



Parliament of Sint Maarten

Staten van Sint Maarten

To the Hon. Minister of General Affairs
Mr. W.V. Marlin
p/a Council of Ministers
Philipsburg

UV/285/2016-2017

Philipsburg, August 08, 2017

Re: Questions from MP G.C. Pantophlet regarding article 103 of the UN Charter

Hon. Minister Marlin,

Herewith I submit to you questions posed by Member of Parliament, Mr. G.C. Pantophlet pursuant to article 62 of the Constitution and article 69 of the Rules of Order of the Parliament of Sint Maarten.

The letter is self-explanatory.

Yours truly,




S.A. Wescot-Williams
President of Parliament

STATEN VAN SINT MAARTEN			
Ingek. 03 AUG 2017			
Volgnr. 151961/16-17			
Par.	5		nr. 7

Honorable Prime Minister Marlin:

On July 5, 2017 Minister of Kingdom Affairs, Mr. Plasterk addressed a letter to the Executive Council of St. Eustatius in which he stated the following:

“De totstandkoming en de wijzigingen van het Statuut zijn met inachtneming van de eisen die het Handvest stelt, tot stand gekomen”

1. My first question therefore is: What are these “eisen that were taken into account?”
2. United Nations Resolution 747 (VIII) of 27 november 1953, **“expresses to the Netherlands Government its confidence that as a result of the negotiations, a new status will be attained by the Netherlands Antilles and Surinam representing a full measure of self-government in fulfillment of the objectives set forth in Chapter XI of the Charter”**
3. Is this the requirement that Mr. Plasterk is referring to?

These questions are important because if we have a full measure of self-government then perhaps the legal basis for the ethics chambers might not even exist. We need clarity on this matter, because I do not have the answer.

In addition, does resolution 747 give St. Maarten the right to a “full measure of self-government?” We also need an answer to this question, because who knows, we might have been negotiation something that is non-negotiable. How can we negotiate about something to which we have the right to? We need to find out exactly how these UN rights operate. In addition there is the matter of article 103 of the United Nations, which states that obligations under the charter always have preference. Does our right to a “full measure of self-government” have preference over provisions in “Het Statuut” that are in conflict with our right to a full measure of self-government?”

We need clarity on this on other matters. I will therefore submit a few questions to you with the request that you ask the Raad van Advies to answer them, so we can have some clarity on where we stand on the issues I raised above. As soon as you have the answers I would appreciate your scheduling a next meeting where we can discuss them in Parliament.

I will now submit my questions to the Chairlady for remittance to you.

Thank you.

/

Questions submitted by MP George Pantophlet to The Hon. Prime Minister, August 3, 2017

Point of departure are the following two Hoge Raad Arresten:

" in de in dit citaat bedoelde paragraaf 27 stelt Het EHRM onder meer vast dat art. 103 Handvest VN naar de opvatting van het Internationaal Gerechtshof betekent dat de verplichtingen die ingevolge dit Handvest rusten op de leden van de VN voorrang hebben boven daarmee strijdige verplichtingen uit hoofde van een ander verdrag, ongeacht of dit werd gesloten voor of na het Handvest of slechts een regionale regeling behelst". (HR ECLI:N::HR:2012:BW1999, 13-4-2012, r.o. 4.3.4)

...het Handvest van de Verenigde Naties vormt blijkens Resolutie 955 (1994) mede grondslag voor de instelling van het Rwanda-tribunaal, hetgeen het gewicht van dat orgaan en de dominante verplichtingen van staten om aan het Handvest te voldoen onderstreept.
(HR:ECLI:NL:GHSGR:2007:BC0287, 21-10-2008, r.o. 23)

1. Mr. Plasterk is the Minister in Charge of Kingdom affairs. Can we therefore accept his statement as representing the official position on this matter?
2. "UN Resolution 747 (VIII) of November 27, 1953 states:
***Expresses** to the Government of the Netherlands it confidence that, as a result of the negotiations a new status will be attained by the Netherlands Antilles and Suriname representing a full measure of self-government in fulfilment of the objectives set forth in the Chapter XI of the Charter.*"
3. If as Mr. Plasterk states, all the requirements of the Charter have been taken into account can we conclude that all the islands have obtained a "full measure of self-government"?
4. If the islands do not have a full measure of self-government can they claim it under article 73 of the UN Charter?
5. If as Mr. Plasterk states, the requirement of the Charter have been met, does that make the rest of his letter contradictory and or redundant?
6. If as Mr. Plasterk states the Charter has been complied with, can there be any further discussion about more autonomy if a "full measure of self-government" has been attained?
7. Article 73 of the UN Charter states in the dutch version: "de belangen van de inwoners van deze gebieden ALLESOVERHEERSEND zijn" Does that mean that the interest of St. Maarten prevail over any provision in Het Statuut?
8. Does Mr. Plasterk's statement mean that Het Statuut is subject to and subordinate to the UN Charter?
9. What does the RvA understand under "een dominante verplichting?"
10. Does the RvA agree with the UN repertory of practice that "The United Nations Charter is the paramount instrument of international law?"
11. Does the RvA agree with its statement that: "there can be no conflict between it and the charter of a regional organization?"
12. Does the RvA agree with its statement that: "the laws of the regional organization must conform to those of the World Organization?"
13. Should the Government of the Netherlands "fulfill in good faith its obligations under the Charter" as stipulated in article 2 of the Charter?
14. If it can be shown that a member persistently violates the principle that "**the interests of the inhabitants are paramount**" (art. 73 UN Charter) should that member be expelled from the UN as provided for in Article 6 of the UN Charter?

15. UN Resolution 747 (VIII) of November 27, 1953 states:

Expresses to the Government of the Netherlands its confidence that, as a result of the negotiations a new status will be attained by the Netherlands Antilles and Suriname representing a full measure of self-government in fulfilment of the objectives set forth in the Chapter XI of the Charter.

Does this resolution create the obligation to fulfill the objectives of the Charter which is a full measure of self-government?

16. Does this resolution create the right to a "full measure of self-government?"
17. Does the RvA agree with the following statement?
"The fact that domestic law cannot be invoked so as to justify a non-observance of an obligation of international law surely rules out the possibility that an arrangement contracted under domestic law could prevail over international law".
18. Does the RvA agree with the following statement?
...article 103 applies to all sorts of contractual rights and obligations, irrespective of their source, including unilaterally obtained obligations. There are good reasons for such a perspective. Most importantly, it would completely defeat the object and purpose of Article 103 if States could avoid its effect by subjecting their agreements to a domestic legal system....
19. Can obligations under the Charter be avoided by invoking "Het Statuut"?
20. Does the RvA agree with the following statement found on page 203 of the UN repertory of practice?: *"Under article 103 of the United Nations Charter no provisions or obligations arising from regional treaties or arrangements could be put ahead of the existing provisions of the United Nations Charter..."*
21. Does the RvA agree with this statement found on page 202?: *" During the debate prior to the adoption of the resolution, it was repeatedly pointed out that under Article 193 the United Kingdom should place its compliance with its obligations under the Charter above its respect of a parliamentary convention which conflicted with legal norms laid down in the Charter?"*
22. Does the RvA agree with this statement found on page 206?: *" Moreover, while a club or an alliance of nations could make its own rules for its membership, all Members of the United Nations, of whatever regional organization they might be a member owed allegiance first and foremost to the United Nations Charter, which clearly prevailed over the rules of any regional organization."*
23. UN Resolution 742(VIII) of November 27, 1953, Annex, Third part sub 6 states:
 Constitutional considerations. *"Association by virtue of a treaty or bilateral agreement..."*
 Does this create the obligation to associate, which is what the Kingdom relationship most closely resembles, by means of a treaty?
24. Does this provision mean that "Het Statuut" is in fact a treaty?
25. The International Law Commission defines "treaty" as "charter"
26. Why does the Government of the Netherlands refer to "Het Statuut" as a "Charter?"
27. Does "Het Statuut" fall under the scope of article 103.?
28. Can the Government of the Netherlands sit in the Security Council and refuse to comply with its obligations under the Charter?
29. Article 73 states : the principle that the interests of the inhabitants are paramount. Does this create the obligation to treat their interests as paramount?
30. Does this obligation fall within the scope of article 103?

31. In Chapter 6 of Hillebrink's thesis we find a detailed account of the UNGA debate with respect to the position and function of governor, articles 43, 44, 50 and 51, "Statuut". What were the objections to these articles?
32. Are these articles as well as the position of governor in conflict with a full measure of self-government?
33. Which obligations according to article 103 should prevail: obligations under the Charter or obligations under "Het Statuut"?
34. Do you agree with the following statement of Judge Jessup, found on the UN repertory of practice page 208: "*Article 103 of the Charter uses merely the expression "international agreement" but there appears to be no reason to interpret this Article as excluding any treaty, convention, accord, or other type of international agreement or undertaking*"
35. Under this interpretation does "Het Statuut" fall within the scope of article 103?

Thank you in advance for your cooperation in this matter,

Sincerely,

MP George Pantophlet

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Ministerie van Binnenlandse Zaken en
Koninkrijksrelaties

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Kenmerk
2017-0000318708

Uw kenmerk

Datum 5 juli 2017
Betreft Beroep Sint Eustatius op VN-Handvest

Hierbij reageer ik op uw schrijven van 20 juni 2017, met kenmerk 069/17. Uw constatering dat ik niet heb geantwoord op diverse brieven van uw hand uit de maanden mei en april is correct. De reden hiervan is enerzijds dat niet altijd om een reactie wordt gevraagd, en ik die betreffende brieven daarmee voor kennisgeving aanneem. Anderzijds is reactie uitgebleven omdat ik naar mijn mening in mijn brief van 12 mei 2016 (kenmerk 2017-0000073370) voldoende duidelijk ben geweest over het door u ingenomen standpunt ten aanzien van het zelfbeschikkingsrecht en meer autonomie voor Sint Eustatius en daarbij ook ben ingegaan op de door de Eilandsraad op 9 mei aangenomen motie inzake de WolBES en de FinBES. Hierin heb ik uiteengezet dat de binnen dit Koninkrijk geldende wet- en regelgeving onverkort van toepassing is op Sint Eustatius en aldus dient te worden nageleefd.

Daarnaast zijn wij overeengekomen dat een Commissie van Wijzen wordt ingesteld die binnen drie maanden onderzoek doet naar het functioneren van het openbaar lichaam Sint Eustatius en aanbevelingen doet hoe te komen tot een kwalitatief voldoende functionerend openbaar lichaam, en daarover aan de minister van Binnenlandse Zaken en Koninkrijksrelaties rapporteert. Zoals in een eerder schrijven gemeld zie ik uw wens om te spreken over meer autonomie niet los van de uitkomsten van de werkzaamheden van de Commissie van Wijzen. Ik verwacht het eindrapport van de Commissie in september.

U stelt in diverse brieven dat de Nederlandse regering in strijd zou handelen met het VN-Handvest en enkele Resoluties van de Algemene Vergadering van de Verenigde Naties. U wijst ook op het arrest van de Hoge Raad inzake Srebrenica. Het zal u niet verbazen dat ik uw interpretatie van het Handvest en de door u genoemde resoluties niet deel. Sint Eustatius heeft nu de status van openbaar lichaam binnen Nederland. In gesprekken met de Verenigde Naties is bevestigd dat de verhoudingen binnen het Koninkrijk een interne aangelegenheid zijn. Discussie hierover kan onderling gevoerd worden zonder tussenkomst van de Verenigde Naties. De totstandkoming en de wijzigingen van het Statuut zijn met inachtneming van de eisen die het Handvest stelt, tot stand gekomen. Het bestuurscollege van Sint Eustatius heeft bij de slot-Ronde tafel Conferentie van

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Ministerie van Binnenlandse
Zaken en Koninkrijksrelaties

Kenmerk
2017-0000318708

9 september 2010 de nieuwe status van openbaar lichaam aanvaard, met het argument realiteitszin te hebben en achtereenvolgende verkiezingen te hebben gewonnen. Sint Eustatius is met de wijziging van 10 oktober 2010 deel gaan uitmaken van het staatsbestel van Nederland. Daarbij is in overleg met de Nederlandse Antillen en de eilandbesturen wetgeving tot stand gebracht voor Bonaire, Sint Eustatius en Saba, onder meer de Wet openbare lichamen BES.

