ARTICLE 103

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TEXT OF ARTICLE 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

INTRODUCTORY NOTE

1. During the period under review Article 103 was discussed by United Nations organs in connection with various agenda items. Although in most cases no reference was made to Article 103 in the decisions of the organs concerned, if the discussion of that Article was of a constitutional nature, a reference thereto was included in the present study.

2. This study is divided into four main parts, dealing respectively with: A. Compatibility between regional arrangements and the Charter; B. Compatibility between international treaties and the Charter; C. Consequences of a conflict between an international treaty and a peremptory norm of general international law; and D. Application of successive treaties which relate to the same subject-matter. It was found advisable to treat regional arrangements separately from international treaties, since a Member State's participation in a regional arrangement may also entail membership in a regional organization and therefore involve more complex problems of procedure and substance than merely being party to an international agreement.

3. It is to be noted that there were few new developments concerning subsections A, C and D.

4. Subsection B deals mainly with the discussions that took place in the First and Sixth Committees of the General Assembly and in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations.

I. GENERAL SURVEY

5. During the period under review the General Assembly adopted two resolutions quoting the text of Article 103 and containing other provisions related to its interpretation. These were resolutions 2625 (XXV) and 2731 (XXV) adopted respectively on 24 October and 16 December 1970.

6. Annexed to resolution 2625 (XXV) is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which contains the following provisions deriving from Article 103:

"PREAMBLE

"*The General Assembly*,

". . .

"1. *Solemnly proclaims* the following principles:

". . .

"*The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter*

"Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

"Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

"Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

"Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail."

7. Resolution 2734 (XXV) entitled "Declaration on the Strengthening of International Security" contains the following provision deriving from Article 103:

"*The General Assembly*,

". . .

"3. *Solemnly reaffirms* that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail;".

II. ANALYTICAL SUMMARY OF PRACTICE

**A. Compatibility between regional arrangements and the Charter

B. Compatibility between international treaties and the Charter

1. CONCLUSION OF A WORLD TREATY ON THE NON-USE OF FORCE IN INTERNATIONAL RELATIONS

a. *Consideration of the question by the First Committee (thirty-first session)*

8. In the course of the consideration of the draft World Treaty on the Non-Use of Force in International Relations[1] submitted by the Soviet Union, the opinion[2] was expressed that the proposed treaty was wholly based on the Charter of the United Nations. In this respect

article III of the draft was cited as clearly providing that nothing in the treaty shall affect the rights and obligations of States under the Charter.

9. Another view was that article 2 (3) and (4) set forth the Charter's basic obligations with respect to the peaceful settlement of disputes and the non-use of force and the primacy of those obligations was firmly established by Article 103. Therefore, the very proposal of a separate treaty on the non-use of force tended to undermine existing Charter obligations by implying that the Member States of the United Nations were still free to adopt or reject the principle of non-use of force embodied in Article 2 (4) of the Charter.[3]

b. *Consideration of the question by the Sixth Committee (thirty-first session)*[4]

10. During the debate the view was expressed that the proposed treaty was fully in accord with the Charter of the United Nations and was in no way intended to change, undermine or derogate from the general principle of the non-use of force which was one of the Charter's basic elements. The Charter could be seen as the principal source of contemporary international law, for it laid down the general principles and rules for the activity of the United Nations and the conduct of its members in international relations. By definition, those general principles needed to be further developed in such instruments as international conventions and declarations, as had been done, for example, in the Declaration on the Strengthening of International Security (General Assembly resolution 2734 (XXV)), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and the Definition of Aggression (General Assembly resolution 3314 (XXIX)). Codification of the principle of the non-use of force in the form of a world treaty would establish the necessary legal prerequisites for the more effective application of that and other important principles of the Charter designed to safeguard international peace and security.

11. A number of representatives expressed the view that, by accepting the Charter, all States had entered into a solemn treaty commitment to avoid the threat or use of force. They must not diminish the force of those Charter obligations by elaborating a partial parallel treaty structure. If the provisions of both treaties were identical, they would debase the rule of *pacta sunt servanda* by suggesting that two treaties were better than one. If the words of the two treaties were not precisely the same, a number of difficulties would be bound to arise. All States might not become parties to the second treaty and thus there would be two régimes, sometimes parallel, sometimes divergent. A second major difficulty would be that some States would seek interpretive loopholes stemming from the differences between the two texts. Some might even argue that the elaboration of a new treaty implied that Member States were free to adopt or reject the basic prohibition of the threat or use of force. All those difficulties must be avoided.

