Constitutional Subdivisions of States or Unions and their Capacity to conclude Treaties

Comments on Art. 5 Para. 2 of the ILC's 1966 Draft Articles on the Law of Treaties

*Helmut Steinberger**)*

Article 5 of the International Law Commission's final Draft Articles on the Law of Treaties[1]) provides:

"Capacity of States to conclude treaties.

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

The following comment is concerned mainly with para. 2 of draft article 5. Its purpose is not to give a systematical interpretation of its provisions but rather to submit a few critical considerations.

I

Para. 2 of draft article 5 has to be evaluated within the context of the provisions dealing with the scope of application of the draft articles. The main provision defining the scope of application is art. 1, which specifies that application of the draft articles is limited *ratione materiae* to "treaties"[2]) and *ratione personae* to "States". During its fourteenth session the International Law Commission had decided to confine the draft articles to treaties between States. Earlier drafts of the Commission and reports

*) Dr. iur., research fellow at the Max-Planck-Institute for Comparative Public Law and International Law, Heidelberg.

[1]) Reports of the International Law Commission on the second part of its seventeenth session 3–28 January 1966 and on its eighteenth session 4 May–19 July 1966, General Assembly, Official Records: Twenty First session, Supplement No. 9 (A/6309/Rev. 1), United Nations (New York 1966), p. 10 *et seq.* (Text and Commentary).

[2]) The term as defined by art. 2 para. 1 (a) of the draft articles.

of the special rapporteurs had not restricted the scope of application to States but had covered treaties of "other subjects of international law" as well[3]). While that broader scope of application would have extended mainly to international organizations, it would also have included entities such as members of federal States, insurgents of a recognized belligerent status, and the Holy See[4]). Since the capacity of those "other subjects of international law" obviously differs substantially from the corresponding capacity of States, the former drafts and reports thought it necessary to deal expressly with the question of the capacity to conclude treaties of all the entities falling under the scope of application *ratione personae*[5]). Article 3 of the draft articles provisionally adopted by the Commission in 1962 accordingly had provided:

"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".

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[3]) *E. g.* art. 1 para. 1 (a) of the ILC's 1962 draft, Yearbook of the International Law Commission (YBILC) 1962, vol. II, p. 161; art. 2 of the 1959 draft, YBILC 1959, vol. II, p. 95.

[4]) See: Third report by Mr. G. G. Fitzmaurice, YBILC 1958, vol. II, pp. 24, 32 *et seq.*; see also para. (2) of the Commentary on art. 3 of the 1962 draft, YBILC 1962, vol. II, p. 164.

[5]) See: First and Third Reports by Mr. J. L. Brierly, YBILC 1950, vol. II, p. 230; 1952, vol. II, p. 50; First Report by Mr. H. Lauterpacht, YBILC 1953, vol. II, p. 93 *et seq.* (comment on art. 1) and p. 137 *et seq.* (comment on art. 10), the rapporteur expressing some doubts as to the importance of some aspects of the question (see: *ibid.*, note p. 141); First and Third Reports by Mr. G. G. Fitzmaurice, YBILC 1956, vol. II, pp. 107 *et seq.*, 118 (text of and comment on art. 3); 1958, vol. II, p. 32 *et seq.*; First and Fourth Reports by Sir Humphrey Waldock, YBILC 1962, vol. II, p. 35 *et seq.*; 1965, vol. II, p. 16 *et seq.*; Art. 1 of the articles tentatively adopted by the ILC at its third session, YBILC 1952, vol. II, p. 50. The draft articles provisionally adopted by the ILC in 1959 (YBILC 1959, vol. II, p. 92 *et seq.*) did not include a separate article on the capacity to conclude treaties (see, however, draft article 2); the question was reserved to be dealt with later as one of the topics of substantive validity of treaties. The draft articles provisionally adopted by the ILC in 1962 dealt with the question in art. 3, YBILC 1962, vol. II, p. 164 (text and commentary).

While the Havana Convention on Treaties of February 20, 1928 (Supplement to The American Journal of International Law [AJIL], vol. 29 [1935], p. 1205 *et seq.*) did not contain a separate article on the capacity to conclude treaties, the Harvard Draft Convention on the Law of Treaties *(ibid.*, p. 657 *et seq.)* in draft article 3 had provided: "Capacity to make treaties.

Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited".

As a consequence of its decision during its 14th session to restrict the scope of the draft articles to treaties concluded between States, the Commission removed references in its former draft to "other subjects of international law" and adjusted articles accordingly. The question of the capacity to conclude treaties was discussed by the Commission during its fourteenth session 1962[6]) and during the first part of its seventeenth session 1965[7]); draft article 5 para. 1[8]) was adopted then by 11 votes to 2, with 1 abstention; para. 2 was adopted by 7 votes to 3, with 4 abstentions; the article as a whole being adopted by 7 votes to 3, 4 members of the Commission abstaining[9]). This shows that the Commission was far from being unanimous on these provisions[10]); the very learned special rapporteur, Sir Humphrey Waldock, in his Fourth Report had even recommended to strike out the whole article dealing with the capacity to conclude treaties[11]).

