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THE NEW LAW OF TREATIES: THE  
CODIFICATION OF THE LAW OF TREATIES  
CONCLUDED BETWEEN STATES AND  
INTERNATIONAL ORGANIZATIONS OR  
BETWEEN TWO OR MORE INTERNATIONAL  
ORGANIZATIONS

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## I. INTRODUCTION

At its thirty-eighth session, the General Assembly of the United Nations decided to convene a Conference of Plenipotentiaries in Vienna in 1986 to negotiate a convention on the law of treaties to which one or more international organizations are parties.<sup>1</sup> The delegates to this conference will have as a basis of discussion a set of draft articles, prepared by the United Nations International Law Commission over a period of twelve years.<sup>2</sup>

After reviewing the history of this codification work, one may conclude that even though discussions on the existence of an international legal personality for international organizations seemed closed with the 1949 Advisory Opinion on "Reparations for Injuries" by the International Court of Justice,<sup>3</sup> and even though these organizations in reality participate in international legal relations together with states, differences of opinion on the character, and in particular the scope, of this international personality still exist.<sup>4</sup>

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<sup>1</sup> The subject of this article is limited to the law of treaties involving international inter-governmental organizations, i.e., organizations established by a treaty between states. External relations of non-governmental organizations (NGO's) or other subjects of international law remain outside of the scope of this study.

<sup>2</sup> See Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, [1979] 2 Y.B. INT'L L. COMM'N 137, U.N. Doc. a/CN.4/SER.A/1979 (texts of all draft articles as adopted by the Commission) [hereinafter cited as 1979 Draft Articles].

<sup>3</sup> Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174.

<sup>4</sup> On the various theories on the subject of the legal character and scope of the international legal personality of international organizations an extensive literature exists. Those theories may, on one end of the spectrum, be founded on a legal personality which is derived exclusively from the will of the member states, and which favors, via the theory of implied powers, near equality with states in international legal relations. Whatever the theory behind it, however, the participation of international organizations in international legal relationships has become a daily reality. See D. Vignes, *The Impact of International Organizations on the Development and Application of International Law*, THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 809-55, at 833-34 (R. MacDonald and D. Johnston eds.) (1983). The importance of the participation of international organizations in international relations is still growing; their total number of 37 organizations in 1909 has grown to 179 in 1964, and to 365 today—a growth of 100% during the last twenty years. YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1984-85, (Brussels 1985).

Indeed, perplexing questions with regard to both the external relations of international organizations and their treaty-making capacity abound.

The prevailing opinion holds that the power of an international organization to enter legal relationships is always limited by the organization's constitution and other internal instruments because the separate legal personality of the organization is based on these provisions.<sup>5</sup> This also means that a fundamental inequality between international organizations makes it very difficult, if not impossible, to draft general rules applicable to all organizations. A second problem concerns the question of representation. The question of who is authorized to negotiate and to enter agreements binding the organization is crucial, although in some cases impossible to answer. Additional inquiry should be made into the constitutionality of the present practice in this area. Additionally, if agreements concluded by organs of an international organization, such as its Secretary General, are binding on the organization, to what extent are they binding on its member states?<sup>6</sup>

The answer to these questions depends not so much on the status and recognition of an organization in and by the international community, but mainly on the division of power within the organization itself as to both the decision-making process and the organi-

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<sup>5</sup> The International Court, in its "Reparations for Injuries" opinion, *supra* note 3, speaks about "a large measure of international personality" which the organization needs to be able to exercise its functions under the Charter: "[U]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." 1949 I.C.J. 1982. However, it is sometimes maintained that the capacity of international organizations to enter into external relations is limited not by their nature or by provisions of their constitution, but solely because their functions are limited, and the need is not (yet?) as keenly felt as is the case with states. See F. Seyferstedt, *Treaty-Making Capacity of Intergovernmental Organizations: Article 6 of the International Law Commission's Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations*, 34 *OSTERR. Z. OFFENTL. RECHT UND VOLKERRECHT* 261-67, at 262 (1983) (further discussed in text accompanying *infra* notes 88-93).

<sup>6</sup> The OAU Council of Ministers, for instance, has at one time reprimanded its Secretary-General and accused him of having overstepped his mandate in connection with the conclusion of agreements of cooperation with certain UN organs and organizations. In November 1966, then Secretary-General Diallo Telli was criticized severely by the Council for having surpassed his mandate and his administrative role in having concluded, in the name of the organization, agreements with the UN Economic Commission for Africa (ECA) and with the International Labour Organization. The Council felt that this matter fell entirely within its own competence. See N. SYBESMA-KNOL, *THE STATUS OF OBSERVERS IN THE UNITED NATIONS*, at 112-13 (1981). As regards the question of whether the organization is bound by agreements entered into *ultra vires* by certain officials, see text accompanying *infra* notes 68-119.

zation's external policy. This division of power is in constant change, for it is related to one of the fundamental problems underlying the law of international organizations. On the one hand, it has become clear that the great problems of society can no longer be solved by one state alone; an increasing interdependence necessitates international cooperation, and perhaps even, integration. On the other hand, states still hesitate, or even refuse to relinquish even the smallest segment of what they consider their national sovereignty. The scope of the participation of international organizations in international legal relations thus is being continuously challenged from two sides: from the outside world, where historically only states have held "full powers," and also from within, where member states are constantly on guard against both loss of sovereignty and against any consequences the activities of the organization might bring for them.<sup>7</sup> The outcome of this dual challenge will eventually determine the character and scope of the participation of international organizations as partners in international legal relationships.

## II. THE LAW OF INTERNATIONAL ORGANIZATIONS AND THE WORK OF THE UNITED NATIONS' INTERNATIONAL LAW COMMISSION

In two advisory opinions<sup>8</sup> the Court of International Justice dealt extensively with the question of the status and competence of a specific international organization, namely, the United Nations. Both opinions have played a determinant role in the development of general legal norms for this new phenomenon on the international stage, the international organization.<sup>9</sup>

The most prolonged and extensive discussions on this subject have taken place within the framework of the United Nations' International Law Commission.<sup>10</sup> The Commission assists the General Assembly in its task of promoting "the progressive development of international law and its codification."<sup>11</sup> The Commission

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<sup>7</sup> D. Vignes, *supra* note 4, at 834; see N. SYBESMA-KNOL, *supra* note 6, at 80.

<sup>8</sup> "Reparations for Injuries," *supra* note 3; see also *Certain Expenses of the United Nations*, 1962 I.C.J. 151.

<sup>9</sup> See M. Lachs, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, 10 SYR. J. INT'L L. & COMM. 239, 251-54 (1983).

<sup>10</sup> This commission, established by the General Assembly in 1947, now consists of thirty-four highly qualified and internationally renowned specialists in the field of international law.

<sup>11</sup> See U.N. CHARTER art. 13.

is empowered to "survey the whole field of international law with a view to selecting topics for codification. . . ."<sup>12</sup> Reviewing the history of the work of the Commission reveals that it has played a major role in the codification of international law on many subjects.<sup>13</sup> These "topics for codification" usually are selected by members of the Commission. Sometimes, however, the General Assembly proposes a certain subject it considers particularly important. Thus, in 1958, the General Assembly suggested to the Commission consideration of the question of the "Relations between States and International Organizations." In fact, since 1962 when the Commission appointed Professor Abdullah El-Erian as its first Special Rapporteur for this subject,<sup>14</sup> the question of "Relations between States and International Organizations" has remained on its agenda.

