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Eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur - draft articles, with commentaries (continued)

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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

[Agenda item 4]

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Eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

Draft articles, with commentaries* (continued)

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* For the preceding draft articles presented by the Special Rapporteur, see the third to seventh reports (*Yearbook... 1974*, vol. II (Part One) p. 135, document A/CN.4/279; *Yearbook... 1975*, vol. II, p. 25, document A/CN.4/285; *Yearbook... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1; *Yearbook... 1977*, vol. II (Part One), p. 119, document A/CN.4/298; *Yearbook... 1978*, vol. II (Part One), p. 247, document A/CN.4/312, respectively).

ABBREVIATIONS

I.C.J.	International Court of Justice
I.C.J. Reports	*I.C.J. Reports of Judgments, Advisory Opinions and Orders*

Draft articles with commentaries (*continued*)

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

General considerations

1. Part V of the 1969 Vienna Convention on the Law of Treaties[1] is perhaps the most original and the most debated component of the Convention. There was no

[1] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereinafter referred to as the "Vienna Convention".

substantial body of practice relating to many of the questions covered in that part, which could be considered as having resulted in a quite perceptible degree of progressive development of international law. Both legal writers and the United Nations Conference on the Law of Treaties itself examined most of these provisions with great care, and sometimes with strong feelings.

2. Today, however, ten years after the signing of that Convention, the provisions of part V seem to be generally accepted and the International Court of Justice has confirmed the customary value of some of its most important articles.[2] There is thus *a priori* no reason to depart in principle from the general line adopted by the Commission and approved by the Sixth Committee according to which the present draft articles will follow the text of the Vienna Convention as far as possible.

3. No doubt various problems will arise in connection with part V which have already attracted the attention of the Commission and which result from the basic differences which distinguish international organizations from States. The most important of these (embodied in draft article 6)[3] concerns the capacity of international organizations to conclude treaties; in addition, there is the diversity of structures, which vary from one organization to another, thus preventing the development of uniform practices; and, in most cases, the weakness or uncertainty of the legal personality of the organization, which does not always make it possible to distinguish or separate the organization from its member States. During the consideration of this subject by the Commission, several of its members have frequently stressed the need to take those facts into account and to ensure strict application of the rules regarding the capacity of international organizations. The Special Rapporteur has sought to give due weight to this concern. But only a few of the 31 articles which make up part V of the Vienna Convention are likely to raise questions of principle. In order to give the members of the Commission a better opportunity to evaluate the range of choices available to them, variant versions have been submitted for some articles. In other cases, drafting changes constitute the only difference between the draft articles submitted and the corresponding articles of the Vienna Convention.

4. The last general comment concerns the position of the member States of an organization in relation to the treaties to which the latter is a party. The Vienna Convention specified with great care and subtlety which States are entitled to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. The solutions adopted (articles 46 and 47; articles 48 to 50; articles 50 to 53; article 60; article 62) embody a simple idea: the right to invoke these grounds depends on the interest that State are acknowledged to have in the matter, which varies according to the ground invoked. Thus any State may invoke unlawful violence as a ground for invalidating a treaty, whereas only the State which is the victim of an error may invoke that ground. But would not a State member of an international organization have a legitimate interest in invoking a ground relating to a treaty to which that organization is a party?

5. As will be explained below (commentary to draft article 46, paragraph (17)), and without prejudice to the treaties governed by the special rules of a given organization, this question must be answered in the negative. To acknowledge that a member State had that power would be to deny the separate legal personality of the organization and would confer on each member State, acting individually, the right to use, without considering the position of the organization and of the other member States, a power which the organization possesses in its own right. Moreover, it was only to a very limited extent, and without fully convincing all its members, that the Commission included in article 36 *bis* the idea that the members of an organization are in a special position with regard to treaties concluded by that organization. In fact, in the most serious cases (violence and breach of an absolute peremptory rule) the members of an international organization are well protected, as are all States and all international organizations, since invalidity is established *erga omnes*, and this protection must be considered as generally sufficient.

SECTION 1. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties[4]

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present draft articles.

[2] For example, article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach): Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (*Advisory Opinion, I.C.J. Reports 1971*, p. 16). The same is true of article 62 (Fundamental change of circumstances): *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*) (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3).

[3] For the text of all the articles adopted so far by the Commission, see *Yearbook ... 1978*, vol. II (Part Two), pp. 124 *et seq.*, document A/33/10, chap. V, sect. B.1.

[4] Corresponding provision of the Vienna Convention:

"*Article 42: Validity and continuance in force of treaties*

"1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

"2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present draft articles. The same rule applies to suspension of the operation of a treaty.

3. The preceding provisions are without prejudice to the obligations that may derive from the Charter, and particularly from Article 103.

Commentary

(1) The purpose of the provisions of article 42 of the Vienna Convention is to provide "a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for";[5] "... the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for ... are exhaustive";[6] and these grounds can be invoked only under the conditions provided for in the Convention and eventually in the treaty itself.

(2) The intention thus defined is perfectly valid for treaties between States and international organizations or between two or more international organizations. The provisions of article 42 of the Vienna Convention can thus be adopted, with one small drafting addition in paragraph 1—but some explanatory remarks are nevertheless called for.

(3) First of all, it is natural that, as was done in the Vienna Convention in the case of treaties between States, the possibility should be left open that the treaties which are the subject of this report may contain clauses concerning termination, denunciation, withdrawal or suspension of operation. Concern has been expressed in connection with other articles, such as article 39[7] that an organization might take advantage of that possibility to include in a treaty to which it is a party clauses that run counter to its statutory rules. But even if it is considered possible that such a case might occur, it would be covered by article 46; and in any event, it should be noted that such provisions, which are already very uncommon in the internal law of States, are virtually unknown in the relevant rules of each organization, and such a case may therefore be considered as purely theoretical.