Voor alternatieve posities van Sint Eustatius binnen het Koninkrijk verwijs ik naar mijn brief aan het bestuurscollege van 12 mei waarin uiteen is gezet dat daarvoor wijziging van het Statuut nodig is, met de instemming van de landen van het Koninkrijk, volgens de regels van artikel 55 van het Statuut. Een eenzijdige beslissing van Sint Eustatius kan daartoe niet leiden. Zoals ik in mijn brief van 12 mei aan u heb geschreven komt een alternatief feitelijk neer op de status van een min of meer autonoom land binnen het Koninkrijk waarbij er geen sprake is van begrotingssteun en het eiland dus geheel op eigen financiële inkomsten moet steunen. Gelet op de kleinschaligheid van Sint Eustatius en de huidige staat van het bestuur van het openbaar lichaam is de status van autonoom land binnen het Koninkrijk niet realistisch.

Ik ga ervan uit dat ik hiermee voldoende duidelijkheid heb gegeven ten aanzien van uw standpunt en wensen. En ik beschouw daarmee de correspondentie hierover als afgesloten tot het moment dat de Commissie van Wijzen haar rapport heeft opgeleverd.

Een afschrift van deze brief zend ik aan zowel de Tweede Kamer der Staten-Generaal als de Eerste Kamer der Staten-Generaal.

De minister van Binnenlandse Zaken en Koninkrijksrelaties,

dr. R.H.A. Plasterk

READER

Guide to Answering Questions

Submitted by MP George Pantophlet

During Public Meeting of the Parliament of St. Maarten

August 3, 2017

1. The Charter of the United Nations – Article 2, 6, 73, 103
2. UN Resolutions 945, 747(VIII) and 742(VIII)
3. Two Hoge Raad and One Raad van State Decision
4. The International Law Commission Yearbook 1966
5. The Scope of the Supremacy Clause of the United Nations Charter
6. United Nations Repertory of Practice Article 103

The Galvao case-the scope of article 103

- Documents 4-5 are important because they support Statia's claim that "Het Statuut" falls within the scope of Article 103. In addition to the highlighted text, the reader should pay particular attention to the opinion of Judge Jessup on page 208 (footnote) and the case of Mr. Galvao, on page 208 and 209 of the UN Repertory of practice.

Domestic Law vs the Charter

- Pages 599 and 601 of the "Scope of the Supremacy Clause" bear some telling remarks with respect to relationship between domestic law and obligations under the Charter.

Charter of the United Nations

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

Chapter XI

CHAPTER XI: DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

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

The Uruguay and India amendments to UN Resolution 945

945 (X) Communication from the Government of the Netherlands concerning the Netherlands Antilles and Suriname

The General Assembly,

Recalling that, by resolution 222 (III) of 3 November 1948, the General Assembly, while welcoming any development of self-government in the Non Self-Governing Territories, considers it essential that the United Nations be informed of any change in the constitutional status of any such Territory as a result of which the responsible Government concerned thinks it is unnecessary to transmit information in respect of that Territory under Article 73 e of the Charter of the United Nations,

Recalling that, by resolution 747 (VIII) of 27 November 1953, the General Assembly invited the Government of the Netherlands to communicate to the Secretary-General the results of the negotiations between the representatives of the Netherlands, the Netherlands Antilles and Surinam, and invited the Committee on Information from Non-Self-Governing Territories to report to the General Assembly on the information received,

Having received the communication dated 30 March 1955, by which the Government of the Netherlands transmitted to the Secretary-General the constitutional provisions embodied in the Charter for the Kingdom of the Netherlands promulgated on 29 December 1954, together with an explanatory memorandum thereon,

Having studied the report prepared by the Committee on Information from Non-Self-Governing Territories during its session of 1955, on the question of the cessation of the transmission of information with respect to the Netherlands Antilles and Surinam,

Bearing in mind, the competence of the General Assembly to decide whether or not a Non-Self-Governing Territory has attained the full measure of self-government referred to in Chapter XI of the Charter of the United Nations,¹

1. *Takes note* of the documentation submitted, and of the explanation provided, to the effect that the peoples of the Netherlands Antilles and Surinam have expressed through their freely elected representative bodies, their approval of the new constitutional order, and takes note also of the opinion of the Government of the Netherlands;
2. *Expresses the opinion*, that **without prejudice to the position of the United Nations as affirmed in General Assembly resolution 742 (VIII) of 27 November 1953, and to such provisions of the Charter of the United Nations as may be relevant**², on the basis of the information before it as presented by the Government of the Netherlands, and as desired by the Government of the Netherlands, cessation of the transmission of information under Article 73 e of the Charter in respect of the Netherlands Antilles and Surinam is appropriate.

557th plenary meeting, 15 December 1955

¹ **Amendment submitted by Uruguay.** The representative of Uruguay had explained that he submitted this amendment because the Netherlands Antilles and Surinam were still not fully self-governing. The amendment was intended to offer the peoples of the Netherlands Antilles and Surinam "a safeguard, an opportunity of coming at a later date to knock at the door of the United Nations, should the need arise. (525th Meeting, p 315, viz. Hillebrink p. 224)

² **Amendment submitted by India.** India explained this amendment by stating that it intended to declare that the decision of the General Assembly only related to Article 73 e and that paragraphs a to d remained in force and could be invoked by the General Assembly at any time. (Hillebrink, *op. cit.* p. 223)

qualifications in the functional fields studied by the Committee,

Considering that this is a practice which might be extended with advantage to the work of the Committee, in that the pooling and exchange of knowledge and experience thus achieved will enable it more efficaciously to assess the economic, social and educational problems of Non-Self-Governing Territories in the light of the solutions being found to those problems elsewhere in the world,

1. Commends the action of those Members which have included specialist advisers in their delegations to the Committee;

2. Expresses the hope that those Members which have not hitherto found it possible to do so, will find it appropriate to associate with their delegations persons specially qualified in the functional fields within the Committee's purview.

459th plenary meeting,
27 November 1953.

746 (VIII). Employment of international staff from Non-Self-Governing and Trust Territories

The General Assembly,

Considering that the paragraph 3 of Article 101 of the Charter of the United Nations, regarding the employment of the staff of the United Nations, states that, in addition to the necessity of securing the highest standards of efficiency, competence and integrity in employment of Secretariat staff, due regard should be paid to the importance of recruiting the staff on as wide a geographical basis as possible,

Having regard to the objectives set forth in Chapters XI and XII of the Charter in respect of the advancement of the inhabitants of Non-Self-Governing and Trust Territories,

Considering that the services of individuals from Non-Self-Governing and Trust Territories in the Secretariat of the United Nations will contribute to a wider geographical coverage in the recruitment of staff,

Considering the statement⁴ made by the Secretary-General that he has already taken note of the wishes expressed in the Fourth Committee on this matter,

1. Recommends that the Secretary-General consider the desirability of continuing and increasing the recruitment of suitably qualified inhabitants of Non-Self-Governing and Trust Territories for the Secretariat of the United Nations;

2. Invites the Secretary-General to draw the attention of the specialized agencies to the present resolution with a view to a similar policy being followed as far as possible in the secretariats of those agencies.

459th plenary meeting,
27 November 1953.

747 (VIII). Cessation of the transmission of information under Article 73 e of the Charter in respect of the Netherlands Antilles and Surinam

The General Assembly,

Recalling that in its resolution 650 (VII) of 20 December 1952 it invited the Committee set up to study

⁴ See Official Records of the General Assembly, Eighth Session, Fourth Committee, 342nd meeting.

the factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government to examine carefully the documents submitted by the Netherlands Government relating to the Netherlands Antilles and Surinam in the light of resolution 648 (VII) of 10 December 1952,

Having received and considered the report⁵ of the Ad Hoc Committee on Factors (Non-Self-Governing Territories) established by resolution 648 (VII),

Having taken note of the statement⁶ of the representative of the Netherlands that the negotiations between representatives of the Netherlands, the Netherlands Antilles and Surinam, which were adjourned in the year 1952, will shortly be resumed,

1. Notes with satisfaction the progress made by the Netherlands Antilles and Surinam towards self-government;

2. Considers that the new status of the Netherlands Antilles and Surinam can only be rightly appraised after the said negotiations have led to a final result and this has been embodied in constitutional provisions;

3. Expresses to the Netherlands Government its confidence that, as a result of the negotiations, a new status will be attained by the Netherlands Antilles and Surinam representing a full measure of self-government in fulfilment of the objectives set forth in Chapter XI of the Charter;

4. Invites the Government of the Netherlands to communicate to the Secretary-General the result of these negotiations as well as the provisions mentioned in paragraph 2 above;

5. Invites the Committee on Information from Non-Self-Governing Territories to examine these communications in connexion with the information already transmitted and to report thereon to the General Assembly;

6. Requests the Government of the Netherlands to transmit regularly to the Secretary-General the information specified in Article 73 e of the Charter in regard to the Netherlands Antilles and Surinam until such time as the General Assembly takes a decision that the transmission of information in regard to these Territories should be discontinued.

459th plenary meeting,
27 November 1953.

748 (VIII). Cessation of the transmission of information under Article 73 e of the Charter in respect of Puerto Rico

The General Assembly,

Considering that, in resolution 222 (III) of 3 November 1948, the General Assembly, while welcoming any development of self-government in Non-Self-Governing Territories, considers it essential that the United Nations be informed of any change in the constitutional status of any such Territory as a result of which the government responsible for the transmission, under Article 73 e of the Charter, of information in respect of that Territory thinks it unnecessary or inappropriate to continue such a practice,

Having received the communications⁷ dated 19 January and 20 March 1953 informing the United Nations

⁵ See document A/2428.

⁶ See Official Records of the General Assembly, Eighth Session, Fourth Committee, 343rd meeting, para. 70.

⁷ See document A/AC.35/L.121.

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RESOLUTIONS ADOPTED ON THE REPORTS OF THE FOURTH COMMITTEE

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742 (VIII). Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government

The General Assembly,

Bearing in mind the principles embodied in the Declaration regarding Non-Self-Governing Territories and the objectives set forth in Chapter XI of the Charter.

Recalling the provisions of resolutions 567 (VI) and 648 (VII), adopted by the General Assembly on 18 January and 10 December 1952 respectively, indicating the value of establishing a list of factors which should be taken into account in deciding whether a

Territory has or has not attained a full measure of self-government,

Having regard to the competence of the General Assembly to consider the principles that should guide the United Nations and the Member States in the implementation of obligations arising from Chapter XI of the Charter and to make recommendations in connexion with them,

Having examined the report¹ of the *Ad Hoc* Committee on Factors (Non-Self-Governing Territories) set up by resolution 648 (VII).

¹ See document A/2428.