To deal with the capacity to conclude treaties raises intricate problems because this question is linked inherently with the general problem of international personality reaching far beyond the sphere of the law of treaties. As far as States are concerned, the problem immediately emerges as to what elements constitute statehood, *i.e.*, which criteria determine whether a given entity is a State. Mr. G. G. Fitzmaurice, as he then was, in his First Report had attempted to define the term "State"[12]). But his

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[6]) See: Summary Records of the 639th, 640th, 658th, 666th meetings, YBILC 1962, vol. I, pp. 57 *et seq.*, 64 *et seq.*, 193 *et seq.*, 240 *et seq.*

[7]) See: Summary Records of the 779th, 780th, 810th, 811th, 816th meetings, YBILC 1965, vol. I, pp. 23 *et seq.*, 30 *et seq.*, 245 *et seq.*, 249 *et seq.*, 280. For a complete list of references, including replies of Governments, discussions in the UN General Assembly and the Sixth Committee, see UN Doc. A/C. 6/376, p. 44 *et seq.*

[8]) Draft article 5 of the final draft was then numbered art. 3.

[9]) 816th meeting, *loc. cit.*, p. 280; Mr. Briggs (USA) and Mr. Ruda (Argentina) explained their voting against, Mr. Rosenne (Israel) his voting in favour of the article, Mr. Tsuruoka (Japan) his abstention, p. 281. The Summary Record of the final adoption during the 892nd meeting (18 July 1966) merely states that the draft article "was adopted without comment" (YBILC 1966, vol. I, part II, p. 325, *ad* art. 3, as it then was numbered). The commentary to the draft article was finally adopted during the 894th meeting (19 July 1966), YBILC 1966, vol. I, part II, p. 339.

[10]) The corresponding provision to art. 5 para. 2 of the 1966 draft in the 1962 draft had been adopted by 9 votes to 7, with 3 abstentions, see YBILC 1962, vol. I, p. 243.

[11]) YBILC 1965, vol. II, p. 18.

[12]) His definition ran as follows: "(a) In addition, to the case of entities recognized as being States on special grounds, the term 'State':

(i) Means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of methods by, or channel through which a treaty on behalf of any given State must be negotiated – depending on its status and international affiliations;

purpose had not been to draft a provision which should become a binding rule of a convention on the Law of Treaties but to give, possibly in the form of a Code, an explanatory statement[13]). To include a substantive definition of the term "State" in a convention would presuppose a sufficient degree of determinateness of the relevant elements or criteria of such definition. Taking into account the political implications of the question, chances for acceptance of such a definition by an international conference would not appear to be great [14]). For this practical reason it does not seem disadvantageous that the final draft of the International Law Commission does not contain a definition of the term "State"; the reference in the Commission's commentary on draft article 5, explaining that the term "State" was used with the same meaning as in the United Nations Charter, the Statute of the International Court of Justice, the Geneva Conventions on the Law of the Sea, and the Vienna Convention on Diplomatic Relations, merely illustrates that the term is used in its international sense but does not provide a substantive definition.

On the other hand, one may legitimately ask whether a provision dealing with the capacity of States to conclude treaties is of any use at all when this capacity is inseparably linked with statehood. There might still be some sense in such a provision if it dealt with the possible limits upon the capacity of States to conclude treaties. While reports of the special rapporteurs had dealt extensively with problems of limited capacity, article 5 para. 1 of the Final Draft of the Commission dropped references to any possible limitations on the capacity of States to conclude treaties. This does not imply that there may not exist such limitations in fact or in law; draft article 5 para. 1 leaves it open whether there exist such limits in a given case or not. It, nevertheless, draws a borderline: if an entity is not possessed of any capacity to conclude treaties it will not qualify as a State in the sense of this provision. One may indeed doubt, as Sir Humphrey Waldock did[15]), whether draft article 5 para. 1 in its truncated form does mean anything which would not already be included in the term "State".

As it stands now, draft article 5 para. 1 has been the result of the

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(ii) Includes the government of the State;" see YBILC 1956, vol. II, p. 107 *et seq.* (draft article 3).

[13]) YBILC 1956, vol. II, p. 106 *et seq.*

[14]) The Harvard Draft Convention on the Law of Treaties in art. 2 (a) did not intend to give a definition but a mere explanation of the use of the term "State": "A 'State' is a member of the community of nations" (AJIL vol. 29 [1935] suppl., p. 703). This explanation, however, would seem to be superfluous.

[15]) YBILC 1965, vol. I, p. 23; see also his Fourth Report, YBILC 1965, vol. II, p. 18.

attitude of certain members of the Commission who wished to avoid any reference to the dependent status of certain entities which they considered as relicts from the period of colonialism soon to be outdated[16]). Agreeable as this aim appears to be, it is questionable whether such a provision will ever render any service for such purposes. It may even have opposite effects, since it might lead to the consequence that a given entity would be denied to qualify as a State because it did not possess any capacity to conclude treaties. There was a tendency among distinguished members of the International Law Commission to attach the provision of draft article 5 para. 1 the quality of a peremptory rule of international law, a rule of *ius cogens*, prohibiting to deprive States of their capacity to conclude treaties[17]). This question obviously raises basic problems as to the status of States under general international law which cannot be dealt with adequately under the limited aspects of the law of treaties.