(4) On the other hand, some doubts might arise as to the exhaustive nature of the enumeration in the Vienna Convention; even the explanation given at the time by the Commission in its 1966 report was not fully convincing.[8] Two cases must be examined: that of the disappearance of international organizations and the special case of the United Nations.

(5) Although international organizations are unusually long-lived, they may nevertheless disappear. It seems unlikely that the disappearance of an international organization could occur "purely and simply".[9] In some cases, at least the member States of which it had been composed would remain. Other cases, like that which occurred when the Organisation for European Economic Co-operation became the Organisation for Economic Co-operation and Development in 1960, involve the transformation of one organization into another by means of a process whose effects are fully defined in a treaty. It is also necessary to include the theoretical case in which a regional organization would be absorbed by the single State that its member States would constitute if they were to merge. These are, no doubt, special situations for which the precedents are neither numerous nor convincing, and in the view of the Special Rapporteur it would be inadvisable to begin considering them in this report. However, it would be advisable in due course to include a reservation on that subject in the draft articles. It would seem that this should be done in connection with draft article 73: while article 73 of the Vienna Convention reserves the case of State succession, it will be necessary to cover also those problems which are peculiar to international organizations.[10]

(6) Another special problem resulting from the Charter of the United Nations has led the Special Rapporteur to propose the inclusion in the present draft article of a new paragraph 3. As is well known, Article 103 of the Charter provides that:

> 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.

The Commission and the Vienna Conference on the Law of Treaties reserved the effects of this Article with

[5] *Yearbook ... 1966*, vol. II, p. 236, document A/6309/Rev.1, part II, chap. II, para. (1) of the commentary to article 39.

[6] *Ibid.*, para. (5) of the commentary.

[7] *Yearbook ... 1978*, vol. II (Part One), p. 248, document A/CN.4/312.

[8] See *Yearbook ... 1966*, vol. II, p. 236, document A/6309/Rev.1, part II, chap. II, para. (5) of the commentary to article 39.

[9] Noting that "a bilateral treaty, lacking two parties, may simply cease any longer to exist, while a multilateral treaty in such circumstances may simply lose a party", the Commission, in paragraph (5) of the commentary to article 39 of its draft articles on the law of treaties, observed that "... this does not appear to be a distinct legal ground for terminating a treaty requiring to be covered in the present articles" (*ibid.*)—but this elusive attitude was covered by article 69 of the draft, which reserved questions relating to the succession of States (*ibid.*).

[10] The very term "succession" seems inappropriate in the cases mentioned. Neither the 1978 Vienna Convention on Succession of States in Respect of Treaties (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185) nor the 1974 draft articles of the Commission on the same subject (*Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D) deal with these questions. Only a few aspects of them were mentioned in the Commission's commentary to articles included in part IV (Uniting and Separation of States) of the draft articles on succession of States in respect of treaties (*ibid.*, pp. 252 *et seq.*).

regard to the provisions of article 30 (Application of successive treaties relating to the same subject-matter). As Article 103 does not deal explicitly with the obligations of international organizations, and since it could be argued either that it does not cover such organizations or that because of the general nature of its wording it should also be applied to international organizations, the Commission, in article 30 of the present draft, adopted a deliberately ambiguous formulation, which consists in placing the reservation concerning Article 103 of the Charter at the end of draft article 30 and wording it as follows:

> The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.[11]

(7) It might be wondered whether a reference to Article 103 of the Charter would not also be appropriate in article 42. The Special Rapporteur has proposed the insertion of paragraph 3 in order that the Commission may be led to consider the question. The elements of the discussion concern the significance of this reference, its utility and its form.

(8) The *significance* of a reference to Article 103 of the Charter is to recall the exceptional importance of a provision whose exact scope may be open to discussion but whose general sense is clear. Not only do the legal rules incorporated in the Charter prevail over obligations under other international agreements, but obligations under the Charter, such as those deriving from binding resolutions of the Security Council or judgments of the International Court of Justice, lead at least to the suspension of the operation of agreements which run counter to them. But this very consequence makes it possible to strengthen a solution already adopted by the Commission in connection with article 27 of the present draft.

(9) The Commission has, in fact, adopted article 27, paragraph 2, which provides:

> An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.[12]

The purpose of this provision is to prevent a treaty concluded *only* to implement a resolution of an organ of the organization from immobilizing the position of that organ contrary to the intention of the parties to the treaty. In the case of the United Nations, Article 103 of the Charter reinforces this principle still further. In fact, the resolutions of the Security Council which give rise to obligations are made superior in principle to all agreements that may have been or may be concluded by Member States, even agreements concluded by those States with the United Nations itself, when it seems that the sole purpose and effect of those agreements is to facilitate the implementation of Security Council resolutions.

(10) The significance of the reference to Article 103 of the Charter in draft article 42 having thus been clarified, we may now turn to a discussion of its *utility*. It could be argued that the reference to Article 103 in draft article 30 is sufficient; indeed, the first two paragraphs of article 42 refer to "the application of the present draft articles"; article 30 already incorporates the reservation relating to Article 103, and one formulation of the reservation suffices. In reply it could be observed that article 30 concerns successive treaties only, and that Article 103 is more general in scope, since it entails consideration of the relationship between acts of United Nations organs and treaties. It is thus for the Commission to decide whether the reference to Article 103 in article 30, paragraph 6, is sufficient.

(11) If we now turn to the *form* of a reference to Article 103, there is no doubt that the best solution would be to refer to Article 103 only once in the whole set of draft articles. In the second reading of the draft articles it may perhaps seem desirable to replace the various references to Article 103 by a single provision, but this question cannot be settled at the current stage of the Commission's work on the draft. For the time being, it is necessary only to take a position regarding the question of whether it is or is not useful to refer to Article 103 in so general a provision as draft article 42.