In the meantime, the work on the first part of the topic, the question of the representation of states before international organizations, resulted in a codification conference in Vienna in 1975 and the adoption of the "Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character."<sup>15</sup> The second part of the topic was placed on the agenda of the Commission in 1976<sup>16</sup> and a Special Rapporteur was appointed to study the question of the "status, privileges and immunities of international organizations" in the broadest sense.<sup>17</sup>

From the beginning of discussions concerning delimitation of the

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<sup>12</sup> Article 18 of the statute of the Commission.

<sup>13</sup> On the Commission's work in general, see H. BRIGGS, *THE INTERNATIONAL LAW COMMISSION* (1965); B. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION: ITS APPROACH TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW* (The Hague 1977); UNITED NATIONS, *THE WORK OF THE INTERNATIONAL LAW COMMISSION* (3d ed. 1980). The most important sources for a study of the Commission's work are its yearbooks, which contain records of meetings, reports, draft texts, and the Commission's reports to the General Assembly.

<sup>14</sup> Following the election of Professor El-Erian to the International Court of Justice, Mr. Leonardo Diaz Gonzalez was appointed Special Rapporteur on this topic in 1979.

<sup>15</sup> The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Vienna 1975. The convention has not yet entered into force, among other reasons due to the fact that some of its provisions are of a controversial character (namely part III on the status of permanent representatives of observers (international organizations and liberation movements), and two resolutions, *inter alia*, on the representation of liberation movements, annexed to the Final Act of the Conference).

<sup>16</sup> Because of its heavy schedule with regard to its work on other topics, this subject has not yet been discussed by the Commission.

<sup>17</sup> [1973] 1 Y.B. INT'L L. COMM'N 298, U.N. Doc A/CN.4/156/1963/Add. 1.

scope of the subject, the question arose whether the problem of the international legal personality of international organizations would be included. In response, Professor El-Erian recommended, in his initial report on the first part of the topic, consideration of the general principles of legal personality, such as legal capacity, treaty-making capacity, and the capacity to bring international claims.<sup>18</sup> During the 1963 session of the Commission, however, the members of the Commission decided to reject Professor El-Erian's recommendation.<sup>19</sup> The Commission had already faced that question, at least indirectly, in the course of its work on the draft-convention on high seas.<sup>20</sup> In essence, therefore, the issue of international legal personality of international organizations has been dealt with by the Commission explicitly only in the context of and, as a consequence of, its work on the codification of the Law of Treaties.

### III. LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS AND THE CODIFICATION OF THE LAW OF TREATIES

At its first session in 1949, the Commission included the law of treaties in its list of subjects to be considered.<sup>21</sup> Thereafter, the Commission dedicated the larger part of its time and efforts, especially during the 1962 to 1966 period, to the codification of the law of treaties.<sup>22</sup> In 1961, when Sir Humphrey Waldock became Special Rapporteur,<sup>23</sup> the Commission combined the various studies and reports into a draft convention. In 1966, the draft was sent to the General Assembly's Sixth Committee for discussion, with the re-

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<sup>18</sup> *Id.* The Special Rapporteur also discussed in detail the codification efforts during the League of Nations era on the subject of the law of international organizations.

<sup>19</sup> Ramcharan, *supra* note 13, at 153-54.

<sup>20</sup> *Id.* at 154. See also B. De Schutter, *The United States Flag, a Full-Fledged Seaflag? Legal Status of Ships Employed in the Official Service of an International Organization*, 1 STUDIES EN VOORDRACHTEN VAN DE VRIJE UNIVERSITEIT BRUSSEL 39 (1963).

Draft article 67 of the convention, dealing with the flag and the flag-state, provided that "the provisions of the preceding articles do not prejudice the question of the ships employed in the official service of an inter-governmental organization flying the flag of the organization." The Commission must have considered this a real possibility, with far reaching legal consequences. The draft articles eventually became the Convention on the High Seas (Geneva 1958).

<sup>21</sup> S. ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 33 (1970).

<sup>22</sup> *Id.* at 33-41.

<sup>23</sup> *Id.* at 34. Several Special Rapporteurs have reported on this topic: Briefly (four reports, 1950-52), Lauterpacht (two reports, 1953-54), Fitzmaurice (five reports, 1956-61), and Waldock (seven reports, 1962-66).

quest that the Assembly convene a conference of plenipotentiaries to discuss the draft and adopt a definitive text of the convention.<sup>24</sup>

In the earlier stages, limiting the scope of the codification and convening a convention were important aspects of the codification effort. One by one various aspects were excluded from the topic, such as the effect of the outbreak of hostilities on existing treaty obligations,<sup>25</sup> recognition of states,<sup>26</sup> state responsibility,<sup>27</sup> the question of the most-favored nation clause,<sup>28</sup> and the interpretation of United Nations Charter provisions.<sup>29</sup> None of these aspects, however, were fundamental problems *per se* on the law of treaties. The real issue arose because existing treaty law had, as all international law tends to do, developed in and by state practice.<sup>30</sup> Until recently, a treaty could be defined as "an agreement concluded between two or more states." Today, a different kind of agreement, one in which international organizations are involved, must also be considered in the definition. It seemed natural that the Commission would include this new type of treaty in the "entire subject of the law of treaties" under consideration.<sup>31</sup> Initially, the Commission assumed that an eventual convention would also apply to this new kind of treaty, although the first drafts referred only to "states" as possible parties to international agreements.<sup>32</sup> In 1962, the Commission adopted a definition of the word "treaty" to be used in the draft articles, providing that the term "treaty" would refer not only to agreements concluded between two or more states, but also to agreements concluded between states and international organizations, or between two or more international orga-

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<sup>24</sup> S. ROSENNE, *supra* note 22, at 34.

<sup>25</sup> This subject was dealt with in a separate convention, the Vienna Convention on Succession of States in Respect of Treaties, adopted at a Conference in Vienna in 1977-78. For a summary report on the history of this convention, see UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 13 at 59-63; see also United Nations Conference on Succession of States in Respect of Treaties, Vienna, April 4 - May 6, 1977 and July 31 - August 23, 1978 (official records vols. I, II, & III).

<sup>26</sup> This topic, although considered important, was not given priority. S. ROSENNE, *supra* note 22, at 42; see also *infra* note 33 and accompanying text.

<sup>27</sup> Since 1955, state responsibility has been on the agenda of the Commission as a separate topic for codification. The Special Rapporteur at the time was F.V. Garcia Amador, who after being elected to the International Court of Justice was succeeded by W. Riphagen. See THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 13, at 80-88.

<sup>28</sup> This topic was placed on the Commission's agenda in 1967. Special Rapporteur at the time was Endre Ustor. See *id.* at 73-77; S. ROSENNE, *supra* note 21, at 231.

<sup>29</sup> S. ROSENNE, *supra* note 21, at 42.

<sup>30</sup> *Id.* at 44.

<sup>31</sup> *Id.* at 44-45 (n.41 and accompanying text).

