained in the commentary that the expression 'treaty-making capacity' qualified the term 'States' as well as the phrase 'other subjects of international law', which seemed to give the impression that some

55. No provisions on the draft code on the law of treaties were included in the resolutions which the General Assembly adopted as a result of its consideration of the Commission's report on the work of its eleventh session.

116/ (continued)

> States might not be possessed of treaty-making capacity. While that might be true of international organizations, it was not true of States which, by virtue of their sovereignty, had the right to conclude treaties. The point should be clarified, particularly since the Commission admitted in the report that it had not been fully discussed, and there were conflicting views within the Commission itself." (Ibid., 605th meeting, para. 31)

B. THE SECOND PHASE: 1960-1966

56. On 6 December 1960 Sir Gerald Fitzmaurice resigned from the Commission upon his election to the International Court of Justice. [117] On 26 May 1961, during its thirteenth session, the Commission appointed Sir Humphrey Waldock as Special Rapporteur on the topic of the Law of Treaties. [118] During the same session, the Commission held a brief debate on the topic and took several decisions which were summarized as follows in its report to the General Assembly:

> "With a view to giving the new Special Rapporteur guidance for his work, the Commission, at its 620th and 621st meetings, held a debate of a general character on the subject. At the conclusion of the debate the Commission decided:
>
> (i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;
>
> (ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its special rapporteurs;
>
> (iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years." [119]

1. Sir Humphrey Waldock's first report on the law of treaties

57. In his first report on the law of treaties Sir Humphrey

117/ Yearbook of the International Law Commission, 1961, vol. I, 580th meeting, para. 4.

118/ Ibid., 1961, vol. I, 597th meeting, para. 33.

119/ Ibid., 1961, vol. II, A/4843, p. 128, para. 39.

proposed to the Commission the texts of twenty-seven articles, with commentaries, divided into four chapters, entitled respectively "General provisions", "The rules governing the conclusion of treaties by States", "The entry into force and registration of treaties" and "The correction of errors and functions of depositaries". The first three chapters were submitted to the Commission on 26 March 1962 [120], the last chapter, on 2 May 1962. [121] In the introduction to his report, Sir Humphrey explained that, in accordance with the decision taken by the Commission the previous year [122] he had framed the twenty-seven articles with a view to their forming the basis of a convention. He also explained that he intended to submit to the Commission at a later date an additional group of articles, constituting a fifth chapter entitled "The treaties of international organizations". [123] He did not, however, carry out that intention in view of the decision taken by the Commission on 7 May 1962. [124]

58. The texts of two of the articles proposed by Sir Humphrey in his first report - articles 1 and 3 - contained provisions referring to treaties concluded by subjects of international law other than States. Article 3 referred also to the capacity of international organizations to become parties to a treaty.

120/ Yearbook of the International Law Commission, 1962, vol. II, A/CN.4/144, p. 27.

121/ Ibid., 1962, vol. II, A/CN.4/144/Add.1, p. 80.

122/ See above para. 56.

123/ Yearbook of the International Law Commission, 1962, vol. II, A/CN.4/144, p. 30, paras. (10) and (11).

124/ See below paras. 65 and 66.

a) Proposed texts of paragraphs (a), (c) and (h) of article 1

59. The relevant provisions of the text proposed by Sir Humphrey for article 1, entitled "Definitions", appeared in paragraphs (a), (c) and (h). Paragraph (a) read:

"Article 1. Definitions

["For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:]

"(a) International agreement means an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below." 125/

The international agreements defined in paragraph (a) were brought under the scope of the articles by the provisions of paragraph (b) of article 1 and paragraph 1 of article 2. 126/ Those provisions read:

"Article 1. Definitions

. . . . . .

"(b) 'Treaty' means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation).

"Article 2. Scope of the present articles

"1. Except to the extent that the particular context may otherwise require, the present articles shall apply

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125/ Yearbook of the International Law Commission, 1962, vol. II, A/CN.4/144, p. 31. For article 3 see below, paras. 62 to 64.

126/ Ibid., 1962, vol. II, A/CN.4/144, p. 35.

to every international agreement which under the definitions laid down in article 1, paragraphs (a) and (b), constitutes a treaty for the purpose of these articles."

60. Sir Humphrey included in his commentary on article 1 the following observations on the expression "other subjects of international law" appearing in paragraph (a) quoted above:

"The [expression] . . . is designed (a) to leave no doubt as to the right of entities such as the Holy See to be considered parties to international agreements and (b) to admit the possibility of international organizations being parties to international agreements. The obvious case is the United Nations, whose capacity to be a party to treaties was expressly recognized in the Regulations adopted on 14 December 1946 by the General Assembly, concerning the Registration and Publication of Treaties and International Agreements 127/ and whose international personality and treaty-making capacity was affirmed by the International Court of Justice in the case of Reparations for Injuries Suffered in the Service of the United Nations. 128/ In fact, the number of international agreements concluded by international organizations in their own names, both with States and with each other, and registered as such with the Secretariat of the United Nations, is now very large, so that inclusion in the general definition of 'international agreements' for the purposes of the present articles seems really to be essential.

"But it is not enough that the party to the agreement should be a 'State' or that it should be a 'subject of international law'; it must also possess 'international personality' and have 'capacity to enter into treaties'. This requirement is designed to exclude a State which is subordinated to another State, whether under a federal constitution of otherwise, and which under the applicable constitutional agreements or arrangement does not possess any distinct international personality and treaty-making capacity . . . It is also designed to exclude any question of agreements made by States or organizations with private individuals or with corporate legal persons from the category of international agreements. . ."129/

127/ See General Assembly resolution 97 (I), article 4, para. 1.

128/ See above, footnote 71.

129/ Yearbook of the International Law Commission, 1962, vol. II, A/CN.4/144, p. 32, paras. (3) and (4).

61. Paragraph (c) of article 1 proposed by Sir Humphrey read:

> "(c) 'Party' means a State or other subject of international law, possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below, which has executed acts by which it has definitively given its consent to be bound by a treaty in force; 'Presumptive party' means a State or other subject of international law which has qualified itself to be a 'party' to a treaty which has not yet entered into force." 130/

Paragraph (h) of article 1 read:

> "(h) 'Signature' means the acts whereby a duly authorized representative of a State or other Subject of international law signs the treaty on behalf of such State or other Subject of international law, and includes initialling where, under the provisions of article 8 below, initialling is equivalent to a full signature. 'Signature ad referendum' means a signature expressly made conditional upon reference to and confirmation by the State or other subject of international law whose representative has so worded his signature." 131/

Sir Humphrey's commentary on article 1 contained no observations relating to those two paragraphs.

b) Proposed texts of paragraphs 1 and 4 of article 3

62. As proposed by Sir Humphrey, paragraph 1 of article 3, entitled "Capacity to become a party to treaties", read:

130/ Ibid., 1962, vol. II, A/CN.4/144, p. 31.

131/ Ibid., 1962, vol. II, A/CN.4/144, p. 31. It should be noted that paragraphs (i), (j), (k) and (l) of article 1, defining respectively the terms "ratification", "accessions", "acceptance" and "reservation" referred only to States and contained no mention of other subjects of international law.

"Article 3. Capacity to become a party to treaties

"1. Capacity in international law (hereafter referred to as international capacity) to become a party to treaties is possessed by every independent State, whether a unitary State, a federation or other form of union of States, and by other subjects of international law invested with such capacity by treaty or by international custom." 132/

In his commentary on the above text, Sir Humphrey explained that

"The phrase 'other subjects of international law invested with such capacity by treaty or by international custom' is designed primarily to cover the cases of international organizations and agencies and other entities like the Holy See. . . ." 133/

63. Paragraphs 2 and 3 of article 3 dealt with the case of federations of States and dependent States. Paragraph 4 concerned international organizations. It read:

"4. International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument or instruments prescribing the constitution and functions of the organization or agency in question." 134/

64. Sir Humphrey's commentary on paragraph 4 of article 3 was as follows:

"Paragraph 4 of [article 3] seeks to state the general rule in regard to the treaty-making capacity of international organizations and agencies. The view has previously been expressed in the introduction to this report that the appropriate method of dealing with treaty-making by international organizations is to deal with it in a separate chapter, 135/ and it may be

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132/ Ibid., 1962, vol. II, A/CN.4/144, p. 35.

133/ Ibid., 1962, vol. II, A/CN.4/144, p. 36, para. (2).

134/ Ibid., 1962, vol. II, A/CN.4/144, p. 36.

135/ See above para. 57.

wondered why it is proposed to include a rule concerning their treaty-making capacity in the present article. The reason is that it seems logical to regard treaty-making capacity as a general matter distinct from the procedure of treaty-making, and to include it in chapter I. If this arrangement is accepted, then the appropriate place for the general rule concerning the treaty-making capacity of organizations is in the present article. As to the rule proposed in paragraph 4, it is based upon principles analogous to those laid down by the International Court of Justice in its opinion on Reparations for Injuries Suffered in the Service of the United Nations for determining the capacity of the United Nations to present an international claim. In particular, it is based upon the statement 136/ of the Court that: 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.' " 137/

2. The decision taken by the Commission on 7 May 1962

65. Sir Humphrey Waldock's first report was considered by the Commission at its fourteenth session. At the first meeting of the session devoted to the report - the 637th, held on 7 May 1967 - Mr. Tunkin asked whether the draft articles to be adopted by the Commission should deal only with treaties concluded by States. 138/ In reply to Mr. Tunkin's question the Chairman made a statement which was recorded as follows in the summary record of the meeting:

136/ I.C.J. Reports, 1949, p. 182.

137/ Yearbook of the International Law Commission, 1962, vol. II, A/CN.4/144, p. 37, para. (6).

138/ Ibid., 1962, vol. I, 637th meeting, para. 27.

"The CHAIRMAN said that the Commission would discuss the present draft on the understanding that treaties entered into by international organizations were not within its scope." 139/

66. Since the Chairman's statement was not challenged, it became a decision of the Commission itself. Subsequently, the Commission recorded in paragraph 21 of its report the following expanded version of that decision:

"The Commission again considered the question of including provisions concerning the treaties of international organizations in the draft articles on the conclusion of treaties. The Special Rapporteur had prepared, for submission to the Commission at a later stage in the session, a final chapter on treaty-making by international organizations. 140/ He suggested that this chapter should specify the extent to which the articles concerning States apply to international organizations and formulate the particular rules peculiar to organizations. The Commission, however, reaffirmed its decisions of 1951 and 1959 141/ to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States. At the same time the Commission recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Accordingly, while confining the specific provisions of the present draft to the treaties of States, the Commission has made it plain in the commentaries attached to articles 1 and 3 142/ of the present draft articles that it considers the international agreements to which organizations are parties, to fall within the scope of the law of treaties." 143/

139/ Ibid., 1962, vol. I, 637th meeting, para. 28.

140/ See above para. 57.

141/ See above paras. 23 and 47 to 49.

142/ See below paras. 79 and 92.

143/ Yearbook of the International Law Commission, 1962, vol. II, A/5209, p. 161, para. 21.

3. The provisional draft articles on the law of treaties adopted by the Commission in 1962 (articles 1 to 29)

67. As a result of its consideration of Sir Humphrey Waldock's first report, the Commission adopted at its fourteenth session, held in 1962, a provisional draft of twenty-nine articles on the law of treaties. The provisional draft was entitled "Part I - Conclusion, entry into force and registration of treaties". It was included, together with commentaries, in Chapter II of the Commission's report on the work of its fourteenth session. 144/

68. Paragraphs 1 (a) of article 1, 1 and 3 of article 3 and 2(b) and 6(c) of article 4 contained provisions referring to treaties concluded by subjects of international law other than States. A brief account of the travaux préparatoires of those provisions is given in the following sub-sections. The account is limited to the arguments and proposals which were relevant to the subject matter of this Survey.

a) Paragraph 1(a) of article 1

69. Paragraph 1(a) of article 1 was based on paragraphs (a) 145/ and (b) 146/ of the text of article 1 proposed by Sir Humphrey in his first report.