1. *Takes note* of the conclusions of the report of the *Ad Hoc* Committee on Factors (Non-Self-Governing Territories);

2. *Approves* the list of factors as adopted by the Fourth Committee;

3. *Recommends* that the annexed list of factors should be used by the General Assembly and the Administering Members as a guide in determining whether any Territory, due to changes in its constitutional status, is or is no longer within the scope of Chapter XI of the Charter, in order that, in view of the documentation provided under resolution 222 (III) of 3 November 1948, a decision may be taken by the General Assembly on the continuation or cessation of the transmission of information required by Chapter XI of the Charter;

4. *Reasserts* that each concrete case should be considered and decided upon in the light of the particular circumstances of that case and taking into account the right of self-determination of peoples;

5. *Considers* that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan or any other country essentially depends on the freely expressed will of the people at the time of the taking of the decision;

6. *Considers* that the manner in which Territories referred to in Chapter XI of the Charter can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of absolute equality;

7. *Reaffirms* that the factors, while serving as a guide in determining whether the obligations as set forth in Chapter XI of the Charter shall exist, should in no way be interpreted as a hindrance to the attainment of a full measure of self-government by a Non-Self-Governing Territory;

8. *Further reaffirms* that, for a Territory to be deemed self-governing in economic, social or educational affairs, it is essential that its people shall have attained a full measure of self-government;

9. *Instructs* the Committee on Information from Non-Self-Governing Territories to study any documentation transmitted hereafter under resolution 222 (III) in the light of the list of factors approved by the present resolution, and other relevant considerations which may arise from each concrete case of cessation of information;

10. *Recommends* that the Committee on Information from Non-Self-Governing Territories take the initiative of proposing modifications at any time to improve the list of factors, as may seem necessary in the light of circumstances.

459th plenary meeting,
27 November 1953

ANNEX

List of Factors

FACTORS INDICATIVE OF THE ATTAINMENT OF INDEPENDENCE OR OF OTHER SEPARATE SYSTEMS OF SELF-GOVERNMENT

First part

FACTORS INDICATIVE OF THE ATTAINMENT OF INDEPENDENCE

A. International status

1. *International responsibility*. Full international responsibility of the Territory for the acts inherent in the exercise of

its external sovereignty and for the corresponding acts in the administration of its internal affairs.

2. *Eligibility for membership in the United Nations*.

3. *General international relations*. Power to enter into direct relations of every kind with other governments and with international institutions and to negotiate, sign and ratify international instruments.

4. *National defence*. Sovereign right to provide for its national defence.

B. Internal self-government

1. *Form of government*. Complete freedom of the people of the Territory to choose the form of government which they desire.

2. *Territorial government*. Freedom from control or interference by the government of another State in respect of the internal government (legislature, executive, judiciary, and administration of the Territory).

3. *Economic, social and cultural jurisdiction*. Complete autonomy in respect of economic, social and cultural affairs.

Second part

FACTORS INDICATIVE OF THE ATTAINMENT OF OTHER SEPARATE SYSTEMS OF SELF-GOVERNMENT

A. General

1. *Opinion of the population*. The opinion of the population of the Territory, freely expressed by informed and democratic processes, as to the status or change in status which they desire.

2. *Freedom of choice*. Freedom of choosing on the basis of the right of self-determination of peoples between several possibilities, including independence.

3. *Voluntary limitation of sovereignty*. Degree of evidence that the attribute or attributes of sovereignty which are not individually exercised will be collectively exercised by the larger entity thus associated and the freedom of the population of a Territory which has associated itself with the metropolitan country to modify at any time this status through the expression of their will by democratic means.

4. *Geographical considerations*. Extent to which the relations of the Non-Self-Governing Territory with the capital of the metropolitan government may be affected by circumstances arising out of their respective geographical positions, such as separation by land, sea or other natural obstacles; and extent to which the interests of boundary States may be affected, bearing in mind the general principle of good-neighbourliness referred to in Article 74 of the Charter.

5. *Ethnic and cultural considerations*. Extent to which the populations are of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from the peoples of the country with which they freely associate themselves.

6. *Political advancement*. Political advancement of the population sufficient to enable them to decide upon the future destiny of the Territory with due knowledge.

B. International status

1. *General international relations*. Degree or extent to which the Territory exercises the power to enter freely into direct relations of every kind with other governments and with international institutions and to negotiate, sign and ratify international instruments freely. Degree or extent to which the metropolitan country is bound, through constitutional provisions or legislative means, by the freely expressed wishes of the Territory in negotiating, signing and ratifying international conventions which may influence conditions in the Territory.

2. *Change of political status*. The right of the metropolitan country or the Territory to change the political status of that Territory in the light of the consideration whether that Territory is or is not subject to any claim or litigation on the part of another State.

3. *Eligibility for membership in the United Nations*.

C. Internal self-government

1. *Territorial government*. Nature and measure of control or interference, if any, by the government of another State in

respect of the internal government, for example, in respect of the following:

Legislature: The enactment of laws for the Territory by an indigenous body whether fully elected by free and democratic processes or lawfully constituted in a manner receiving the free consent of the population:

Executive: The selection of members of the executive branch of the government by the competent authority in the Territory receiving consent of the indigenous population, whether that authority is hereditary or elected, having regard also to the nature and measure of control, if any, by an outside agency on that authority, whether directly or indirectly exercised in the constitution and conduct of the executive branch of the government;

Judiciary: The establishment of courts of law and the selection of judges.

2. **Participation of the population.** Effective participation of the population in the government of the Territory: (a) Is there an adequate and appropriate electoral and representative system? (b) Is this electoral system conducted without direct or indirect interference from a foreign government?*

3. **Economic, social and cultural jurisdiction.** Degree of autonomy in respect of economic, social and cultural affairs, as illustrated by the degree of freedom from economic pressure as exercised, for example, by a foreign minority group which, by virtue of the help of a foreign Power, has acquired a privileged economic status prejudicial to the general economic interest of the people of the Territory; and by the degree of freedom and lack of discrimination against the indigenous population of the Territory in social legislation and social developments

Third part

FACTORS INDICATIVE OF THE FREE ASSOCIATION OF A TERRITORY ON EQUAL BASIS WITH THE METROPOLITAN OR OTHER COUNTRY AS AN INTEGRAL PART OF THAT COUNTRY OR IN ANY OTHER FORM

A. General

1. **Opinion of the population.** The opinion of the population of the Territory, freely expressed by informed and democratic processes, as to the status or change in status which they desire.

2. **Freedom of choice.** The freedom of the population of a Non-Self-Governing Territory which has associated itself with the metropolitan country as an integral part of that country or in any other form to modify this status through the expression of their will by democratic means.

3. **Geographical considerations.** Extent to which the relations of the Territory with the capital of the central government may be affected by circumstances arising out of their respective geographical positions, such as separation by land, sea or other natural obstacles. The right of the metropolitan country or the Territory to change the political status of that Territory in the light of the consideration whether that Territory is or is not subject to any claim or litigation on the part of another State.

4. **Ethnic and cultural considerations.** Extent to which the population are of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from the peoples of the country with which they freely associate themselves.

5. **Political advancement.** Political advancement of the population sufficient to enable them to decide upon the future destiny of the Territory with due knowledge.

6. **Constitutional considerations.** Association by virtue of a treaty or bilateral agreement affecting the status of the Territory, taking into account (i) whether the constitutional guarantees extend equally to the associated Territory, (ii) whether there are powers in certain matters constitutionally reserved to the Territory or to the central authority, and (iii) whether there is provision for the participation of the Territory on a basis of equality in any changes in the constitutional system of the State.

B. Status

1. **Legislative representation.** Representation without discrimination in the central legislative organs on the same basis as other inhabitants and regions.

2. **Participation of the population.** Effective participation of the population in the government of the Territory: (a) Is there an adequate and appropriate electoral and representative system? (b) Is this electoral system conducted without direct or indirect interference from a foreign government?*

3. **Citizenship.** Citizenship without discrimination on the same basis as other inhabitants.

4. **Government officials.** Eligibility of officials from the Territory to all public offices of the central authority, by appointment or election, on the same basis as those from other parts of the country.

C. Internal constitutional conditions

1. **Suffrage.** Universal and equal suffrage, and free periodic elections, characterized by an absence of undue influence over and coercion of the voter or of the imposition of disabilities on particular political parties.^b

2. **Local rights and status.** In a unitary system equal rights and status for the inhabitants and local bodies of the Territory as enjoyed by inhabitants and local bodies of other parts of the country; in a federal system an identical degree of self-government for the inhabitants and local bodies of all parts of the federation.

3. **Local officials.** Appointment or election of officials in the Territory on the same basis as those in other parts of the country.

4. **Internal legislation.** Local self-government of the same scope and under the same conditions as enjoyed by other parts of the country.

5. **Economic, social and cultural jurisdiction.** Degree of autonomy in respect of economic, social and cultural affairs, as illustrated by the degree of freedom from economic pressure as exercised, for example, by a foreign minority group which, by virtue of the help of a foreign Power, has acquired a privileged economic status prejudicial to the general economic interest of the people of the Territory; and by the degree of freedom and lack of discrimination against the indigenous population of the Territory in social legislation and social developments.

* For example, the following questions would be relevant:

(i) Has each adult inhabitant equal power (subject to special safeguards for minorities) to determine the character of the government of the Territory?

(ii) Is this power exercised freely, i.e., is there an absence of undue influence over and coercion of the voter and of the imposition of disabilities on particular political parties?

Some tests which can be used in the application of this factor are as follows:

(a) The existence of effective measures to ensure the democratic expression of the will of the people;

(b) The existence of more than one political party in the Territory;

(c) The existence of a secret ballot;

(d) The existence of legal prohibitions on the exercise of undemocratic practices in the course of elections;

(e) The existence for the individual elector of a choice between candidates of differing political parties;

(f) The absence of "martial law" and similar measures at election times;

(iii) Is each individual free to express his political opinions, to support or oppose any political party or cause, and to criticize the government of the day?

^b For example, the following tests would be relevant:

(a) The existence of effective measures to ensure the democratic expression of the will of the people;

(b) The existence of more than one political party in the Territory;

(c) The existence of a secret ballot;

(d) The existence of legal prohibitions on the exercise of undemocratic practices in the course of elections;

(e) The existence for the individual elector of a choice between candidates of differing political parties;

(f) The absence of "martial law" and similar measures at election times;

(g) Freedom of each individual to express his political opinions, to support or oppose any political party or cause, and to criticize the government of the day.

Uitspraak 201409956/1/V1

Datum van uitspraak: donderdag 2 juli 2015
Tegen: de staatssecretaris van Veiligheid en Justitie
Proceduresoort: Hoger beroep
Rechtsgebied: Vreemdelingenkamer - Asiel
ECLI: **ECLI:NL:RVS:2015:2100**

Bij deze uitspraak is een [persbericht](#) uitgebracht.

201409956/1/V1.

Datum uitspraak: 2 juli 2015

AFDELING BESTUURSRECHTSPRAAK

Uitspraak op de hoger beroepen van:

1. de staatssecretaris van Veiligheid en Justitie,
 2. C.G. Taylor,
- appellanten,

. 4.....Ter zitting van de Afdeling heeft de staatssecretaris toegelicht dat krachtens artikel 103 van het VN-Handvest de verplichtingen voor Nederland uit het VN-Handvest voorrang hebben op verplichtingen krachtens andere verdragen.

Instantie

Hoge Raad

Datum uitspraak

21-10-2008

Datum publicatie

21-10-2008

Zaaknummer

08/00142

Formele relaties

Conclusie: [ECLI:NL:PHR:2008:BD6568](#)

In cassatie op : [ECLI:NL:GHSGR:2007:BC0287](#), Meerdere afhandelingswijzen

In cassatie op : [ECLI:NL:GHSGR:2007:BC1757](#), Meerdere afhandelingswijzen

Rechtsgebieden

Strafrecht

Bijzondere kenmerken

Cassatie

Het Handvest van de Verenigde Naties c.a.

23. Met betrekking tot het Handvest van de Verenigde Naties, het Statuut van het Rwanda-tribunaal en de toepasbare Rules of Procedure and Evidence kan het navolgende worden vastgesteld.

Hoofdstuk VII van het Handvest van de Verenigde Naties vormt blijkens Resolutie 955 (1994) mede grondslag voor de instelling van het Rwanda-tribunaal, hetgeen het gewicht van dat orgaan en de dominante verplichtingen van staten om aan het Handvest te voldoen, onderstreept.

Daarop heeft het openbaar ministerie terecht gewezen, daarbij verwijzende naar de artikelen 25 en 103 van het Handvest, luidende:

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

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.