12. On two occasions Article 103 was specifically noted during the debate by those representatives when it was admitted that recollection of the provisions of Article 103 of the Charter was not sufficient to dispel doubts about the possibility of conflict between the Charter and the new treaty.[5]

c. *Consideration of the question by the Sixth Committee (thirty-second session)*

13. Representatives supporting the draft treaty and considering it compatible with the Charter expressed the following arguments in support of their position. The principle of the non-use of force was closely linked to other principles governing international relations, for example, the principle of sovereign equality, the territorial integrity of States and non-intervention in the internal affairs of other States, the violation of which was in most cases accompanied by the violation of the principle of refraining from the use of force.

14. Some representatives held that the draft treaty reaffirmed principles of international law which were already embodied in other legal instruments, such as the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and the Definition of Aggression. The repetition or reformulation of the principles contained in the Charter or in other international legal instruments might undermine those principles or weaken their effect—a result which would be contrary to the desired goal of strengthening international law.

15. In observations concerning the text of the Soviet draft a few representatives directly recollected Article 103 of the Charter with reference to articles II and III of the draft.[6]

d. *Consideration of the question by the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations (thirty-third session)*[7]

16. The report of the Committee contains the following summary of the relevant discussions.[8]

17. It was stressed that although the principle of the non-use of force had been recognized by virtually all States as one of the main foundations of international relations, had received legal confirmation in Article 2 (4) of the Charter and had been authoritatively confirmed and developed in a number of international instruments, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations as well as in a number of bilateral treaties, the world had witnessed since the entry into force of the Charter over a hundred wars and armed conflicts in which millions of people had perished.

18. It was stated that the proposed treaty, far from weakening the relevant provisions of the Charter, would enhance their effectiveness. In this connection, it was stressed that, while it was true that the principle of non-use of force had been enshrined in the Charter, principles of international law could be enhanced by the conclusion of international treaties and the establishment of binding juridical rules, which was precisely the aim of the proposed treaty. A similar approach had been used to promote the progressive development of other principles laid down in the Charter. Many Charter principles and provisions, it was recalled, had been progressively codified and developed since the inception of the United Nations and it was only natural that they should be further interpreted and concretized as international relations developed. Reference was made in this connection to General Assembly resolution 1815 (XVII) of 18 December 1962, by which the Assembly had decided to undertake, pursuant to Article 13 (1) (*a*) of the Charter, a study of the principles of international law concerning friendly relations

and co-operation among States in accordance with the Charter with a view to their progressive development and codification so as to secure their more effective application, an initiative which had been brought to a successful conclusion with the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV)).

19. It was stated that to claim that the proposed treaty could have a negative influence on the legal force of the Charter was unfounded. In this connection, a distinction was drawn between the legal force of a principle and its effectiveness; the proposed treaty, while merely confirming the legal force already possessed by the principle under consideration, would seek to raise its effectiveness.

20. It was stated that the argument that, because the principle of non-use of force was already an active principle of international law and could not be strengthened by a treaty because the reason for the non-observance of the norm lay in the absence of political will, was without foundation. The strict fulfilment by States of their obligations could not, it was observed, be automatically assumed merely as a result of their being parties to a treaty since the will of States presupposed a complex of social and political factors not governed by international law. However, the will of States could not be weighed against the obligation not to use force. Moreover, the argument in question reflected a nihilistic approach towards international law and a belief in the freedom of States to act in accordance with circumstances.

21. A number of other delegations observed that the principle of non-use of force had already been stated with admirable clarity in the Charter, in particular in its Article 2 (4) and the clarity and scope of that provision was confirmed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Thus, the basic problem was not that there was no rule prohibiting the use of force or that some States were unaware of the existence of such a rule, for all States were aware that a clear and solemn rule did exist. If some of them were prepared to break that rule or to maintain that it did not apply, no amount of repetition of the injunction against the threat or use of force would deter them from breaking the rule.

22. Furthermore, it was observed, the principle of non-use of force was linked with the principle of the peaceful settlement of disputes and the right of self-defense and was a component of the peace-keeping system established by the Charter in Articles 11 and 12 and in Chapter VII. Risking to divest the Security Council of its freedom of action and to restrict its discretionary powers under Article 39 would be most dangerous and that was why texts of such political importance on the definition of aggression had been given the status of a recommendation. Although there were undeniably instances of conventions that expanded on provisions of the Charter, particularly in the field of human rights, no immediate parallel could be drawn between the subject-matter of human rights and that of non-use of force. In the latter case, it did not seem possible to develop the principles laid down in the Charter without upsetting the basic balance established in this context by the Charter.