(12) If the Commission answers this question in the affirmative, there is one last question relating to form to be decided. In its desire to use as general a formulation as possible, the Commission adopted the aforementioned wording for draft article 30, paragraph 6.[13] The same course could be followed for article 42. It would also be possible—and this is the intention behind paragraph 3 as submitted by the Special Rapporteur—to adopt a somewhat more extensive formulation, so as to affirm even more emphatically the superiority of obligations under the Charter over all treaties whatsoever, even those concluded only between international organizations. In that case, reference would be made not only to Article 103 but to the Charter as a whole. A general examination of the Charter certainly leads to an acknowledgement that obligations under that instrument are superior to all other obligations, whatever their technical characteristics.

[11] For the text of article 30 of the present draft and the commentary thereto, see *Yearbook ... 1977*, vol. II (Part Two), pp. 121–122. See also the debate on this subject at the same session: *ibid.*, vol. I, pp. 119–120 (1437th meeting, paras. 43 *et seq.*, and 1438th meeting paras. 1–12), and pp. 236–238 (1458th meeting, paras. 20–32, and 1459th meeting, paras. 1–5).

[12] For the text of article 27 of the draft and the commentary thereto: *ibid.*, vol. II (Part Two), pp. 118–120; for the debate on this subject at the same session: *ibid.*, vol. I, pp. 107–114 (1435th meeting, paras. 37 *et seq.*, and 1436th meeting, paras. 1–40), pp. 199–201 (1451st meeting, paras. 47 *et seq.*), and pp. 238–240 (1459th meeting, paras. 6 *et seq.*).

[13] See para. (6) of this commentary.

Article 43. Obligations imposed by international law independently of a treaty[14]

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Commentary

Except for drafting changes, the text of draft article 43 is the same as that of the corresponding article of the Vienna Convention.

Article 44. Separability of treaty provisions[15]

1. A right of a party, provided for in a treaty or arising under [article 56], to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in [article 60].

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under [articles 49 and 50] the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under [articles 51, 52 and 53], no separation of the provisions of the treaty is permitted.

Commentary

Except for drafting changes, the text of draft article 44 is the same as that of the corresponding article of the Vienna Convention.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty[16]

VARIANT A

A State or an international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

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[14] Corresponding provision of the Vienna Convention:

"*Article 43: Obligations imposed by international law independently of a treaty*

"The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

[15] Corresponding provision of the Vienna Convention:

"*Article 44: Separability of treaty provisions*

"1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

"2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

"3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

"(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

"(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

"(*c*) Continued performance of the remainder of the treaty would not be unjust.

"4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

"5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted."

[16] Corresponding provision of the Vienna Convention:

"*Article 45: Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

"(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

"(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

VARIANT B

A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] may no longer be invoked by:

(*a*) a State if, after becoming aware of the facts:

(i) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(ii) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

(*b*) an international organization if, after becoming aware of the facts, it has, in accordance with the relevant rules of the organization, agreed that the treaty is valid or remains in force or continues in operation, as the case may be.

Commentary

(1) At the United Nations Conference on the Law of Treaties, there was a fairly serious difference of views concerning article 45, paragraph (*b*); on the other hand, there was inevitably unanimous agreement on paragraph (*a*), which merely sanctions the right of the State to act according to its interests, except in cases involving a breach of an absolute peremptory rule or unlawful recourse to coercion, when renunciation by the State in question would run counter to the interests of the international community. Paragraph (*b*) refers to a concept whereby a State may be bound by its conduct as well as by express consent when that conduct implies acquiescence. The Commission did not adopt any of the technical constructions of internal law based on the same concept (*actos proprios*, *estoppel*), but related the solution to the principle of good faith and referred to numerous international judicial decisions.[17]

(2) The Special Rapporteur is submitting two solutions to the Commission. In the first (*variant A*), no distinction is drawn between the case of a State and that of an international organization. The proposed text for draft article 45 thus differs from article 45 of the Vienna Convention only with respect to minor drafting changes. In the second solution (*variant B*), the case of a State is submitted to exactly the same rules as in the Vienna Convention but the case of an international organization is quite different. In the latter case, no distinction is drawn between "express agreement" and "conduct equivalent to acquiescence"; reference is made only to "agreement", but the latter is qualified by a reference to the "relevant rules of the organization". In variant B there is a marked difference between the case of a State and that of an organization with regard both to *principles* and to *practice*. With regard to principles, the State loses the right to invoke certain facts that could modify its situation with regard to the treaty by reason of its *conduct* and consequently for reasons alien to any treaty commitment: acquiescence is not consent to a treaty. The organization, on the other hand, loses the same right by reason of *agreement*, which must be given according to the rules of the organization as defined in draft article 2, paragraph 1 (*j*). The competence to give such agreement and the form which it must take will therefore vary from one organization to another; what is involved is no longer conduct but an act related to the treaty-making process itself. With regard to practice, the determination of a State's acquiescence will not be easy, but will depend only on the factual circumstances of each case. The determination of the agreement of an organization will likewise depend on the same circumstances of each case, but in addition should be subordinated to a special demonstration concerning the regularity of the acts giving rise to the agreement vis-à-vis the rules of the organization. Thus, all things being equal, it will be more difficult for an organization than for a State to lose the right to invoke certain facts.

(3) In other words, an organization is better protected than a State against the abandonment of certain rights; in the case of an organization, the sanction of rights is ensured by its own rules, and is therefore better ensured than in the case of a State. It is thus clear what is involved in a choice between variant A and variant B. If it is felt that international organizations are, like States, subject to the rules of international relations which render the subjects of international law responsible for their conduct, it will be seen that solution B has, as it were, the effect, if not the purpose, of protecting the organization against its own conduct, that is, it treats the organization in the same way that private law treats all those who by reason of their youth or weakness are treated as "incapacitated". Solution A, on the other hand, which is designed to protect the co-contractants of the organization, draws all the inferences of the participation of an international organization in international relations. It is true that in practice there is often some uncertainty regarding the capacity of an organization to conclude a treaty and the role of its different organs in that connection, but the choice lies between the security of the other parties to a treaty and that of the organization. Although the Special Rapporteur is more responsive to the considerations militating in favour of variant A, he felt it would be advisable to offer the Commission a choice between both possible options.[18]

[17] See *Yearbook ... 1966*, vol. II, p. 239, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries, para. (2) of the commentary to art. 42.