70. The Commission began its consideration of that text at its 637th meeting, on 7 May 1962. During the meeting, Mr. Luna

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144/ Ibid., 1962, vol. II, A/5209, pp. 159-186.

145/ For the text of paragraph (a) see above para. 59.

146/ For the text of paragraph (b) see above para. 59.

suggested [147] the deletion of the phrase "possessing international personality" appearing in paragraph (a) after the words "or other subjects of international law". He expressed the view that the phrase was unnecessary since all subjects of international law possessed international personality. His suggestion was supported by Messrs. Ago [148] and Castren. [149]

71. At the 638th meeting, on 8 May 1962, Sir Humphrey Waldock suggested the following draft combining paragraphs (a) and (b) of the text of article 1 proposed in his first report:

> "'Treaty' means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol . . . or any other appellation) which is intended to be governed by international law and is concluded between two or more states or other subjects of international law having capacity to enter into treaties under the rules set out in article 3." [150]

72. Mr. Paredes expressed the view that not only States and international organizations but also individuals could be subjects of international law and that this should be reflected in the definition of the term "Treaty". [151] Mr. Tunkin said he had some doubts about the expression "or other subjects of international law", which might create confusion in the

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147/ Yearbook of the International Law Commission, vol.I, 637th meeting, para.62.

148/ Ibid., 1962, vol. I, 637th meeting, para. 64.

149/ Ibid., 1962, vol. I, 637th meeting, para. 80.

150/ Ibid., 1962, vol. I, 638th meeting, para. 3. For article 3 see below paras. 81 to 92.

151/ Ibid., 1962, vol. I, 638th meeting, para. 22.

application of a convention. [152] Mr. El-Erian regretted that Sir Humphrey had replaced the phrase "possessing international personality" - appearing in his original text - by "having capacity to enter into treaties under the rules set out in article 3". [153]

73. After a discussion of several other questions unrelated to the subject matter of this Survey, the Commission referred [154] paragraphs (a) and (b) of article 1 to the Drafting Committee.

74. At the Commission's 655th meeting, on 1 June 1962, the Committee submitted a text for a paragraph 1(a) [155] which combined the former paragraphs (a) and (b) of Article 1. The text read:

> "1(a). Treaty means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), which is governed by international law and is concluded between two or more states or other subjects of international law." [156]

The expression "other subjects of international law" - which in the Drafting Committee's text is unqualified by any phrase such as those previously proposed by Sir Humphrey - gave rise to the following discussion.

152/ Ibid., 1962, vol. I, 638th meeting, para. 28.

153/ Ibid., 1962, vol. I, 638th meeting, para. 33.

154/ Ibid., 1962, vol. I, 638th meeting, para. 36.

155/ The paragraph was numbered 1(a) since at the same time the Drafting Committee proposed the addition of a paragraph 2 to article 1.

156/ Yearbook of the International Law Commission, 1962, vol. I, 655th meeting, para. 4.

75. Mr. Tunkin observed that the Commission had agreed that, while the draft articles should deal only with treaties between States, the definition of the term "treaty" should cover treaties between States, treaties between States and international organizations and treaties between international organizations. The words "or other subjects of international law" might not express that intention clearly and were open to misconstruction owing to the controversy as to whether individuals could be subjects of international law. 157/ Mr. Amado stated that some explanation should be given on the commentary of what was meant by "other subjects of international law" since the expression raised the difficult question whether individuals could be subjects of international law. 158/

76. Sir Humphrey explained that that expression had been used advisedly so as not to exclude certain entities such as the Holy See and belligerents which had received de facto recognition. In his first report he had excluded individuals by inserting in the text of the definition the qualification of treaty-making capacity 159/ but the Drafting Committee had thought that unnecessary since, if the definition were read as a whole, no misunderstanding on that point could arise. 160/ Mr. Tunkin said that, in the light of the explanation given by the Special Rapporteur, he accepted the retention of the expression "other subjects of international law". He felt,

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157/ Ibid., 1962, vol. I, 655th meeting, para. 17.

158/ Ibid., 1962, vol. I, 655th meeting, para. 23.

159/ See above para. 59.

160/ Yearbook of the International Law Commission, 1962, vol. I, 655th meeting, paras. 30 and 31.

however, that the Commission's commentary on article 1 should make it clear that there was no intention to cover individuals. [161]

77. After some further discussion, the Commission referred back to the Drafting Committee the text of paragraph 1(a) of article 1. [162]

78. At the 661st meeting, on 13 June 1962, the Committee submitted a new text [163] which was adopted without change. [164] That text read:

["Article 1]

["Definitions]

["1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:]

"(a) 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), concluded between two or more States or other subjects of international law and governed by international law."

The treaties defined in paragraph 1 (a) of article 1 came under the scope of the draft articles in pursuance of paragraph 1 of article 2, which read:

"Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1(a)." [165]

161/ Ibid., 1962, vol. I, 655th meeting, para. 41.

162/ Ibid., 1962, vol. I, 655th meeting, para. 71.

163/ Ibid., 1962, vol. I, 651st meeting, para. 27.

164/ Ibid., 1962, vol. II, A/5209, p. 161.

165/ Ibid., 1962, vol. II, A/5209, p. 163.

79. The Commission's commentary on article 1 contained the following passage relating to the words "other subjects of international law" appearing in paragraph 1(a):

> "The term 'treaty' as used in the draft article covers only international agreements made between 'two or more States or other subjects of international law'. The phrase 'other subjects of international law' is designed to provide for treaties concluded by: (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law." 166/

80. It will be recalled that in addition to paragraph (a), paragraphs (c) and (h) of the text proposed for article 1 by Sir Humphrey Waldock in his first report used the expression "other subjects of international law". 167/ Paragraph (c) defined the term "Party" and paragraph (h) of the term "Signature". As regards the former, the Commission decided on the recommendation of the Drafting Committee 168/ not to define

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166/ Ibid., 1962, vol. II, A/5209, p. 162, para. (8). In the Commission's report, the following footnote referred to the last sentence of the passage of the commentary quoted above:

"As to this point and the general question of the capacity of subjects of international law to enter into treaties, see further the commentary to article 3." (For the commentary to article 3, see below para. 92.)

167/ See above, para. 61.

168/ Yearbook of the International Law Commission, 1962, vol. I, 661st meeting, para. 28.

the term "Party" in article 1. As regards the term "Signature", the Commission devoted a single paragraph of article 1 to the definitions of the terms "Signature", "Ratification", "Accession", "Acceptance" and "Approval". That paragraph - numbered 1(d) - did not use the expression "other subjects of international law". 169/

b) Paragraphs 1 and 3 of article 3

81. Paragraphs 1 and 3 of article 3 are based on paragraphs 1 170/ and 4 171/ of the text of article 3 proposed by Sir Humphrey in his first report.

82. The Commission devoted its 639th and 640th meetings - held on 9 and 10 May 1962 respectively - to a first reading of that text which, it will be recalled, dealt with the capacity to conclude treaties. The discussion in the Commission centered on the treaty-making capacity of States, and only passing references were made to the treaty-making capacity of other subjects of international law. 172/ At the end of the 640th meeting, the

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169/ Ibid., 1962, vol. II, A/5209, p. 161, Paragraph 1(d) of article 1 read:

"1. (d) 'Signature', 'Ratification', 'Accession', 'Acceptance' and 'Approval' mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by a treaty. 'Signature' however also means, according to the context, an act whereby a State authenticates the text of a treaty without establishing its consent to be bound."

170/ Quoted above in para. 62.

171/ Quoted above in para. 63.

172/ See for instance Yearbook of the International Law Commission, 1962, vol. I, 639th meeting, paras. 6, 57 and 70, 640th meeting, paras. 10, 26 and 74.

Commission requested the Drafting Committee to prepare a new text of article 3. [173]

83. At the Commission's 658th meeting, on 6 June 1962, the Drafting Committee submitted [174] the requested text, consisting of four paragraphs. Paragraphs 2 and 3 were not relevant to the question of treaties concluded by international organizations. [175] Paragraphs 1 and 4 read:

"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.

. . . . . .

"4. In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted."

84. As regards paragraph 1, Mr. Castrén observed that certain subjects of international law, such as individuals or some international organizations, lacked the capacity to conclude treaties. He therefore suggested that the word "certain" should be inserted in that paragraph before the expression "other subjects of international law". [176] Mr. Bartoš expressed the view that the point raised by Mr. Castrén should be dealt with in the commentary on

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173/ Ibid., 1962, vol. I, 640th meeting, para. 91.

174/ Ibid., 1962, vol. I, 658th meeting, para. 87.

175/ These paragraphs read:

"2. The capacity to conclude treaties may be limited by the provisions of a treaty relating to that capacity.

"3. In a federation, the capacity to conclude treaties depends on the federal constitution."

176/ Yearbook of the International Law Commission, 1962, vol. I, 658th meeting, para. 90.

article 3 which should explain that the article referred only to subjects of international law whose treaty-making power was recognized by the instruments by which they were constituted or by rules of international law. 177/

85. As regards paragraph 4, Mr. Briggs observed that an international organization might derive its capacity to conclude treaties not from the instrument by which it was constituted but from a subsequent amendment to that instrument or event from practice. He therefore suggested that the paragraph should be broadened. 178/ His suggestion was supported by Mr. Tunkin. 179/

86. After further discussion, the Commission referred article 3 back to the Drafting Committee. 180/ At the Commission's 666th meeting, on 22 June 1962, the Committee submitted 181/ an amended version of the article consisting of four paragraphs. Paragraph 1 was identical with paragraph 1 submitted by the Committee at the Commission's 658th meeting, which is quoted above. 182/ Paragraphs 2 and 3 were not relevant to the question of treaties concluded by international organizations. Paragraph 4 was an amended version of the corresponding paragraph submitted at the 658th meeting. It read:

177/ Ibid., 1962, vol. I, 658th meeting, para. 97.
178/ Ibid., 1962, vol. I, 658th meeting, para. 96.
179/ Ibid., 1962, vol. I, 658th meeting, para. 106.
180/ Ibid., 1962, vol. I, 658th meeting, para. 121.
181/ Ibid., 1962, vol. I, 666th meeting, para. 16.
182/ See para. 83.

"Article 3

"Capacity to conclude treaties

. . . . . .

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

87. Mr. Rosenne suggested the deletion of the whole article since, in his view, paragraph 1 stated the obvious, paragraphs 2 and 4 were irrelevant because they concerned the validity and interpretation of treaties, and paragraph 3 was really concerned with the interpretation of national constitutions. 183/ Mr. Yasseen, on the other hand, expressed the view that an article on the capacity to conclude treaties should be included in the draft, but he doubted whether it was advisable to retain paragraph 4. Although the substance of the paragraph was unexceptionable, the provision seemed out of place in a set of articles dealing with the law of treaties in inter-state relations. 184/

88. Mr. Briggs observed that the term "international organization" in paragraph 4 was unduly vague and seemed to suggest that non-governmental organizations might have the capacity to conclude treaties. He therefore suggested that paragraph 4 should be deleted. 185/ That suggestion was supported by Messrs. Tunkin 186/ and El-Erian 187/ for the reason given by Mr. Briggs and because the Commission had decided not to deal in the draft articles with

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183/ Yearbook of the International Law Commission, 1962, vol. I, 666th meeting, para. 63.

184/ Ibid., 1962, vol. I, 666th meeting, para. 48.

185/ Ibid., 1962, vol. I, 666th meeting, paras. 17 and 20.

186/ Ibid., 1962, vol. I, 666th meeting, paras. 24 and 25.