23. As to the formulation of the proposed treaty, it was pointed out that, if the provisions of the envisaged instrument were identical to those of the Charter, the repetition of an existing obligation would give the false impression that time had eroded that obligation; it would also call into question the effect of the Charter. If, on the other hand, the obligation set forth in Article 2 (4) were to be not only reaffirmed but also reformulated as in the proposed draft, there would be a risk of differing interpretations of the two formulae, which would open the way to new problems; the provisions of Article 103 of the Charter would be helpful in the event of a clear conflict between the wording of a treaty and that of the Charter but the question became more subtle when the conflict was not obvious. In that connection, it was stated that the qualification of the principle of non-use of force might detract from the original more general principle and might give those countries which sought to avoid the Charter prohibition of the use of force a means of arguing that that prohibition had been overtaken by a later instrument or that the later instrument took account of some consideration which was not contemplated in the Charter and which therefore could only have a qualifying effect. Mention was made in this connection of the problem of asserted or implied exceptions or reservations to the principle of non-use of force, including the assertion that armed struggle and assistance to those engaged in armed struggle was consistent with the Charter—a proposition which, it was stated, was by no means generally accepted as a proposition of law—and also including the all too frequent attempts of States guilty of encouraging the use of force by proxy or covertly, to disclaim responsibility for the ensuing violence or even to justify uses of force as well as the use of force across frontiers to ensure doctrinal orthodoxy.

2. The United Nations and the specialized agencies

24. This section contains reference to the opinion expressed in the Fourth Committee of the General Assembly that the United Nations could request the specialized agencies to take certain actions.

a. *Question of Namibia (Fourth Committee, twenty-sixth session)*

25. During the discussion of this item, a representative of the Friends of Namibia Committee in London, basing herself on Article 103 of the Charter, suggested that, since the United Nations had declared South Africa's occupation of Namibia illegal, it could request the specialized agencies to suspend South Africa from the privileges of membership so long as it failed to fulfil its obligations under international law.[9]

C. Consequences of a conflict between an international treaty and a peremptory norm of general international law, in relation to Article 103

1. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[10]

26. The Sixth Committee, at the twenty-fifth session of the General Assembly, considered the report of the Special Committee on Principles of Friendly Relations and Co-operation among States, containing a draft declaration on the issue. It was asserted during the debate that the importance of the declaration would not reside in the fact that it codified individual principles of international law but in the fact that it would codify the principles contained in the Charter. It therefore represented a creative contribution to the further application and promotion of the Charter.

27. Some of the delegates held the view that the seven principles contained in the draft declaration had been

expressed in the form of general legal rules. Those principles were derived from the Charter and formed an integral part of universal international law. They were valid for, and binding on, every single State in its relations with others.

28. An opinion was expressed that there seemed to be some confusion between international law and the Charter of the United Nations. One of the representatives considered that some attempt should have been made to enlarge the scope of the declaration, by codifying the principles of general international law, because all international law was not to be found in the Charter and the provisions of the Charter were not all rules of international law. Without prejudice to the Charter, it would have been better not to represent it as having exclusive authority in the matter of international relations.[11]

2. Question of the Western Sahara (Fourth Committee, thirtieth session)

29. During the debate on this issue under agenda item 23 (Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) the representative of Austria expressed the hope that Spain, Morocco and Mauritania, parties to the Madrid Agreement on the Western Sahara, concluded on 14 November 1975, should be mindful of the fact that they had no right to presume that they were not bound by their obligations under the Charter, particularly with regard to the right of peoples to self-determination.

D. Application of successive treaties relating to the same subject-matter in connection with Article 103

1. Fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by a special rapporteur

30. At the twenty-seventh session of the International Law Commission, the Special Rapporteur on the above subject submitted a report[12] containing draft articles with commentaries. For lack of time the Commission did not come during that session to the consideration of draft article 30 of the report devoted to the question of successive treaties. Draft article 30 submitted by the Special Rapporteur read as follows:

"Article 30

"APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States and organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

"2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

"3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

"4. When the parties to the later treaty do not include all the parties to the earlier one:

"(*a*) as between States or international organizations parties to both treaties the same rule applies as in paragraph 3;

"(*b*) as between a State or international organization party to both treaties and a State or international organization party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

"5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or another international organization under another treaty."

31. With the exception of a few drafting changes in paragraphs 1, 4 and 5, the provisions did not differ from the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties.

32. The Special Rapporteur in his commentary[13] admitted that, by referring in paragraph 1 to Article 103 of the Charter of the United Nations, the Vienna Conference showed not only that on occasion it interpreted the concept of "treaties relating to the same subject-matter" fairly broadly but that it neglected to make generally applicable the case thus provided for.