Uitspraak ECLI:NL:HR:2012:BW1999

LJN BW1999, Hoge Raad, 10/04437

Datum uitspraak: 13-4-2012

Datum publicatie: 5-4-2013

Rechtsgebied:

- Civiel recht

Soort procedure: Cassatie

Zaaknummer:

- 10/04437

Instantie: Hoge Raad

Vindplaatsen:

- NJB 2012/987
- RvdW 2012/579
- NJ 2014/262 met annotatie van N.J. Schrijver

In de in dit citaat bedoelde paragraaf 27 stelt het EHRM onder meer vast dat art. 103 Handvest VN naar de opvatting van het Internationaal Gerechtshof betekent dat de verplichtingen die ingevolge dit Handvest rusten op de leden van de VN voorrang hebben boven daarmee strijdige verplichtingen uit hoofde van een ander verdrag, ongeacht of dit werd gesloten voor of na het Handvest of slechts een regionale regeling behelst. En in paragraaf 149 oordeelt het EHRM, dat gelet op het belang voor de internationale vrede en veiligheid van operaties die op grond van resoluties van de Veiligheidsraad plaatsvinden in het kader van Hoofdstuk VII van het Handvest VN, het EVRM niet aldus kan worden uitgelegd dat het handelen en nalaten van Lidstaten dat wordt beheerst door resoluties van de Veiligheidsraad onderworpen zou zijn aan beoordeling door het EHRM.

4.3.5 De tussenconclusie moet zijn dat het hof ten onrechte aan de hand van de in Beer en Regan alsmede Waite en Kennedy geformuleerde criteria heeft onderzocht of het ten behoeve van de VN gedane beroep op immuniteit moet wijken voor het recht op toegang tot de rechter als bedoeld in art. 6 EVRM

4.3.6 Die immuniteit is absoluut. Het handhaven daarvan behoort bovendien tot de verplichtingen van de leden van de VN die, zoals ook het EHRM in Behrami, Behrami en Saramanti in aanmerking heeft genomen, ingevolge art. 103 Handvest VN in geval van strijdigheid voorrang hebben boven verplichtingen krachtens andere internationale overeenkomsten.

(h) "Third State" means a State not a party to the treaty.

(i) "International organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meanings with which terms are used in the draft articles.

(2) "Treaty". The term "treaty" is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States. Although the term "treaty" in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding", could not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law of treaties. A general convention on the law of treaties must cover all such agreements, and the question whether, for the purpose of describing them, the expression "treaties" should be employed rather than "international agreements" is a question of terminology rather than of substance. In the opinion of the Commission a number of considerations point strongly in favour of using the term "treaty" for this purpose.

(3) First, the treaty in simplified form, far from being at all exceptional, is very common, and its use is steadily increasing.³⁷ Secondly, the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.³⁸ But these differences spring neither from the form, the appellation, nor any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in regard to the method of conclusion and entry into force, there may be certain differences between such

agreements and formal agreements. Thirdly, even in the case of single formal agreements an extraordinarily varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to "treaty", "convention" and "protocol", one not infrequently finds titles such as "declaration", "charter", "covenant", "pact", "act", "statute", "agreement", "concordat", whilst names like "declaration", "agreement" and "*modus vivendi*" may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement", "exchange of notes", "exchange of letters", "memorandum of agreement", or "agreed minute" may be more common than others.³⁹ It is true that some types of instruments are used more frequently for some purposes rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction. Fourthly, the use of the term "treaty" as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.

(4) Even more important, the generic use of the term "treaty" is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed "a. the interpretation of a treaty". But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Court for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, "a. international conventions". But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions". On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is "treaty" and in the other the even more formal term "convention" is used serves to confirm that the use of the term "treaty" generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase "international agreement", which would not only make the drafting more cumbersome but would sound strangely today, when the "law of treaties" is the term almost universally employed to describe this branch of international law.

(5) The term "treaty", as used in the draft articles, covers only international agreements made between "two or more States". The fact that the term is so defined here and

³⁷ See first report by Sir H. Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, pp. 101-106.

³⁸ See on this subject the commentaries to Sir G. Fitzmaurice's second report (*Yearbook of the International Law Commission, 1957*, vol. II, p. 16, paras. 115, 120, 125-128 and 165-168), and his third report (*Yearbook of the International Law Commission, 1958*, vol. II, p. 20, paras. 90-93).

³⁹ See the list given in Sir H. Lauterpacht's first report (*Yearbook of the International Law Commission, 1953*, vol. II, p. 101), paragraph 1 of the commentary to his article 2. Article 1 of the General Assembly regulation concerning registration speaks of "every treaty or international agreement, whatever its form and descriptive name".

so used throughout the articles is not, as already underlined in the commentary to the previous article, in any way intended to deny that other subjects of international law, such as international organizations and insurgent communities, may conclude treaties. On the contrary, the reservation in article 3 regarding the legal force of and the legal principles applicable to their treaties was inserted by the Commission expressly for the purpose of refuting any such interpretation of its decision to confine the draft articles to treaties concluded between States.

(6) The phrase "governed by international law" serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties). The Commission examined the question whether the element of "intention to create obligations under international law" should be added to the definition. Some members considered this to be actually undesirable since it might imply that States always had the option to choose between international and municipal law as the law to govern the treaty, whereas this was often not open to them. Others considered that the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance. The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase "governed by international law", and it decided not to make any mention of the element of intention in the definition.

(7) The restriction of the use of the term "treaty" in the draft articles to international agreements expressed in writing is not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements. But the term "treaty" is commonly used as denoting an agreement in written form, and in any case the Commission considered that, in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form. On the other hand, although the classical form of treaty was a single formal instrument, in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more instruments. The definition, by the phrase "whether embodied in a single instrument or in two or more related instruments", brings all these forms of international agreement within the term "treaty".

(8) The text provisionally adopted in 1962 also contained definitions of two separate categories of treaty: (a) a "treaty in simplified form" and (b) a "general multilateral treaty". The former term was employed in articles 4 and 12 of the 1962 draft in connexion with the rules governing respectively "full powers" and "ratification". The definition, to which the Commission did not find it easy to give sufficient precision, was employed in those articles as a criterion for the application of certain rules. On re-examining the two articles

at its seventeenth session, the Commission revised the formulation of their provisions considerably and in the process found it possible to eliminate the distinctions made in them between "treaties in simplified form" and other treaties which had necessitated the definition of the term. In consequence, it no longer appears in the present article. The second term "general multilateral treaty" was employed in article 8 of the 1962 draft as a criterion for the application of the rules then included in the draft regarding "participation in treaties". The article, for reasons which are explained in a discussion of the question of participation in treaties appended to the commentary to article 12, has been omitted from the draft articles, which do not now contain any rules dealing specifically with participation in treaties. Accordingly this definition also ceases to be necessary for the purposes of the draft articles and no longer appears among the terms defined in the present article.

(9) "Ratification", "Acceptance", "Approval" and "Accession". The purpose of this definition is to underline that these terms, as used throughout the draft articles, relate exclusively to the international act by which the consent of a State to be bound by a treaty is established on the international plane. The constitutions of many States contain specific requirements of internal law regarding the submission of treaties to the "ratification" or the "approval" of a particular organ or organs of the State. These procedures of "ratification" and "approval" have their effects in internal law as requirements to be fulfilled before the competent organs of the State may proceed to the international act which will establish the State's consent to be bound. The international act establishing that consent, on the other hand, is the exchange, deposit or notification internationally of the instrument specified in the treaty as the means by which States may become parties to it. Nor is there any exact or necessary correspondence between the use of the terms in internal law and international law, or between one system of internal law and another. Since it is clear that there is some tendency for the international and internal procedures to be confused and since it is only the international procedures which are relevant in the international law of treaties, the Commission thought it desirable in the definition to lay heavy emphasis on the fact that it is purely the international act to which the terms ratification, acceptance, approval and accession relate in the present articles.

(10) "Full powers". The definition of this term does not appear to require any comment except to indicate the significance of the final phrase "or for accomplishing any other act with respect to a treaty". Although "full powers" normally come into consideration with respect to conclusion of treaties (see articles 6, 10 and 11), it is possible that they may be called for in connexion with other acts such as the termination or denunciation of a treaty (see article 63, paragraph 2).

(11) "Reservation". The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular pro-



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January 2008

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an 'agreement'.⁷⁷ Such contracts have indeed been registered by the UN Secretariat in accordance with the rule contained in Article 102,⁷⁸ making it not too adventurous to describe them as 'international agreements' in the widest sense and within the meaning of both Articles 102 and 103.

But more fundamentally, it must seriously be doubted whether a domestic law contract can be upheld as against international law to begin with. The fact that domestic law cannot be invoked so as to justify a non-observance of an obligation of international law surely rules out the possibility that an arrangement contracted under domestic law could prevail over international law. Thus, possible conflicts between domestic instruments (or rights and obligations granted under their terms) and the Charter seem to be a non-issue, at least from the perspective of international law.

A contract may also be concluded between a State and a private entity (most likely a company, but in principle also an individual or an NGO). If such a contract is clearly subject to a particular domestic legal system, the considerations of the supremacy of international law over national law apply. But some contracts, especially those involving concessions of natural resources, are deemed 'internationalized', in so far as they can be viewed as disconnected from a particular domestic legal system.⁷⁹ These instruments are arguably not domestic law contracts. But they are certainly not treaties either. Whatever may be the correct solution to this conundrum, there seems little reason to believe that 'internationalized' instruments escape the operation of Article 103 of the Charter due to their own terms, susceptible as these are to the will of the parties. A better view would be to consider them 'international agreements' for the purposes of Article 103, without taking a position as to whether they form a separate category of instruments.⁸⁰

Unilateral declarations of States pose a slightly more difficult problem. One can view a declaration of this type as one half of an agreement, the other half being the acceptance of, or reliance on, it by another State. Indeed, the drafters of the Charter had something like this in mind when they formulated Article 102 on the registration of agreements: 'The word "agreement" must be

⁷⁷ Indeed, *Black's Law Dictionary* (8th edn, West, St Paul, 2004) 834 defines an 'international agreement' as '[a] treaty or other contract between different countries' (emphasis added).

⁷⁸ See n 75.

⁷⁹ This may be due to so-called 'stabilisation clauses' which insert into the contractual relationship legal standards external to the domestic law of the participating State (such as general principles of law), or which limit the possibility of the State concerned to influence the carrying out of the contract via changes in domestic law. On such contracts generally, see, eg, E Paasivirta, *Participation of States in International Contracts* (Lakimiesliiton kustannus, Helsinki, 1990).

⁸⁰ An important consideration in this respect would be, though, that the private entity in question does not have any 'obligations under the Charter', as those lie on the Member States. However, the internal legal system of the State in which such an entity is established might give effect to obligations of that State on the domestic plane, thus affecting the private entity concerned.

Importantly for present purposes, the Council claimed the sanctions to affect the rights and obligations deriving not only from international agreements *stricto sensu* but also from various other instruments. While it cannot be claimed with absolute certainty that the language employed by the Council has been an interpretation of Article 103, these clauses are remarkably similar to Article 103 and their purpose is clearly the same.⁸⁶ Furthermore, for whatever that is worth, the Security Council practice just mentioned is summarized in the *Repertory of Practice* of the UN under the heading of Article 103,⁸⁷ suggesting that the UN itself considers it to be practice, which is related to this article.

The Security Council practice thus backs up what has been said about contracts. As regards licences and permits, there are at least two ways to reconcile the language of the Council resolutions with that of the Charter. First, certain licences and permits may be viewed as domestic legal acts. This is the case, for instance, with licences for importing and exporting military and dual-use goods, which are particularly relevant in the context of arms embargos imposed by the Security Council. Secondly, some licences are, in fact, contracts—various agreements on the use of intellectual property being perhaps the most obvious example. In the first instance, these instruments would give way to the Charter because of their domestic law origin and, in the second case, on the same grounds or because of their contractual nature.