187/ Ibid., 1962, vol. I, 666th meeting, para. 27.

treaties concluded by international organizations. Mr. Tunkin added that it would not be accurate to suggest - as did paragraph 4 - that the treaty-making capacity of an international organization depended solely on the constitution of the organization. A statement to that effect could be taken to mean that if a small number of States set up an international organization and gave it treaty-making capacity, all other States would have to consider treaties concluded by that organization as international treaties. Agreeing with Mr. Tunkin, Mr. Bartoš said that he could accept paragraph 4 only if it was made clear in the commentary that the constitution of an international organization would have effect as between the parties but not erga omnes. 188/

89. Sir Humphrey Waldock expressed his views on the matter in a statement which was reported as follows in the summary record of the 666th meeting:

> "With regard to the proposal for deleting paragraph 4, he thought the paragraph had its usefulness because it dealt with the limitations imposed upon the treaty-making capacity of an international organization by its constitution. The treaty-making capacity of an organization was nearly always limited to its object and purpose; the organization was not entitled to enter into any kind of treaty.
>
> "The expression 'the constitution of the organization concerned' had been chosen because it was broader than 'constituent instrument'; it covered also the rules in force in the organization. In most organizations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organization under its constitution.

188/ Ibid., 1962, vol. I, 666th meeting, para. 31.

"It would be possible to omit paragraph 4, but in that case it would be necessary to explain in the commentary that the Commission intended to deal separately on some future occasion with treaties concluded by international organizations. He still felt, however, that article 3 was the right context for the provisions of paragraph 4, because the article dealt with the capacity to conclude treaties in general and not only with the capacity of States to conclude treaties." 189/

90. At the same meeting, the Commission adopted by 18 votes to none, with 1 abstention, the text of paragraph 1 of article 3 quoted above. 190/ It deleted paragraph 2 and adopted an amended version of paragraph 3, which became paragraph 2. It adopted by 9 votes to 8, with 2 abstentions, the text of paragraph 4 quoted above. 191/ That text became paragraph 3 of article 3. The Commission adopted article 3 as a whole, by 12 votes to 1, with 3 abstentions. 192/

91. As adopted by the Commission article 3 read:

"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."

189/ Ibid., 1962, vol. I, 666th meeting, paras. 38, 39 and 40.

190/ See para. 83.

191/ See para. 86.

192/ Yearbook of the International Law Commission, 1962, vol. I, 666th meeting, para. 65.

92. The Commission included in its commentary on paragraph 1 of article 3 the following observation on the expression "other subjects of international law" appearing in paragraph 1:

> "The phrase 'other subjects of international law' is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded." 193/

The Commission's commentary on paragraph 3 of the article read:

> "Paragraph 3 states that the treaty-making capacity of an international organization depends on its constitution. The term 'constitution' has been chosen deliberately in preference to 'constituent instrument'. For the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless, the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization. Even when, as in the case of the Charter, the constituent treaty has contained express provisions concerning the making of certain treaties, they have not been considered to exhaust the treaty-making powers of the organization. In this connexion, it is only necessary to recall the dictum of the International Court in its opinion on Reparation for Injuries Suffered in the Service of the United Nations. 194/ 'Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.' Accordingly, important although the provisions of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole - the constituent treaty together with the rules in force in the organization - that determine the capacity of an international organization to conclude treaties." 195/

193/ Ibid., 1962, vol. II, A/5209, p. 164, para. (2).

194/ I.C.J. Reports 1949, p. 182.

195/ Yearbook of the International Law Commission, 1962, vol. II, A/5209, p. 164, paras. (2) and (4).

c) Paragraphs 2 (b) and 6 (c) of article 4

93. Article 4 as proposed by Sir Humphrey Waldock in his first report made no reference to treaties concluded by subjects of international law other than States. It did, however, contain a provision relating to permanent representatives to international organizations. That provision appeared in the last sentence of paragraph 2(c). The paragraph read:

"Article 4

"Authority to negotiate, sign, ratify, accede to or accept a treaty

. . . . . .

"2. (c) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be employed provisionally as a substitute for full-powers, subject to the production in due course of an instrument of full-powers, executed in proper form. Similarly, full-powers issued by a State's permanent representative to an international organization may also be employed provisionally as a substitute for full-powers issued by the competent authority of the State concerned, subject to the production in due course of an instrument of full-powers executed in proper form." 196/

94. At the Commission's 666th meeting, on 22 June 1962, the Drafting Committee submitted 197/ a new text for article 4, 198/ paragraph 2 of which read:

196/ Ibid., 1962, vol. II, A/CN.4/144, p. 38.

197/ Ibid., 1962, vol. I, 666th meeting, para. 67.

198/ The Committee had submitted an earlier version of the article which the Commission had referred back to it at the 659th meeting (Ibid., 1962, vol. I, 659th meeting, para. 45).

"Article 4

"Authority to negotiate, draw up, authenticate, sign, ratify, accede to or accept a treaty

. . . . . .

"2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

"(b) The same rule applies in the case of the head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question."

The treaties referred to in paragraph 2 (b) were also mentioned in paragraph 6 (c) of the text submitted by the Drafting Committee. Paragraph 6 (c) read:

"6. (c) The same rule applies to a letter or telegram sent by the head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2 (b)."

The rule referred to in the first phrase of the provision quoted above was laid down in paragraph 6 (b) which read:

"6. (b) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full-powers executed in proper form."

95. At the Commission's 666th meeting, Mr. Rosenne expressed the view that heads of permanent missions to international organizations should be placed on an equal footing with heads of diplomatic missions. To achieve that end, paragraph 2 (b) of article 4 should refer not only to treaties drawn up under the auspices of an international organization but also to treaties drawn up between an organization and one of its member

States. He therefore proposed to add at the end of the paragraph the words "or between their State and the Organization to which they are accredited". 199/

96. At the same meeting, the Commission adopted 200/ without a vote paragraph 2(b) as amended by Mr. Rosenne. It adopted article 4 as a whole with some drafting changes in paragraphs 5 and 6 (a). Finally, in the title of the article, the Commission replaced the words "accede to or" by "accede to, approve or".

97. The Commission's commentary on article 4 contained the following passage relating to paragraph 2 (b):

> "The practice of establishing permanent missions at the headquarters of certain international organizations to represent the State and to invest the permanent representatives with powers similar to those of the Head of a diplomatic mission is now extremely common. The Commission therefore considers that the rule in paragraph 2 should also apply to such permanent representatives to international organizations." 201/

98. As regards paragraphs 6 (b) and (c) the commentary stated:

> "Paragraphs 6 (b) and (c) recognize a practice of comparatively recent development which is of considerable utility and should serve to render initialling and signature ad referendum unnecessary save in exceptional circumstances. A letter or telegram is, in case of urgency, accepted as provisional evidence of authority, subject to the production in due course of full powers executed in proper form." 202/

199/ Yearbook of the International Law Commission, 1962, vol. I, 666th meeting, para. 73.

200/ Ibid., 1962, vol. I, 666th meeting, para. 84.

201/ Ibid., 1962, vol. II, A/5209, p. 165, para. (3).

202/ Ibid., 1962, vol. II, A/5209, p. 166, para. 9.

d) The remaining provisions of the draft articles

99. The remaining provisions of the draft articles adopted by the Commission in 1962 contained no mention of treaties concluded by subjects of international law other than States. A few were drafted in general terms and, interpreted literally, could be applied to treaties concluded by any subject of international law having treaty-making capacity, in particular by an international organization. 203/ Most of those provisions, however, referred exclusively to States and could therefore be applied only to treaties concluded between States. 204/

203/ See for instance article 5.

204/ See for instance articles 8, 9, 10, 11, 13, 14, 17, etc.

4. Sir Humphrey Waldock's second and third reports on the law of treaties and the question of the conclusion of treaties by an international organization on behalf of member States

100. Sir Humphrey Waldock submitted his second report[205] in March, April and June 1963 and his third report[206] in March, June and July 1964. The second report contained twenty-eight articles - numbered 1 to 28 - constituting part II of the draft proposed by Sir Humphrey. Part II was entitled "The essential validity, duration and termination of treaties". The third report contained twenty-one articles - numbered 55[207] to 75 - constituting part III - the last part - of that draft, entitled "Application, effects, revision and interpretation of treaties". With one exception, all the articles proposed in both reports made no reference to treaties concluded by international organizations. The exception was article 60,[208] appearing in the third report.

101. Article 60 was divided into two paragraphs and was entitled: "Application of a treaty concluded by one State on behalf of another". Actually, only the first paragraph related to the conclusion of treaties by one State on behalf of another. The second paragraph raised the question of the conclusion of treaties by an international organization on behalf of member States. Article 60 read:

205/ Yearbook of the International Law Commission, 1963, vol. II, A/CN.4/156 and Add.1 - 3, pp. 36 and ff.

206/ Ibid., 1964, vol. II, A/CN.4/167 and Add.1 - 3, pp. 5 and ff.

207/ The articles were numbered consecutively after the last article - article 54 - which the Commission had adopted in 1963 at its fifteenth session.

208/ Yearbook of the International Law Commission, 1964, vol. II, A/CN.4/167 and Add.1 - 3, p. 16.

"1. When a State, duly authorized by another State to do so, concludes a treaty on behalf and in the name of the other State, the treaty applies to that other State in the capacity of a party to the treaty. It follows that the rights and obligations provided for in the treaty may be invoked by or against the other State in its own name.

"2. Similarly, when an international organization, duly authorized by its constituent instrument or by its established rules, concludes a treaty with a non-member State in the name both of the organization and of its Member States, the rights and obligations provided for in the treaty may be invoked by or against each Member State."

102. Sir Humphrey included in his third report the following commentary on paragraph 2 of article 60:

"The question may ... be posed as to how far the institution of 'agency' may play a rôle in cases where treaties are concluded by international organizations on behalf of their members. In paragraph (3) of the commentary to the previous article 209/ reference was made to treaties

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209/ The previous article - article 59 - provided that:

"Extension of a treaty to the territory of a State with its authorization

"The application of a treaty extends to the territory of a State which is not itself a contracting party if -

(a) the State authorized one of the parties to bind its territory by concluding the treaty;

(b) the other parties were aware that the party in question was so authorized; and

(c) the party in question intended to bind the territory of that State by concluding the treaty."

Paragraph 3 of Sir Humphrey's commentary on article 59 read:

"Application of a treaty to the territory of a State not an actual party to the treaty in consequence of a delegation of a treaty-making authority also appears to occur in the case of some treaties made by international organizations, where the treaty is concluded not merely for the organization as such but also for the individual member States. Thus

concluded by the European Economic Community and by Euratom where the principle of territorial application

209/ (continued)

article 228 of the Treaty of 1957 establishing the European Economic Community [United Nations, Treaty Series, vol. 298, p. 90], after providing for the conclusion of certain types of agreements by the Community through its Council, states: 'Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States.' This article would appear to make the Community itself the party to the agreements which it concludes and the Member States territories to which the agreements apply. Article 206 of the Treaty of 1957 establishing the European Atomic Energy Community [ibid., p. 231] also provides that this Community may conclude certain types of agreement but does not make any statement as to the binding effects of the agreements. However, it seems that Euratom treaties, though regarded as made by the Community alone, apply automatically in the territories of the Member States. The Agreements of 1958 for Co-operation between Euratom and the United States of America [United Nations, Treaty Series, vol. 335, pp. 161 and ff and vol. 338, pp. 135 and ff], for example, actually defines the term 'parties' as meaning the Government of the United States and Euratom, whereas the detailed provisions of the treaty clearly assume that the treaty will be binding on the territories of the Member States. In drawing attention to these cases the Special Rapporteur does not wish to be understood as taking any definite position in regard to the territorial application of treaties concluded by organizations. The cases are mentioned merely for the purpose of illustrating the possible significance of the principle formulated in this article in connexion with the treaties of international organizations." (Yearbook of the International Law Commission, 1964, vol. II, A/CN.4/167 and Add. 1 - 3, p. 15, para (3) and p. 16.)

appears to be contemplated rather than that of agency. It is easy, however, to imagine cases, especially in the economic sphere, where the Organization intends to conclude a treaty with a third State on behalf of its Member States in such a manner as to place them individually in the position of parties to the treaty.

