

# 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 subject to discussion and decisions by different United Nations organs in relation to a number of agenda items.

2. This study, in its analytical summary of practice, follows the division into four main parts established by the previous study, namely:

(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;

(d) Application of successive treaties which relate to the same subject matter, in relation to Article 103.

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. It is to be noted that there were no new developments concerning subsection C.

3. Subsection B deals mainly with the discussions that took place in the Sixth Committee 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

4. During the period under review, Article 103 was not expressly mentioned in the resolutions adopted by the General Assembly. In two instances, however, the General Assembly adopted resolutions the annexes to which indicate definite concern with the rule of supremacy of the obligations assumed by Member States under the Charter over their obligations under other international instruments.

5. Thus, on 17 December 1979, the General Assembly adopted the International Convention against the Taking of Hostages, the text of which is annexed to resolution 34/146. Article 14 of the Convention provides:

"Nothing in this Convention shall be construed as justifying the violation of the territorial integrity or

political independence of a State in contravention of the Charter of the United Nations."

6. On 15 November 1982, the General Assembly adopted the Manila Declaration on the Peaceful Settlement of International Disputes, the text of which is annexed to resolution 37/10. The final provisions of the Declaration read, *inter alia*, as follows:

"... nothing in the present Declaration shall be construed as prejudicing in any manner the relevant provisions of the Charter or the rights and duties of States, or the scope of the functions and powers of the United Nations organs under the Charter, in particular those relating to the peaceful settlement of disputes".

### II. ANALYTICAL SUMMARY OF PRACTICE

#### A. Compatibility between regional arrangements and the Charter

##### 1. OBLIGATIONS ASSUMED UNDER REGIONAL AGREEMENTS IN RELATION TO ARTICLE 103

7. In the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility,<sup>1</sup> the fifth and final contention of the United States under the Application's inadmissibility was based upon the Contadora process as allegedly being the appropriate method

for the resolution of the conflicts occurring in Central America. The United States supported the view of a "regional arrangement within the meaning of Article 52, paragraph 2, of the Charter" and submitted that Nicaragua was under the obligation to exhaust such a regional process as a precondition to the referral of the dispute to the Security Council, and a fortiori to the Court.

8. The Court did not yield to these arguments and held:<sup>2</sup>

"The Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a

<sup>1</sup>*I.C.J. Reports 1984*, p. 438, para. 102.

<sup>2</sup>*Ibid.*, pp. 440-441, paras. 107-108.

'regional arrangement' for the purposes of Chapter VIII of the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral and even multilateral arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter . . .

"In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion or regional negotiating processes as a precondition to seizing the Court of the Nicaraguan Application and judicial determination in due course of the submissions of the Parties in the case."

**\*\*2. ACTIONS TAKEN BY A REGIONAL AGENCY  
IN RELATION TO ARTICLE 103**

**B. Compatibility between international treaties  
and the Charter**

9. During the period under review, Article 103 continued to be commented on in connection with the consideration of the draft World Treaty on the Non-Use of Force in International Relations as submitted by the Union of Soviet Socialist Republics.<sup>3</sup>

**1. CONSIDERATION OF THE QUESTION BY THE SPECIAL  
COMMITTEE ON ENHANCING THE EFFECTIVENESS OF  
THE PRINCIPLE OF NON-USE OF FORCE IN INTERNA-  
TIONAL RELATIONS**

*(a) Thirty-fourth session*

10. At the 1979 session of the Special Committee (thirty-fourth session of the General Assembly),<sup>4</sup> the representative of the Soviet Union introduced article III of the Soviet draft World Treaty,<sup>5</sup> which read as follows:

"Nothing in this Treaty shall affect the rights and obligations of States under the Charter of the United Nations and treaties and agreements concluded by them earlier."

The same representative expressed the view<sup>6</sup> that an important criterion of the legality of any international document adopted in the process of extending the Charter and making it more specific should be the compatibility of its content with fundamental Charter obligations, as clearly follows from Article 103 of the Charter.

11. At the same session of the Special Committee, the view was expressed<sup>7</sup> that any eventual treaty on the non-use of force would be less solemn in political scope than the Charter and that in addition, from a strictly legal standpoint, such a treaty would be hierarchically subject to the Charter, by virtue of Article 103. The view was further expressed<sup>8</sup> that elaborating a new treaty on the principle of the non-use of force which would depart from the Charter in any respect would have even worse consequences. Aside from the fact that such a course would violate the

amendment procedure provided by the Charter without, for that matter, producing any legally valid effect in view of the terms of Article 103, it would result not only in endless confusion over the governing legal regimes in the critical area covered by Article 2, paragraph 4, but also in blurring the rules concerning the inherent right of self-defence and the entire collective security mechanism.