The draft articles, therefore, had better refrained from reaching beyond the specific scope of the law of treaties by trying to regulate a general aspect of the international personality of States; that is treading delicate ground. The concept of State in international law has always been an open concept whose contents changes according to the necessities of the international society and the specific purpose of international law, *i.e.* the maintenance of peace and justice in international relations. The Vienna Convention on Diplomatic Relations of 1961, *e.g.*, does not contain a provision on the capacity to enter into diplomatic relations; this was purportedly left, after some discussion, to general international law[18]). In the opinion of this author, it would be better to delete the provision of draft article 5 para. 1 and leave the question of the capacity of States to conclude treaties to general international law.

II

Article 5 para. 1 of the draft articles does not speak of "sovereign" or "independent" States, it uses the term "State" without any qualifications.

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[16]) See, *e. g.*, statements by Mr. Tunkin (Soviet Union), YBILC 1962, vol. I, p. 66; 1965, vol. I, pp. 25, 250, arguing that such provision would reflect one of the aspects of the new international law, in contradiction to the old law, which had recognized the existence of States not fully independent, a situation which had been the expression of colonial dependence; Mr. Yasseen (Iraq), *ibid.*, p. 23; Mr. El-Erian (United Arab Republic), *ibid.*, p. 26 *et seq.*; Mr. Lachs (Poland), *ibid.*, p. 251.

[17]) See, *e. g.*, statements of Mr. Paul Reuter (France), 779th meeting, YBILC 1965, vol. I, p. 25; Mr. R. Ago (Italy), *ibid.*, p. 24; Mr. Lachs, *ibid.*, p. 24.

[18]) Several members of the ILC who were critical of the provision of art. 5 para. 1 of the draft articles on the Law of Treaties referred expressly to this precedent, see, *e. g.*, para. (1) of the commentary on draft article 5, *loc. cit.* (see above note 1), p. 24 *et seq.*

The commentary of the Commission states that the term is used with the same meaning as in the Charter of the United Nations, the Statute of the International Court of Justice, the Geneva Conventions on the Law of the Sea, and the Vienna Convention on Diplomatic Relations[19]); all these instruments, to which might be added others, do not refer to "independent" or "sovereign" States. The term, nevertheless, means a State in the international sense for the purposes of international law. This corresponds with article 1 which restricts the scope of application of the draft articles to "States".

The same term "State", however, is also used in para. 2 of draft article 5, dealing with the capacity of members of federal unions. Several distinguished members of the Commission apparently have given the term "State" the same meaning in both paragraphs. In Mr. Ago's opinion, *e.g.*, though he was conscious of the double meaning of the term State in the two paragraphs, para. 2 was necessary because in the absence of this provision "in a federal union each member automatically had the capacity to conclude treaties" under the provision of para. 1[20]). With due respect to the very distinguished member of the Commission it is submitted, however, that this view would not seem to be correct. It is established doctrine that for the purposes of international law in the case of a federal State solely the union is a State in the international sense[21]). The component members of the union may be endowed with limited international personality, but they do not constitute States in the sense of international law; probably nobody would reason that they were capable, *e.g.*, of becoming members of the

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[19]) Para. (4) of the commentary on draft article 5, *loc. cit.* (see above note 1), p. 25.

[20]) YBILC 1965, vol. I, p. 28; Mr. Tunkin's view came quite close to this opinion, *ibid.*, p. 25; see also the statements of Mr. Ruda, *ibid.*, p. 247

[21]) See, *e.g.*, P. Guggenheim, Traité de Droit International Public, vol. 1 (1953), p. 305 *et seq.;* Hackworth, Digest of International Law, vol. 1 (1940), p. 60; C. C. Hyde, International Law, 2nd ed., vol. 1 (1947), p. 122 *et seq.;* H. Mosler, Die völkerrechtliche Wirkung bundesstaatlicher Verfassungen, in: Festschrift für Richard Thoma (Tübingen 1950), pp. 129 *et seq.*, 142 *et seq.*; Rudolf Bernhardt, Der Abschluß völkerrechtlicher Verträge im Bundesstaat (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 32) 1957, p. 12 *et seq.;* Oppenheim-Lauterpacht, International Law, 8th ed. 1955, vol. 1, p. 177; Sibert, Traité de Droit International Public, vol. 1 (1951), p. 113; H. Lauterpacht, [First] Report on the Law of Treaties, YBILC 1953, vol. II, p. 138 *et seq.;* G. G. Fitzmaurice, [First] Report on the Law of Treaties, YBILC 1956, vol. II, p. 118; Third Report on the Law of Treaties, YBILC 1958, vol. II, p. 32, para. (26); the further view, however, of the very learned rapporteur that a member of a federal State never possesses any separate capacity to conclude treaties *sui iuris*, is not shared by the author of this comment. For a radically different concept of the international personality of federal States and their members see Alf Ross, Lehrbuch des Völkerrechts (1951), p. 96 *et seq.*

United Nations under article 4 para. 1 of the Charter[22]). Para. 2 of draft article 5, therefore, does not provide a limitation on the capacity to conclude treaties of entities which, failing such provision, would possess such capacity as States in the sense of para. 1[23]); para. 2 rather extends the scope of application of the draft articles to entities (*i.e.* the component members of a federal union) whose treaties otherwise would not have come under the scope of application of the draft articles. The term "State" cannot be attached the same sense in both paragraphs of draft article 5; in para. 2 it is not applied in the sense of general international law.