"Two recent judgements of the International Court, in the South West Africa cases 210/ and in the Northern Cameroons case 211/ have been concerned with the rights of members of an organization under treaties concluded pursuant to a provision contained in the constitution of the organization. In the South West Africa cases the complexity of the legal acts creating the Mandate gave rise to sharp divisions in the Court as to its legal basis, some Judges considering that it was constituted by a treaty, others that it resulted from a legislative act by the Council of the League. The majority of the Court upheld both the character of the Mandate as a 'treaty in force' and the right of two States to avail themselves of a provision in the Mandate conferring a right upon 'Members of the League of Nations'. But it is not easy to discern in the judgements exactly what legal relation the Court considered the two States to have to the treaty. One Judge, it is true, placed himself squarely upon the principles of stipulation pour autrui, rejecting the idea that the plaintiff States could be considered 'parties' to the Mandate. The other Judges in the majority did not push their analysis of the legal position to the point of indicating whether they regarded the two States as 'parties', either directly or indirectly, to the Mandate treaty, or as beneficiaries of a stipulation pour autrui, or as entitled to exercise the right conferred by the Mandate on some other basis connected with their membership of the Organization. In the Northern Cameroons case the legal basis of the Trusteeship Agreement was less complex and received little examination from the majority of the Judges, while the Court decided the case on a special ground. Although references were made in the main judgement and in individual opinions to the rights of Members of the United Nations under the Agreement, these references were in terms which left open the question of the true juridical relation of Members of the Organization to the Agreement. These two cases do not therefore provide any

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210/ I.C.J. Reports, 1962, p. 319.

211/ I.C.J. Reports, 1963, p. 15.

clear guidance on this issue; and in any event, whether or not the treaties in these cases are properly to be considered as having been made by the Organization, the treaties were made with Members of the Organization. Such treaties raise special problems of the law governing international organizations which it seems advisable to leave for consideration by the Commission in connexion with its study of the relations between States and inter-governmental organizations. Accordingly, paragraph 2 of the present article is confined to treaties made by organizations with third States.

"Paragraph 2 therefore provides that the same result will follow as in paragraph 1 when an organization contracts with a third State not merely on behalf of the organization as a collective legal person but also on behalf of its Member States individually. 212/

5. The decision to postpone consideration of the question of the conclusion of treaties by an international organization on behalf of member States and the provisional draft articles on the law of treaties adopted by the Commission in 1963 and 1964 (articles 30 to 73)

a) The decision to postpone consideration of the question of the conclusion of treaties by an international organization on behalf of member States

103. Articles 59[213/] and 60[214/], proposed by Sir Humphrey Waldock in his third report were considered simultaneously by the Commission at its 732nd and 733rd meetings held during the sixteenth session, on 27 and 28 May 1964, respectively. The arguments advanced by members concerning paragraph 2 of article 60 may be summarized as follows.

212/ Yearbook of the International Law Commission, 1964, vol. II, A/CN.4/167 and Add.1 - 3, p. 17, paras. (4) to (6).

213/ Quoted above in footnote 209.

214/ Quoted above in para. 101.

104. Messrs. Tunkin,[215] Tabibi,[216] Castrén,[217] and Elias[218] suggested that the paragraph should be deleted. Mr. Tunkin recalled that the Commission had decided[219] to defer examination of treaties concluded by international organizations. The Chairman, (Mr. Ago), speaking as a member of the Commission, expressed the view, however, that the Commission could retain paragraph 2 of article 60 without infringing its previous decision provided it restricted that paragraph to the cases where organizations acted as agents for States.[220]

105. Mr. Rosenne felt that the situation contemplated in paragraph 2 of article 60 constituted a new form of treaty-making which had nothing to do with "agency". The judgements of the International Court of Justice in the South West Africa cases[221] and in the Northern Cameroons case[222] provided limited authority for a possible development of international law in that respect.[223] On another aspect of the question, he wondered why paragraph 2 was confined to treaties concluded between international organizations and non-member States.[224]

106. Mr. Luna suggested that the substance of article 60 should be transferred to part I of the draft.[225]

107. After discussing several questions concerning article 59, and paragraph 1 of article 60, the Commission decided to delete article 59 and to refer the whole of article 60 to the Drafting Committee.[226]

215/ Yearbook of the International Law Commission, 1964, vol. I, 732nd meeting, para. 50.

216/ Ibid., 1964, vol. I, 733rd meeting, para. 7.

217/ Ibid., 1964, vol. I, 733rd meeting, para. 11.

218/ Ibid., 1964, vol. I, 733rd meeting, para. 23.

219/ See above paras. 65 and 66.

220/ Yearbook of the International Law Commission, 1964, vol. I, 733rd meeting, para. 18.

221/ See above footnote 210.

222/ See above footnote 211.

223/ Yearbook of the International Law Commission, 1964, vol. I, 733rd meeting, para. 13.

224/ Ibid., 1964, vol. I, 732nd meeting, para. 27.

225/ Ibid., 1964, vol. I, 732nd meeting, para. 66.

226/ Ibid., 1964, vol. I, 733rd meeting, paras. 35, 40 and 41.

108. At the Commission's 750th meeting, on 23 June 1964, the Drafting Committee submitted a text for article 60 which contained no reference to treaties concluded by international organizations.[227] The Committee specified that, in its view, the subject matter of the article belonged to part I of the provisional draft on the law of treaties.

109. After some discussion of the Drafting Committee's text, the Commission referred the matter back to the Committee.[228] At the 770th meeting, on 20 July 1964, Sir Humphrey informed the Commission that the Committee had been unable, in the short time available, to find a satisfactory text. He therefore proposed that no article on the matter should be adopted for the time being.[229]

110. The Commission accepted[230] Sir Humphrey's proposal and included the following passage in its report on the work of the sixteenth session:

> "The Commission ... considered whether it should include an article covering the making of treaties by one State on behalf of another or by an international organization on behalf of a member State. As to the latter type of case, some members felt that it was too closely connected with the general problem of the relations between an international organization and its member States to be dealt with conveniently as part of the general law of treaties. Other members took the view that cases - and these are found in practice - where an international organization enters into a treaty not simply on its own behalf but in the name of its members may constitute the latter actual parties to the treaty and should therefore be covered in the general law of treaties. As to the former type of case - where one State authorizes another to conclude a treaty in its name and thereby make it a party to the treaty - some members noted that, although instances occurred, they were infrequent, and these members felt hesitation about including specific provisions to cover this practice from the point of view of the principle of the

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227/ Ibid., 1964, vol. I, 750th meeting, para. 2.

228/ Ibid., 1964, vol. I, 750th meeting, para. 61.

229/ Ibid., 1964, vol. I, 770th meeting, para. 50.

230/ Ibid., 1964, vol. I, 770th meeting, para. 51.

equality and independence of States. Other members pointed out that the practice, if not extensive, has a certain importance with regard to economic unions, such as the Belgo-Luxembourg Economic Union, where treaties may be concluded by one State on behalf of the Union. These members also felt that the expanding diplomatic and commercial activity of States and the variety of their associations with one another might lead to an increase in cases of this type, and that it was, on the whole, desirable to provide for them in the draft articles. The Commission decided that, in any event, the question really belonged to part I of the draft articles since it concerned the conclusion rather than the application of treaties. It therefore postponed its decision regarding the inclusion of an article on this question until [the seventeenth] session when it intends to re-examine its draft of part I." 231/

b) The provisional draft articles on the law of treaties adopted by the Commission in 1963 and 1964

111. In 1963, at its fifteenth session, the Commission adopted twenty-five articles - numbered 30 to 54 - which constituted part II of the provisional draft on the law of treaties.232/ Part II was entitled "Invalidity and termination of treaties". In 1964, at its sixteenth session, it adopted nineteen articles - numbered 55 to 73 - constituting part III of the provisional draft.233/ Part III - the last part of the draft - was entitled "Application, effects, modification and interpretation of treaties".

112. The articles adopted in 1963 and 1964 contained no mention of treaties concluded by subjects of international law other than States. As was the case for the articles adopted in 1962,234/ they can be divided into two categories. Some were drafted in general terms and, if interpreted literally, could be applied to treaties concluded by any subject of international law having treaty making capacity, in particular by an international organization.235/ Others, however, referred exclusively to States and could therefore be applied only to treaties concluded between States.236/

231/ Ibid., 1964, vol. II, A/5809, p. 176, para. 20.
232/ Ibid., 1963, vol. II, A/5509, pp. 189 and ff.
233/ Ibid., 1964, vol. II, A/5809, pp. 176 and ff.
234/ See above para. 99.
235/ See, for instance, articles 37, 38, 39, 55, 56, 65 etc.
236/ See, for instance, articles 30, 32, 33, 34, 35, 59, 60, 61, 62 etc.

6. Sir Humphrey Waldock's fourth report on the the law of treaties

113. In conformity with decisions taken by the Commission in 1962, 1963 and 1964 [237], the Secretary-General requested Governments to submit their written comments on the provisional draft articles on the law of treaties adopted during each of those years. The comments submitted in pursuance of those requests were published by the Secretariat in documents A/CN.4/175 and Add.1 to 5 and A/CN.4/182 and Corr. 1 and 2 and Add.1, 2/Rev.1 and 3. The Secretariat included in those documents extracts, arranged article by article, from the summary records of the discussions in the Sixth Committee of the provisional draft articles. The written comments - but not the extracts from the summary records - were subsequently printed in the Annex to the Report of the Commission on the work of its eighteenth session (1966). [238]

237/ Those decision were taken in pursuance of articles 16 and 21 of the Commission's Statute. (Yearbook of the International Law Commission, 1962, vol. II, A/5209, p. 160, para. 19; ibid., 1963, vol. II, A/5509, p. 189, para. 13; ibid. 1964; vol. II, A/5809, p. 175, para. 16).

238/ Yearbook of the International Law Commission, 1966, vol. II A/6309/Rev.1, Part II, pp. 279 and ff.

114. Sir Humphrey Waldock's fourth report on the law of treaties [239] - submitted to the Commission in March and June 1965 - was prepared in the light of the Governments comments on, and of the discussion in the Sixth Committee of, the provisional draft articles adopted by the Commission in 1962, 1963 and 1964. It examined the articles of part I of the draft and the first three articles [240] of part II. It contained summaries of the Governments' comments and Sir Humphrey's observations and proposals for revision of the articles examined. The proposals relating to the title of the draft articles, to paragraph 1 (a) of article 1, to paragraph 2 (b) of article 2, to articles 3 and 4 and to the question of the conclusion of treaties by an international organization on behalf of member States are relevant to the subject matter of this historical survey and are examined below.

a) Proposed revision of the title of the draft articles

115. After examining several comments by Governments which did not relate to the question of treaties concluded by international organizations, Sir Humphrey stated in his fourth report:

239/ Ibid., 1965, vol. II, A/CN.4/177 and Add.1 and 2, pp. 3 and ff.

240/ Articles 30, 31 and 32.

> "... it seems desirable for the Commission to consider whether it should now take account in the title [of the draft articles] of its decision 241/ to confine the draft articles to the treaties of States. It is true that articles 1 and 3, as at present drafted, refer to the treaties of 'other subjects of international law', and that article 3 also deals with the capacity of international organizations to conclude treaties. But all the remaining articles have been drafted for application in the context of treaties concluded between States, and the view of the Special Rapporteur is that for reasons of logic and relevance these two articles ought now to be brought into line with the rest of the draft. If the Commission accepts this view, the Special Rapporteur suggests that it may be advisable, in order to prevent any misconception, to amend the title to read: 'Draft articles on the Law of Treaties concluded between States'." 242/

b) Proposed revision of paragraph 1 (a) of article 1

116. Numerous observations were made by Governments with respect to the definition of "treaty" contained in paragraph 1 (a) of article 1 of the provisional draft 243/. Only three of those comments concerned - directly or indirectly - the expression "or other subjects of international law" appearing in that provision. The first was made by Finland in the section of its written comments devoted to article 1. That section read:

241/ See above paras. 65 and 66.