[18] It might also be possible to accept solution A in the case of articles 60 and 62, but solution B in the case of articles 46 to 50, for the validity of the organization's consent is called in question only in the latter articles.

SECTION 2. INVALIDITY OF TREATIES

Article 46. Violation of provisions regarding competence to conclude treaties[19]

1. 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 was manifest and concerned a rule of its internal law of fundamental importance.

VARIANT A

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

3. A violation is manifest if it would be objectively evident to any State and any organization conducting itself in the matter in accordance with normal practice and in good faith.

VARIANT B

2. In the case referred to in the preceding paragraph, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

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

4. In the case referred to in paragraph 3, a violation is manifest if it would be objectively evident to any State not a member of the organization concerned and any international organization conducting itself in the matter in accordance with the normal practice relating to that organization and in good faith.

Commentary

(1) The solution adopted by the Conference on the Law of Treaties by 94 votes to none, with 3 abstentions,[20] is the outcome of a compromise between divergent theoretical positions, formulated to take account of practical considerations. It is based on the idea that the verification of the constitutionality of treaties between States is not the affair of other States, and that it is for each State to take the necessary steps to ensure there is no violation of its internal law regarding competence to conclude treaties. Once a State has expressed its consent, it is in principle bound vis-à-vis its co-contractors. The only exception to this rule is when the violation is so manifest that the co-contractors should be put on notice of it, but even in this case the violation must be of fundamental importance. In other words, article 46 of the Vienna Convention adopts a solution oriented towards the security of legal relations; it departs from that solution only if the legitimate trust of the partners of a State could not be betrayed because the violation was so manifest they would necessarily have detected it for themselves. The implementation of the invalidity of consent given in violation of the internal law regarding competence to conclude treaties is also limited by the fact that only the State whose consent had been vitiated is entitled to invoke the invalidity; it is clear from article 46, as from the solution incorporated in article 45, that no other State can invoke invalidity.

(2) The problem which was solved in that way in the case of treaties between States must also be solved in the case of the treaties which are the subject of the present articles. In so far as it is necessary to that end to establish a rule for the consent of States, there would certainly be no question of proposing any rule other than that embodied in the delicate balance adopted in 1969. The present draft article therefore adopts unchanged the rule of the Vienna Convention relating to the consent of States. However, the solution is not obvious in the case of the consent of organizations; can the rule establish for States be extended to them without change, or should another rule be proposed?

(3) The question has already been raised in the Commission on several occasions. When the Commission adopted in 1977 draft article 27 (which, like the corresponding provision of the Vienna Convention, reserved article 46), several members of the Commission took up the question of article 46 directly or indirectly and it was even noted that "the real problem to be solved" would arise in connection with that article and that "a number of problems" would be encountered at that time.[21] As early as his second report, the Special Rapporteur posed the problem in these terms: "It may ... be wondered whether the rule patiently drawn up and established by article 46 is

[19] Corresponding provision of the Vienna Convention:

"*Article 46: Provisions of internal law regarding competence to conclude treaties*

"1. 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 was manifest and concerned a rule of its internal law of fundamental importance.

"2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

[20] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nation publication, Sales No. E.70.V.6), p. 88, 18th meeting.

[21] *Yearbook ... 1977*, vol. I, pp. 109 and 112, 1436th meeting, paras. 1 and 29.

valid in all cases for international organizations", and he considered the special case—to which we shall have occasion to revert—of an agreement concluded between an international organization and one of its members.[22]

(4) In the same report, the substance of which was based largely on the replies of a number of international organizations to a questionnaire addressed to them by the Special Rapporteur, the latter raised the question of defining and proving capacity to represent an international organization in any of the phases of the conclusion of a treaty and stressed that, unlike States, international organizations differed from each other and did not possess that common structure (Head of State or Government, Minister for Foreign Affairs) empowered by international law itself to represent a State, to express and to certify its will in international relations. He concluded in these terms:

> 60. The most direct consequence of this situation might be that the entity concluding an agreement with an international organization should, in theory, ask for a much more extensive proof of the involvement of all the organs competent to assume a commitment on behalf of the organization, and should then require the natural person finally expressing the will of the organization to furnish proof that he is duly authorized to perform the acts he is proposing to perform. In other words, the distinction between the "internal" and the "international" phases of the conclusion of agreements could not, in the present state of international relations, be as clear-cut as it is in the case of States.
>
> 61. However, it appears from the information given by international organizations that in practice the difficulties are not as serious as might be feared. In the first place, by force of circumstances, the most senior official of international secretariats enjoys a privileged situation ....
>
> 62. Secondly, all the organizations stressed the practical importance of the correspondence exchanged prior to the conclusion of an agreement. In fact, all the stages—constitutional stages, internal stages, authorizations, delegations of authority, and approvals—are mentioned and described in this correspondence; and in addition copies of the documents and records of the discussions concerning them are generally included in this exchange of correspondence. The partner of an organization is thus informed regularly, and often from day to day, of the development of a situation affecting any stage in the conclusion of an agreement. ...
>
> 63. Thus, the situation as it seems to emerge from the information received may be summed up, rather surprisingly perhaps but nevertheless accurately, by saying that it is not radically different from that of relations between States. As in the case of States, the internal procedure of each organization remains the affair of each organization, but the partner to the agreements of the organization is generally informed of it by administrative correspondence. ...[23]