<sup>32</sup> *Id.* at 44-45.

nizations.<sup>33</sup> With regard to the definition of the phrase "capacity to conclude treaties," the Commission stated that the capacity of an international organization would depend on the relevant constitutional provisions of the organization.<sup>34</sup>

Nevertheless, in the course of the Commission's discussions during the 1963 and 1964 sessions, it became clear that a strong opposition against this "equal treatment" of organizations and states existed.<sup>35</sup> This opposition became manifest not only within the Commission, but also in the General Assembly.<sup>36</sup> As a result, all references to international organizations were deleted from the reports and drafts of the Commission, namely from the draft articles defining "treaties"<sup>37</sup> and delimiting treaty-making capacity.<sup>38</sup> Furthermore, a preliminary draft article 0 expressly stated that draft articles referred only to agreements between states.<sup>39</sup> In making these changes, the Commission reasoned that the draft articles were generally based on existing state practice, and that detailed study of the practice with regard to treaties involving international organizations would be necessary before the Commission could proceed with the codification of such practice.<sup>40</sup> The Commission also recognized that codifying general principles of the law of treaties could be accomplished only if the scope of the subject remained limited to treaties between states.<sup>41</sup>

Many members of the International Law Commission considered this decision a step backwards in the development of the law of international organization.<sup>42</sup> Yet, in retrospect, it may not have been an entirely negative decision to avoid the inclusion of such a delicate subject in the codification proposals for the law of treaties.

<sup>33</sup> *Id.* at 44-46.

<sup>34</sup> See Report of the I.L.C. to the General Assembly, 14 U.N. GAOR Int'l L. Comm'n at 1-11, U.N. Doc. A/CN.4/144 and add.1 (1962).

<sup>35</sup> S. ROSENNE, *supra* note 21, at 41-46.

<sup>36</sup> A similar controversy became apparent during the discussions on the legal consequences of an international organization's acting as a "Flag-State" in the course of the preparatory work on the High Seas Convention. See *supra* note 20.

<sup>37</sup> Compare Report 1962, chptr. II, arts. 1, 1(a), & 3 with 1965 text, arts. 1, 1(a), & 2. For added emphasis in the 1965 text, the Commission included a new article, then numbered article 0, expressly limiting the scope of the articles to treaties concluded between states (retained, although further modified, in the Vienna Convention, arts. 1, 2, 1(a), & 3). S. ROSENNE, *supra* note 21, at 45 nn. 43 & 45.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; see [1965] Y.B. INT'L L. COMM'N 159, U.N. Doc. a/600g.

<sup>40</sup> [1965] Y.B. INT'L L. COMM'N, *supra* note 39, at 158.

<sup>41</sup> *Id.*

<sup>42</sup> S. ROSENNE, *supra* note 21, at 46.

First, it is extremely important, as it was in the 1960's, to support the United Nations' codification efforts. Success was, and is, not self-evident, and postponement of the consideration of questions clearly not yet ready for codification or of a politically controversial character may in the end benefit the development of international law. Second, it was important for the Commission to achieve a speedy codification of the general principles of the law of treaties. Since the codification of these principles, treaties have become the primary source of international law in both importance and quantity.

The question of treaties involving international organizations came up again at the Conference of Vienna<sup>43</sup> where the Commission's draft was discussed and the "Treaty of Treaties" was adopted.<sup>44</sup> During one of the first sessions of the conference, the delegate from the United States pointed out that draft article I, in excluding from the scope of the convention treaties concluded by international organizations, took into account neither the development of international law which had taken place during the twentieth century, nor the growth of activities of international organizations which clearly possess treaty-making capacity and play important roles in the modern international community.<sup>45</sup> The United States delegate proposed establishment of a working group of representatives from selected international organizations to study the question and to formulate proposals for necessary changes in the text of the draft convention. A number of delegates, including those from Cyprus, Australia, and Great Britain supported this proposal.<sup>46</sup> The Soviet representative and others, how-

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<sup>43</sup> See R. WETZEL & D. RANSCHNING, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1978) (text of convention in English and German, with bibliography); 1979 Draft Articles, *supra* note 2; see also Report of the Commission to the General Assembly on the work of the thirty-fourth session, U.N. Doc. A/37/10, reprinted in [1982] Y.B. INT'L L. COMM'N 1077, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 2) (containing the text of the draft articles with commentary) [hereinafter cited as 1982 Draft Articles].

<sup>44</sup> See *infra* note 52 and accompanying text.

<sup>45</sup> Even then, international organizations of a universal character, such as the League of Nations, United Nations, and more specialized agencies had already concluded hundreds of treaties. This number has increased greatly by the conclusion of agreements by regional organizations such as the European Communities.

<sup>46</sup> Official Records of the Vienna Conference on the Law of Treaties (First Session), at 11-14, U.N. Sales No. E.70V.5; see also R. WETZEL & D. RAUSCHNING, *supra* note 43. Other supporters of the proposal included the delegations from India, Canada, and Switzerland. A majority of the conference delegates was clearly convinced of the growing importance of treaties involving international organizations, but apparently considered the time improper for introducing such an amendment as it would have caused a significant and intolerable

ever, resolutely opposed any amendments to this effect, arguing that the work of the conference would be significantly delayed, if not fail completely.<sup>47</sup>

At this impasse, the Swedish delegate formulated a practical compromise proposal: the conference would retain the present draft article, and thus limit the scope of the future convention to the law of treaties between the states, but at the same time adopt a resolution formally requesting that the International Law Commission draft additional rules applicable specifically to treaties concluded by international organizations.<sup>48</sup> In this way, the conference could proceed without further delay with its projected work schedule. To the extent that the draft articles expressed existing customary international law, they would be relevant both in the conclusion of international agreements and also where international organizations or other subjects of international law were involved.<sup>49</sup> The Swedish proposal obtained the general approval of the delegates at the conference.<sup>50</sup> Draft article I became, with minor alterations, article I of the treaty.<sup>51</sup> At the same time the conference adopted, with eighty-five affirmative votes, zero negative votes, and thirteen abstentions, the resolution suggested by the Swedish delegate.<sup>52</sup>

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delay in the timing of the conference.

<sup>47</sup> Official Records of the Vienna Conference on the Law of Treaties, *supra* note 46, at 11-14.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 15.

<sup>50</sup> *Id.*

<sup>51</sup> "Scope of the Present Convention: The Present Convention applies to treaties between States." R. WETZEL & D. RAUSCHNING, *supra* note 43, at 45; *see infra* note 52 and accompanying text.

<sup>52</sup> Resolution relating to article 1 of the Vienna Convention on the Law of Treaties:

*Recalling* that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,

*Taking note* that the Commission's draft articles deal only with treaties concluded between States,

*Recognizing* the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

*Cognizant* of the varied practices of international organizations in this respect, and

*Desirous* of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,

*Recommends* to the General Assembly of the United Nations that it refer to the International Law Commission the study, *in consultation with the principal in-*

#### IV. CODIFICATION OF THE NEW LAW OF TREATIES: THE WORK OF THE INTERNATIONAL LAW COMMISSION

With an explicit mandate from the General Assembly,<sup>53</sup> the Commission started its work on the codification of this second part of the law of treaties. A special sub-commission discussed the subject during the 1970 session and Professor Paul Reuter was appointed Special Rapporteur in 1971.<sup>54</sup> Eleven reports were submitted during the 1972 to 1982 period and were subjected to careful study and extensive discussions within both the Commission and the Sixth Committee of the General Assembly. The Commission also consulted important international organizations.

In his initial report, the Special Rapporteur offered an overview of the Commission's discussion of the law of treaties in general, including an inventory of the specific problems inherent in the new topic and a work schedule.<sup>55</sup> In 1973, the Commission gave its approval to the proposed schedule and requested that the Special Rapporteur begin drafting a series of articles for a draft convention. The Commission approved a series of sixty draft articles dur-

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*ternational organizations* [emphasis added] of the question of treaties concluded between States and international organizations or between two or more international organizations.