242/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, page 10.

243/ For the text of paragraph 1 (a) of article 1 see above para. 78.

> "Since the definitions contained in article 1 considerably affect the subsequent articles every effort should be made to formulate these definitions as clearly and unequivocally as possible. As the definition contained in paragraph 1 (a) of article 1 is given for the purposes of this Convention only and since the Convention deals exclusively with treaties concluded between States, there appears to be no need in this connextion to touch upon other subjects of international law. Consequently, the words 'or other subjects of international law' could be deleted from sub-paragraph (a)." 244/

The second was made by the Netherlands in a section of its written comments entitled "The scope of the draft articles". It read:

> "Although the Netherlands Government endorses the principle on which, in paragraph 21 245/ of its report, the Commission bases its commentary on the introduction, it believes it would be better if no mention were made yet in articles 1, 2 and 3 of the draft of the fact that the provisions apply to treaties entered into by international organizations and if the question as to which articles could be made to apply in their original form to treaties concluded by international organizations, and to what extent special articles would have to be drafted for those organizations, were gone into later. The Netherlands Government has in mind the method adopted for laying down the 'Régime Relating to Honorary Consular Officers' in the Vienna Convention on Consular Relations of 24 April 1963". 246/

244/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, Annex, p. 291.

245/ Quoted above in para. 66.

246/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, Annex, p. 313.

The third observation - which related only indirectly to paragraph 1 (a) of article 1 - was made by the representative of Colombia at the 741st meeting of the Sixth Committee, during the seventeenth session (1962) of the General Assembly. It was reported as follows in the summary record of that meeting:

> "... as the draft articles from article 4 onwards dealt with the conclusion of treaties by States only, there was no need to mention the capacity [to conclude treaties] of 'other subjects of internation law'". 247/

117. In the section of his report devoted to paragraph 1 (a) of article 1, Sir Humphrey summarized the comments of several Governments - in particular that of Finland quoted in the previous paragraph - and listed four points in the Commission's definition of "treaty" which had been questioned. 248/ The second of those points concerned the expression "or other subjects of international law". Sir Humphrey observed in that respect:

> "The second point is the suggestion that the words 'or other subjects of international law' should be deleted. The Special Rapporteur agrees with this suggestion... The Commission, as already mentioned in the Special Rapporteur's observations and

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247/ Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 741st meeting, para. 5.

248/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 11, para. 2.

proposals regarding the title to the draft articles 249/, decided at its fourteenth session to confine the draft articles to the treaties of States 250/. It rejected the idea of including a separate section dealing with the treaties of international organizations, preferring not to complicate the drafting of the present articles by trying to deal with the special case of treaties concluded by international organizations. It did not, however, fully draw the consequences which naturally followed from its decision to confine the draft articles to the treaties of States. It retained in article 1, paragraph 1, a reference to the treaties of 'other subjects of international law' and in article 3, paragraph 3, it included an express provision regarding the treaty-making capacity of international organizations 251/. The Commission was anxious, it is believed, to make it plain that it accepted the concept of treaty-making by international organizations, even while it preferred not to deal with their treaties in the draft articles. This has already been done in its 1962 report 252/, and can appropriately be emphasized again in the commentaries to the final texts of the articles. But the Special Rapporteur considers that, as the articles are designed to provide the basis for a convention dealing only with the law of treaties concluded between States, the texts of the articles ought now at all points to be drafted with that design in view. Since the aim of paragraph 1 (a) is to define the term 'treaty' for the purpose only of the 'present articles', it seems necessary to eliminate from it the reference to treaties concluded by subjects of international law other than States". 253/

249/ See above para. 115.

250/ See above paras. 65 and 66.

251/ See above para. 91.

252/ See above para. 66.

253/ Yearbook of the International Law Commission, 1965, vol.II, A/CN.4/177 and Add.1 and 2, p.11, para.4 and p. 12.

118. In the light of Sir Humphrey's observation quoted above and of his observations on the other points questioned by Governments, he proposed that paragraph 1 (a) of article 1 of the provisional draft articles should be amended to read:

> "'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, concluded between two or more States and governed by international law." 254/

c) Proposed revision of article 2

119. The text of article 2 adopted by the Commission in 1962 contained no reference to treaties concluded by subjects of international law other than States. That text read:

> " Scope of the present articles
>
> " 1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).
>
> " 2. The fact that the present articles do not apply to international agreements not in written form 255/ shall not be understood as affecting the legal force that such agreements possess under international law." 256/

254/ Ibid., 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 12, para. 7.

255/ The term "treaty" as defined by the Commission in 1962 was already restricted to agreements in written form (See above para. 78).

256/ Yearbook of the International Law Commission, 1962, vol. II, A/5209, p. 163.

120. Reviewing article 2 in 1965, Sir Humphrey Waldock wrote in his fourth report:

> "No exception has been taken to this article by any Government. On the other hand, the final form of its text must clearly take into account both the decision already arrived at by the Commission to confine the draft articles to the treaties of States and the decision ultimately reached by it regarding the definition of the term 'treaty' in article 1, paragraph 1 (a). If the Commission endorses the Special Rapporteur's view that the words 'or other subjects of international law' should be deleted from article 1, paragraph 1 (a), and also the provision in paragraph 3 of article 3 regarding the treaty-making capacity of international organizations, then it seems to him desirable that article 2 should contain a reservation respecting treaties concluded by 'other subjects of international law' as well as concerning agreements not in written form. He accordingly suggests that article 2 should be revised to read as follows:
>
> '1. The present articles apply to treaties as defined in article 1, paragraph 1 (a).
>
> '2. The fact that the present articles do not apply -
>
> (a) to international agreements not in written form,
>
> (b) to international agreements concluded by subjects of international law other than States,
>
> shall not be understood as affecting the legal force that such agreements possess under international law nor the rules of international law applicable to them'."257/

257/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 16.

d) Proposal to delete article 3

121. It will be recalled [258] that the written comments of the Netherlands and the statement made by the representative of Colombia in the Sixth Committee related not only to paragraph 1 (a) of article 1 but also to article 3 (Capacity to conclude treaties) of the provisional draft articles adopted by the Commission [259]. Sir Humphrey Waldock's fourth report included summaries of further comments on article 3, submitted by Austria, Finland, Israel, Japan, Sweden, the United Kindom and the United States. Extracts of those summaries, relevant to the question studied in this survey, are quoted below:

"Austria [260]

> "In paragraph 3 [of article 3] the Austrian Government considers that the restriction on the treaty-making capacity of international organizations resulting from the words 'depends on the constitution of the organization concerned' is not absolutely necessary. In its view, the starting point might rather be that capacity to conclude treaties is an inherent right of any international organization which is a subject of international law; indeed, capacity to conclude treaties appears to it to be the essential criterion of the status of a subject of international law, so that an organization

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258/ See above para. 116.

259/ For the text of article 3 see above para. 91.

260/ For the full text of the comments by Austria, see Yearbook of the International Law Commission, 1966, vol.II, A/6309/Rev.1, Part II, Annex, pp. 281 and ff.

lacking such capacity would not be one. The constitutions of many international organizations, it observes, do not contain any mention of the capacity of the organization to conclude treaties, yet its organs consider themselves competent to do so on its behalf. When, on the other hand, the constitution does contain provisions on the point, they either relate to the question which organ is competent for the purpose or limit the extent of the freedom to conclude treaties. Such restrictions assume that in principle the organization would possess an all-embracing capacity to conclude treaties. The Austrian Government thinks that paragraph 3 is incorrect if it means that the treaty-making capacity of an international organization is derived solely from its constitution. Nor does it think that there is anything to the contrary to be found in the opinions of the Court in the Reparation for Injuries 261/ and Certain Expenses of the United Nations 262/ cases. It suggests that paragraph 3 should be deleted; or that, at the very least, the words 'depends on the constitution' should be revised so as to indicate that the constitution can only contain restrictions on the freedom of an organization to conclude treaties." 263/

"Finland 264/

"The Finnish Government recalls its proposal for the deletion of the words 'or other subjects of international law' from the definition of 'treaty' in article 1(a) 265/because the draft articles deal exclusively with treaties concluded

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261/ See above footnote 71.

262/ I.C.J. Reports, 1962, p. 151.

263/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, pp. 16 and 17.

264/ For the full text of the comments by Finland, see Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, Annex, p. 291.

265/ See above para. 116.

between States. For the same reason it here proposes that the words 'and by other subjects of international law' should be deleted from paragraph 1 of this article and that paragraph 3 should be omitted. Another possibility, it suggests, would be to drop the article altogether as superfluous, in accordance with the opinion expressed by some members of the Commission at its fourteenth session..." 266/

Israel

[The comments of Israel on article 3 did not concern the question studied in this survey.]

"Japan 267/

"The Japanese Government proposes the deletion of paragraph 2, which does not appear to it to add much to paragraph 1. Indeed, in its view, paragraph 2 may even be misleading in that it does not mention another element in international capacity to conclude treaties - the need for recognition of that capacity by the other contracting party or parties. The same may, it thinks, be said of paragraph 3, the deletion of which it also proposes." 268/

266/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 17.

267/ For the full text of the comments by Japan, see Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, Annex, pp. 301 and ff.

268/ Yearbook of the International Law Commission, 1965, vol.II, A/CN.4/177 and Add.1 and 2, p. 17.

"Sweden [269]

"The Swedish Government observes that the rule in paragraph 1 is necessarily stated in broad terms and is evidently not very helpful. On the other hand, it feels that any detailed elaboration of this point is bound to encounter great difficulties and that it may be better to leave the development of the law to take place in the practice of States and international organizations and in the decisions of international tribunals." [270]

United Kingdom

[The comments of the United Kingdom on article 3 did not concern the question studied in this survey.]

"United States [271]

"..... In paragraph 3 the United States Government considers that the word 'constitution' may be too limiting, especially in view of the apparently different sense in which it is used in the previous paragraph and of the explanation in the Commission's commentary [272] .... In its view, a good measure of the treaty-making authority of an international organization can be found in the dictum of the International Court in the Reparation for Injuries, opinion mentioned in the commentary:

269/ For the full text of comments by Sweden, see Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev. 1, Part II, Annex, pp. 337 and ff.

270/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 17.

271/ For the full text of the comments by the United States, see Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, Annex, pp. 346 and ff.

272/ See above para. 92.

> 'Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.' 273/
>
> It suggests that the word 'authority' would be less likely to create confusion than the word 'constitution', which is generally understood to mean a written document. It further suggests that the paragraph should be so worded that its meaning would be clear without reference to the commentary; and that, in particular, the paragraph should be more specific as to what is meant by an 'international organization'". 274/

122. In the Observations and Proposals of his fourth report, Sir Humphrey suggested the deletion of article 3. He explained as follows that suggestion:

> "After careful consideration of the comments of Governments and of the records of the Commission's previous discussion of this article, the Special Rapporteur is of the opinion that the entire article should be deleted. He shares the view of those who think that the question of capacity is more prominent in the law of treaties than in that of diplomatic intercourse. But he doubts both the value of the truncated treatment of the question which is found in article 3 as at present drafted and the possibility of formulating more extended provisions that would have a reasonable prospect in present circumstances of

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273/ See footnote 194.