(5) The passage quoted above deals mainly with the question of powers, and the Commission in fact adopted draft article 7, which, by means of certain changes, adapts the solution adopted for States to international organizations.[24] But that article also deals with the question raised by draft article 46. Indeed, it shows clearly, as a result of the replies of the organizations to the questions addressed to them at the time by the Special Rapporteur, that the two questions are linked. The Commission decided (article 7, paragraph 4) that:

> A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:
>
> (*a*) he produces appropriate powers; or
>
> (*b*) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

It was made clear that the verb "communicate" was used instead of the verb "express" in order to emphasize that the representative did not participate in the establishment of the consent of the organization, but merely transmitted that consent.[25] However, by this transmission he likewise certifies that the consent is legally perfect. The partner of the organization in question has generally been kept informed of the progress of the internal procedures involved in the formation of that consent. It is thus familiar with what might be called the "practice" of the organization, but is not usually called upon to compare that "practice" with the "rules of the organization", with regard to which it is a third party. That is the conclusion which emerges both from the information provided in 1973 by the international organizations consulted and from the way in which the Commission settled in 1975 the question of the authority of representatives of organizations to communicate their consent to be bound by a treaty.

(6) It follows from the foregoing that a partner of an international organization is certainly never called upon to invoke for its own benefit the failure of a treaty concluded by an international organization to conform to the general rules of that organization. However, it is not this point which is being called in question but rather that of determining whether the organization, after having "communicated" its will to its partner, has *itself* lost the right to deprive that communication of all effect by invoking a violation of the rules of the organization regarding competence to conclude treaties. On this point the foregoing considerations do, however, seem to lead to one certain conclusion: the right of an international organization to invoke the violation of the rules of the organization regarding competence to conclude treaties cannot be admitted without restriction. Of course, such a possibility would theoretically provide the organization with complete protection against its own legal errors or any temporary abuse of the organization by one of its own organs, but it would leave the partners of the organization with no

[22] *Yearbook ... 1973*, vol. II, p. 89, document A/CN.4/271, para. 88.

[23] *Ibid.*, p. 85.

[24] *Yearbook ... 1975*, vol. II, pp. 28–30, document A/CN.4/285, draft articles and commentaries, art. 7; and *ibid.*, pp. 174–176, document A/10010/Rev.1, chap. V, sect. B.2, art. 7. For the Commission's consideration of the question of powers: *ibid.*, vol. I, pp. 207 *et seq.* (1344th meeting, paras. 3 *et seq.*), 218–219 (1345th meeting, paras. 62–68), and pp. 265–266 (1353rd meeting, paras. 23–28).

[25] *Ibid.*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B2, para (11) of the commentary to art. 7. Cf. footnote 38 below.

protection and no guarantee of stability with regard to the treaties concluded. Despite the communication of the consent of the organization to be bound by a treaty received from organs duly empowered to that effect, they would be obliged to accept without limit communications in the opposite sense from the same organization without being able to raise any objection, for since they would be third parties with regard to the organization, they would have no right to contest the latter's interpretation of its own rules. The result in practice would be a system whereby the treaty commitments of international organizations would always be assumed on a purely potestative condition. There is no need to demonstrate that such a concept would be counterproductive as far as the organizations themselves are concerned; their limited capacity to conclude international treaties would be nothing more than the capacity to assume commitments without value.

(7) The other solution, however, under which international organizations could never invoke the violation of the rules of the organization regarding competence to conclude treaties, is equally unacceptable. It was rejected in the case of States by article 46 of the Vienna Convention, and there seems to be no reason why international organizations should not need the same protection as States; rather, their need is even greater. In fact, from an informal standpoint, it is finally States, or certain States, which are protected by the invalidity of a treaty concluded by an international organization. In certain cases the invalidity would stem from the fact that the organization concluded a treaty concerning a subject-matter for which it had not received the requisite competence: that subject-matter remains within the competence of the member States without diminution or limits. In other cases, it is the respective powers of the organs of the organization regarding the conclusion of treaties which have not been respected, but since States are unequally represented in these organs, it is still the interest of member States, or at least of some member States, which is at stake. It could also be argued, as has already been stated, that international organizations have a greater need than States for the protection of their fundamental rules regarding competence to conclude treaties. These rules are not always explicit or clear, and the structures of the organization are fragile; they are not based on solid sociological realities. An international organization, more than any other institution, is obliged to derive its force from law, and consequently to respect the law.

(8) If the foregoing contradictory considerations are regarded as valid and if the two extreme antinomic solutions are rejected, the only available solution is a compromise solution, like that which the Conference on the Law of Treaties, following the Commission, established in the case of States. The problem is then posed in the following terms: should the compromise adopted in 1969 in the case of States likewise be adopted in the case of international organizations?

(9) The solution which consists in simply extending to international organizations the rule formulated for States can be defended. In that connection, it may be observed that all the reasons militating in favour of the compromise solution adopted for States are valid for international organizations, and it is difficult to conceive of a compromise solution having more advantages and fewer drawbacks than the one embodied in article 46 of the Vienna Convention. It was in that spirit that the Special Rapporteur drafted variant A proposed above. Article 46, paragraph 1, of the Vienna Convention has been divided into two separate paragraphs, solely for drafting reasons. The first of these paragraphs concerns the case of States and simply reproduces article 46, paragraph 1, of the Vienna Convention; the second adapts the first paragraph to the case of international organizations by replacing the term "internal law" with the term "rules of the organization", in accordance with article 2, paragraph 1 (*j*). Article 46, paragraph 2, of the Vienna Convention has become paragraph 3 of draft article 46, the only difference being the addition of the words "and any organization".

(10) If it is desired to pursue the research further with a view to proposing for the case of organizations a compromise different from that which was adopted in the case of States, it becomes necessary to ponder the two conditions posed by article 46 of the Vienna Convention for the implementation of a violation of the rules regarding competence to conclude treaties. It does not seem advisable to suggest any change regarding the "fundamental" character of the rule violated; that is a reasonable criterion which provides a degree of flexibility and which has been the subject of no criticism or reservations. On the other hand, it might be wondered whether the definition of the "manifest" character of the violation does not call for clarification in the case of international organizations.