33. In connection with application of paragraph 1 of article 30 the Special Rapporteur also drew the attention in his commentaries to the question of the possible effects of Article 103 with regard to international organizations. Taking the example of the United Nations itself, he concluded that, although it was not a party to the Charter, the Organization was not a third party in relation to its constituent Charter and, if the United Nations was to conclude an international treaty which was contrary to the provisions of the Charter, such treaty might be null and void. Considering that question in a more general way, the Special Rapporteur expressed the general view that it would be rather difficult to accept that international organizations, the vast majority of whose members were States Members of the United Nations, could disregard the rules of the Charter.

2. Report of the International Law Commission on the work of its twenty-ninth session (9 May-29 July 1977)

34. At its twenty-ninth session the International Law Commission considered the texts of articles 19 to 38 related to the question of treaties concluded between States and international organizations or between two or more international organizations, submitted by the Special Rapporteur and adopted on first reading the text of some of those articles, including article 30, relating to successive treaties, which read as follows:[14]

"Article 30

"APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER

"1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

"2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with an

earlier or later treaty, the provisions of that other treaty prevail.

"3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated (or suspended in operation under article 59), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

"4. When the parties to the later treaty do not include all the parties to the earlier one:

"(*a*) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

"(*b*) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

"5. Paragraph 4 is without prejudice [to article 41,] [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

"6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations."

35. In the commentaries made by the Commission on draft article 30, attention was called to one substantial question, namely, whether the provision "Subject to Article 103 of the Charter of the United Nations . . .", from which the relevant article of the Vienna Convention starts, could be extended not only to States but to international organizations as well. The Commission recognized in the commentaries that, despite all discussions, it had failed to settle that issue and, as a consequence, the draft article it proposed did not solve the problem either. Referring to the considerations that finally led to the adoption of draft article 30, the Commission commented as follows:

"Two arguments were advanced in the Commission. The first was that the provision extends to international organizations as well as to States because the membership of the United Nations is quasi-universal, because international organizations constitute instruments for collective action by States and because it is inconceivable that, in regard to collective action, States should rid themselves of limitations to which they are subject individually. The second argument was that Article 103 does not mention international organizations, which can therefore conclude any agreement whatsoever without having to take account of the Charter, to which they are not and cannot be parties. Besides the fact that these two arguments are diametrically opposed, some members considered that it was not the Commission's function to interpret the Charter and that the Commission should state the provision regarding Article 103 of the Charter in such a way that both interpretations would be possible. To that end, the reservation of Article 103 has been separated from paragraph 1 of the draft article and placed at the end of the article as paragraph 6 in terms which are deliberately ambiguous."[15]

NOTES

[1] G A (31), Annexes, a.i. 124, A/31/243.

[2] For the texts of relevant statements see G A (31), 1st Com., 11th mtg.

[3] On the recommendation of the First Committee the General Assembly, at its 57th mtg., adopted resolution 31/9 entitled "Conclusion of a world treaty on the non-use of force in international relations".

[4] In allocating agenda item 124 (conclusion of a world treaty on the non-use of force in international relations) to the First Committee, the General Assembly, at its 16th mtg., on 4 October 1976 also decided to refer that item, at the appropriate stage, to the Sixth Committee for examination of its legal implications. Consequently, at its 57th mtg., on 8 November 1976 the General Assembly, after concluding the consideration of the report of the First Committee on agenda item 124, referred it to the Sixth Committee. G A (31), Plen., 57th mtg., para. 5.

[5] G A (31), 6th Com., 50th mtg., para. 19, and 51st mtg., para. 15.

[6] G A (32), 6th Com., 65th mtg., para. 21, and 67th mtg., para. 112.

[7] At its 106th mtg., on 19 December 1977, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 32/150 entitled "Conclusion of a world treaty on the non-use of force in international relations" in which it decided to establish a Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, composed of thirty-five members. The Committee met in New York from 21 August to 15 September 1978.

[8] For the report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, see G A (33), Suppl. No. 41.

[9] For the text of the statement, see G A (26), 4th Com., 1922nd mtg., para. 26.

[10] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations was adopted by the General Assembly at its 1883rd plenary meeting, on 24 October 1970. G A (25), Suppl. No. 8, resolution 2625 (XXV).

[11] For the texts of relevant statements, see G A (25), 6th Com., 1178th-1184th mtgs.

[12] *Yearbook of the International Law Commission, 1975*, vol. II, p. 25, document A/CN.4/285.

[13] *Ibid.*, p. 43.

[14] *Yearbook of the International Law Commission, 1977*, vol. II (Part Two), p. 121, document A/32/10.

[15] *Ibid.*, p. 122.