274/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, pp. 17 and 18.

meeting with general acceptance. The text of paragraph 2 of the article was adopted by the Commission by the narrow majority of 9 votes to 7, with 3 abstentions; and even then it deals with only one of several similar problems. The text of paragraph 3 was adopted by the even narrower majority of 9 votes to 8, with 2 abstentions 275/. Furthermore, the Commission having decided to confine the specific provisions of the draft articles to the treaties of States, the rules governing the capacity of international organizations to conclude treaties have only the most marginal, if any, claim to be included in the draft articles. Paragraph 1 commanded the almost unanimous support of the Commission, being adopted by 18 votes to none, with 1 abstention. However, the rule stated in the paragraph is already implied in the definition of 'treaty' in article 1 paragraph 1 (a) and ..... the paragraph is not, in itself, very helpful in resolving the problems of capacity.

"Accordingly, the Special Rapporteur proposes the deletion of the article." 276/

e) Proposed revision of article 4

123. It will be recalled that at the Commission's 666th meeting, on 22 June 1962, Mr. Rosenne suggested that a clause referring to treaties drawn up between an international organization and one of its member States should be added to article 4 (Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty). The Commission approved Mr. Rosenne's suggestion without a

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275/ See above para. 90.

276/ Yearbook of the International Law Commission, 1965, vol. II A/CN.4/177 and Add.1 and 2, p. 18.

vote [277]. In his fourth report, Sir Humphrey proposed a new text for article 4 which omitted the clause in question [278]. In explaining the grounds for the new text, he did not refer to that clause and did not mention his proposals concerning the title of the draft articles and paragraph 1 (a) of article 1 [279].

f) Proposal not to deal in the draft articles with the question of the conclusion of treaties by an international organization on behalf of member States

124. As already noted, [280] in 1962 the Commission postponed consideration of the above question and of the question of treaties concluded by one State on behalf of another. In his fourth report, Sir Humphrey Waldock dealt with both questions in a single section entitled "Question A - Conclusion of treaties by one State on behalf of another or by an international organization on behalf of a member State". [281] The passages of the section relevant to the conclusion of treaties by an international organization on behalf of member States read as follows:

277/ See above paras. 95 and 96.

278/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, para. 11 and p. 22.

279/ See above paras. 115 and 117.

280/ See above paras. 109 and 110.

281/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add. 1 and 2, p. 22.

"[A] case that might conceivably arise would be the conclusion of a treaty by an international organization with a third State as agent for its members, with the object that they should severally become parties to the treaty. The organization might, in short, be used simply as a convenient 'representative' of the member States for the purpose of concluding a treaty in which their interests were all the same.

"A further special problem may be mentioned, if only to be dismissed. This is the case where an international organization enters into an agreement with one of its own members containing provisions for the benefit of the other members. Examples are mandate and trusteeship agreements, the legal nature and effects of which came under consideration in the South West Africa cases 282/ and in the Northern Cameroons case 283/. The decisions of the International Court in these cases left open the question of the true juridical relation of members of the organization to the agreements in question; and the problems which they raise appear to be quite special and to belong to the law governing international organizations rather than to the general law of treaties. Accordingly, in the view of the Special Rapporteur, they can be left out of account in connexion with the present question.

"...As to treaties concluded by international organizations with third States on behalf of their members, some members felt that this type of case is too closely connected with the general problem of the relations between an organization and its members to be dealt with conveniently as part of the general law of treaties. Other members took the view that in these cases the transaction may constitute the members actual parties to the treaties, and that the cases should therefore be covered in the general law of treaties" 284/

282/ See above footnote 210.

283/ See above footnote 211.

284/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 22, paras. 2-4 and p. 23.

125. Sir Humphrey Waldock proposed to omit question A for the following reasons:

> "The Special Rapporteur believes that, if on a limited scale and in particular connexions, the phenomenon of agency does exist in international law and does, in principle, belong to the general law of treaties. On the other hand, he feels that it may be difficult for the Commission to formulate wholly satisfactory rules covering the cases which arise under this head without becoming involved to a certain extent in controversial problems of international capacity and personality and without encroaching to a certain extent on the law governing international organizations. Accordingly, similar considerations to those which lead him to propose the deletion of article 3 regarding 'capacity to conclude treaties'285/ also lead him to propose the omission from the draft articles of the topic which is the subject-matter of the present question. The omission of the topic would not mean the taking of any position by the Commission on the substance of the matter. It would simply mean that the topic would be left aside for special treatment as and when that might be considered necessary or desirable. However desirable in principle it might be to prepare a complete and exhaustive statement of the principles governing every possible aspect of the law of treaties, the Special Rapporteur is of the opinion that, on practical grounds, the Commission should now confine its draft to the main principles governing treaties concluded between States. The Special Rapporteur accordingly proposes the omission of this question" 286/

285/ See above para. 122.

286/ Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add. 1 and 2, p. 23, para. 7.

7. Sir Humphrey Waldock's fifth and sixth reports on the law of treaties

126. Sir Humphrey Waldock submitted to the Commission his fifth report on the law of treaties [287] in November and December 1965 and January 1966. He submitted his sixth - and last - report on the topic [288] in March, April, May and June 1966. The two reports reviewed the provisional draft articles not covered in the fourth report. Like the latter, they were prepared in the light of the written comments by Governments and the discussion in the Sixth Committee. Neither raised the question of treaties concluded by international organizations.

8. The final draft articles on the law of treaties, adopted by the Commission in 1966

127. The Commission considered in 1965, at the first part of its seventeenth session, [289] the section of Sir Humphrey Waldock's fourth report [290] which dealt with part I of the provisional draft articles. It considered in 1966, at the second part of its seventeenth session [291] and at its eighteenth session, [292] the remainder of Sir Humphrey's

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287/ Ibid., 1966, vol. II, A/CN.4/183 and Add.1-4, pp. 1 and ff.

288/ Ibid., 1966, vol. II, A/CN.4/186 and Add.1-7, pp. 51 and ff.

289/ The first part of the seventeenth session was held in Geneva from 3 May to 9 July 1965.

290/ See above para. 114.

291/ The second part of the seventeenth session was held in Monaco from 3 to 28 January 1966.

292/ The eighteenth session was held in Geneva from 4 May to 19 July 1966.

fourth report and his fifth and sixth reports. [293/] At the end of the eighteenth session, the Commission adopted a final draft of articles on the law of treaties with commentaries, which it included in chapter II of its report on the work of the eighteenth session.[294/] The draft consisted of 75 articles divided into the following parts:

I. Introduction (articles 1 to 4);

II. Conclusion and entry into force of treaties (articles 5 to 22);

III. Observance, application and interpretation of treaties (articles 23 to 34);

IV. Amendment and modification of treaties (articles 35 to 38);

V. Invalidity, termination and suspension of the operation of treaties (articles 39 to 68);

VI. Miscellaneous provisions (articles 69 and 70);

VII. Depositaries, notifications, corrections and registration (articles 71 to 75).

128. The present section examines first a decision by the Commission not to deal in the draft articles with the question of the conclusion of treaties by an international organization on behalf of member States. It turns next to the title of the draft articles. It then deals with the provisions of the final draft articles which are relevant to the question of treaties concluded by international organizations, namely, article 1,

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293/ See above para. 126.

294/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, pp. 177 and ff.

paragraph 1 (a) of article 2 and paragraph (a) of article 3. It gives an account of the travaux préparatoires of those provisions, limited to the aspects concerning the subject matter of this survey. It also deals with two articles - Articles 5 and 6 - which are not relevant to the question of treaties concluded by international organizations but were based on articles of the provisional draft which contained express references to such treaties. Finally, it devotes a brief sub-section to the remaining provisions of the final draft articles, considered from the point of view of the subject matter of the Survey.

a) The decision not to deal in the draft articles with the question of the conclusion of treaties by an international organization on behalf of member States

129. It will be recalled [295] that Sir Humphrey dealt in his fourth report with the above question and with the question of the conclusion of treaties by one State on behalf of another in a single section entitled "Question A - Conclusion of treaties by one State on behalf of another or by an international organization on behalf of a member State". It will also be recalled [296] that the section concluded with the following statement: "The Special Rapporteur accordingly proposes the omission of this question". That proposal was adopted [297] by the Commission at its 810th meeting, on 24 June 1965, after a brief discussion of Question A. [298]

295/ See above paras. 124 and 125.

296/ See above para. 125.

297/ Yearbook of the International Law Commission, 1965, vol. I, 810th meeting, para. 9.

298/ Ibid., 1965, vol. I, 781st meeting, paras. 42 to 58 and 810th meeting, paras. 4 and 8.

b) The title of the draft articles

130. In 1965 some members expressed views[299] on Sir Humphrey Waldock's amendment[300] to the title of the draft articles but no decision was taken on the matter. In 1966, at the 892nd meeting, on 18 July, the Commission held a brief discussion on the title of the draft.[301] At the end of the discussion, Sir Humphrey proposed that the Commission should retain the title it had used so far, namely, "Draft Articles on the Law of Treaties". His proposal was adopted without a vote.[302]

c) Article 1 (new provision)

131. Article 1 of the final draft read: "The present articles relate to treaties concluded between States". It was entitled: "The scope of the present articles". It will be recalled that that title had been given in the provisional draft to article 2, which dealt with an entirely different matter.[303] That article formed the basis in the final draft of article 2 under a new title, namely, "International agreements not within the scope of the present articles".[304]

132. Article 1 of the final draft was a new provision which was the outcome of the discussion by the Commission at its 776th and 777th meetings, held on 4 and 5 May respectively,[305] of Sir Humphrey Waldock's revised versions[306] of article 1,

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299/ Ibid., 1965, vol. I, 766th meeting, paras. 51 and 70: 777th meeting, para. 7.

300/ See above para. 115.

301/ Yearbook of the International Law Commission, 1966, vol. I, Part II, 892nd meeting, paras. 30 to 44. The discussion bore mainly on the question whether the expression "Draft Articles" or "Draft Convention" should be used.

302/ Ibid., 1966, vol. I, Part II, 892nd meeting, para. 46.

303/ For the text of article 2 of the provisional draft, see above para. 119.

304/ See below paras. 147 to 149.

305/ The 776th and 777th meetings were held during the first part of the seventeenth session.

306/ Those revised versions were proposed by Sir Humphrey in his fourth report. (See above paras. 118 and 120).

paragraph 1 (a) (definition of "treaty"), and of article 2 (see preceding paragraph). For the sake of clarity, that discussion is analyzed below in the present sub-section although it bore also on provisions which are the subject matter of sub-sections d) and e).

133. At the outset of the discussion, Sir Humphrey observed that there was an inconsistency in the provisional draft between, on the one hand, the definition of the term "treaty" in paragraph 1 (a) of article 1, [307] which referred to treaties concluded by subjects of international law other than States, and, on the other, the great majority of the provisions of the draft, which dealt exclusively with treaties between States. He expressed the view that, in order to eliminate the inconsistency, it was necessary to limit the scope of paragraph 1 (a) of article 1 to what was actually covered in the draft and he recalled the proposals he had submitted to that effect in his fourth report. [308] Sir Humphrey's views were supported by Messrs. Castrén, [309] Yasseen, [310] Tunkin, [311] and Reuter. [312] Mr. Tunkin, in particular, recalled the decision taken by the Commission on 7 May 1962 [313] and Mr. Reuter observed that agreements concluded by subjects of international law other than States had been

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307/ For the text of paragraph 1 (a) of article 1, see above para. 78.

308/ Yearbook of the International Law Commission, 1965, vol. I, 776th meeting, paras. 50 and 51. For the proposals submitted by Sir Humphrey in his fourth report, see above paras. 115, 117 and 118.

309/ Ibid., 1965, vol. I, 776th meeting, para. 55.

310/ Ibid., 1965, vol. I, 776th meeting, para. 63.

311/ Ibid., 1965, vol. I, 776th meeting, para. 72.

312/ Ibid., 1965, vol. I, 777th meeting, para. 23.

313/ See above paras. 65 and 66.

excluded from the scope of the draft because they had not been studied in detail by the Commission.