*(b) Thirty-fifth session*

12. At the 1980 session of the Special Committee,<sup>9</sup> the representative of France said<sup>10</sup> that, in his delegation's opinion, a new instrument prohibiting the use of force would probably not strengthen the authority or the effectiveness of the principle laid down in Article 2, paragraph 4, since it would have neither the solemn political scope of the Charter—a universal and binding instrument—nor its legal standing, under Article 103, in the hierarchy of the rules of international law. He also expressed the view<sup>11</sup> that, as to the question of reformulating a particular principle of the Charter by adding something to it or eliminating something from it, such an exercise would constitute a departure from the method of review laid down in the Charter itself and would not have any legal effect, taking into account the provisions of Article 103.

13. At the same session, the representative of the Soviet Union stated<sup>12</sup> that the claim by certain States that the draft treaty would undermine the Charter constituted a deliberate distortion of the actual situation and that, indeed, a measure directed towards the further development of a principle of the Charter could neither contradict nor weaken that principle nor the entire Charter. He also underlined<sup>13</sup> that, even if such a possibility existed, under Article 103 of the Charter the obligation assumed by the States under that instrument would prevail.

*(c) Thirty-sixth session*

14. At the 1981 session of the Special Committee,<sup>14</sup> the representative of France<sup>15</sup> expressed the view that, with regard to the Soviet proposal, a treaty on the non-use of force would be of dubious value since it would be subordinate to the Charter, in accordance with Article 103, and would certainly not have the universal character of the Charter.

15. At the same session, the representative of the Soviet Union<sup>16</sup> stated that the principle of non-use of force was expressed in the Charter in a general form, which had made it possible for some States, through various tricks, to bypass it, to distort it and even, in some cases, to justify the illegal use of armed forces, and that the Soviet proposal was aimed at excluding any vagueness and eliminating the possibility of bypassing that key obligation and evading its strict observance.

<sup>3</sup>See this *Supplement*, under Article 103, paras. 8-23.

<sup>4</sup>See G A (34), Supplement No. 41 (A/34/41).

<sup>5</sup>A/AC.193/L.3; reproduced in *ibid.*, p. 65.

<sup>6</sup>G A (34), Supplement No. 41 (A/34/41), para. 113.

<sup>7</sup>*Ibid.*, para. 50.

<sup>8</sup>*Ibid.*, para. 51.

<sup>9</sup>See G A (35), Supplement No. 41 (A/35/41).

<sup>10</sup>*Ibid.*, para. 74.

<sup>11</sup>*Ibid.*, para. 74.

<sup>12</sup>*Ibid.*, para. 169.

<sup>13</sup>*Ibid.*, para. 169.

<sup>14</sup>See G A (36), Supplement No. 41 (A/36/41).

<sup>15</sup>*Ibid.*, para. 146.

<sup>16</sup>*Ibid.*, para. 155.

(d) *Thirty-seventh session*

16. At the 1992 session of the Special Committee,<sup>17</sup> consideration was given by the Working Group to the revised version of a working paper<sup>18</sup> which had been submitted at the preceding session by the delegations of Benin, Cyprus, Egypt, India, Iraq, Morocco, Nepal, Nicaragua, Senegal and Uganda.<sup>19</sup> Paragraph 15 of the working paper reads as follows:<sup>20</sup>

“Reaffirmation that the implementation of the principle of good faith in the development of international relations as well as that of respect of obligations emanating from treaties, valid under the generally recognized principles and rules of international law, and in full conformity with Article 103 of the Charter, contributes to the creation of the atmosphere of trust and confidence which is necessary to the enhancement of the principle of non-use of force.”

17. During the course of the discussions on the paragraph, the view was expressed<sup>21</sup> that it had the advantage over article III of the Soviet draft World Treaty<sup>22</sup> of containing a mention of Article 103 of the Charter, which was considered essential by several delegations.

(e) *Thirty-eighth session*

18. At the 1983 session of the Special Committee,<sup>23</sup> the view was expressed<sup>24</sup> with regard to the idea of drafting a treaty on the non-use of force in international relations that, although Article 103 of the Charter would continue to apply, it would not necessarily be sufficient as a practical means to avoid the confusion arising out of the existence of a new treaty in parallel with the Charter.