Once it is realized that the provision of para. 2 means an extension *ratione personae* of the scope of application of the draft articles on the Law of Treaties the question may be asked whether such extension as presently framed by the draft is adequate or not. As it stands now, the provision speaks of States members of a "federal union"; it does not speak of a "federation" or "federal State", as former drafts and reports had done. Within the International Law Commission several distinguished members attached to this term "federal union" a broader meaning which was not restricted to the sole type of the "federal State" but would cover as well other unions on a federal basis[24]). The Final Commentary of the Commission on the provision of para. 2 of draft article 5, on the other hand, mentions only the case of federal States[25]). This might imply that the Commission thought to deal exclusively with the type of State traditionally spoken of as the federal State or federation (in contrast to the type traditionally spoken of as the confederation)[26]). Objections against this provision of para. 2 of draft article 5 would seem to be less imposing

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[22]) The Byelorussian and the Ukrainian Soviet Republics obviously were admitted to the United Nations for the sole purpose of increasing the voting power of the Soviet Union but not for the reason that they were considered as States in the international sense of the term.

[23]) In Mr. Tunkin's view (YBILC 1965, vol. I, p. 245) para. 2 is a logical consequence of para. 1, since a member of a federal State under international law possessed the right to enter into treaties. With due respect to the very distinguished member of the Commission it is submitted, however, that this view would not appear to be correct.

[24]) See: 810th and 811th meetings of the International Law Commission, Mr. Reuter, YBILC 1965, vol. I, pp. 246, 252, insisting that federalism was characterized by reciprocity; Mr. Yasseen, *ibid.*, p. 246; Mr. Pessou (Senegal), *ibid.*, p. 252; Sir Humphrey Waldock, *ibid.*, p. 252.

[25]) See: para. (5) of the commentary on draft article 5.

[26]) During the 811th meeting the Chairman noted that for some members of the Commission the term "federation" indicated the political constitution of a State, while for others it suggested a community of States, such as the European Economic Community or the former French-African Community; in his view, however, it was better not to deal with that question; YBILC 1965, vol. I, p. 252.

if it was beyond doubt that the term "federal union" was not to be taken exclusively in the sense of "federal State"[27]). It may still be asked whether limitation of the draft to a single type of State or union is satisfactory.

General international law recognizes not only the competence of States to create international associations with limited international personality, *e.g.*, international organizations of States, but also the competence to endow political subdivisions of a State with a limited capacity to enter into relations governed by international law. From a certain theoretical conception of international law this may be considered a delegated competence. This competence reflects basic aspects of general international law. International law does not contain a *numerus clausus* of its possible subjects. From its very idea, to maintain peace and justice in international relations, international law tends to apply to all situations which sociologically constitute relevant factors in international relations[28]). This is, aside from historical traditions, the reason behind the fact that the subjects of international law had never been restricted exclusively to States (in the international law sense) but had included such entities as the Holy See, international unions and organizations, recognized insurgents or, though as merely passive subjects, even pirates. At the point of determining its subjects international law by necessity is governed by open concepts capable to meet socio-political developments of the international community. One may regret, therefore, that the scope of application of the draft articles was limited to States, while at the same time practical reasons which led the International Law Commission to make this decision are understandable. Not so convincing, however, is the limitation of para. 2 of draft article 5 to members of federal unions. Once the Commission decided in the case of federal unions to recognize the competence of States under general international law to endow political subdivisions of a State with a limited international capacity no valid reason can be seen to restrict this decision to one single type of State, *i.e.* the federal State.

The draft articles do not define the term "federal union". The term, as mentioned before, seems to have been used by the Commission in the sense of the "federal State". By applying the term in its general meaning, draft article 5 introduces into the draft a term that is inductively determined by the method of typological classification and insulating abstrac-

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[27]) The draft provisionally adopted by the Commission in 1962 (for the text see above p. 412) obviously had used the term "federal State" and "federal union" synonymously.

[28]) See, generally, H. Mosler, Die Erweiterung des Kreises der Völkerrechtssubjekte, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 22 (1962), pp. 1 *et seq.*, 17 *et seq.*

tion. Outside specific law systems it is not a legal term in the sense that its contents were defined by a legal rule. Typological classification terms change their contents according to different criteria of classification applied. Is the term federal union, as used by para. 2 of draft article 5, to be given the meaning attached to corresponding terms in the general theory of State by Georg Jellinek[29]), Josef L. Kunz[30]) or K. C. Wheare[31]), just to mention a few authors whose concepts of a federal State differ considerably? Wheare, for example, while characterizing the constitutions of the Weimar Republic and, after the amendment of 1944, of the Soviet Union as quasi-federal, denies that both States provide examples of federal governments[32]); Canada, on the other hand, in Wheare's opinion, has a federal government although she does not have a federal constitution[33]). Would para. 2 of draft article 5 apply in such cases? Mr. Tunkin would probably claim application to Soviet Republics, but would the very distinguished member of the Commission do so too for the Canadian Province of Quebec[34])? These examples are mentioned to demonstrate the difficulties involved in using undefined terms of typological classification. It is not overlooked that the use of such terms in international treaty law can never be avoided completely, the term "State" being the most prominent example. With para. 2 of draft article 5 the question, however, is whether difficulties at least would have been diminished by a different draft. This leads to the main criticism that might be levelled at the present draft of para. 2 of article 5.