134. Mr. Ago, however, said that he would regret the deletion from paragraph 1 (a) of article 1 of the reference to "other subjects of international law". Indeed, a treaty did not cease to be a treaty merely because a subject of international law other than a State was a party thereto. He therefore suggested that, if any limitation of the scope of the draft articles was necessary, it should be indicated in article 2 (provisional draft). 314/ Mr. Reuter 315/ and Mr. Rosenne 316/ supported Mr. Ago's remarks.

135. Mr. Briggs expressed the view that it might be reasonable to disregard treaties concluded between international organizations to which States were not parties since there were only about 200 such treaties. But there were over a thousand treaties to which both States and international organizations were parties and he could not agree to their exclusion from the scope of the draft articles. 317/

136. In this connexion, Mr. Reuter suggested 318/ the inclusion in the draft of the following provision:

> "The fact that a subject of international law other than a State is a party to a treaty binding two or more States shall not render the rules laid down by the present Convention inapplicable to that treaty." 319/

314/ Yearbook of the International Law Commission, 1965, vol. I, 776th meeting, para. 58.

315/ Ibid., 1965, vol. I, 776th meeting, para. 66.

316/ Ibid., 1965, vol. I, 776th meeting, para. 67.

317/ Ibid., 1965, vol. I, 777th meeting, para. 7.

318/ Ibid., 1965, vol. I, 777th meeting, para. 24.

319/ Compare with paragraph (c) added to article 3 by the Vienna Convention on the Law of Treaties (See below Chapter II).

Mr. Reuter also suggested [320] that, if the expression "other subjects of international law" was deleted from the definition of the term "treaty", the draft articles should include a provision along the following lines:

> "The rules which follow shall apply to agreements governed by public international law which are not treaties within the meaning of paragraph 1 (a), subject to due regard for the special nature of those agreements".

137. Mr. Ago submitted [321] the following amendments to paragraph 1 (a) of article 1 and to article 2 of the provisional draft:

> "Paragraph 1 (a) of article 1 (provisional draft)
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> "Replace the text adopted by the Commission [322] by the text proposed by Sir Humphrey Waldock, [323] up to and including the words 'particular designation'. [324]

320/ Yearbook of the International Law Commission, 1965, vol. I, 777th meeting, para. 25. At the previous meeting, Mr. Reuter had submitted an earlier version of the provision quoted above. (See para. 66 of the summary record of the 776th meeting.)

321/ Ibid., 1965, vol. I, 777th meeting, paras.58 and 59. At the previous meeting Mr. Ago had also submitted an earlier version of his proposed amendments.(See para. 65 of the summary record of the 776th meeting).

322/ See above para. 78.

323/ See above para. 118.

324/ With the change suggested by Mr. Ago, paragraph 1 (a) of article 1 would have read:

> "'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

"Article 2 (provisional draft)

"Replace the text adopted by the Commission, [325] by the following text:

'1. The present articles refer only to treaties concluded between States.

'2. The fact that the present articles do not refer to treaties to which subjects of international law other than States are parties does not mean that the rules contained in the present articles do not apply, so far as possible, to such treaties.

'3. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.' "

138. Mr. Tunkin said [326] that, unlike the other paragraphs of article 1 (provisional draft), paragraph 1 (a) did not contain the definition of a term used in the draft articles but indicated the scope of application of those articles. He felt that the proper place for such an indication was not in the article on definitions, but in a new article 1 which would state that the rules set out in the draft articles applied to treaties concluded between States. Mr. Tunkin's suggestion was supported by Messrs. Ago, [327] Elias, [328] Rosenne [329] and Sir Humphrey Waldock. [330] Mr. Rosenne, however, remained of the opinion that

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325/ See above para. 119.

326/ Yearbook of the International Law Commission, 1965, vol. I, 777th meeting, para. 14.

327/ Ibid., 1965, vol. I, 777th meeting, para. 26.

328/ Ibid., 1965, vol. I, 777th meeting, para. 32.

329/ Ibid., 1965, vol. I, 777th meeting, paras. 37 and 38.

330/ Ibid., 1965, vol. I, 777th meeting, para. 71.

it would be a retrograde step to eliminate from the definition of the term "treaty" the reference to subjects of international law other than States. The Commission, however, appeared to favour Sir Humphrey's proposal to delete that reference. He was, therefore, attracted by Mr. Tunkin's suggestion since the purpose of the new article 1 would be to indicate the area of application of the draft articles and not to define the term "treaty".

139. In summarizing the discussion, Sir Humphrey Waldock made several suggestions which are reported as follows in the record of the 777th meeting:

> ". . . [Sir Humphrey Waldock] favoured Mr. Tunkin's proposal that the draft should begin with the article on scope rather than the definitions article. The article on scope should be exceedingly short, however, and should not say much more than 'The present articles apply to treaties concluded between States'.
>
> "Then, in article 2 [new numbering], there would be the abbreviated definition now proposed, though perhaps not abbreviated to the extent Mr. Ago had suggested. 331/ It might be couched in some such terms as 'A treaty means any international agreement concluded 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 3 [new numbering] would then contain the substance of the existing article 2, but differently formulated, on some such lines as 'The fact that the present articles do not relate to treaties concluded between subjects of international law other than States, or between States and such other subjects of international law, shall not be understood as affecting in any way the legal force of such treaties or as excluding the application to them, so far as may be appropriate, of the rules laid down in the present articles. . ." 332/

331/ See above para. 137.

332/ Yearbook of the International Law Commission, 1965, vol. I, 777th meeting, paras. 71-73.

140. The Chairman noted that there appeared to be no objections to Sir Humphrey's suggestions and proposed that the Commission "refer paragraph 1 (a) of article 1 and related problems to the Drafting Committee". The Commission decided without discussion to adopt the Chairman's proposal. 333/

141. In pursuance of that decision, the Drafting Committee submitted three texts at the Commission's 810th meeting on 24 June 1965. The first text is dealt with below. The other two, which were amended versions of paragraph 1 (a) of article 1 and of article 2 (provisional draft) are examined in sub-sections d) and e).

142. The first text submitted by the Drafting Committee read:

"New First Article

"The scope of the present articles

"The present articles relate to treaties concluded between States." 334/

At its 811th meeting, on 25 June 1965, the Commission adopted 335/ that text without discussion, by 17 votes to none.

143. In the 1965 report of the Commission 336/ - covering the

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333/ Ibid., 1965, vol. I, 777th meeting, para. 78.

334/ Ibid., 1965, vol. I, 810th meeting, para. 10.

335/ Ibid., 1965, vol. I, 811th meeting, para. 104. At the previous meeting, the Commission had adopted the text informally, without comment (see para. 10 of the summary record of the 810th meeting).

336/ Ibid., 1965, vol. II, A/6009, p. 159. The Commission decided not to attach to its 1965 report any commentaries on the draft articles on the law of treaties adopted in 1965. It included, however, in the introductior to Chapter II of the report (paras. 20 and 21), several observations on the question of treaties concluded by international organizations. These observations are not quoted in this Survey since their substance is reproduced in the commentary to article 1 contained in the 1966 report, which is reproduced below.

work of the first part of the seventeenth session - the new first article was numbered 0. In the final draft, as reproduced in the 1966 report - covering the work of the eighteenth session - the article was renumbered 1 and the following commentary was attached to it:

> "This provision defining the scope of the present articles as relating to 'treaties concluded between States' has to be read in close conjunction not only with article 2 (1) (a), 337/ which states the meaning with which the term 'treaty' is used in the articles, but also with article 3, 338/ which contains a general reservation regarding certain other categories of international agreements. The sole but important purpose of this provision is to underline at the outset that all the articles which follow have been formulated with particular reference to treaties concluded between States and are designed for application only to such treaties.
>
> "Article 1 gives effect to and is the logical consequence of the Commission's decision at its fourteenth session 339/ not to include any special provisions dealing with the treaties of international organizations and to confine the draft articles to treaties concluded between States. Treaties concluded by international organizations have many special characteristics; and the Commission considered that it would both unduly complicate and delay the drafting of the present articles if it were to attempt to include in them satisfactory provisions concerning treaties of international organizations. It is true that in the draft provisionally adopted in 1962, article 1 defined the term treaty 'for the purpose of the present articles' as covering treaties 'concluded between two or more States or other subjects of international law'. 340/ It is also true that article 3 of that draft contained a very general reference to the capacity of 'other subjects of international law' to conclude treaties and a very general rule concerning the capacity of international

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337/ See below paras. 144 and 145.

338/ See below paras. 147 to 149.

339/ See above paras. 65 and 66.

340/ See above para. 78.

organizations in particular. 341/ But no other article of that draft or of those provisionally adopted in 1963 and 1964 made any specific reference to the treaties of international organizations or of any other 'subject of international law'.

"The Commission, since the draft articles were being prepared as a basis for a possible convention, considered it essential, first, to remove from former articles 1 and 3 (articles 2 and 5 of the present draft) the provisions relating to treaties not specifically the subject of the present articles and, secondly, to indicate clearly the restriction of the present articles to treaties concluded between States. Accordingly, it decided to make the appropriate adjustments in articles 1 and 5 and to insert article 1 restricting the scope of the draft articles to treaties concluded between States. The Commission examined whether the object could be more appropriately achieved by merely amending the definition of treaty in article 2. But considerations of emphasis and of drafting convenience led it to conclude that the definition of the scope of the draft articles in the first article is desirable.

"The Commission considered it no less essential to prevent any misconception from arising from the express restriction of the draft articles to treaties concluded between States or from the elimination of the references to treaties of 'other subjects of international law' and of 'international organizations'. It accordingly decided to underline in the present commentary that the elimination of those references is not to be understood as implying any change of opinion on the part of the Commission as to the legal nature of those forms of international agreements. It further decided to add to article 3 342/ (former article 2) a specific reservation with respect to their legal force and the rules applicable to them." 343/

341/ See above para. 91.

342/ See below paras. 147 to 149.

343/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, p. 187, paras. (1) to (4).

d) Paragraph 1 (a) of article 2 (former paragraph 1 (a) of article 1)

144. The second text submitted by the Drafting Committee at the Commission's 810th meeting[344] read:

"[Article 1]

"[Use of terms]

"[1. For the purposes of the present articles:]

"(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." [345]

145. At its 811th meeting, on 25 June 1965, the Commission adopted that text without discussion by 17 votes to none[346]. In the final draft, as reproduced in the Commission's 1966 report, article 1 was renumbered 2[347] and a commentary was attached to it. The following passage of the commentary dealt with the words "concluded between States" appearing in paragraph 1 (a):

"The term 'treaty', as used in the draft articles, covers only international agreements made between 'two or more States'. The fact that the term is so defined here and so used throughout the articles is not, as already underlined in the commentary to the previous article,[348] in any way intended to deny that other subjects of international law, such as international organizations and insurgent communities, may conclude treaties. On the contrary, the reservation in article 3 [349] regarding the legal force of and the legal principles applicable to their treaties was inserted by the Commission expressly for the purpose of refuting any such interpretation of its decision to confine the draft articles to treaties concluded between States. [350]

344/ See above paras. 140 and 141.

345/ Yearbook of the International Law Commission, 1965, vol. I, 810th meeting, para. 11. For the title of the article and for the introductory phrase see ibid., 1965, vol. I, 820th meeting, paras. 15, 17, 26 and ibid., 1965, vol. II, A/6009, p. 159.

346/ Ibid., 1965, vol. I, 811th meeting, para. 104. At the previous meeting, the Commission had adopted the text of paragraph 1(a) of article 1 informally, without comment. (See para. 11 of the summary record of the 810th meeting)

347/ Ibid., 1966, vol. II, A/6309/Rev.1, Part I, p. 187.

348/ See above para. 143.

349/ See below paras. 147 to 149.