The generalization that could be made is that Article 103 applies to all sorts of contractual rights and obligations, irrespective of their source, including unilaterally obtained obligations. There are good reasons for such a perspective. Most importantly, it would completely defeat the object and purpose of Article 103 if States could avoid its effect by subjecting their agreements to a domestic legal system or, instead, by issuing declarations, licences, permits and the like.

12; UNSC Res 918 (17 May 1994) (Rwanda) para 15; UNSC Res 1054 (26 April 1996) (Sudan) para 5; UNSC Res 1127 (28 August 1997) (Angola/UNITA) para 10; UNSC Res 1132 (8 October 1997) (Sierra Leone) para 11; UNSC Res 1160 (31 March 1998) (Yugoslavia) para 10; UNSC Res 1173 (12 June 1998) (Angola) para 17; UNSC Res 1267 (15 October 1999) (Taliban) para 7; UNSC Res 1298 (17 May 2000) (Eritrea and Ethiopia) para 9; UNSC Res 1306 (5 July 2000) (Sierra Leone) para 9; UNSC Res 1333 (19 December 2000) (Taliban) para 17.

⁸⁶ Recourse to the practice of UN bodies as an auxiliary tool for the interpretation of the Charter has been criticized more generally. See, eg. *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, Separate Opinion of Sir Percy Spender, 189–90 ('I find difficulty in accepting the proposition that a practice pursued by an organ of the United Nations may be equated with the subsequent conduct of parties to a bilateral agreement and thus afford evidence of intention of the parties to the Charter... and in that way or otherwise provide a criterion of interpretation.')

⁸⁷ *Repertory of Practice of United Nations Organs*, Supplement No 8 (forthcoming), vol VI (revised advance version). <untreaty.un.org/cod/repertory/art103/english/rep_supp8_vol6-art103_e_advance.pdf> accessed 20 August 2007.

ARTICLE 103

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ARTICLE 103

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 considerable discussion by United Nations organs in connexion with various agenda items. Although in most cases no reference was made to Article 103 in the decisions of the organs concerned, the discussion of that Article was of a constitutional nature and therefore was included in the present study.
2. This study is divided into four main parts, dealing with the question of compatibility between regional arrangements and the Charter and between international treaties and the Charter; the consequences of a conflict between an international treaty and a peremptory norm of general international law; and the application of successive treaties which relate to the same subject-matter and of which some provisions are incompatible. It was found advisable to treat regional arrangements apart from international treaties, since a Member State's being a party to a regional arrangement entails also membership in a regional organization and therefore involves more complex problems of procedure and substance than being merely party to an international agreement.
3. Subsections C and D of the Analytical Summary of Practice are concerned with discussions which took place in the International Law Commission and the Sixth Committee of the General Assembly up to 31 August 1966, the terminal date of the period under review.¹

¹ Those discussions led ultimately to the adoption of articles 30 and 53 of the Vienna Convention on the Law of Treaties signed at Vienna on 23 May 1969 (A/CONF. 39/27 (mimeographed)). See paras. 78-97 below.

I. GENERAL SURVEY

4. During the period under review, Article 103 was mentioned in only one resolution adopted by the Security Council, resolution 144 (1960) of 19 July 1960 in connexion with a complaint by Cuba. The second preambular paragraph of that resolution, by which the Security Council *inter alia* decided to adjourn consideration of the question pending receipt of a report from the Organization of American States (OAS) read as follows:

"Taking into account the provisions of Articles 24, 33, 34, 35, 36, 52 and 103 of the Charter of the United Nations,"

5. In one case, the Security Council rejected a draft resolution under which it would have requested the International Court of Justice to give an advisory

opinion on certain legal questions, including the question whether the charter of the OAS and the Inter-American Treaty of Reciprocal Assistance should be regarded as having precedence over the obligations of Member States under the United Nations Charter.²

6. In four instances, although Article 103 was not mentioned in the decisions, the proceedings lead to the adoption of those decisions indicated that the latter were concerned with the rule of supremacy of the obligations assumed by Member States under the Charter over their obligations under other international agreements.

² See paras. 42-45 below.

(a) Thus, in General Assembly resolution 1889 (XVIII), adopted on 6 November 1963 on the question of Southern Rhodesia, no mention was made of the existence of a parliamentary or constitutional convention entered into prior to the Charter by the United Kingdom and the then authorities of Southern Rhodesia, but the General Assembly recalled its request that the Constitution of 1961, a consequence of the autonomy granted earlier by the United Kingdom under that convention, be abrogated.³ During the debate prior to the adoption of the resolution, it was repeatedly pointed out that under Article 103 the United Kingdom should place its compliance with its obligations under the Charter above its respect of a parliamentary convention which conflicted with legal norms laid down in the Charter.

(b) In another case concerning the Territories under Portuguese administration, the Fourth Committee, on 14 November 1963, requested the Secretary-General to take the necessary action with the United States Government in order to ensure a petitioner full protection during his stay in United States territory for the purpose of testifying before the Committee. That decision was taken after the United States Government had contended that because of the obligations assumed by it under its extradition Convention with Portugal, it could not guarantee that the petitioner would be immune from legal process while he was in the United States outside the Headquarters area. In reply to that contention, it was maintained that the obligations of the United States Government under Article 103 of the Charter and under the Headquarters Agreement prevailed over its obligations under its extradition Convention with Portugal.⁴

(c) In Security Council resolution 188 (1964) of 9 April 1964 concerning the complaint of Yemen, no mention was made of the contention raised by the United Kingdom that the action it had taken against Yemen constituted the implementation of the obligations it had assumed under the treaty of assistance it had concluded with the Federation of South Arabia. During the debate it had been pointed out *inter alia* that the obligations assumed by the United Kingdom under that treaty could not justify an action contrary to the principle of the prohibition of the use of force in international relations laid down in the Charter and that under Article 103 the obligations it had assumed

under the Charter prevailed over those it had contracted in the treaty of assistance.⁵

(d) In the preamble of Security Council resolution 186 (1964) adopted on 9 April 1964, in connexion with the complaint by Cyprus, no specific reference was made to Article 103, but the Council stated that it had considered the positions taken by the parties in relation to the treaties signed at Nicosia on 16 August 1960 and recalled the relevant provisions of the Charter, in particular the rule prohibiting the threat or use of force in international relations set out in Article 2 (4). That part of resolution 186 (1964) should be read in the light of the debates which preceded its adoption, in the course of which one of the parties to the dispute contended that it had acted in the Cyprus situation under the treaties mentioned above and others pointed out *inter alia* that, under Article 103, the alleged rights conferred by such treaties could not prevail over the obligation assumed by Member States under the Charter to refrain from the threat or use of force.⁶

7. In connexion with the situation in the Congo, the Secretary-General invoked Article 103 in his *note verbale* of 2 March 1961 to the representative of Belgium,⁷ stating that bilateral agreements concluded by Belgium could not override its obligations under the peremptory decisions of the Security Council.

8. In one case, a proposal containing reference to Article 103 submitted to a subsidiary organ of the General Assembly was not adopted because of a lack of consensus.⁸

9. In five of the cases analysed below in section II A, 1 and 2, Article 103 was expressly invoked in the communications whereby the question in each instance was brought to the attention of the Council.

10. When certain principles of international law concerning friendly relations and co-operation among States and of the law of treaties were being considered by the International Law Commission, the Sixth Committee and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, extensive discussion took place concerning Article 103 and the rule of supremacy of the Charter over other international agreements.⁹

⁵ See paras. 61-63 below.

⁶ See paras. 64-71 below.

⁷ See para. 76 below.

⁸ See paras. 31 and 32 below.

⁹ See paras. 78-97 below.

³ See paras. 47-52 below.

⁴ See paras. 53-60 below.

II. ANALYTICAL SUMMARY OF PRACTICE

A. Compatibility between regional arrangements and the Charter

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

11. In the six cases analysed hereunder, the issues involved were related to the question whether and in what circumstances a Member State which is also a

member of a regional agency can bring its dispute with another State, a member of the two organizations, concurrently before the Security Council and the regional agency; or before the Council in preference to bringing it before the regional agency. A question raised in one of those cases was whether and in what circumstances the Security Council could transfer to a regional agency the examination of a local dispute brought to its attention.

a. *Complaint by Cuba (letter dated 11 July 1960): Security Council resolution 144 (1960) of 19 July 1960*

12. On 11 July 1960, Cuba requested¹⁰ an immediate meeting of the Security Council to consider a grave situation endangering international peace and security which had arisen as a result of repeated threats, reprisals and aggressive acts by the United States against Cuba.¹¹ Cuba based its submission of the question to the Council on Article 52 (4) and Articles 103, 24, 34, 35 (1) and 36 of the United Nations Charter. In its request, Cuba pointed out that Article 103, without invalidating any regional arrangements, clearly laid down that obligations under the Charter should prevail over such arrangements.

13. At the 874th meeting, on 18 July 1960, the representative of Cuba in his initial statement declared that Cuba was entirely within its rights in resorting to the Security Council. Referring to Articles 52 (4) and 103 of the United Nations Charter, he said that any member of OAS which was also a Member of the United Nations could choose to appeal either to the Security Council or to OAS; the right to choose rested solely with the Member State. Article 52, which provided for the establishment of regional agencies, made it clear that regional arrangements did not take precedence over the obligations of the Charter since it stated in its paragraph 4:

"This Article in no way impairs the application of Articles 34 and 35."¹²

In his reply, the representative of the United States maintained that Cuba's decision to come before the Security Council was not in harmony with existing obligations under the Inter-American Treaty of Reciprocal Assistance (the Treaty of Rio de Janeiro) and the charter of the OAS (the Charter of Bogota), which provided that differences among American States should be resolved, first of all, through OAS. The proper forum to discuss the question was OAS, which already had under consideration the causes of international tensions in the Caribbean area.¹³ Therefore, the Council should take no action, at least until the discussion by OAS had been completed.

¹⁰ S C, 15th yr., Suppl. for July-Sept. 1960, p. 9, S/4378.

¹¹ For a more detailed study of the question, see case 10 of chapter X of the *Repertoire of the Practice of the Security Council*, Suppl. 1959-1963, p. 240; case 24 of chapter XII, *ibid.*, p. 313; and case 29 of chapter XII, *ibid.*, p. 326.

¹² During the discussion in the Sixth Committee of the item concerning the principles of international law with regard to friendly relations among States, at the eighteenth session of the General Assembly, the representative of Cuba said that the States members of OAS were not obliged to submit their disputes to OAS before referring them to the Security Council. He mentioned Articles 34 and 35 of the Charter, according to which Member States might bring before the Council or the Assembly any dispute of the nature referred to in Article 34. He further mentioned Article 103, under which the obligations of Member States under the Charter prevailed over their obligations under any other international agreement (G A (XVIII), 6th Com., 820th mtg.: Cuba, para. 31).

¹³ The United States had transmitted to the Council in its letter dated 15 July 1960 (S/4388) a memorandum which it had previously submitted to the Inter-American Peace Committee of OAS in connexion with that Committee's study of tensions in the Caribbean area.

14. At the same meeting, the representatives of Argentina and Ecuador submitted a draft resolution¹⁴ whereby the Security Council, taking into account Articles 24, 33, 34, 35, 36, 52 and 103 of the United Nations Charter as well as articles 20 and 102 of the charter of OAS, would note that the situation was under consideration by OAS and would decide *inter alia* to adjourn the consideration of the question pending the receipt of a report from OAS. During the debate it was pointed out that, under Article 52 (2) of the Charter, Member States which were parties to regional arrangements had the obligation to achieve pacific settlement of disputes through such regional arrangements before referring them to the Security Council, and that there was a similar provision in article 20 of the charter of OAS. That did not imply any conflict between the obligations of the interested Member States under the Charter and their obligations under other international agreements — the situation envisaged in Article 103 — because the object of the draft resolution was not that the Council should decline to examine the question but that it should adjourn its consideration of it.