In the practice of international relations, federal States play the most important role in those cases where a political subdivision of a State is endowed with capacity to conclude treaties. Although in a number of federal States the component members according to the federal constitutional law are not possessed of any capacity to enter into international relations and, in particular, are precluded from entering into treaty relations[35]), there are federal States where such a capacity of component mem-

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[29]) Georg Jellinek, Allgemeine Staatslehre (3rd ed. 7th reprint 1960), p. 769 *et seq.*

[30]) Josef L. Kunz, Die Staatenverbindungen (1929), p. 537 *et seq.*

[31]) K. C. Wheare, Federal Government (2nd ed. 1951).

[32]) Wheare, *loc. cit.*, pp. 25, 26 *et seq.*

[33]) Wheare, *loc. cit.* p. 19 *et seq.*

[34]) In Mr. Tunkin's view determination whether a given component entity of a union was a State or not, should depend on the federal constitution as written, see YBILC 1965, vol. I, p. 245.

[35]) Such is presently the case, *e. g.*, with the United States of America, the United States of Brazil, the Commonwealth of Australia, the Federal Republic of Austria, the Republic of India.

bers is of some importance, as in the cases of the Swiss Cantons[36]) or the *Länder* of the Federal Republic of Germany[37]). It is appropriate, therefore, that a provision in the draft articles dealing with the capacity to conclude treaties of political subdivisions of States should cover the case of federal States.

It is submitted, however, that this is not enough. There is no legitimate reason to limit the provision to one particular type of State, the federal union. General international law does not preclude other types of States from endowing their political subdivisions with a limited capacity to conclude treaties. Provinces of a decentralized unitary State, for instance, may possess a high degree of autonomy and a corresponding competence to enter into treaty relations. Several governments in their comments as well as members of the International Law Commission itself criticized the limitation of para. 2 of draft article 5 to federal States as too narrow[38]). Their

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[36]) Under art. 9 of the Swiss Constitution of 1848.

[37]) Under art. 32 para. 3 of the Constitution of the Federal Republic of Germany of 1949.

[38]) See, *e. g.*, the comments of the Dutch Government, who pointed out that such a provision ought to be applicable to other forms of States than federal States, for instance, to the Kingdom of the Netherlands with its three autonomous countries; see also the comment of the Finnish Government suggesting that para. 2 of draft article 5 (draft article 3 as it then was numbered) should refer to "a union of States"; Reports of the International Law Commission on the second part of its seventeenth session 3–28 January 1966 and on its eighteenth session 4 May – 19 July 1966, p. 139 and p. 118. In the Commission Mr. Castrén (Finland) took the same view (YBILC 1962, vol. I, p. 193; 1965, vol. I, p. 23 *et seq.*); Mr. Ago, at a time, wanted to refer to "international unions, in particular, federal states," though para. 2, as it stands now, appears to have been drafted according to a different line taken later by Mr. Ago (YBILC 1965, vol. I, p. 24). Mr. Lachs argued that the provision dealt with only one of several similar problems and was not indispensible (*ibid.*, p. 24).

Sir Humphrey Waldock, in his First Report (YBILC 1962, vol. II, pp. 27 *et seq.*, 35 *et seq.*), had also suggested a broader scope of such a provision, including "constituent States of a federation or union". Draft article 3 para. 2 of his report ran as follows:

"2. (a) In the case of a federation or other union of States, international capacity to be a party to treaties is in principle possessed exclusively by the federal State or by the Union. Accordingly, if the constitution of a federation or Union confers upon its constituent States power to enter into agreements directly with foreign States, the constituent State normally exercises this power in the capacity only of an organ of the federal State or the Union, as the case may be.

(b) International capacity to be a party to treaties may, however, be possessed by a constituent State of a federation or union, upon which the power to enter into agreements directly with foreign States has been conferred by the Constitution:

(i) If it is a member of the United Nations, or

(ii) If it is recognized by the federal State or Union and by the other contracting State or States to possess an international personality of its own".

In his Fourth Report (YBILC 1965, vol. II, p. 18) the very learned rapporteur took the view that the entire article on the capacity to conclude treaties should be deleted.

criticism, in the opinion of this author, would seem to be valid. A wording of para. 2 of draft article 5 not limited to one particular type of State would have the advantage of covering cases which might be controversial according to differing concepts of the federal State, such as Canadian provinces or Soviet Republics. While some authors may consider the Soviet Union as a unitary State with some degree of decentralization, it would not be very satisfying to exclude from the scope of application of the draft articles international agreements entered into by, *e. g.*, the Byelorussian or Ukrainian Soviet Republics. Both Soviet Republics are members of the United Nations and parties to the Statute of the International Court of Justice and a number of other international organizations and agreements. Para. 2 of draft article 5 should be drafted so as to minimize possible controversies over cases like this.