Official Records of the Vienna Conference on the Law of Treaties, *supra* note 46, at 178-79. The phrase "in consultation with the principal international organizations" was inserted at the request of Sweden. *Id.*

<sup>53</sup>

*The General Assembly,*

*Having considered* the report of the International Law Commission on the work of its twenty-first session,

*Having discussed* the resolution relating to article 1 of the Vienna Convention on the Law of Treaties adopted by the United Nations Conference on the Law of Treaties,

*Emphasizing* the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

*Recommends* 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. . . ."

G.A. Res. 2501 (XXIV), 24 U.N. GAOR Supp at 97, U.N. Doc. A/7630/1969.

<sup>54</sup> The purpose of the "Sub-Commission Reuter," as it was called, was to make a preliminary study of the scope of the subject and a work plan for the Commission. Report of the Sub-Commission Reuter, [1971] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/250.

<sup>55</sup> *Id.*

ing its 1979 session and sent the draft to states and international organizations for comment. The completed draft text, consisting of eighty articles and an annex, was approved in 1982 and forwarded to the General Assembly.<sup>56</sup>

In the initial report, the Rapporteur, after a historical introduction on increased treaty-making by international organizations and an extensive listing of the literature on the subject,<sup>57</sup> also formulated two basic principles which became the points of departure for this new codification effort. The first premise established that the work on the codification of the law of treaties involving international organizations is an extension of the codification of the general law of treaties during the 1960's.<sup>58</sup> In practice, and historically, the codification of the new law of treaties is a review and adaptation of the 1969 treaty, which should form the basis and the points of departure.<sup>59</sup> Therefore, it is necessary to follow as closely as possible the structure and the terminology of the "mother treaty," and to ensure that the two texts form "a body of law as homogeneous as possible, particularly in terminology."<sup>60</sup> The report's second premise stated, however, that the two texts should be independent of one another.<sup>61</sup> Thus, the texts of identical articles would have to be repeated in the new convention; a simple *renvoi* of corresponding articles in the 1969 Convention would not be sufficient.<sup>62</sup> A *renvoi*,

<sup>56</sup> Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations, as Finally Approved by the International Law Commission, U.N. Doc. A/37/402, at 3-42. For a detailed report on the work of the Commission on this topic, see the ILC Yearbooks 1973-1982, and the yearly reports on the sessions of the Commission in the "ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL PUBLIC" and the AMERICAN JOURNAL OF INTERNATIONAL LAW; see 1979 Draft Articles, *supra* note 2.

<sup>57</sup> The foundation of the United Nations, the 1949 Advisory Opinion of the International Court, the creation of important regional organizations such as the EEC, and discussions before and during the 1968-69 Vienna Conference have, in turn, led to a current of literature on the subject of the status of international organizations. Specifically on their treaty-making capacity and practice, see *inter alia*: K. ZEMANEK, AGREEMENTS OF INTERNATIONAL ORGANIZATIONS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (1971); S. HUNGDA CHIU, THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED (1966); H.J. GEISER, "LES EFFETS DES ACCORDS CONCLUS PAR LES ORGANISATIONS INTERNATIONALES" (1977); S. DENYS, "L'INTERPRETATION DES TRAITES DES ORGANISATIONS INTERNATIONALES" (1981). See F. Seyerstedt, *infra* notes 84 and 93.

<sup>58</sup> Report of the Sub-Commission Reuter, *supra* note 54.

<sup>59</sup> *Id.*

<sup>60</sup> 33 U.N. GAOR Int'l L. Comm'n. at 8-11, U.N. Doc. A/CN.4/341 (1981).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 8-11. In the past, the Commission has never used *renvoi* in its draft texts. Compare for instance independent texts of respectively, the "Vienna Convention on Diplomatic Relations," the "Vienna Convention on Consular Relations," the "Convention on Special

in any case, would cause complications in the event of amendments to the earlier treaty.<sup>63</sup> Additionally, complications could arise for those states or organizations that were parties to the new but not to the former convention.<sup>64</sup>

The task of the Commission has proved surprisingly difficult. The texts adopted by the Commission in the first reading seemed unnecessarily cumbersome and designed to stress the difference between states and organizations, rather than to reveal common interests.<sup>65</sup> Certain members apparently wished to demonstrate the "inferiority" of international organizations to states, a conception which also appears in the comments by states to the draft articles.<sup>66</sup> However, in the end reasonable compromises were made in the face of insistent demands for simpler and more equitable rules; earlier texts were drastically shortened and made more coherent, while a distinction between states and international organizations was maintained whenever real differences so required. The result is that the two texts will be almost identical. The only term which has different meanings is the term "treaty," which the 1969 Convention defined as a "treaty between States."<sup>67</sup>

## V. SPECIFIC PROBLEMS OF THE NEW LAW OF TREATIES

From the beginning of the Commission's work on the topic, it became clear that this "new law of treaties" displayed specific characteristics, sometimes fundamentally different from the law of inter-state treaties.<sup>68</sup> While the Commission usually attempted to transfer the corresponding provisions from the 1969 Convention to the new draft articles, basic difficulties sometimes had to be overcome. The most important problems demanding a new and/or specific solution included: (1) the form of the treaties; (2) the question of the representation of the organization; (3) the competence of international organizations to enter into treaty-relationships, or in other words, their "treaty-making capacity"; (4) the role played by

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Missions," and the "Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character." These conventions have many common provisions.

<sup>63</sup> 33 U.N. GAOR Int'l L. Comm'n. at 8-11, U.N. Doc. A/CN.4/341 (1981).

<sup>64</sup> *Id.*

<sup>65</sup> See UNITED NATIONS, *supra* note 13 at 215; see also Official Records of the United Nations Conference on the Law of Treaties, Vienna, done on May 23, 1969, U.N. Doc. A/Conf. 39/11/Add. 2 (1971); R. WETZEL & D. RAUSCHNING, *supra* note 43.

<sup>66</sup> UNITED NATIONS, *supra* note 65.

<sup>67</sup> See *supra* note 37 and accompanying text.

<sup>68</sup> Report of the Sub-Commission Reuter, *supra* note 54, at 95.

the internal structures of the organization, that is, the question of the relevant rules of the organization; (5) modes for dispute settlement; and (6) legal consequences of such treaties with regard to third states and, more specifically, to the member states of the particular organization.

This Article considers the general provisions of treaty law found in the 1969 Convention. It then discusses specific requirements, as well as suggested solutions pertaining to international organizations as formulated by the International Law Commission. The Article also considers the final solution proposed in the draft articles.

### A. *Treaty Form*

From preliminary discussions it was generally understood that the new subject would be limited to the question of "agreements governed by international law and concluded in written form."<sup>69</sup> Oral or silent agreements would remain outside the scope of the codification draft, a decision corresponding to provisions formulated at the 1969 Convention.<sup>70</sup> The 1969 Convention provides no definition of what "written form" means and the Commission decided to phrase the draft article similarly, perhaps because this treatment leaves room for interpretation to accommodate the needs of treaty-making international organizations.<sup>71</sup>

### B. *Representation of International Organizations, Particularly the Requirement of Proof of Full Powers of a Person Acting for an International Organization in the Conclusion of International Agreements*

With regard to the representation of a state in the process of negotiating and concluding a treaty, the 1969 Vienna Convention distinguished persons who can be considered as representing their state "in virtue of their functions and without having to produce full powers" from those persons who would have to produce full powers.<sup>72</sup> The general rule makes it clear that production of full powers is normally required as a fundamental safeguard for negoti-

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<sup>69</sup> 1982 Draft Articles, *supra* note 43, at 17.