15. It was contended, on the other hand, that, under Article 52 of the Charter, membership in a regional organization entailed rights which were optional rather than exclusive in character. Consequently, the request of a Member State that the Security Council consider a question brought by it before the Council had not been invalidated because of membership of that Member in a regional body, if that Member considered that the defence of its rights and interests so required or that a specific situation or dispute, although appropriate for regional action, might endanger international peace and security.

16. The view was also expressed that the procedures laid down in the Charter of OAS were consonant with Article 33 of the United Nations Charter, which referred specifically to "resort to regional agencies or arrangements" for the solution of disputes while, according to another opinion, under Article 103 of the United Nations Charter no provisions or obligations arising from regional treaties or arrangements could be put ahead of the existing provisions of the United Nations Charter which gave Cuba the right to bring its case before the Council if it so chose.¹⁵

17. At the 876th meeting, on 19 July 1960, the draft resolution submitted by Argentina and Ecuador which mentioned expressly Article 103 in its preamble was adopted by 9 votes to none, with 2 abstentions, as resolution 144 (1960).¹⁶

After having noted that the situation existing between Cuba and the United States was under consideration by OAS, the Council *inter alia* decided "to adjourn

¹⁴ S/4392, same text as S C resolution 144 (1960) of 19 July.

¹⁵ For text of relevant statements, see S C, 15th yr., 874th mtg.: President (Ecuador), paras. 152-156; Argentina, paras. 134-136; Cuba, paras. 6-10; United States, paras. 97-102; 875th mtg.: Ceylon, paras. 28-32; France, para. 21; Italy, paras. 10 and 11; Poland, paras. 55-60; Tunisia, paras. 40 and 41; United Kingdom, para. 63; 876th mtg.: Cuba, paras. 132 and 133; Tunisia, para. 136; USSR, paras. 77-87, 97-102 and 105-107.

¹⁶ S C, 15th yr., 876th mtg., paras. 127 and 128.

the consideration of this question pending the receipt of a report from the Organization of American States".

b. *Complaint by Cuba (letter dated 31 December 1960)*

18. On 31 December 1960, Cuba requested a meeting of the Security Council on the ground that plans for an invasion of Cuba had been developed by the United States, and Cuba asked the Council to take the necessary measures to prevent such action.¹⁷ Cuba based its request on Articles 34, 35 (1), 52 (4) and 103 of the United Nations Charter and on article 102 of the charter of OAS; it invoked also Articles 24 (1), 31 and 32 of the United Nations Charter. By a further communication dated 3 January 1961,¹⁸ Cuba apprised the Security Council of the decision of the United States to break off diplomatic relations with Cuba. During the discussion, the representative of Cuba expressed opposition to any attempt to transfer the examination of the complaint to OAS. Ecuador and Chile submitted on 4 January 1961 a draft resolution¹⁹ whereby the Council would recommend to the two Governments, *inter alia*, that they make every effort to resolve their differences by the peaceful means provided for in the Charter. Since there was not the desired unanimity for the adoption of their draft resolution, Ecuador and Chile stated that they would not press it to a vote. Consequently, no decision was adopted by the Council.

c. *Complaint by Cuba (letter dated, 21 November 1961)*

19. In a letter dated 21 November 1961²⁰ the representative of Cuba requested under Articles 34, 35, 52 and 103 of the United Nations Charter a meeting of the Security Council to consider charges that the Government of the United States was carrying out a plan of armed intervention in the Dominican Republic in violation of that country's sovereignty, designed to prevent the Dominican people from stamping out the vestiges of the Trujillo dictatorship.

20. During the debate, it was pointed out that since Cuba had brought identical charges to the Council of OAS, the Security Council should declare the Cuban complaint non-receivable while it was *sub judice* in OAS. Cuba contended that the question raised by it before the Council went beyond the framework of relations inside OAS, since it requested that sanctions be applied to the United States. It was also recalled that both the United Nations and OAS systems were in harmony: they were based on the principle of non-intervention. Both systems maintained the balance provided for in Chapter VIII of the Charter, particularly Article 52, complemented by Article 103.

21. At the conclusion of the discussion, the President stated that it appeared that most members of the Council were of the opinion that it was not necessary to examine further the question before the Council, and that the matter would remain on the agenda for further discussion if required.²¹

¹⁷ S C, 15th yr., Suppl. for Oct.-Dec. 1960, p. 107, S/4605.

¹⁸ S C, 16th yr., Suppl. for Jan.-March 1961, p. 15, S/4611.

¹⁹ *Ibid.*, p. 16, S/4612.

²⁰ S C, 16th yr., Suppl. for Oct.-Dec. 1961, p. 139, S/4992.

²¹ For text of relevant statements, see S C, 16th yr., 981st mtg.: Dominican Republic, paras. 27 and 28; 983rd mtg.: President (USSR), para. 179; Chile, para. 155; Ecuador, paras. 165-167; USSR, para. 43.

d. *Complaint by Haiti (telegram dated 5 May 1963)*

22. In a telegram dated 5 May 1963,²² the Minister for Foreign Affairs of the Republic of Haiti requested an urgent meeting of the Security Council to examine the grave situation existing between Haiti and the Dominican Republic which had been caused by the repeated threats of aggression and attempts at interference made by the Dominican Republic.

23. In his opening statement, the representative of the Dominican Republic pointed out that the dispute between the two countries was under consideration by OAS which, as the proper organization to deal with the matter, had already taken steps with a view to finding a solution of the problem.²³ Consequently, the Council should suspend its consideration of the question and leave it in the hands of OAS.

24. The representative of Haiti stated that his country was within its rights in having appealed to the Security Council under Articles 34 and 35 of the Charter. However, if the Council considered that despite the gravity of the situation it should await the results of the OAS peace mission which was under way, the Government of Haiti would agree, provided that the Security Council remained seized of the question and resumed consideration of it whenever necessary.

25. A number of representatives expressed the view that under article 102 of the Charter of Bogota (the charter of OAS) and Article 52 (4) of the United Nations Charter, any member State of the OAS had the right to bring a regional controversy to the Security Council. Competence of the Security Council to deal with a matter already under consideration by OAS undoubtedly existed on the basis of Articles 24, 34, 35, 52 (4) and 103 of the United Nations Charter. Moreover, Article 36 of the United Nations Charter authorized the Council to take up at any time any dispute of the nature referred to in Article 33.

26. Some representatives asserted that the Charter of the United Nations and the responsibilities of its Members had priority over the charter of any regional organization and over the latter's responsibilities. Regional agreements were permissible and effective only to the extent to which they were compatible with the principles and purposes of the United Nations. They could not, and should not, be a hindrance to the rights and obligations of the Organization. Nevertheless, in the existing hopeful stage of developments, it would be better for the Security Council to be guided by Article 52 (3) of the Charter and not to intervene.²⁴

27. The President (France) noted that the majority of members felt it preferable for the time being to leave

²² S C, 18th yr., Suppl. for April-June 1963, p. 38, S/5302.

²³ In a letter dated 28 April 1963 (S/5301), the Secretary General of OAS had informed the Security Council that the Council of OAS had decided, in response to the request of the Government of Costa Rica, to convene a Meeting of Consultation of Ministers of Foreign Affairs to study the situation which had arisen between the Dominican Republic and Haiti.

²⁴ For text of relevant statements, see S C, 18th yr., 1035th mtg.: Dominican Republic, paras. 49-53; 1036th mtg.: President (France), paras. 147, 148, 150 and 151; Brazil, paras. 48 and 53; China, para. 129; Ghana, paras. 55 and 71; Haiti, paras. 17-19; Morocco, para. 132; Norway, paras. 114-116; Philippines, paras. 120 and 123; USSR, paras. 76-80; United Kingdom, para. 141; United States, para. 104; Venezuela, paras. 34 and 39-42.

the initiative to the regional organization. The two parties had indicated that they saw no objection to that procedure. The question would thus remain on the agenda of the Council.

e. *Complaint by the USSR (letter dated 1 May 1965): Security Council resolution 203 (1965) of 14 May 1965*

28. By a letter dated 1 May 1965,²⁵ the representative of the USSR asked for an urgent meeting of the Security Council to consider the question of the armed intervention by the United States in the internal affairs of the Dominican Republic. The representative of the United States stated²⁶ that OAS was already dealing with the question.²⁷ Article 33 of the United Nations Charter stated that efforts should be made to find solutions first of all by peaceful means including "resort to regional agencies or arrangements". That did not derogate from the authority of the Security Council, but, in the light of the action already taken by OAS, the Council should permit the regional organization to deal with that regional problem.

29. During the debate it was stated that regional arrangements should be consistent with the principles and purposes of the United Nations. OAS could not use force without the authorization of the Security Council nor could it act in such a way as to impair the rights and obligations of States Members of the United Nations, not only because that was expressly laid down in article 10 of the Treaty of Rio de Janeiro but also because Article 103 of the United Nations Charter provided that, in the event of a conflict of obligations, Members' obligations under the Charter must prevail.²⁸

30. At the 1208th meeting on 14 May 1965, the representative of Jordan submitted a draft resolution co-sponsored by the Ivory Coast, Jordan and Malaysia, which called *inter alia* for a strict cease-fire. That draft resolution was adopted unanimously as resolution 203 (1965) of 14 May 1965.

f. *Report of the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*²⁹

31. At the 1966 session of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, during the discussion of the principle that States must settle their international disputes by peaceful means, specific reference was made to Article 103 in operative para-

graph 4 of a draft resolution submitted by Chile.³⁰ The paragraph in question read as follows:

"4. That, by virtue of Articles 52, paragraph 4, and 103 of the Charter of the United Nations, the right to have recourse to a regional agency in pursuit of a pacific settlement of a dispute does not preclude or diminish the right of any State to have recourse direct to the United Nations in defence of its rights."

32. In the part of the Special Committee's report concerning the decisions adopted by it, paragraph 4 of the Chilean draft resolution was mentioned among the proposals and amendments on which the Drafting Committee reached no consensus.³¹

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

a. *Complaint by Cuba (letter dated 8 August 1961)*

33. On 8 August 1961, Cuba requested the inclusion in the agenda of the General Assembly's sixteenth session of an item entitled "Threats to international peace and security arising from new plans of aggression and acts of intervention being executed by the Government of the United States of America against the Revolutionary Government of Cuba".³²

34. During the discussion in the First Committee at the resumed sixteenth session in February 1962, it was pointed out in connexion with the measures taken by OAS at Punta del Este³³ that the charter of OAS, signed at Bogota on 30 April 1948, had been established in full accordance with Article 52 of the United Nations Charter. But OAS had been devised to enable it to adopt specifically American solutions for international problems arising in the American continent. Thus, article 5 (d) of the charter of OAS declared that the solidarity of the American States required that their political organization be based on the effective exercise of representative democracy. Cuba having voluntarily rejected that system could, therefore, be excluded from OAS. Membership in OAS or in the United Nations was subject to specific conditions: but while OAS required its members to adopt a specific form of government, the United Nations imposed no such requirement.

35. It was recalled that the United Nations Charter was the paramount instrument of international law and that there could be no conflict between it and the charter of a regional organization: the laws of the regional organization must conform to those of the world Organization. Conflict could arise only if OAS took decisions likely to infringe the international law of the United Nations or took action fraught with danger to international peace and security.

36. It was also pointed out that if the aim pursued by OAS was sanctions, then the decisions of Punta

²⁵ S C, 20th yr., Suppl. for April-June 1965, p. 70, S/6316.

²⁶ S C, 20th yr., 1196th mtg., United States, paras. 57, 87 and 88.