(11) It was to cover this hypothesis that the Special Rapporteur chose the wording of variant B, which differs from variant A in that it contains a new paragraph 4, concerning the definition of the "manifest" character of a violation in the case of an international organization, the three other paragraphs of variant B being the same as those of variant A, although arranged in a different order.

(12) To begin with, it is perhaps advisable to recall that article 46, when proposed by the Commission (as draft article 43), did not contain paragraph 2, which was drafted by the Conference on the Law of Treaties. An amendment submitted by the United Kingdom led to the adoption of a definition which the Commission had provided, but only in the commentary, explaining that the exception in question would come into play when the violation of internal law was objectively evident to any State dealing with the matter normally and in good faith.[26] The Drafting Committee put the

[26] See *Yearbook ... 1966*, vol. II, p. 242, document A/6309/Rev.1, part II, chap. II, para. (11) of the commentary to

text into the form[27] adopted by the plenary meeting in 1969.[28]

(13) Although no other elements are available that would make it possible to determine the meaning of article 46, paragraph 2, of the Vienna Convention, the text of the article itself shows that in order to determine the level of evidence reference is made to "any State" conducting itself in a certain way. No account is taken of geographical proximity or of the existence or absence of any legal or political community that may exist between the State whose law has been violated and the State which serves as reference; similarly, no account is taken of the frequency and scope of the treaty relations between those two States. It is quite obvious that two States which are closely linked by geography, history, culture and the density of their treaty relations are generally fairly familiar with each other's constitutional law; it is conceivable that each of these States would be in a fairly good position to perceive any violation of the constitution of the other which might be committed. But it is not this privileged basis of reference which is envisaged in article 46: in order that the error be manifest, it must be evident to the State which has the fewest reasons to be familiar with the internal law of the State in question. This implies—and all the observations of Governments confirm it—a "flagrant", "enormous" violation.

(14) There is no reason to amend the principle of this solution for international organizations. However, the Special Rapporteur felt that two changes should be made in the text to cover the case of international organizations.

(15) First of all, the level of evidence should be verified for any State, whether it is a party to the treaty, could have been a party to the treaty or is completely unconnected with the treaty. But in the case of the treaties which are the subject of the present articles it would seem to be more correct, although not essential, to take into consideration not only States but all the international organizations belonging to the broad community to which the articles will apply. Furthermore, this provision is intended to apply only to treaties concluded between international organizations, and it is therefore natural to refer to international organizations.

(16) However, there are some States which must be set aside as regards the establishment of this level of evidence, namely those which are members of the organization in question. Such States, by reason of their intimate and permanent participation in the internal life of the organization, must be perfectly familiar with its rules; they are not ordinary States and should not be taken into account in establishing the level of evidence which violations of the rules of the organization must attain in order to be invoked by the organization. Paragraph 4 of variant B contains a provision along these lines. But this solution nevertheless requires more detailed discussion.

(17) In the case of treaties concluded between an international organization and States (or international organizations) which are not members of that organization, it seems quite easy to accept the idea that in establishing the level of evidence which should be apparent to "any State", no account should be taken of the special knowledge of the law of the organization which is the prerogative of its members. But let us now take the case of a treaty concluded between an international organization and a State which is a member of that organization: does not this treaty fall within the scope of the present articles? Must it be acknowledged that the organization may not invoke certain violations as a ground for invalidation because they would not have been evident to a State completely unconnected with the organization? Or is it necessary to adopt the opposite solution, and include in article 46 a new paragraph dealing with this special case?

(18) The Special Rapporteur does not favour any of these solutions,[29] for a very simple reason. The relations between an international organization and its members are governed by a special system of law, whatever name it may be known by; it is the rules of this system which apply to treaties concluded by an organization with its members, and it is the rules of each organization which will determine the fate of treaties concluded between the organization and one of its members if they are concluded in violation of the rules of the organization regarding competence to conclude treaties.[30] Draft article 46 as submitted does not take this particular case into account; it will suffice that the commentary states this point clearly.

(19) Draft article 46, paragraph 4, raises another problem. Article 46, paragraph 2, of the Vienna Convention refers to a State conducting itself "... in the matter in accordance with normal practice and in

article 43. See also *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 239, 43rd meeting, para. 17.

[27] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (*op. cit.*), p. 464, 78th meeting, para. 8

[28] *Ibid., Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (*op. cit.*), pp. 85–88, 18th meeting, paras. 5 *et seq.*

[29] See *Yearbook ... 1973*, vol. II, p. 89, document A/CN.4/271, para. 88.

[30] The replies of the organizations consulted on this question in 1973 showed that they had never faced these problems in practice, but even in the case of treaties between States the value of article 46 is primarily theoretical. It should, however, be noted that the position defended here has very far-reaching consequences for universal organizations and particularly for the United Nations, which has concluded almost all its treaties with Member States; the definition of evidence proposed in art. 46, para. 4, would not apply to such treaties; in practice that would mean that it would be easier for the United Nations to invoke any violation of a fundamental rule in connection with treaties concluded with Member States, which seems quite fair.

good faith". What is *normal practice*? It is clearly a general practice, common to all States, since it is evident "... to any State conducting itself in the matter in accordance with normal practice". This is not surprising, since there is a *general* practice relating to treaties between States, even with regard to the sanctioning of the violation by States of their internal law: the practice is precisely to disregard the violation by a third State of its own internal law unless the violation is "flagrant". But can it be said today that there is in this sphere a *general* practice for international organizations? This practice might tend to emerge from the progressive standardization of conduct. However, this may also be doubted.