<sup>70</sup> See Vienna Convention on the Law of Treaties, art. 2. (use of terms), U.N. Doc. A/37/402, reprinted in R. WETZEL & D. RAUSCHNING, *supra* note 43, at 45.

<sup>71</sup> Chapter II of the Report of the International Law Commission on the work of its thirty-fourth session, *supra* note 43, including the final version of the draft articles, has been re-issued for the 1986 conference as U.N. Doc. A/CONF. 129/4.

<sup>72</sup> Vienna Convention on the Law of Treaties, art. 7 (full powers), U.N. Doc. A/37/402, reprinted in R. WETZEL & D. RAUSCHNING, *supra* note 43, at 46.

ating states; however, in virtue of their function and without having to produce full powers, heads of state, heads of government, and ministers of foreign affairs are considered as representing their state for all acts relating to the conclusion of a treaty.<sup>73</sup> Representatives accredited by states to an international conference or to an international organization or one of its organs enjoy the same powers, but only for the purpose of adopting the text of a treaty within the framework of that conference, organization, or organ.<sup>74</sup>

In the new law of treaties, the problem of the requirement of producing full powers is of a different nature. According to existing practice, representatives of international organizations normally do not produce full powers; there is usually no doubt who is the highest official. On the other hand, it may be argued that whenever representatives of organizations participate in negotiations with representatives of states, maintaining some kind of equal treatment would be important. Thus, the Commission set out to prepare a draft for an article corresponding with article 7 of the 1969 draft articles.<sup>75</sup> In the course of the discussions, however, it became extremely difficult to draft rules applicable to international organizations under all circumstances. The Commission decided to limit its draft to a general reference to "the practice of international organizations."<sup>76</sup> Practice, with regard to the first part of the treaty as well as to the second part, refers to the adoption and authentication of the treaty-text.<sup>77</sup> For the second part, however, concerning the expression of consent to be bound by the treaty, the draft articles refer to the practice of "the competent organs of the organization."<sup>78</sup> The commentary indicates that the Commission discussed the possibility of equating the powers of the highest official of an organization with the powers of heads of state or government for the purpose of negotiating treaties.<sup>79</sup> The commentary, how-

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *id.*; Report of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. (No. 9) at \_\_, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 169, at 178, U.N. Doc. A/6309/Rev. 1 (commentaries on articles).

<sup>76</sup> Article 7(4)(6), 1982 Draft Articles, *supra* note 43, at 25.

<sup>77</sup> *Id.* art. 7(3)(a) & (b).

<sup>78</sup> *Id.* art. 7(4)(b).

<sup>79</sup>

. . . it is well established that as far as treaties of the United Nations are concerned, in nearly every case it is the Secretariat that represents the Organization at all stages, including the negotiating stage, and the establishment of the Organization's consent to be bound. In exceptional cases, . . . formal approval has been

ever, also noted that there is no clear evidence of a continuous, established, and universally accepted practice in this regard.<sup>80</sup> There are developments, however, and in some organizations, such as the Council of Europe, such a practice already exists. It seems too early, though, to justify the assumption of complete equality solely on the text of a draft article.<sup>81</sup>

Inquiry should also be made into the legal consequences of *ultra vires* acts performed by a person representing an organization. More specifically, what are the consequences if it later becomes clear that a representative overstepped his mandate and did not have the competence to negotiate and to conclude treaties for the organization? Article 46 of the 1969 Convention established the principles that a state may not invoke the defense that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties unless that violation was manifest and concerned a rule of fundamental importance in its internal law.<sup>82</sup> The presumption is incontestable that certain office-holders are *ex officio* entitled to bind the state, without the need to produce full powers. The Permanent Court of International Justice upheld this presumption in the *Eastern Greenland* case,<sup>83</sup> finding that certain statements by the Minister of Foreign Affairs had a binding effect on the government of Norway, notwithstanding constitutional restrictions on his competence.<sup>84</sup>

There is no reason why this basic presumption could not be maintained in the case of certain officials of international organizations, and why legal consequences of acts performed *ultra vires* should be different from the consequences of such acts performed by representatives of states. That same presumption is indeed maintained in draft article 7, which makes distinctions similar to

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expressed by an intergovernmental organ of the United Nations but in nearly all other cases, including headquarters agreements . . . no formal action was taken by any intergovernmental organ either before or after the treaty had been established as authentic and definitive. . . .

U.N. Doc. A/CN.4/339/Add. 5, at 4 (commentary to the draft article); see also *supra* note 6.

<sup>80</sup> See 33 U.N. GAOR Int'l L. Comm'n. at app. 4, U.N. Doc. A/CN.4/339/Add. 5.

<sup>81</sup> See Report of the Commission, *supra* note 43, at 46-52 (commentary).

<sup>82</sup> See UNITED NATIONS, *supra* note 65, at 228.

<sup>83</sup> PCIJ Ser. A/B, No. 53, at 91-92.

<sup>84</sup> See F. Seyerstedt, *International Personality of Intergovernmental Organizations: Its Scope and Its Validity vis-a-vis Non-members*, 14 INT'L J. LEGAL INFOR. 233-64 (1964), and *Do the Capacities Really Depend on the Constitutions?*, 18 INT'L J. LEGAL INFOR. 27-28 (1968).

article 7 of the 1969 Convention.<sup>85</sup> Draft article 7 should be read in conjunction with draft article 27(2) and (3),<sup>86</sup> as well as draft article 46(3) and (4).<sup>87</sup>

### C. *Treaty-Making Capacity*

Article 6 of the 1969 Convention confirms the prevailing opinion that "every state possesses the capacity to conclude treaties."<sup>88</sup> During the discussions of the Vienna Conference, several delegates remarked that there was no need for the inclusion of this provision since the capacity of states to conclude treaties was an essential attribute of sovereignty and international legal personality. On the other hand, because the Convention contained many other provisions which merely restated existing law, article 6 was retained in the definitive text.

In contrast to the relative ease with which agreement was reached on the treaty-making capacity of states, agreement on the treaty-making capacity of international organizations proved more difficult. Notwithstanding the fundamental inequality between international organizations, it could perhaps have been possible to outline certain basic principles with respect to their treaty-making capacity if the scope of those principles could be limited to a small group of the most important global organizations. The International Law Commission, however, considered it essential to draft rules which would apply to all international organizations, even those to which such a capacity is not expressly given in their con-

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<sup>85</sup> See UNITED NATIONS, *supra* note 65, at 217; see also Draft Article 7, 1982 draft articles, *supra* note 43, at 24-25.

<sup>86</sup> Draft article 27 corresponds with provisions found in article 27 of the 1969 Convention, and reads: "An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty." Article 27(2), 1982 Draft Articles, *supra* note 43, at 38; cf. article 27 of the 1967 Convention, *reprinted in* UNITED NATIONS, *supra* note 65, at 223.

<sup>87</sup> Draft article 46 corresponds with article 46 of the 1969 Convention and states in pertinent part:

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

4. In the case of paragraph 3, a violation is manifest if it is or ought to be within the knowledge of any contracting state or any contracting organization.

Draft article 46, 1982 Draft Articles, *supra* note 43, at 51; cf. UNITED NATIONS, *supra* note 65, at 228.