²⁷ By a telegram dated 6 May 1965 (S/6333/Rev.1), the Assistant Secretary General of OAS had transmitted the text of a resolution adopted by the Tenth Meeting of Consultation of Ministers of Foreign Affairs on that day. Under that resolution, the Tenth Meeting had resolved *inter alia* to request Governments of its member States that were willing and capable of doing so to make contingents of their land, naval, air or police forces available to OAS, in order to form an inter-American force that would operate in the Dominican Republic under the authority of the Tenth Meeting of Consultation of Ministers.

²⁸ For text of relevant statements, see S C, 20th yr., 1196th mtg.: USSR, paras. 205 and 206; 1203rd mtg.: Cuba, paras. 33, 94 and 96.

²⁹ G A (XXI), Annexes, a.i. 87, A/6230.

³⁰ *Ibid.*, para. 160, in which the Chilean draft resolution (A/AC.125/L.26) is quoted in full.

³¹ *Ibid.*, para. 248. It should be noted that that proposal remained before the Special Committee and was discussed at its subsequent session.

³² G A (XVI), Annexes, a.i. 78, p. 1, A/4832 and Add. 1.

³³ Cuba's complaint was submitted prior to the adoption by OAS of the Punta del Este resolutions at the end of January 1962. While the debate took place in February 1962, it was mainly concerned with those new developments.

del Este were contrary to Article 52 of the United Nations Charter and were thus "incompatible" with the principles of that instrument, the provisions of which clearly took precedence over those of the charter of OAS, according to Article 103. Even by following an "appropriate procedure", a regional organization or one of its members could not adopt sanctions; only the United Nations had that prerogative. Moreover, while a club or an alliance of nations could make its own rules for its membership, all Members of the United Nations, of whatever regional organization they might be a member owed allegiance first and foremost to the United Nations Charter, which clearly prevailed over the rules of any regional organization. Article 52 of the United Nations Charter, which had its counterpart in article 102 of the charter of OAS, stated that principle unambiguously. The very terms of both instruments precluded any attempt to interpret the provisions of the charter of the regional organization as permitting the violation of obligations assumed under the Charter of the world Organization.³⁴

37. A draft resolution submitted in the Committee was not approved. Another submitted in plenary was rejected. They contained no reference to Article 103.³⁵

b. *Complaint by Cuba (letter dated 22 February 1962)*

38. In a letter dated 22 February 1962, addressed to the President of the Security Council,³⁶ the representative of Cuba stated that the United States had promoted the adoption of enforcement action within and outside OAS as a prelude to the large-scale invasion of Cuba. The measures taken by OAS at Punta del Este³⁷ were at variance *inter alia* with the United Nations Charter and had been adopted without the authorization of the Security Council. Their implementation had led to further violations of the United Nations Charter, including Article 53. The representative of Cuba, under Articles 34, 35 (1), 24 (1), 41, 52, 53 and 103 of the United Nations Charter, requested an immediate meeting of the Council to bring to an end the illegal action taken by the United States Government and thus to prevent the development

of a situation endangering international peace and security.

39. The Council considered the question of including the item in its agenda at its 991st meeting, on 27 February 1962. The inclusion of the item in the agenda was opposed by a number of representatives on the ground that the General Assembly had just disposed of a similar complaint by Cuba on 20 February 1962. There was therefore no valid justification for reopening the same debate in the Security Council. If the new Cuban complaint purported to seek a ruling on the relationship of the Security Council to actions taken by regional organizations, the Council had already taken a stand on such a matter by its decision of 9 September 1960,³⁸ in connexion with the action taken by OAS regarding the Dominican Republic. That resolution had simply taken note of the actions of OAS, indicating clearly that the approval or disapproval of the Council was neither necessary nor appropriate. Nothing had happened since September 1960 which would lead the Council to reverse its decision.

40. In support of the inclusion of the item in the agenda, it was contended *inter alia* that the Security Council must examine the resolutions adopted at Punta del Este (which constituted a new development) in order to ascertain their legality in the light of the United Nations Charter. The United States had made OAS take enforcement measures against Cuba which that organization was not entitled to carry out without the authorization of the Security Council, according to Article 53 (1) of the Charter. Those measures also violated Articles 52 and 2 (7) of the Charter, and therefore the decisions of Punta del Este were illegal under Article 103.

41. At the 991st meeting of the Security Council, on 27 February 1962, the provisional agenda was put to the vote and was not adopted, having failed to obtain the affirmative votes of seven members. There were 4 votes in favour, none against, with 7 abstentions.³⁹

c. *Complaint by Cuba (letter dated 8 March 1962) : Security Council decision of 23 March 1962*

42. In his letter dated 8 March 1962 to the President of the Security Council,⁴⁰ the representative of Cuba complained that certain resolutions and measures adopted at Punta del Este, Uruguay, by OAS violated the Charter of the United Nations. He asked that the Security Council request the International Court of Justice to give an advisory opinion on seven specific legal questions concerning the compatibility of the activities and actions of OAS with provisions of the United Nations Charter. The fifth of those questions read as follows:

"Whether the provisions of the Charter of the Organization of American States and of the Inter-American Treaty of Reciprocal Assistance are to be regarded as having precedence over the obli-

³⁴ For text of relevant statements, see G A (XVI), 1st Com., 1234th mtg.: Brazil, paras. 10, 11, 15 and 16; 1238th mtg.: Ghana, para. 33; 1239th mtg.: Mali, para. 10; 1240th mtg.: Ceylon, para. 30; 1241st mtg.: Morocco, paras. 2 and 10.

³⁵ G A (XVI), Annexes, a.i. 78, p. 7, A/C.1/L.309, reproduced in A/5090, para. 3; and p. 8, A/L.385/Rev.1.

³⁶ S C 17th yr., Suppl. for Jan.-March, pp. 82-84, S/5080.

³⁷ In a letter dated 31 January 1962 (S/5075), the Secretary General of OAS transmitted to the Secretary-General of the United Nations, for the information of the Security Council, the Final Act of the Eighth Meeting of Consultation of Ministers of Foreign Affairs of the American Republics held on 22-31 January 1962 at Punta del Este, Uruguay. The Final Act comprised nine resolutions. By resolution VII, the Government of Cuba was excluded immediately from the Inter-American Defense Board, while resolution VI stated that the Government of Cuba had voluntarily placed itself outside the Inter-American system since it had officially identified itself as a Marxist-Leninist Government, which was incompatible with the principles and objectives of the Inter-American System. Furthermore, by resolution VIII it was decided to suspend immediately trade with Cuba in arms and other implements of war, and the Council of the OAS was charged with studying the feasibility and desirability of extending the suspension of trade to other items (see G A (XVII), Suppl. No. 2, p. 51).

³⁸ S C, resolution 156 (1960).

³⁹ For text of relevant statements, see S C, 17th yr., 991st mtg.: Chile, para. 18; Ghana, paras. 23 and 24; Romania, paras. 70-80; USSR, paras. 30-34, 46-48, 131; United Kingdom, paras. 3-11; United States, paras. 97-99.

⁴⁰ S C, 17th yr., Suppl. for Jan.-March, p. 88, S/5086.

gations of Member States under the Charter of the United Nations."

According to the terms of that letter, the Revolutionary Government of Cuba requested an immediate meeting of the Security Council and stated that it made that request under Articles 34, 35 (1) and 96 of the Charter of the United Nations and that it invoked also Articles 24 (1), 40, 41, 52, 53 and 103.

43. The debates⁴¹ were mostly concerned with the compatibility or lack of it between the actions taken by OAS against Cuba (especially Cuba's expulsion from the OAS and the decisions to cease trade with that country) and Articles 52, 53 and 41 of the United Nations Charter. The discussions bore particularly on the questions whether the actions taken by the OAS were enforcement actions in the sense of Article 53 and whether such actions taken under a regional arrangement such as OAS should have been taken without prior authorization of the Security Council.

44. During the debate, Article 103 was specifically mentioned in connexion with article 102 of the charter of OAS,⁴² which, it was stated, embodied the same principle as Article 52 of the United Nations Charter, namely, that regional agencies might be established on condition that their activities were "consistent with the Purposes and Principles of the United Nations". Article 10 of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro in 1947,⁴³ had been drawn up in the same spirit. The United Nations Charter was specific as regards both the rights and the obligations of Members, it was said. Any confusion or doubt in that respect was removed by the provisions of Article 103. The resolutions adopted at Punta del Este could not be reconciled with the principles set forth in Articles 1 and 2 and the explicit provisions of Article 2 (7) and Articles 41, 52, 53 and 103 of the Charter; they were indeed mutually exclusive. In the last analysis, clear limitations had been imposed on the competence of regional agencies by the Charter, particularly by the provisions of Articles 52, 53 and 103.⁴⁴

45. The draft resolution originally transmitted by the representative of Cuba by a letter dated 19 March 1962,⁴⁵ under which the Council would have requested an advisory opinion of the International Court of Justice on certain legal questions, as indicated in paragraph 42 above, was rejected by 7 votes to 2, with 1 abstention (one member did not take part in the vote) at the 998th meeting of the Council on 23 March 1962.⁴⁶

⁴¹ For a detailed summary of these debates, see case 27 of Chapter XII of *Repertoire of the Practice of the Security Council*, Suppl. 1959-1963, p. 320.

⁴² Article 102 of the OAS charter reads as follows: "None of the provisions of this Charter shall be construed as impairing the rights and obligations of the member States under the Charter of the United Nations" (United Nations, *Treaty Series*, vol. 119 (1952), I, No. 1609).

⁴³ *Ibid.*, vol. 21 (1948), No. 324 (a), p. 78.

⁴⁴ S C, 17th yr., 996th mtg.: Romania, paras. 9-12 and 28; Ghana, para. 90.

⁴⁵ S C, 17th yr., Suppl. for Jan.-March, p. 96, S/5095.

⁴⁶ S C, 17th yr., 998th mtg., para. 158.

d. *Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*

46. In the course of the discussions of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States at its session held in Mexico City from 27 August to 1 October 1964, reference was made to Article 103 in connexion with the use of force on the decision of a regional agency. In its report to the General Assembly, the Special Committee noted that a number of representatives had expressly supported the view that the Special Committee should mention among the legal uses of force the measures which regional agencies might take under Chapter VIII of the Charter. In that respect, it was stated that certain regional agreements, such as the Inter-American Treaty of Reciprocal Assistance, which provided for the use of force by regional agencies, were fully consonant with the Charter, and their validity had not been challenged; neither did the Security Council ever question the rights of regional agencies in that respect. Other representatives, however, formulated some reservations about express mention of the use of force by regional agencies, unless strictly circumscribed and so worded as not to weaken the powers of the Security Council. In that connexion, it was stated that any decision by a regional organization to use coercive measures or force against a Member of the United Nations, without the authorization of the Security Council, would be a breach of the Charter and illegal. Members of the United Nations supporting such a decision would furthermore be acting in contravention of Article 103, which laid down that obligations under the Charter prevailed over obligations under any other international agreement.⁴⁷

B. Compatibility between international treaties and the Charter

1. QUESTION OF SOUTHERN RHODESIA: GENERAL ASSEMBLY RESOLUTION 1889 (XVIII) OF 6 NOVEMBER 1963

47. Prior to the adoption of resolution 1889 (XVIII), the General Assembly had adopted *inter alia* resolution 1747 (XVI) on 28 June 1962 whereby it declared that Southern Rhodesia was a Non-Self-Governing Territory. In two subsequent resolutions—resolution 1760 (XVII) of 31 October 1962 and resolution 1883 (XVIII) of 14 October 1963—the General Assembly had requested the United Kingdom to suspend immediately the enforcement of the Southern Rhodesian Constitution of 6 December 1961, which frustrated the will and the rights of the majority of the people, and not to transfer to its colony any of the attributes of sovereignty.