19. At the same session, some of the representatives who were opposed to the elaboration of a treaty said<sup>25</sup> that they did not rule out the possibility of drafting a declaration on the matter.

(f) *Thirty-ninth session*

20. At the 1984 session of the Special Committee,<sup>26</sup> it was pointed out<sup>27</sup> with regard to the question of the compatibility of the draft World Treaty with the relevant provisions of the Charter that the conclusion of such a treaty in the form of a binding legal instrument would reaffirm, specify and elaborate further the principle of non-use of force, set forth in Article 2, paragraph 4, of the Charter. The authority of the Charter would even be strengthened and it was recalled<sup>28</sup> in that regard that the countries represented by those delegations which had adduced the arguments concerning the alleged incompatibility of the proposed treaty with the Charter and the possibility of the latter being weakened or undermined had been ready to

include the principle of non-use of force in bilateral agreements or in the Final Act of the 1975 Conference on Security and Cooperation in Europe without raising the above arguments.

21. At the same session, the delegations opposed to a world treaty on the non-use of force pointed out<sup>29</sup> that the principle of non-use of force was already embodied in the Charter, which was a genuinely universal treaty whose solemn value could not be surpassed by any new instrument and to which all other treaties were subordinated by virtue of its Article 103. It was further observed<sup>30</sup> that repeating the relevant provisions of the Charter would, in the current instance, add nothing to the existing law but would suggest that two treaties were better than one, thereby undercutting the rule *pacta sunt servanda*, casting doubts on the continuing validity of the original formulation of the principle and jeopardizing the authority of the Charter as a whole. If, on the other hand, the treaty were to deviate from the Charter, it would indirectly and illegally amend the Charter. It would also create a parallel regime which would open the door to divergent interpretations of that instrument.

## 2. CONSIDERATION OF THE QUESTION BY THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

(a) *Thirty-fourth session*

22. At the thirty-fourth session of the General Assembly, in 1979, the Sixth Committee from 12 to 23 October<sup>31</sup> examined the report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations.<sup>32</sup>

23. During the debate, the representative of the Soviet Union stated<sup>33</sup> that the proposed World Treaty on the Non-Use of Force was in no way intended to amend the Charter, but was aimed at making more specific the general obligation not to use force, taking into account above all the emergence of nuclear weapons and the special danger of the use of armed force in present-day conditions. He recalled<sup>34</sup> that the draft treaty specifically provided that its signatories' rights and obligations under the Charter and earlier agreements in keeping with the Charter's purposes and principles should not be affected. The representative of Mexico expressed the view<sup>35</sup> that such a provision could be an escape valve contrary to the Charter and could even be interpreted as meaning that any right recognized in the Charter could be defended by the use of force.

24. The representative of the United States stated<sup>36</sup> that a treaty on the non-use of force must either be the same as the Charter or different from it. If it was the same, it debased the Charter; if different, it was an amendment which failed to follow the requirements of Article 109, not to mention the conflicts it raised with the supremacy clause. The same view was supported by the representative of France,<sup>37</sup> who added<sup>38</sup> that the danger would be greater in

<sup>17</sup>See G A (37), Supplement No. 41 (A/37/41), para. 396.

<sup>18</sup>A/AC.193/WAG/R.2/Rev.1; reproduced in G A (36), Supplement No. 41(A/36/41), pp. 67, 70.

<sup>19</sup>G A (36), Supplement No. 41 (A/36/41), para. 259.

<sup>20</sup>Ibid., p. 70.

<sup>21</sup>G A (37), Supplement No. 41 (A/37/41), para. 497.

<sup>22</sup>Ibid.

<sup>23</sup>See G A (38), Supplement No. 41 (A/38/41).

<sup>24</sup>Ibid., para. 34.

<sup>25</sup>Ibid., para. 35.

<sup>26</sup>See G A (39), Supplement No. 41 (A/39/41).

<sup>27</sup>Ibid., para. 27.

<sup>28</sup>Ibid.

<sup>29</sup>Ibid., para. 33.

<sup>30</sup>Ibid.

<sup>31</sup>A/C.6/34/SR.16 25.

<sup>32</sup>G A (34), Supplement No. 41 (A/34/41).

<sup>33</sup>A/C.6/34/SR.17, para. 18.

<sup>34</sup>Ibid.

<sup>35</sup>A/C.6/34/SR.18, para. 18.

<sup>36</sup>Ibid., para. 27.

<sup>37</sup>A/C.6/34/SR.20, para. 19 (*in fine*).