(20) It is for this reason that when the Special Rapporteur proposed draft article 7 he acknowledged that a person could be considered as representing an organization if "it appears from the practice of the States and international organizations concerned ... that their intention was to consider that person as representing the organization ...",[31] and during the discussion he explained that in his opinion the wording referred to the practice of *each* organization concerned.[32] But the Drafting Committee decided "to refer only to practice in general, rather than to specify the source of the practice, in order to avoid difficulties in achieving a balance between States and international organizations"[33] and draft article 7 as adopted by the Commission refers to "practice" without qualifying or identifying it.

(21) The Special Rapporteur nevertheless felt that in the case of article 46 it was necessary to revert to this question. The purpose is not to oppose the practice of States to that of international organizations, but simply to observe that *in relation to each* international organization a body of practice is built up consisting of the initiatives and reactions of that organization and the initiatives and reactions of the States and international organizations with which it has treaty relations. It would be dangerous to jump to the conclusion that this practice in relation to one international organization constitutes a set of legal rules, but it certainly constitutes a yardstick for conduct, and the rule to be embodied in the draft article corresponds to a requirement of security and common sense. The partners of an organization which conform to this yardstick of conduct must be protected from a change of position on the part of the organization which might, without warning, produce a different interpretation of its own law and suddenly invoke grounds for invalidation of which its partners had no conception.

(22) This is at least the basic idea which led the Special Rapporteur to specify that what was involved was the normal practice "relating to that organization".

(23) The differences between variant B and variant A are perhaps minor and might lead to the conclusion that it would be preferable to adopt variant A; the Special Rapporteur has not submitted more far-reaching changes because no fact or consideration has changed the view which he expressed in 1973, namely that "article 46 of the 1969 Convention should be modified slightly, if at all".[34] The title of draft article 46, which differs slightly from the Vienna Convention, remains the same for both versions.

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty[35]

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating international organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the negotiating States and other negotiating organizations prior to his expressing such consent.

Commentary

(1) The significance of article 47 of the Vienna Convention is quite clear in the light of the explanations given when it was introduced by Sir Humphrey Waldock, the Special Rapporteur in 1963.[36] It concerns the case where a representative has received all ostensible formal authority to express the consent of a State to be bound by a treaty; his full powers, if he has them, are in agreement with that ostensible authority.[37] But in addition he has received

[31] *Yearbook ... 1975*, vol. II, p. 28, document A/CN.4/285, draft articles and commentaries, art. 7, para. 3 (*b*).

[32] *Ibid.*, vol. I, p. 218, 1345th meeting, para. 65.

[33] *Ibid.*, p. 266, 1353rd meeting, para. 25.

[34] *Yearbook ... 1973*, vol. II, p. 89, document A/CN.4/271, para. 88.

[35] Corresponding provision of the Vienna Convention:

"*Article 47: Specific restrictions on authority to express the consent of a State*

"If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent."

[36] See *Yearbook ... 1963*, vol. II, p. 47, document A/CN.4/156 and Add.1–3, para. (5) of the commentary to article 6.

[37] The French and Spanish texts may for a moment give rise to some doubt, for they refer to a restriction on "*pouvoirs*", "*poderes*", but as the term used in the English text ("authority") and the obvious meaning of the text show, those terms here signify the real authority, the real substance of the competence

instructions which limit his authority in that they instruct him not to use it except on certain conditions, with certain reservations or in certain hypothetical cases which are still uncertain at the time when both the full powers and the instructions are given. Clearly, these instructions, which are in principle secret, limit the authority of the representative. If, however, the representative does not respect those instructions and expressed the consent of the State to be bound although the conditions specified by his instructions have not been fulfilled, this violation cannot be enforced vis-à-vis the other States and the State is nevertheless bound. In order for the situation to be otherwise, the other States must have received notification of the restrictions *before* the representative has expressed the consent of the State.

(2) So indisputable a rule is as valid for organizations as for States. It is expressed once again in the case of States in draft article 47, paragraph 1, with a slight drafting change. It is formulated for organizations in paragraph 2 of the same draft article, with some drafting changes, only one of which calls for comment. In draft article 7, the Commission retained the term "expressing" (used by the Vienna Convention), in the case of representatives of a State in the expression "expressing the consent of a State to be bound by a treaty"; the term is used in the sense of "making public", "manifesting". But in the case of the consent of an international organization to be bound by a treaty, it used another term: "communicating". In other provisions of the present articles relating to the consent of the organization the term "expressing" has been avoided and has been replaced by "communicating" (article 2, paragraph 1 (*c*) (*bis*)) or "establishing" (articles 11, 12 and 15). This solution has likewise been adopted in paragraph 2 of the present article.[38] A slight change has therefore been made in the title of the article.

Article 48. Error[39]

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

Commentary

Except for drafting changes, the text of the foregoing draft article is the same as that of article 48 of the Vienna Convention.

Article 49. Fraud[40]

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating international organization, the State or the international organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

Except for drafting changes, the text of the foregoing article is the same as that of article 49 of the Vienna Convention.

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received, and not the formal official instruments establishing the competence of the agent in the eyes of the world (*pleins pouvoirs*, *pouvoirs*); otherwise, the text would be incomprehensible.

[38] The reasons for this substitution of terms were given in the commentary on art. 7 of the present draft:

"The Commission believes that to apply the verb 'express' to the representative of an international organization might give rise to some doubt; particularly in view of the rather frequent gaps and ambiguities in constituent instruments, the term might be understood as giving the representative of an international organization the right to determine by himself, as representative, whether or not the organization should be bound by a treaty. A means of avoiding that doubt seemed the use of the verb 'communicate' instead of the verb 'express', since the former indicates more clearly that the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization and that the action of its representative should be to transmit that consent; he should not, at least in the present draft article, be empowered to determine by himself the organization's consent to be bound by a treaty." (*Yearbook ... 1975*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B.2, para. (11) of the commentary to art. 7.)

However, see the commentary to art. 50, footnote 41.