<sup>88</sup> See UNITED NATIONS, *supra* note 65, at 217; R. WETZEL & D. RAUSCHNING, *supra* note 43, at 93.

stitution and those that do not need such capacity. With this as the goal, it becomes almost impossible to define general rules. The main question became whether an international organization, for the purpose of the draft articles, should be defined as "any organization with treaty-making capacity."<sup>89</sup>

With respect to the practice of international organizations, there appears to be great flexibility, as may be deduced from the comments of organizations consulted by the Commission:

1. The United Nations refers to a constant practice of "continuous expansion of the number and subject areas of treaties to which the UN has been or is a party [that] has occurred without an express provision in the constitutive instrument — the Charter of the United Nations — granting the organization the capacity to enter into treaties for the general purpose of carrying out the task entrusted to it . . .";<sup>90</sup>

2. The Council of Europe, stating that nothing in its constitution provides for a treaty-making capacity, refers to numerous agreements concluded by the Secretary-General "solely on his own responsibility . . ." The agreements in question were primarily agreements of cooperation, exchanges of information and documents, and forms of liaison with other organizations. The Council of Europe also refers to a 1951 Resolution of the Council's Committee of Ministers by which the Committee declared itself competent to enter into treaties with other international organizations on questions falling within its competence;<sup>91</sup>

3. The European Community explicitly states that "the community's treaty-making powers are not restricted to the instances explicitly provided for in the treaty establishing the European Economic Community. These powers may be extended in new fields under the conditions provided for in the Treaty . . ."<sup>92</sup>

Under those circumstances, the Commission decided to limit the draft to outlining basic principles of international law concerning the treaty-making capacity of international organizations. It was considered of utmost importance to create a system flexible enough to meet future needs. Thus, the text of draft article 6 provides that "the capacity of an international organization to conclude treaties

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<sup>89</sup> A subsidiary question concerned the type of organizations such a definition would include. More specifically, would this be limited only to organizations with an express provision to this effect in their constitutions, or would it include all organizations whose constitutions do not contain provisions to the contrary?

<sup>90</sup> 33 U.N. GAOR Int'l L. Comm'n. at 2, U.N. Doc. A/CN.4/339/Add. 5 (1981).

<sup>91</sup> 34 U.N. GAOR Int'l L. Comm'n. at 9, U.N. Doc. A/CN.4/350 (1982).

<sup>92</sup> 33 U.N. GAOR Int'l L. Comm'n. at 2, U.N. Doc. A/CN.4/339 (1981).

is governed by the relevant rules of that organization," leaving it to the organizations to chart their present and future needs.<sup>93</sup>

#### D. *Relevant Rules of the Organization*

The Commission separately and thoroughly studied the question of what should be considered the relevant rules of the organization.<sup>94</sup> This problem is fundamental for any discussion on the external relations of international organizations. It seemed logical to transfer the notion of state internal law to the law of organizations. Traditionally, however, the Commission stressed the importance of the basic inequality of the various organizations and strived toward respect for special circumstances and individual characteristics whenever possible.<sup>95</sup> This principle has prevailed in all discussions on the legal status of international organizations in the past and is also currently at issue.

The phrase "relevant rules of that organization" repeatedly appears in the draft articles.<sup>96</sup> Definition of the phrase in draft article 2<sup>97</sup> is based on a definition previously conceived in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>98</sup> From the preparatory work on this convention, apparently the Commis-

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<sup>93</sup> Draft art. 6, 1982 Draft Articles, *supra* note 43, at 23. *But see*, on draft article 6, F. Seyerstedt, *Treaty-Making Capacity of Intergovernmental Organizations: Article 6 of the ILC's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations*, 34 OSTERR. Z. OFF. RECHT U. VOLKERRECHT, 3/3, at 261-67 (1983). The author maintains that this provision in draft article 6 is "useless and misleading" and should be deleted because draft article 46 (3) and (4), read in connection with draft article 27, discussed above, explicitly forbids that international organizations invoke their internal rules as justification for their failure to perform the treaty. He argues rather that the treaty-making capacity of international organizations does not flow from their constitution or other relevant rules, but from general international law, in the same way as is the case with states. He would propose a draft article 6 in accordance with the principle that all international organizations have the capacity to conclude treaties unless their constitution expressly limits this capacity with external effect vis-a-vis the other parties.

<sup>94</sup> See Commentary to draft art. 6, 1982 Draft Articles, *supra* note 43, at 23-24.

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., 1982 Draft Articles, art. 6, *supra* note 43, at 23.

<sup>97</sup> 1982 Draft Articles, art. 2(1)(f), *supra* note 43, at 18.

<sup>98</sup> Article 1 provides that "rules of the Organization means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization." Art. 1, Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, March 14, 1975), *Official Records of the United Nations Conference of the Representation of States in Their Relations with International Organizations*, vol. II, Documents of the Conference, at 210, U.N. Sales No. E.75.V.12.

sion disfavored the idea of equating the constitution of an organization with its own texts and decisions.<sup>99</sup> Granting an equivalent status to international organization, however, seemed to meet the recognized needs and demands and to accord with actual practice of international organizations; thus it became a part of the text.<sup>100</sup> According to the Commission's interpretation, not every constitutional provision, not all resolutions and decisions, and not all examples of existing practice constitute the rules of an organization, but rather only those relevant to a certain situation — the so-called "relevant rules."<sup>101</sup>

### E. *Dispute Settlement*

The draft articles, as approved by the Commission in 1982, led to difficult discussions on two major points during the last session. One problem that developed concerned settlement of disputes pertaining to certain provisions of the convention. Article 66 of the 1969 convention provides for the settlement of two types of disputes. First, disputes concerning the application or interpretation of articles 53 and 64, the *jus cogens* provisions, are submitted by written application to the International Court of Justice unless the parties by common consent agree to submit the dispute to arbitration.<sup>102</sup> Second, parties to a dispute with respect to the application or interpretation of the other articles of part V of the convention, concerning the invalidity, termination, or suspension of treaty operation, may initiate a special procedure, as provided in the annex to the convention, by submitting a request to the Secretary-General.<sup>103</sup>

These dispute resolution provisions cannot be transferred as written to the new draft articles because international organizations do not have access to the International Court of Justice. The solution selected by the Commission was analogous to the modes of dispute settlement provided for in the 1982 Convention on the

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<sup>99</sup> *Id.* at vol. I, p. 316.

<sup>100</sup> 1982 Draft Articles, art. 5, *supra* note 43, at 23.

<sup>101</sup> Report of the Commission, *supra* note 43, at 36-37. The Commission's commentary refers, for example, to the practice of abstentions in the voting procedure of the United Nations Security Council, as analyzed by the International Court of Justice in its *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibi*, (1971) I.C.J. 16, at 22, para. 22.

<sup>102</sup> See Draft art. 66, UNITED NATIONS, *supra* note 65, at 233.

<sup>103</sup> *Id.*

Law of the Sea.<sup>104</sup> Overriding resistance from the eastern European states,<sup>105</sup> the Commission decided that parties to a dispute concerning the application or interpretation of the two *jus cogens* articles should, by written notification to the other party or parties to the dispute, submit to arbitration in accordance with the provisions of the annex attached to the draft articles. As an alternative, the parties by common consent could agree to submit the dispute to an alternative arbitration procedure.<sup>106</sup> The annex establishes an Arbitral Tribunal as well as a Conciliation Commission to settle disputes arising in connection with the other articles of part V of the draft articles, in the same manner as provided for in the 1969 Convention.<sup>107</sup>

F. *Legal Consequences of Treaties Involving International Organizations with Regard to Third States and, More Specifically, to the Member States of the Organization in Question*

One question debated at length in the 1982 session remained unresolved. The question involved the legal consequences of treaties concluded by international organizations with regard to third states and, more specifically, the legal consequences for member states of the organization. Draft article 36, entitled "Obligations and Rights Arising for States Members of an International Organization From a Treaty to Which it is a Party," purportedly dealt with this question.<sup>108</sup> There is no corresponding article in the 1969 Vienna Convention.