While para. 2 of draft article 5, as it stands now, appears to be inadequate to cover existing types of States which might be covered without much controversy, its main defect would seem to be, in this author's view, a certain lack of imagination in failing to take into account possible future developments of the sociological structure of States and of international society. Presently, international society predominantly is a society of States. Politically and sociologically it shows strong features of hegemonial or oligarchical elements. International peace and security in our days are not effectively guaranteed by the United Nations but by a balance of power, real or pretended, between the United States and the Soviet Union. The present technological gap existing between these two States on the one side and the rest of the world on the other side, an advantage which both big States are trying to perpetuate, tends to increase hegemonial structures in international society. This situation, however, is confronted with the quest for equality among States, the efforts of the developing countries to attain political and economic equality being just one striking example for such tendencies. This quest for equality among States tends to undermine, to weaken and even to dissolve hegemonial orders. It may lead among the smaller States to new forms of political cooperation and even integration which will not fit any longer into former historical patterns, such as the federal State. In Europe we find beginnings of such new forms of integrated communities. The federal State is a type of State which has been connected with certain historical situations when nations tried to establish their national identity by forming a political entity while at the same time they had to take into account certain political, cultural or ethnical diversities existing within them. The type of the federal State reflects certain historical situations in the formation

of a nation-State. Future political communities will in most cases reflect basically different constellations. They may avail themselves of institutional structures of the federal State-type. They may, however, also take different forms of political and constitutional organization. As long as the constituent members will remain States in the international sense of the term their treaties will fall under the scope of application of the draft articles on the Law of Treaties as provided for in draft article 1 and para. 1 of draft article 5. There may, however, come into existence political communities whose constituent members will be linked constitutionally to such a degree that they cannot be considered any longer to be States in the international sense of the term while at the same time they do not constitute a federal union in the sense of para. 2 of draft article 5. If they retain a capacity to conclude treaties, such treaties as a consequence of para. 2 of draft article 5, as it stands now, would not fall under the scope of application of the draft articles. Considering that in the future treaties of such constituent entities of political communities may gain greater importance than the relatively modest treaty practice of members of federal States presently existing, this would appear to be a serious flaw in the provision of draft article 5 para. 2.

There is one further consideration which would seem to imply that this provision, as it stands, is inadequate. The principle of self-determination, in spite of the large amount of mere lip-service it is presently paid in international public opinion, slowly but consistently appears to gain ground and to be accepted as a basic principle of international law[39]). Implementation of this principle may in certain cases not lead for the community involved to the establishment of a State in the international sense but may assume the form of constitutional association with a limited capacity of the respective community to enter into treaty relations. Such association will not necessarily constitute a federal union in the sense of para. 2 of draft article 5[40]). Once more then categories of treaties might not fall under the scope of application of the draft articles where there

[39]) See, *e. g.*, Declaration on the granting of independence to colonial countries and peoples, adopted by the General Assembly of the United Nations on 14 December 1960, Resolution 1514 (XV); Resolution 2160 (XXI) adopted by the General Assembly of the United Nations on 30 November 1966; Report of the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly Doc. A/6230, 27 June 1966, p. 240 *et seq.*

[40]) Examples of such associations may be found in the cases of the Cook Islands (see: Cook Islands Constitution Act 1964, The Statutes of New Zealand 1964, vol. 1, no. 69) and the associated States of the West Indies (see: West Indies Act 1967 [1967, c. 4]). In both cases responsibilities for the external affairs and defence rest with the British Crown (in right of New Zealand and of the United Kingdom respectively), but a different

is no valid reason for such exclusion as compared with the case of federal States.

Under these circumstances it would seem appropriate to redraft para. 2 of article 5 so as to cover also other constitutional subdivisions of a State and component entities of a constitutional union or association[41]).

A provision redrafted along these lines would suggest one further point. Actual existence and limits of the capacity to conclude treaties of members of a federal State depend on the respective federal constitutional law. If the draft should be broadened along lines submitted here, references to constitutional law alone would not seem to cover all possible cases. In the case of other unions or associations, actual existence of and limits on the capacity to conclude treaties of respective component entities may not only rest on the constitutional law of the union or the association concerned but may be grounded upon a special international law instrument forming the basis of such union or association. A redraft of the provision should take into account this situation.

The provision of para. 2 of draft article 5, as it stands now, refers for the question of actual existence of and limits on the capacity of members of a federal union to conclude treaties to "the federal constitution". The term "constitution" as used in the context of this provision may provoke difficulties in interpretation. Does it refer to the constitution as written (as Mr. Tunkin once seemed to imply[42])) or does it refer to the relevant constitutional law in a substantive sense, as applied and developped by the competent authorities of a State? There may arise even difficulties in determining what belongs to the constitution in the formal sense. In Canada, for example, there is some controversy about what makes up "the Constitution". Reference to the constitution in the formal sense has a certain advantage in so far as it is easier for a foreign State to determine whether the prospective partner is possessed of a capacity

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solution, with some limited responsibility for external affairs of such communities, might not have been wholly inconceivable. In both cases the former colonies expressly have the right to terminate the association with the United Kingdom and New Zealand respectively and assume their independence.

Mr. Pessou had mentioned the members of the former Communauté franco-africaine as an example of an association of States (see: 810th meeting, YBILC 1965, vol. I, p. 246).