<sup>38</sup>Ibid., para. 20.

the much more likely event of the new treaty not entering into force or entering into force with reservations affecting its scope for a limited number of States which did not include some countries whose legal positions were very influential.

25. In referring to article III of the draft treaty,<sup>39</sup> the representative of China expressed the view that the article was not acceptable because the super-Powers had concluded with some other countries "treaties of so-called friendship and cooperation which, in reality, were aggressive military pacts and enslaving unequal treaties".<sup>40</sup>

26. During the same debate, the representative of Pakistan stated<sup>41</sup> that the principle of the non-use of force, and its corollary, were *jus cogens* not only by virtue of Article 103 of the Charter, but also because they had become norms of customary international law recognized by the international community.

(b) *Thirty-fifth session*

27. At the thirty-fifth session (1980), the Sixth Committee examined<sup>42</sup> the report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations.<sup>43</sup> With regard to the proposed World Treaty on the Non-Use of Force, and its impact upon Article 103, many of the arguments put forward<sup>44</sup> were similar to those exchanged at the previous session.

28. It must be noted, however, that Article 103 was invoked by the representative of the United Kingdom<sup>45</sup> as preventing "the existence of any higher types of international law", whether described as "socialist" or given any other name reflecting a particular ideology.

(c) *Thirty-sixth session*

29. At the thirty-sixth session (1981), the Sixth Committee examined<sup>46</sup> the Report of the Special Committee on Enhancing the Effectiveness of the Non-Use of Force in International Relations.<sup>47</sup>

30. With regard to the proposed World Treaty on the Non-Use of Force and the objections raised against it on the basis of Article 103, the representative of the Soviet Union<sup>48</sup> referred to Article 103 of the Charter as an indication that "the idea of drafting a world treaty was thus in conformity with long-standing United Nations practice".

<sup>39</sup>*Ibid.*, para. 34.

<sup>40</sup>*Ibid.*

<sup>41</sup>A/C.6/34/SR.22, para. 8.

<sup>42</sup>A/C.6/35/SR.26 40.

<sup>43</sup>G A (35), Supplement No. 41 (A/35/41).

<sup>44</sup>For statements made by the representatives of the Soviet Union, see A/C.6/35/SR.26, para. 14; United States, *ibid.*, para. 29; China, A/C.6/35/SR.27, para. 14; France, A/C.6/35/SR.31, para. 6. See also the statements made by the representatives of Pakistan, A/C.6/35/SR.29, para. 55; and Belgium, A/C.6/35/SR.30, para. 48.

<sup>45</sup>A/C.6/35/SR.32, para. 17

<sup>46</sup>A/C.6/36/SR.2, 7-16, SR.16; 21; and 27-29.

<sup>47</sup>G A (36), Supplement No. 41 (A/36/41).

<sup>48</sup>A/C.6/36/SR.7, para. 2; see also the statements made by the representatives of Algeria, A/C.6/36/SR.10, para. 2; Ukrainian SSR, A/C.6/36/SR.14, para. 48; and Guyana, A/C.6/36/SR.15, para. 27.

31. Those delegations opposed to the Soviet proposal raised arguments similar<sup>49</sup> to those exchanged at the previous sessions. In response to the argument that the principle of non-use of force needed further elaboration,<sup>50</sup> the representative of the Netherlands expressed the view<sup>51</sup> that the declarations already adopted by the General Assembly contained enough guidance on the subject.

(d) *Thirty-seventh session*

32. During the debate in the Sixth Committee at the thirty-seventh session of the General Assembly (1982)<sup>52</sup> on the Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations<sup>53</sup> in connection with the proposed World Treaty on the Non-Use of Force, other instruments embodying that principle were proposed<sup>54</sup> by 10 non-aligned countries<sup>55</sup> and by other States.<sup>56</sup>

33. At the 33rd meeting of the Sixth Committee, the representative of China expressed the view<sup>57</sup> that, should a World Treaty on the Non-Use of Force be adopted, "it would be necessary to stress that States should respect obligations emanating from treaties or conventions, valid under generally recognized principles of international law and in accordance with Article 103 of the Charter".

(e) *Thirty-eighth session*

34. At the thirty-eighth session of the General Assembly (1983), the Sixth Committee examined<sup>58</sup> the report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations.<sup>59</sup>

35. During the course of the debate, the representative of Cyprus expressed the view<sup>60</sup> that "further elements of the principle of non-use of force were . . . implementation of the principle of good faith and fulfilment of treaty obligations in accordance with the generally recognized principles and rules of international law, in conformity with Article 103 of the Charter of the United Nations".