The Commission noted that a *de facto* situation developed which the Vienna Convention neither explicitly covered nor anticipated. For example, the Commission noted that "a customs union, in the case where it takes the form of an international organization, normally concludes tariff agreements to which its members are not parties. Such tariff agreements would be pointless unless they were to be immediately binding on member states . . . [Or] an international organization, before concluding a headquarters agreement with a state, may wish its member states to agree among themselves, and with the organization itself, beforehand so

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<sup>104</sup> See The United Nations Convention on the Law of the Sea (1982), annex V & VII.

<sup>105</sup> See S. McCaffey, *The 34th Session of the International Law Convention*, 77 A.J.I.L. 232, at 327 (1983).

<sup>106</sup> 1982 Draft Articles, art. 66, *supra* note 43, at 64.

<sup>107</sup> 37 U.N. GAOR (Provisional Agenda Item 125) at 40-42, U.N. Doc. A/37/402 (1982).

<sup>108</sup> See 1982 Draft Articles, arts. 34-38, *supra* note 43, at 42-48.

as to establish, at least in part, some of the provisions of the headquarters agreement."<sup>109</sup>

The question is whether these situations call for special rules or whether they fall within the scope of articles 34 through 37 of the Vienna Convention. The Commission argues for the inclusion of special provisions in the draft articles because in practice, the consent of states who are members of the organization almost always precedes the conclusion of the treaty by the organization, while the general provision in draft article 35 seems to refer only to subsequent consent.<sup>110</sup> The requirement of express written consent, thus, should be more flexible in cases covered by draft article 36bis. Certain situations are too specific to be covered effectively by general rules.

Several members of the Commission, however, disfavored inclusion of specific provisions because the specific provisions apply mainly in the case of treaties concluded by the European Economic Community (EEC); members considered it inopportune to include provisions covering only special, even unique, situations such as the case of the EEC.<sup>111</sup> The same objections were voiced by some member states during discussions in the Sixth Committee of the General Assembly.<sup>112</sup> The EEC had expressed its interest in the inclusion of a provision such as draft article 36bis. In the commentary on the draft articles,<sup>113</sup> the Commission maintained that the text excluded indications that it would apply only to the EEC and, indeed, as members of the Commission pointed out, the guarantees which the draft provided would apply to a number of organizations as a result.

This problem is a general one and arises in connection with an international organization that enters into treaty relations with a third state or with another international organization. The need for a solution to the problem in the draft articles is inescapable. The legal fiction that an international organization is an entity separate and distinct from its member states should not be carried to the extreme. The EEC is competent under international law to conclude treaties which are binding on its institutions and on its

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> S. McCaffey, *supra* note 105, at 325-26.

<sup>112</sup> [1978] 2 Y.B. INT'L L. COMM'N, pt. 2, at 149.

<sup>113</sup> Comments and Observations of Governments and Principal International Organizations, 33 U.N. GAOR Int'l L. Comm'n at 28, U.N. Doc. A/CN.4/339 (1981).

member states, as provided by article 228 of the EEC treaty.<sup>114</sup> Article 228 intends to give guarantees to non-member states that they assent to and accept by entering into treaty relations with organization. In this respect, article 228 is similar to article 27 of the Vienna Convention, which provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>115</sup> Draft article 36bis, thus, is of general importance.<sup>116</sup>

Although the EEC endorsed the principles embodied in draft article 36bis, it identified shortcomings in the text. In particular, draft article 36bis fails to consider expressly the situation where an international organization, together with its member states, concludes a treaty with a third state or organization. In practice, this situation will become more and more common, at least in the EEC and in those areas within which the competence of the EEC is comingled with the competence of its member states. This situation of "mixed agreements" is, by way of example, the situation confronting a number of international commodity agreements<sup>117</sup> where the EEC has become a party to the agreement together with its member states. The question has also arisen in the context of possible participation by the EEC in the 1982 Law of the Sea Convention.

This last question involves the problem of participation of international organizations in multilateral conventions. Whenever international organizations enter into treaty relations,<sup>118</sup> they almost always have done so through bilateral agreements. This could mean that there are limits to the treaty-making capacity of international organizations. Discussions of the general principles of the law of treaties failed to distinguish between bilateral and multilateral

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<sup>114</sup> Treaty Establishing the European Communities, *done at Rome*, March 25, 1957, 297 U.N.T.S. 3, art. 228.

<sup>115</sup> *Id.*

<sup>116</sup> Comments and Observations of Governments and Principal International Organizations, Report of the Sec. Gen., 39 U.N. GAOR at 8, U.N. Doc. A/CN.4/339 (1981).

<sup>117</sup> The following International Commodity Agreements are mentioned: the 1971 Wheat Agreement, the 1975 Cocoa Agreement, the 1975 Tin Agreement, the 1976 Coffee Agreement, all including later amendments, and the 1979 Natural Rubber Agreement. On the other hand, UNESCO, in its commentary on the draft articles, points out that in general there has not been enough practice in this regard to justify codification at this stage. Report of the Sec. Gen., 39 U.N. GAOR at 8, U.N. Doc. A/39/491 (1984).

<sup>118</sup> Organizations have entered treaty relations in an increasing number; the EEC entered into approximately eight hundred between 1958 and 1985. Statement by the Observer for the EEC Commission in the General Assembly, December 1984.

agreements; the special rapporteurs never alluded to such a distinction during the preparatory work on the 1969 Vienna Convention. Nor does such a distinction appear in the text of the Convention. In practice, however, participation of international organizations in general multilateral conventions has not been readily accepted by participating states, and special clauses must be inserted in the text of conventions to make such participation possible. This question will be on the agenda of the 1986 Vienna Conference, where a decision will be made on the subject of possible participation by international organizations in the Convention on the New Law of Treaties.

The final version of draft article 36bis, as approved by the Commission reads as follows:

Obligations and rights arise for states members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: (1) the states members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unambiguously agreed to be bound by the said provisions of the treaty, and (b) the assent of the states members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating states and negotiating organizations.<sup>119</sup>

Member states of an international organization which enter into treaty relationships thus incur certain legal consequences only when several conditions are fulfilled: (1) the member states of the organization in question unanimously consent to be bound by the provisions of the treaty, which might cause separate legal obligations for individual member states; (2) the consent is brought to the attention of all other negotiating partners; and (3) all other negotiating partners also consent.