[41]) A redraft along these lines would appear to correspond to some extent with the views taken by the Dutch and the Finnish Governments in their comments, by Mr. Castrén in the Debate of the Commission (see above note 38) and by Sir Humphrey Waldock in his First Report (see above note 38). Mr. Verdross' (Austria) reference, on the other hand, to "member States of a federal State" (666th meeting, YBILC 1962, vol. I, p. 242) would not seem to cover all relevant cases but restrict itself to the single type of the federal State.

[42]) See: YBILC 1965, vol. I, p. 245.

to conclude the treaty or not, without having to explore the whole body of the relevant substantive constitutional law as applied; the disadvantage of such a solution, on the other side, would seem to be that the realities of a constitutional situation might be ignored and difficulties in negotiating, concluding or implementing the treaty might occur. It might, therefore, be preferable to refer to "the constitutional law" in its substantive sense rather than to "the constitution", although one will realize that the difficulties of evaluating another State's constitutional law can hardly ever be avoided when a rule of international law refers to constitutional law. Whatever term is used, in the practice of States this problem will only be of minor importance; in reconsidering draft article 5 para. 2 it may, nevertheless, deserve some attention.

III

By extending the scope of application of the draft articles on the Law of Treaties beyond "States" in the international sense of the term to constitutional subdivisions of States, draft article 5 para. 2 also raises problems concerning other rules of the International Law Commission's draft. This would seem to be true, *e.g.*, with regard to provisions concerning full powers of representation in the conclusion of treaties (draft article 6), authority to express the consent to be bound by the treaty (draft article 44), or the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty (draft articles 62, 63). The close link between a member of a federal State and the federal union (or some other type of constitutional union or association, if such cases were to be included) will require special solutions for certain categories of cases. If such member under authority of its federal constitutional law enters into treaty relations in its own name and right, it is to be considered a separate party as distinct from the federal union[43]). In such cases, nevertheless, the federal union for some purposes

[43]) Mr. Fitzmaurice in his First and Third Reports had denied the members of a federal State any international personality apart from that of the federal union and had considered them as mere subordinate organs or agents for the union in concluding treaties (YBILC 1956, vol. II, p. 118; 1958, vol. II, p. 32); Sir Humphrey Waldock, in his First Report, had provided that the constituent member normally exercised a power to enter into agreements directly with foreign States in the capacity only of an organ of the federal State or union, but that the constituent member may possess international treaty capacity if that capacity had been conferred upon them by the constitution, provided that (i) the constituent member was a member of the United Nations (by which the very learned rapporteur appears to have referred to the cases of the Byelorussian and the Ukrainian Soviet Republics), or (ii) it is recognized by the federal State or union and the other contracting State or States to possess an international capacity of its own; (see

cannot be treated on the same level as any other third party or third State. This would seem to be true not only for matters of liability and succession, which remain by provision of article 69 expressly outside the draft articles' scope of application, but also for such matters as fraud, impossibility of performance, fundamental change of circumstances, or procedures to be followed in the case of draft article 62[44]). This comment is not going to deal with these questions important as they are; it will hint to but one specific problem which might deserve a special provision to be included in the draft articles.

Under draft article 5 para. 2 actual existence of and limits on the capacity to conclude treaties of a member of a federal union depends on the federal constitution. The limits, in particular, will result from the rules of constitutional law regarding competence to conclude treaties which usually restrict such competence of component members to certain subject matters[45]). This implies that for the purposes of draft article 5 para. 2 any comportment of a member of a union outside those limits will constitute an act *ultra vires*. This case has to be distinguished from the situation provided for in draft article 43[46]). Article 43 deals with a situation when the capacity under international law to conclude treaties of the State concerned is undoubtedly given, but a violation of its internal law has occurred. Under draft article 5 para. 2 a violation of the federal constitutional law regarding the competence of a component member to conclude

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above note 38). Mr. H. Lauterpacht, as he then was, in his First Report (YBILC 1953, vol. II, commentaries on draft articles 1 and 10, pp. 95 *et seq.*, 138 *et seq.*) proceeded from the assumption that in some cases the component members of a federal State might possess a limited capacity to conclude treaties in their own name and right, though he had not formulated any draft rules on this point. The Commission's Final Commentary on draft article 5 para. 2 leaves the answer to this question to the provisions of the federal constitution; in the opinion of the author of this comment, this would appear to be the correct solution. If the constituent member is acting merely as subordinate organ or agent of the federal union, the problem is not really one of the member's capacity to conclude treaties but of its competence to represent the union (see also the remarks by Mr. Ago during the 780th meeting of the Commission, YBILC 1965, vol. I, p. 31).

[44]) Certain means of peaceful settlement which draft article 62 para. 3 refers to may be open for States (in the international sense) only, *e. g.*, settlement through the International Court of Justice. The question will be whether the federal union as such will have a standing in cases where a treaty of one of its members is concerned.

[45]) In the case of the Federal Republic of Germany, *e. g.*, competence of the *Länder* to conclude treaties with foreign States under art. 32 para. 3 of the constitution is correlated to their legislative competence as defined by arts. 70–75 of the constitution.