350/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part I, p. 188, para. (5) and p. 189.

e) Paragraph (a) (new provision) of article 3 (former article 2)

146. The third text submitted by the Drafting Committee at the Commission's 810th meeting[351] read:

"Article 2

"Treaties and other international agreements not within the scope of the present articles

"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." [352]

After a brief discussion relating mainly to questions of form and to the place of article 2 in the draft, the Commission referred the article back to the Drafting Committee.[353]

147. At the Commission's 816th meeting, on 2 July 1965, Sir Humphrey Waldock submitted on behalf of the Drafting Committee a revised text of article 2 and explained that the only changes made by the Committee had been "drafting changes".[354] The revised text read:

"Treaties and other international agreements not within the scope of the present articles

"The fact that the present articles do not relate

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

(b) To international agreements not in written form

shall not affect the legal force of such treaties or agreements or 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." [355]

351/ See above paras. 140 and 141.

352/ Yearbook of the International Law Commission, 1965, vol. I, 810th meeting, para. 12.

353/ Ibid., 1965, vol. I, 810th meeting, para. 27.

354/ Ibid., 1965, vol. I, 816th meeting, para. 2.

355/ Ibid., 1965, vol. I, 816th meeting, para. 2.

At the same meeting, the Commission adopted that text without discussion by 14 votes to none.[356/]

148. During the eighteenth session, at the Commission's 892nd meeting, on 18 July 1966, Sir Humphrey proposed orally several amendments to article 2 which were reported as follows in the summary record of the meeting:

> "Sir Humphrey WALDOCK, Special Rapporteur, said that since, in article 1, the word 'treaty' had been defined for the purposes of the draft articles as an 'international agreement concluded between States' it was illogical to use the word 'treaty' in article 2 to refer to international agreements concluded between States and other subjects of international law. He therefore proposed that in the title of article 2 the words 'Treaties and other' be deleted, that in sub-paragraph (a) the word 'treaties' be replaced by the words 'international agreements', and that in sub-paragraph (b) the words 'treaties or' be deleted." [357/]

At the same meeting, Sir Humphrey's amendments were adopted by the Commission without discussion.[358/] With those amendments, article 2 read:

> "International agreements not within the scope of the present articles
>
> "The fact that the present articles do not relate:
>
> "(a) To international agreements concluded between States and other subjects of international law or between such other subjects of international law; or
>
> "(b) To international agreements not in written form shall not affect the legal force of such agreements or 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."

149. In the final draft, as reproduced in the Commission's 1966 report, article 2 was renumbered 3[359/] and a commentary was attached to it. The commentary first recalled that

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356/ Ibid., 1965, vol. I, 816th meeting, para. 2.

357/ Ibid., 1966, vol. I, Part II, 892nd meeting, para. 75.

358/ Ibid., 1966, vol. I, Part II, 892nd meeting, para. 75.

359/ Ibid., 1966, vol. II, A/6309/Rev.1, Part II, p. 190.

"The text of this article, as provisionally adopted in 1962,360/ contained only the reservation in paragraph (b) regarding the force of international agreements not in written form."

It next dealt with paragraph (a) of the article as follows:

"The first reservation in sub-paragraph (a) regarding treaties concluded between States and other subjects of international law or between such other subjects of international law was added at the seventeenth session as a result of the Commission's decision to limit the draft articles strictly to treaties concluded between States and of the consequential restriction of the definition of 'treaty' in article 2 to 'an international agreement concluded between States'.361/ This narrow definition of 'treaty', although expressly limited to the purposes of the present articles, might by itself give the impression that international agreements between a State and an international organization or other subject of international law, or between two international organizations, or between any other two non-Statal subjects of international law, are outside the purview of the law of treaties. As such international agreements are now frequent - especially between States and international organizations and between two organizations - the Commission considered it desirable to make an express reservation in the present article regarding their legal force and the possible relevance to them of certain of the rules expressed in the present articles." 362/

f) Article 5 (former article 3)

150. Article 5 of the final draft is based on article 3 of the provisional draft. It will be recalled363/ that article 3 dealt with the capacity to conclude treaties. It consisted of three paragraphs. The first referred to States and "other subjects of international law", the second to federal States and the third to international organizations.

151. It will also be recalled364/ that in his fourth report, Sir Humphrey Waldock had proposed the deletion of the article.

360/ See above para. 119.

361/ See above paras. 144 and 145.

362/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, p. 190, paras. (1) and (2).

363/ See above para. 91.

364/ See above para. 122.

152. At its seventeenth session, the Commission discussed article 3 at the 779th and 780th meetings, on 7 and 10 May 1965.[365] Most of the discussion related to the treaty-making capacity of States - in particular of federal States - and to Sir Humphrey's proposal to delete the article. As regards the question of the treaty-making capacity of other subjects of international law, members generally agreed that, in view of the understanding reached at the 777th meeting,[366] the article should be confined to the treaty-making capacity of States. A few members, however, expressed views on the substance of paragraph 3 of the article. Thus, for instance, the summary record gives the following account of a statement by Mr. Lachs:

> "Mr. LACHS said that paragraph 3 [of article 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." [367]

153. At its 780th meeting, the Commission decided to delete the reference to "other subjects of international law" appearing in paragraph 1 of the article and the whole of paragraph 3. The Commission referred the rest of the article to the Drafting Committee.[368]

365/ Passing references to the article had been made previously at the 776th and 777th meetings (see Yearbook of the International Law Commission, 1965, vol. I, 776th meeting, paras. 61, 64 and 777th meeting, paras. 21, 22, 29, 34-36).

366/ See above para. 140.

367/ Yearbook of the International Law Commission, 1965, vol. I, 779th meeting, para. 23.

368/ Ibid., vol. I, 780th meeting, para. 16.

154. At the Commission's 810th meeting, on 24 June 1965, the Drafting Committee submitted a text of article 3 which the Commission at its 811th meeting, on 25 June 1965 referred back[369] to the Committee. At the 816th meeting, on 2 July 1965, the Drafting Committee submitted a revised text of the article which the Commission adopted[370] without change. The revised text read:

"Article 3

"Capacity of States to conclude treaties

"1. Every State possesses capacity to conclude treaties.

"2. States members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down."

155. In the final draft, as reproduced in the Commission's 1966 report article 3 was renumbered 5[371] and a commentary was attached to it. The following passage of the commentary explained why the Commission had confined the article to the treaty-making capacity of States:

"In 1962 the Commission, while holding that it would not be appropriate to enter into all the detailed problems of capacity which might arise, decided to include in the present article three broad provisions concerning the capacity to conclude treaties of (i) States and other subjects of international law, (ii) Member States of a federal union and (iii) international organizations. The third of these provisions - capacity of international organizations to conclude treaties - was an echo from a period when the Commission contemplated including a separate part dealing with the treaties of international organizations. Although at its session in 1962 the Commission had decided to confine the draft articles to treaties concluded between States, it retained this provision in the present article dealing with capacity to conclude treaties. On re-examining the article, however, at its seventeenth session the Commission concluded that the logic of its decision that the draft articles should deal only with the treaties concluded between States necessitated the omission from the first paragraph of the reference to the

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369/ Ibid., 1965, vol. I, 811th meeting, para. 51.

370/ Ibid., 1965, vol. I, 816th meeting, para. 5. Paragraph 1 of article 3 was adopted by 11 votes to 2, with 1 abstention. Paragraph 2 was adopted by 7 votes to 3, with 4 abstentions. Article 3 as a whole was adopted by 7 votes to 3 with 4 abstentions.

371/ Ibid., 1966, vol. II, A/6309/Rev.1, Part II, p. 191.

capacity of 'other subjects of international law', and also required the deletion of the entire third paragraph dealing specifically with the treaty-making capacity of international organizations." 372/

g) Article 6 (former article 4)

156. Article 6 of the final draft is based on article 4 373/ of the provisional draft and on the revised version 374/ of that article proposed by Sir Humphrey Waldock in his fourth report. It will be recalled that paragraph 2(b) of article 4 contained a reference to treaties drawn up between a State and an international organization. That reference was omitted in the revised version proposed by Sir Humphrey.

157. During the discussion 375/ of article 4 by the Commission in 1965 and 1966, what appears to have been the only mention of treaties between States and international organizations was made by Mr. Rosenne in a statement which is reported as follows in the summary record of the 781st meeting, held on 11 May 1965:

"During the discussions at the fourteenth session, there had been a tendency to confine the provision to treaties concluded between a State and an international organization, but that tendency had not been reflected in the text of paragraph 2(b) adopted by the Commission, which referred both to those treaties 376/ and to treaties 'drawn up under the auspices of the organization': The Special Rapporteur's new text referred only to the latter type of treaty.

"Paragraph 3(b) should be the exact parallel of

372/ Yearbook of the International Law Commission, 1966, vol. II, A/6309/Rev.1, Part II, p. 191, para. (2) and p. 192.

373/ See above paras. 93 to 96.

374/ See above para. 123.

375/ In 1965 the Commission considered article 4 at its 780th, 781st, 811th and 816th meetings; in 1966 it considered the article at its 892nd meeting.

376/ See above paras. 95 and 96.

paragraph 3(a) 377/ and should cover only treaties between a State and the organization to which the representative of that State was accredited..." 378/

158. At its 892nd meeting,379/ on 2 July 1966, the Commission adopted the final text of article 4, which was renumbered 6 in the Commission's 1966 report. That text contained no reference to treaties between States and international organizations. It read:

"Article 6

"Full powers to represent the State in the conclusion of treaties

"1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

(a) He produces appropriate full powers: or

(b) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

"2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

377/ Mr. Rosenne was referring to the amended version of article 4 submitted by Sir Humphrey Waldock. Paragraphs 3(a) and 3(b) of that amended version read:

"3. (a) A Head of a diplomatic mission may be considered as possessing authority to negotiate, draw up or adopt a treaty between his State and the State to which he is accredited.

"(b) The rule in paragraph (a) applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization to which he is accredited." (Yearbook of the International Law Commission, 1965, vol. II, A/CN.4/177 and Add.1 and 2, p. 21).

378/ Yearbook of the International Law Commission, 1965, vol. I, 781st meeting, para. 9.

379/ Ibid., 1966, vol. I, Part II, 892nd meeting, para. 82.

(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ."380/

159. The last paragraph of the Commission's commentary on article 6 dealt with paragraph 2(c) of the article. It read:

"The third special category [of cases in which a person is considered as representing his State without having to produce full powers] is representatives of States accredited to an international conference or to an organ of an international organization, for which the same rule is laid down as for the head of a diplomatic mission: namely, automatic qualification to represent their States for the purpose of adopting the text of a treaty but no more. This category replaces paragraph 2(b) of the 1962 text, which treated heads of permanent missions to international organizations on a similar basis to heads of diplomatic missions, so that they would automatically have been considered as representing their States in regard to treaties drawn up under the auspices of the organization and also in regard to treaties between their State and the organization. In the light of the comments of Governments and on a further examination of the practice, the Commission concluded that it was not justified in attributing to heads of permanent mission such a general qualification to represent the State in the conclusion of treaties. At the same time, it concluded that the 1962 rule was too narrow in referring only to heads of permanent missions since other persons may be accredited to an organ of an international organization in connexion with the drawing up of the text of the treaty, or to an international conference. 381/

380/ Ibid., 1966, vol. II, A/6309/Rev.1, Part II, p. 192.

381/ Ibid., 1966, vol. II, A/6309/Rev.1, Part II, p. 193, para. 6.

h) The remaining provisions of the final draft articles

160. The remaining provisions of the final draft articles contained no reference to treaties concluded by subjects of international law other than States. It is clear from the new article 1[382] that the Commission had intended that those provisions should apply to treaties between States only, even when they were couched in general terms and contained no reference to States.[383]

382/ See above paras. 142 and 143.

383/ For examples of provisions couched in general terms and containing no references to States see articles 28, 50 and 61. Provisions referring to "parties" do not enter into that category in view of the definition of that term in paragraph 1 (g) of article 2, adopted by the Commission in 1965. That paragraph reads:

> "[1. For the purposes of the present articles:]
>
> .....
>
> "(g) 'Party' means a State (emphasis supplied) which has consented to be bound by the treaty and for which the treaty is in force."