## VI. THE DECISION TO CONVENE A CODIFICATION CONFERENCE IN VIENNA IN 1986; SOME CONCLUSIONS

Following final approval of the draft articles by the Commission in 1982, they were sent to the General Assembly. The new law of

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<sup>119</sup> 1982 Draft Articles, art. 36bis, *supra* note 43, at 43.

treaties then became the responsibility of the General Assembly, which faced the decision of how to transform the draft articles into a treaty. It had at least two options: the General Assembly could, after discussions, adopt the final draft in the form of a resolution,<sup>120</sup> or it could convene a special conference for the negotiation and adoption of the treaty.<sup>121</sup>

In 1983, the General Assembly made the fundamental decision that the most appropriate forum would be a conference of plenipotentiaries.<sup>122</sup> After an official invitation by the Austrian government, the General Assembly decided in 1984 to convene a conference of plenipotentiaries in Vienna from February 18 through March 31, 1986, to negotiate, on the basis of the draft articles, the final text of the Convention on the Law of Treaties Between States and International Organizations or Between Two or More International Organizations.<sup>123</sup>

During discussions in the Sixth Committee of the General Assembly, various representatives commented favorably on the draft articles. Some, however, primarily eastern European states, retained the opinion that the text failed to reflect sufficiently the fundamental difference between the international legal capacity of states and the legal capacity of international organizations. In the opinion of these states, this fundamental difference remains secondary to and derivative from the concerted will of the states parties to the constitution of a particular international organization.<sup>124</sup> Other states,<sup>125</sup> however, held a different opinion. They regarded the new convention as the second in a possible trilogy: the first was the 1969 Vienna Convention on the Law of Treaties; the second was the proposed draft convention; and a third convention cover-

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<sup>120</sup> This approach was taken in the case of several other treaties. *E.g.*, The International Covenant on Economics, Social, and Cultural Rights, annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

<sup>121</sup> As has happened in the case of the United Nations Conventions on the Law of the Sea, 1958 (Conferences of Geneva in 1958 and 1960) as well as in the case of the conventions mentioned above on the status of international organizations and on the law of treaties (Vienna Conferences of 1968/1969, 1975, 1978, etc.).

<sup>122</sup> G.A. Res. A/38/139, 38 U.N. GAOR Supp. (No. 47) at 273, U.N. Doc. — (1983). The United States, Israel, and the Soviet Union, however, preferred action by less costly resolution rather than conference. *See* 38 U.N. GAOR c.6 (35th meeting) at 1-9, U.N. Doc. A/C.6/38/SR.35 (1983).

The conference was to be held in 1985 or later, as some time would be needed for preliminary consultations with member states and international organizations.

<sup>123</sup> G.A. Res. A/38/779, — U.N. GAOR —, U.N. Doc. — (1974).

<sup>124</sup> 38 U.N. GAOR c.6 (35th meeting) at para. 1, U.N. Doc. A/C.6/38/SR.35 (1983).

<sup>125</sup> Thailand, for example.

ing international agreements involving non-governmental organizations.

Two fundamental problems remain unsolved in connection with the upcoming conference. The first involves the identity of and capacity in which parties may participate in the conference. Whether interested international organizations will be invited to take part in the discussions on equal footing with the participating states and whether they shall have the right to vote is unclear. During discussions in the Sixth Committee of the General Assembly, the Greek representative, speaking on behalf of the member states of the European Communities, expressed the view that international organizations should be invited to the conference to allow them to contribute to the codification effort most effectively. Their position presumably would be an intermediate one between mere observers and full participants. For such a plan to succeed, international organizations would have to be given the opportunity to take an active part in the discussions and to propose amendments, although they would not be accorded the right to vote. The second fundamental problem concerns who shall be entitled to become a party to the future convention; that is, will it be possible for international organizations to sign and ratify the convention? For this result to occur, special clauses must be inserted in the text.<sup>126</sup> It might be argued that it is important, even essential, that the convention enter into force only after the express consent of, or the ratification by, certain major international organizations, but this is a question for the conference to decide.

Other organizations, commenting on the draft articles, also have pointed out the importance of their active participation in the conference.<sup>127</sup> The European Communities, in the commentary to draft article 9, stated that they generally support the proposed draft, but cannot accede to the principle that states would decide whether organizations would be invited to participate in the negotiation of certain treaties and, if so, which organizations would be invited.<sup>128</sup> This applies even more so, perhaps, to the upcoming

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<sup>126</sup> Certain clauses in the Final Act of the United Nations Law of the Sea Conference make it possible for international organizations that have been given a certain competence in the field of the international relations of their member states (such as the European Communities), to become a party to the convention.

<sup>127</sup> *E.g.*, UNESCO, Report of the Sec. Gen., 39 U.N. GAOR at 9, U.N. Doc. A/39/491 (1984).

<sup>128</sup> U.N. Doc. A/CN.4/339, *supra* note 116, at 27. The Communities obtained the status of observer in 1974; that means that a representative of the EEC is invited to participate in

conference on the new law of treaties.

The decision on whom to invite to the 1986 Vienna Conference nevertheless rested solely with the General Assembly. The resolution of the General Assembly invites: (1) all states; (2) Namibia;<sup>129</sup> (3) representatives of international organizations with a standing invitation from the General Assembly to participate as observers in the sessions and work of international conferences convened under the auspices of the United Nations;<sup>130</sup> (4) representatives of the national liberation movements recognized in their region by regional organizations to participate as observers;<sup>131</sup> and (5) representatives of international intergovernmental organizations that traditionally have been invited as observers at legal codification conferences convened by the United Nations to participate in a capacity to be considered and decided by the General Assembly at its fortieth session.<sup>132</sup> The conclusion must be that only states will be allowed full participation in the conference, with the right to vote.

Even so, the conference represents a significant step in the development of the law concerning international organizations and their participation in international relations. The importance of the work by the International Law Commission on this subject is apparent from its use in the Advisory Opinion by the International

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the work and in the discussions of the General Assembly, without the right to vote. In practice, this means most often the discussion in the Second and Fourth Committee.

<sup>129</sup> Since 1966, the territory of Namibia, formerly Southwest Africa, has been under the direct administration of the United Nations. The territory is represented by the United Nations Council for Namibia.

<sup>130</sup> A number of intergovernmental organizations have obtained the status of observer. They take part, on certain conditions but never with the right to vote, in meetings and conferences of the United Nations. They include the important regional organizations (e.g., OAS, OAU, League of Arab States) and about seven others, such as the Commonwealth Secretariat, the Agency for Cultural and Technical Cooperation, and the Asian-African Legal Consultative Committee. See N. SYBESMA-KNOL, *supra* note 6 (detailed analysis of the various observers and the ways they participate in the work of the U.N.).

<sup>131</sup> *Id.* at chapters IX and X on the status of liberation movements.

<sup>132</sup> For example, at the Vienna Convention of 1968/1969, the following organizations, apart from the specialized agencies of the United Nations themselves, were represented by an official delegation composed of the Asian-African Legal Consultative Committee (which at that time did not yet have the official status of observer): the International Bureau for the Protection of Intellectual Property, the Council of Europe, the General Agreement on Tariffs and Trade, and the League of Arab States. At the Conference on the Representation of States in their Relations with International Organizations of a Universal Character, in 1975, the Council of Europe, the EEC, and the League of Arab States were represented. At the Third U.N. Conference on the Law of the Sea, 1973-1982, a record number of organizations (some 19, apart from the specialized agencies), was represented. For an exhaustive study of the 1969 Vienna Convention on the Law of Treaties, see M. VILLAGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* (1985).

Court of Justice of December 20, 1980 on the Interpretation of the Headquarters Agreement Between the World Health Organization and Egypt. This interpretation repeatedly refers to article 56 of the 1969 Vienna Convention and to "the corresponding provision in the International Law Commission's draft articles on Treaties Between States and International Organizations or Between Two or More International Organizations."<sup>133</sup>

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<sup>133</sup> Advisory Opinion on the Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt, (1980) I.C.J. 73, at paras. 47 & 49.

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