[46]) Art. 43 of the International Law Commission's final draft provides: "A State may not invoke the fact 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 as invalidating its consent unless that violation of its internal law was manifest". For a comment on this draft article see W. K. Geck, below p. 429.

a treaty is directly relevant for the international personality of that member and consequently for the extent of its international capacity to conclude treaties. Reference to constitutional law in para. 2 of draft article 5, on the other hand, does not mean that under international law the whole body of the constitutional law of a federal union will become directly relevant for the capacity of the component members to conclude treaties; only those constitutional provisions will be relevant which determine the existence of and the limits on this capacity. From the viewpoint of the internal law of the union, those provisions are to be considered as rules attributing competences to the component members of the union. Rules other than rules of competence are not referred to by draft article 5 para. 2 and are consequently not made directly relevant to the conclusion of a treaty under this provision. Violation, for example, of a constitutionally provided fundamental right of an individual by a treaty concluded by a component member of a federal union, acting otherwise within its competence to conclude such treaty, would not be directly relevant to the international validity of the treaty.

In this context we may distinguish the following situations:

(1) In cases where in concluding a treaty the federal union has acted in violation of its internal law regarding the competence of component members to conclude treaties draft article 43 will apply[47]). The same is true when any other provision of the internal law of the union has been violated[48]).

(2) In cases where in concluding a treaty a component member of the union has acted in excess of the federal constitutional law regarding its competence to conclude treaties only draft article 5 para. 2 will apply insofar, not draft article 43.

(3) In cases where in concluding a treaty a component member of a federal union has violated other rules of federal law or its own law (as distinguished from federal law) draft article 43 will apply.

We are considering here only the second category where a component member of a union in concluding a treaty has acted in excess of the federal constitutional law regarding its competence to conclude treaties.

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[47]) This is not to say that such violations may successfully be invoked against the validity of a consent under draft article 43; this provision, as it stands now, on the contrary, will admit only manifest violations of internal law regarding competence to conclude treaties to be invoked against the validity of a consent.

[48]) It is respectfully submitted that on this point the First Report by Mr. Lauterpacht would appear to contain too sweeping considerations (YBILC 1953, vol. II, p. 139).

In such cases, to the extent of the excess, the component member under the provision of draft article 5 para. 2 also lacks international capacity to conclude the treaty. What will be the consequence of such an *ultra vires* act? Capacity to conclude a treaty is a *conditio sine qua non* for a treaty to come into existence, an essential requirement for the validity (in a broader sense) of a treaty. Any act outside such capacity would seem to have as a consequence that no treaty would come into existence (at least to the extent that such act is *ultra vires*). Logical as such conclusion may appear to be, it would not seem to be an adequate solution under all circumstances. There are constitutions of federal unions, *e.g.*, the Constitution of the Federal Republic of Germany, which invest the component members with a capacity to conclude treaties in certain fields provided the federal government approves the conclusion of the treaty by the member. It will depend on the constitutional law of the union whether such approval validates or not any transgression by component members of their constitutional competences to conclude treaties. However this may be according to the respective constitutional law, if the federal union has approved the conclusion of a treaty by its component member, under international law it would be inadequate if such transgression of constitutional competences could be invoked against the validity of the component member's consent to be bound by the treaty. It is not the task of general international law or a convention on the Law of Treaties to care for the observance of constitutional competences as between a union and its component members. Broad interpretation of draft article 5 para. 2, as it stands, may already cover this solution[49]). It might be considered advisable, however, to provide this expressly in a convention on the Law of Treaties by adding a separate paragraph to either draft article 5 or 43 along the following line:

In cases where a treaty has been concluded by a constitutional subdivision of a State or a component entity of a constitutional union or association, the fact that the consent of the constitutional subdivision or component entity to be bound by the treaty has been expressed in excess of a provision of the internal law regarding competence to conclude treaties may not be invoked as invalidating this consent if the State or the union or the association has approved the conclusion of the treaty by the constitutional subdivision or the component entity, as the case may be.

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[49]) The question had been touched in the Third Report by Mr. Fitzgerald (YBILC 1958, vol. II, p. 32 *et seq.*), though the very learned rapporteur did not draft a provision to the point.

IV. Conclusion

It is submitted that draft article 5 para. 2 of the International Law Commission's final draft on the Law of Treaties should be reconsidered along the following lines:

(1) Constitutional subdivisions of a State or component entities of a union or association may possess a capacity to conclude treaties if such capacity is admitted by the constitutional law of the State, of the union, or of the association or by an instrument of international law on which such union or association is based, and within the limits there laid down.

If such redraft would not appear to be acceptable, the official commentary which might be added to the articles of a convention on the Law of Treaties should not contain statements implying that the term "federal union" as used in an article corresponding to draft article 5 para. 2 was restricted to the "federal State" as the only type of State referred to.

(2) There might be added an additional paragraph to either draft article 5 or draft article 43 along the following line:

In cases of a treaty concluded by a constitutional subdivision of a State or a component entity of a union or association the fact that the consent of the constitutional subdivision or component entity has been expressed in excess of a provision of the internal law regarding competence to conclude treaties may not be invoked as invalidating this consent if the State or the union or the association has approved the conclusion of the treaty by the constitutional subdivision or the component entity, as the case may be.

If a broadening of the scope of draft article 5 para. 2 along the line suggested above under (1) would not seem to be acceptable, the suggestion under (2) might be confined to members of a federal union.