[39] Corresponding provision of the Vienna Convention:

"*Article 48: Error*

"1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

"2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

"3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."

[40] Corresponding provision of the Vienna Convention:

"*Article 49: Fraud*

"If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty."

Article 50. Corruption of a representative of a State or of an international organization[41]

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

This draft article differs from the corresponding text of the Vienna Convention only in respect of minor changes in the title and the body of the article, the reasons for which are so clear as to require no explanation. However, if the Vienna formulation, "the expression of a State's consent to be bound by a treaty", had been used, it would have been necessary to balance it by using the formula "the communication of an international organization's consent to be bound by a treaty" in order to take account of earlier decisions of the Commission.[42] That solution would not have been incorrect, but it has the double disadvantage of making it necessary to divide article 50 into two separate paragraphs and of emphasizing the sometimes rather unsatisfactory character of the term "communicate". When the representative of an organization is called upon to sign a treaty which will become definitive as a result of signature alone and he possesses a measure of freedom in the negotiating process, it is not very appropriate to say that by the act of signing he "communicates" the will of the organization to be bound, and it is primarily in cases of this nature that corruption is conceivable. Of course, when the representative deposits an instrument of ratification it can properly be said that he "communicates" the consent of the organization, but it seems difficult even to conceive of the purpose of corruption in such a case. In order to avoid all these difficulties the wording has been changed so that the *expression* of consent is attributed to the State or the organization and not to their representative: "the expression by a State or an international organization of consent to be bound". This formulation is even more correct than that used in the Vienna Convention and permits the elimination of several difficulties.

[41] Corresponding provision of the Vienna Convention:

"Article 50: Corruption of a representative of a State

"If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."

[42] See above, para. (2) of the commentary on art. 47 and footnote 38.

Article 51. Coercion of a representative of a State or of an international organization[43]

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Commentary

The commentary on draft article 50 applies to this draft article also.

Article 52. Coercion of a State or of an international organization by a threat or use of force[44]

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Commentary

The title alone has been changed, in order to bring it into line with the purpose of the present articles.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)[45]

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

The title and body of this draft article contain only drafting changes. "The international community of

[43] Corresponding provision of the Vienna Convention:

"Article 51: Coercion of a representative of a State

"The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."

[44] Corresponding provision of the Vienna Convention:

"Article 52: Coercion of a State by the threat or use of force

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

[45] Corresponding provision of the Vienna Convention:

"Article 53: Treaties conflicting with a peremptory norm of general international law (jus cogens)

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

States as a whole" is a unitary concept which does not call for a reference to international organizations in addition to the reference to States.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties[46]

The termination of a treaty or the withdrawal of a party may take place:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the States or international organizations which have only the status of contracting States or contracting international organizations.

Commentary

The last part of paragraph (*b*) of article 54 has been changed for drafting reasons: it is not any clearer as a result. It has been retained only out of respect for the Vienna Convention. The consultation of contracting States which are not parties to a treaty in force is not a concept which is easy to understand. It was added at the Conference on the Law of Treaties as a result of an initiative by the Drafting Committee, the Chairman of which provided the following explanation:

... that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States, which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States, not parties to the treaty, for the limited period in question.[47]

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force[48]

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Commentary

No change has been proposed with respect to the corresponding provision of the Vienna Convention.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal[49]

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Commentary

No change is proposed with respect to the corresponding provision of the Vienna Convention.

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[46] Corresponding provision of the Vienna Convention:

"*Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties*

"The termination of a treaty of the withdrawal of a party may take place:

"(*a*) in conformity with the provisions of the treaty; or

"(*b*) at any time by consent of all the parties after consultation with the other contracting States."

[47] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (*op. cit.*), p. 476, 81st meeting, para. 6.

[48] Corresponding provision of the Vienna Convention:

"*Article 55: Reduction of the parties to a multilateral treaty below the number necessary for its entry into force*

"Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force."

[49] Corresponding provision of the Vienna Convention:

"*Article 56: Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*

"1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

"(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

"(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

"2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties[50]

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the States or international organizations which have only the status of contracting States or contracting international organizations.

Commentary

The commentary on draft article 54 applies to draft article 57.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only[51]

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) the possibility of such a suspension is provided for by the treaty; or

(*b*) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Commentary

No change is proposed with respect to the corresponding provision of the Vienna Convention.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty[52]

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Commentary

This draft article contains no change with respect to the corresponding provision of the Vienna Convention.

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[50] Corresponding provision of the Vienna Convention:

"*Article 57: Suspension of the operation of a treaty under its provisions or by consent of the parties*

"The operation of a treaty in regard to all the parties or to a particular party may be suspended:

"(*a*) in conformity with the provisions of the treaty; or

"(*b*) at any time by consent of all the parties after consultation with the other contracting States."

[51] Corresponding provision of the Vienna Convention:

"*Article 58: Suspension of the operation of a multilateral treaty by agreement between certain of the parties only*

"1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

"(*a*) the possibility of such a suspension is provided for by the treaty; or

"(*b*) the suspension in question is not prohibited by the treaty and:

"(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

"(ii) is not incompatible with the object and purpose of the treaty.

"2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend."

[52] Corresponding provision of the Vienna Convention:

"*Article 59: Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*

"1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

"(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

"(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

"2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."

[53] Corresponding provision of the Vienna Convention:

"*Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach*

"1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

"2. A material breach of a multilateral treaty by one of the parties entitles:

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach[53]

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(*b*) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(*c*) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by the present articles; or

(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

"(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

"(i) in the relations between themselves and the defaulting State, or

"(ii) as between all the parties;

"(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

"(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

"3. A material breach of a treaty, for the purposes of this article, consists in:

"(*a*) a repudiation of the treaty not sanctioned by the present Convention; or

"(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

"4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

"5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Commentary

Compared with the corresponding text of the Vienna Convention, the text of draft article 60 contains only drafting changes designed to bring it into line with the purpose of these draft articles.