36. In referring to the purposes (Article 1, paragraph 1) and principles (Article 2) of the United Nations with respect to the non-use of force in international relations, the representative of the United Kingdom stated<sup>61</sup> that "the capstone of the system" was provided by Article 103.

<sup>49</sup>See the statements made by the representatives of the United States, A/C.6/36/SR.9, para. 16; China, A/C.6/36/SR.10, para. 53; Japan, A/C.6/36/SR.13, para. 13; and France, A/C.6/36/SR.14, para. 62.

<sup>50</sup>See para. 20 above and the notes thereto.

<sup>51</sup>A/C.6/36/SR.10, para. 11.

<sup>52</sup>A/C.6/37/SR.31-40; 51 and 57.

<sup>53</sup>G A (37), Supplement No. 41 (A/37/41).

<sup>54</sup>See however the statements made by the representatives of France, A/C.6/37/SR.35, para. 27, and the United States, A/C.6/37/SR.36, para. 11.

<sup>55</sup>G A (37), Supplement No. 41 (A/37/41), para. 9.

<sup>56</sup>*Ibid.*, para. 11.

<sup>57</sup>A/C.6/37/SR.33, para. 22.

<sup>58</sup>A/C.6/38/SR.12-20 and 57.

<sup>59</sup>G A (38), Supplement No. 41 (A/38/41).

<sup>60</sup>A/C.6/38/SR.14, para. 48.

<sup>61</sup>A/C.6/38/SR.18, para. 17.

(f) *Thirty-ninth session*

37. At its 1984 session, the Sixth Committee examined<sup>62</sup> the report of the Special Committee on Enhancing the Effectiveness of the of Non-Use of Force in International Relations.<sup>63</sup>

38. During the course of the debate, few references were made to Article 103. The representative of the Soviet Union, however, expressed the view that the argument that a world treaty would create a parallel regime was "absurd" since the Charter itself provided that "the obligations under the Charter would prevail in the event of a conflict with obligations under another international agreement".<sup>64</sup>

## C. CONSEQUENCES OF A CONFLICT BETWEEN AN INTERNATIONAL TREATY AND A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW, IN RELATION TO ARTICLE 103

39. The principle of the supremacy of a peremptory norm of general international law over a treaty reaffirmed in the commentary of the International Law Commission on the question of treaties between States and international organizations and between international organizations was supported by the Sixth Committee when it considered the report of the International Law Commission.<sup>65</sup>

<sup>62</sup>A/C.6/SR.12-19, 58, 60-61 and 63.

<sup>63</sup>G A (39), Supplement No. 41 (A/39/41).

<sup>64</sup>A/C.6/39/SR.17, para. 78.

<sup>65</sup>For the report of the International Law Commission, see G A (34), Supplement No. 10 (A/34/10); G A (35), Supplement No. 10 (A/35/10); G A (36), Supplement No. 10 (A/36/10); and G A (37), Supplement No. 10 (A/37/10); for the discussions in the Sixth Committee, see A/C.6/34/SR.38, A/C.6/35/SR.25, A/C.6/36/SR.36 and A/C.6/37/SR.37

## D. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT MATTER, IN RELATION TO ARTICLE 103

40. At its 1982 session, the Sixth Committee examined<sup>66</sup> the report of the International Law Commission on the work of its thirty-fourth session<sup>67</sup> and in particular the draft articles on the law of treaties between States and international organizations or between international organizations.

41. With respect to draft article 30 adopted by the Commission,<sup>68</sup> one representative expressed the view that Article 103 was of such a nature as to apply to international organizations.<sup>69</sup> It was also stated that it was doubtful whether it was reasonable to assert without qualification that international organizations, which for the most part comprised States Members of the United Nations, should be exempt from the provisions of Article 103 of the Charter when the treaties in question were between States and international organizations. A situation in which certain provisions of a treaty would be precluded for States Members of the United Nations in accordance with the terms of Article 103 of the Charter while at the same time being admissible from the point of view of international organizations simply because Article 103 did not apply to them would surely be unacceptable.<sup>70</sup>

<sup>66</sup>A/C.6/39/SR.37-52 and 63.

<sup>67</sup>G A (37), Supplement No. 10 (A/37/10).

<sup>68</sup>Ibid, p. 80.

<sup>69</sup>A/C.6/37/SR.40, para. 8.

<sup>70</sup>A/C.6/37/SR.45, para. 57.