48. During the discussion of the question of Southern Rhodesia by the Fourth Committee at the eighteenth session of the General Assembly, the represen-

⁴⁷ G A (XX), Annexes, a.i. 90 and 94, A/5746, paras. 77-79.

tative of the United Kingdom reiterated that his Government did not accept that Southern Rhodesia was a Non-Self-Governing Territory, since it had become self-governing forty years previously. As a result of Northern Rhodesia's and Nyasaland's claim of their right to secede from the Federation of Rhodesia and Nyasaland, the latter had been dissolved in 1963. General agreement had been reached on procedures for the orderly dissolution of the Federation. The decision to revert to the three Territories the control of the armed forces contributed by them to the Federation had been approved by the elected representatives of Northern Rhodesia, and no objection was raised by the Nyasaland Government. Meanwhile, the Southern Rhodesian government had stated its desire for independence. That Territory had been a fully self-governing colony so far as internal affairs were concerned when it had joined the Federation and would have the same status when the Federation was dissolved.

49. During the debate, it was observed that the United Kingdom, which, pursuant to Article 73 e of the Charter, was obliged to transmit information to the United Nations concerning Southern Rhodesia, had refused to do so on the ground that a certain parliamentary convention agreed on by it and Southern Rhodesia precluded such a procedure. But the United Nations had determined Southern Rhodesia to be a Non-Self-Governing Territory, and the majority of Member States held that the acceptance of the competence of the Organization to make such a determination was an obligation which the United Kingdom could not evade. Indeed, Article 103 prevented the United Kingdom from taking shelter behind a so-called parliamentary convention of doubtful origin to evade the obligations it had assumed under the Charter.

50. With respect to that convention, whereby the United Kingdom had delegated to the Southern Rhodesian government the power to legislate in internal matters such as public order, finance, public health, education, etc., it was pointed out that it could not be extended to include matters which, like those connected with political advancement towards self-government, were governed by international law. Therefore, according to the principle that *nemo dat quod non habet*, such matters could not be the subject of any agreement or negotiation, let alone delegation.

51. Moreover, if, as the United Kingdom contended, Southern Rhodesia possessed *de facto* a certain type of international personality, the so-called constitutional convention would actually constitute a kind of agreement between two subjects of international law and would, consequently, come within the meaning of Article 103 of the Charter.⁴⁸ Consequently, the

specific obligation which emerged from Chapter XI and, in particular, the duty to help colonial peoples to attain a full measure of self-government must prevail over any other treaty, pact, convention or agreement, whether tacit or explicit, concluded before or after 1945.⁴⁹

52. On 6 November 1963, the General Assembly adopted resolution 1889 (XVIII). In that resolution, the Assembly, after having recalled that the settler minority government of Southern Rhodesia had requested the United Kingdom to grant independence to the Territory under the 1961 Constitution, the abrogation of which had been requested by the General Assembly, decided *inter alia* to invite once more the Government of the United Kingdom to hold without delay a constitutional conference in Southern Rhodesia with a view to making constitutional arrangements for independence, on the basis of universal suffrage. The draft resolution was adopted by 73 votes to 2, with 19 abstentions.

2. SITUATION CONCERNING THE TERRITORIES UNDER PORTUGUESE ADMINISTRATION: DECISIONS OF THE FOURTH COMMITTEE OF 24 NOVEMBER 1963 CONCERNING MR. H. GALVÃO'S REQUEST FOR A HEARING

53. During the consideration of the report of the Special Committee on Decolonization on the situation concerning Territories under Portuguese administration, the Fourth Committee received a request from Mr. H. Galvão for a hearing. In that connexion, the representative of the United States noted that the Portuguese Government sought custody of Mr. Galvão with respect to certain serious charges, some of which might perhaps come within the terms of the Extradition Convention of 7 May 1908 between Portugal and the United States. Although the latter was prepared to comply fully with its obligations under the Headquarters Agreement,⁵⁰ that is, it would take steps to enable Mr. Galvão to travel to and from the Headquarters District, the Portuguese Government might well initiate proceedings in the United States courts for the extradition of Mr. Galvão, who had no immunity from legal process under the Headquarters Agreement, and the United States had no choice but to comply with its legal obligations under the extradition convention. A representative pointed out that, under Chapter XVI of the Charter, the obligations of the United Nations to a petitioner should prevail over any obligation of the host country.⁵¹

54. At the request of the Fourth Committee, the United Nations Office of Legal Affairs submitted an opinion on the legal implications of the possible appeal

⁴⁸ In the separate opinion of Judge Jessup appended to the judgement of the International Court of Justice in the South West Africa Cases of 21 December 1962, Judge Jessup, in examining the legal nature of a League of Nations mandate, considered the meaning and interpretation of such terms as "treaty", "convention" and "international agreement" and compared the terminology used in Articles 80, 102 and 103 of the Charter, Articles 35 (2), 36, 37 and 38 (1) (a) of the Statute of the International Court of Justice and Article 18 of the Covenant of the League of Nations. In that connexion, Judge Jessup observed *inter alia* that: "Article 103 of the Charter uses merely the expression 'international agreement' but there appears to be no reason to interpret

this Article as excluding any treaty, convention, accord, or other type of international engagement or undertaking . . ." (South West Africa Cases (Ethiopia v. South Africa; Liberia, v. South Africa), Preliminary Objections, Judgment of 21 December 1962; I C J Reports 1962, pp. 387 *et seq.*, especially pp. 406 and 407).

⁴⁹ For text of relevant statements see G A (XVII), 4th Com., 1355th mtg.: Ceylon, paras. 56 and 57; G A (XVIII), 4th Com., 1434th mtg.: Ghana, paras. 18 and 19; Tanganyika, para. 23; United Kingdom, paras. 7-11; 1436th mtg.: India, para. 49; 1437th mtg.: Syria, para. 17; 1438th mtg.: Cambodia, paras 6 and 7; 1440th mtg.: Uruguay, paras. 17 and 19-24.

⁵⁰ G A resolution 169 (II).

⁵¹ G A (XVIII), 4th Com., 1475th mtg.: Ghana, para. 17.

rance of Mr. Galvão before the Committee.⁵² After an examination of the legal status of an individual invited to the Headquarters,⁵³ the Legal Office pointed out that, in their opinion, with respect to the scope of Article 103 of the Charter, such rights as inured to Mr. Galvão stemmed directly from the Headquarters Agreement and not from the Charter, which did not cover invitees.

55. In the course of the ensuing debate, it was stated that in the opinion of the Legal Counsel the legal status of an individual was the essence of the question, whereas the real issue was of a general character, namely, to determine whether, by failing to give the petitioner immunity from arrest, the United States would not impede the application of the Charter and prevent the United Nations from fulfilling its purposes and functions. No attempt to avoid complying with the provisions of the Charter could be justified even by invoking obligations under other international instruments. That was clearly specified in Article 103 of the Charter. Since the primary purpose of the Headquarters Agreement, as set out in its section 27, was not to define the legal status of individuals but "to enable the United Nations, at its Headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfil its purposes", the position of the United States was contrary to that provision and to the Agreement itself. Permitting extradition proceedings against Mr. Galvão would therefore amount, on the part of the United States, to a violation of its obligations under the Headquarters Agreement and also under the Charter.

56. It was further pointed out that whereas the Legal Counsel's opinion stated that the rights of invitees stemmed from the Headquarters Agreement and not from the Charter, it was clear that the Agreement itself was based on the Charter and should be considered in the light of Chapter XVI of the Charter, Articles 102-105.

57. Conceding that the Headquarters Agreement, strictly speaking, was not part of the Charter, a representative suggested, however, that the words "obligations under the present Charter" in Article 103 need not be given the same narrow meaning as the words "obligations under any of the provisions of the Charter". While invitations to petitioners did not fall under any of the provisions of the Charter, the General Assembly, the Fourth Committee and various special committees had recognized that the hearing of petitioners constituted part of the Organization's rights, duties and functions under Chapters XI and XII of the Charter. Section 11 of the Headquarters Agreement was sufficiently wide in scope to enable the United States to give immunity from arrest to petitioners, notwithstanding the extradition convention with Portugal in view of the provisions of Article 103.

58. It was also pointed out that the principle that the Charter overrode the extradition convention applied equally to Portugal which as a Member State was under an obligation not to obstruct the functions

of the United Nations by instituting proceedings against a person invited to address a United Nations body.

59. The representative of the United States in his concluding remarks noted that his Government was prepared to discuss with the Secretary-General the problem of persons invited by the United Nations and to consider what measures could be found to give them protection and immunity, during a brief stay at the Headquarters, from legal process in respect of matters arising prior to their arrival in the United States on the invitation of the United Nations.⁵⁴

60. At the 1481st meeting on 14 November 1963, the Chairman of the Fourth Committee, summing up the discussion, stated that the consensus appeared to be that the Secretary-General should be requested to take the necessary action with the United States Government with a view to ensuring that petitioners coming to the United States for the purpose of testifying before a Committee should enjoy the necessary protection. The Fourth Committee decided to convey that conclusion to the Secretary-General and to request him to take such action.⁵⁵ Then the Chairman invited the Committee to vote on Mr. Galvão's request for a hearing. The Committee decided by 49 votes to 4, with 41 abstentions, to grant that request.⁵⁶

3. COMPLAINT OF YEMEN (LETTER DATED 1 APRIL 1964):⁵⁷ SECURITY COUNCIL RESOLUTION 188 (1964) OF 9 APRIL 1964

61. In reply to Yemen's complaint concerning continuous British acts of aggression, culminating in an air attack against Harib Fort on 28 March 1964, the representative of the United Kingdom asserted that it was the Federation of South Arabia that had been the victim of aggression on the part of Yemen and that the British Government was by treaty responsible for the defence of the Federation and thus had an obligation to assist it in protecting its territory from external aggression and encroachment. The action had not been retaliation or a reprisal but a legitimate action of a defensive nature authorized by the Charter, taken in response to an urgent request from the Federation that the United Kingdom fulfil its treaty obligations and preserve the Federation's territorial integrity.

62. In reply to the statement made by the representative of the United Kingdom, it was maintained that the so-called "defensive response" undertaken by the United Kingdom was in fact a retaliatory action and that the Security Council had already rejected the lawfulness of such a type of action. Moreover, the policy of retaliation flagrantly contradicted the Purposes and Principles of the United Nations Charter. Assum-

⁵² For text of relevant statements, see G A (XVIII), 4th Com., 1475th mtg.: United States, paras. 2-4; 1479th mtg.: Ghana, para. 27; USSR, paras. 11-18; United Arab Republic, paras. 2-5; 1480th mtg.: Ceylon, paras. 40-44; Cuba, para. 50; Syria, paras. 10 and 11; 1481st mtg.: Liberia, para. 27; Togo, para. 1; United States, para. 52.

⁵³ G A (XVIII), 4th Com., 1481st mtg., para. 53.

⁵⁴ *Ibid.*, para. 79. See also this Supplement under Article 73.

⁵⁵ S C, 19th yr., Suppl. for April-June 1964, p. 1, S/5635.

⁵² G A (XVIII), Annexes, a.i. 23, A/C.4/621, paras. 1, 3, 4, 6, 7 and 12.

⁵³ See this Supplement under Articles 104 and 105.

ing that the provisions of the treaties linking the United Kingdom with the component parts of the Federation had been valid at the time when those treaties were made, the obligations then contracted by the United Kingdom were no longer valid in the light of the provisions of the Charter, since under that instrument one must be a Member State to be able to invoke the provisions of Article 51, and it had been adequately proved that the Federation was not a State.⁶³ Moreover, under the terms of Article 103, the obligations assumed by the United Kingdom under the Charter must prevail over the obligations assumed by the United Kingdom under those so-called treaties whose validity had been at any rate contested on a number of occasions. Actually, the situation was a typical colonial case; the British action was an attempt by a colonial Power to protect its overseas Territories. The so-called treaties and obligations invoked by the United Kingdom had no longer any validity either intrinsically or under the provisions of Article 103.⁶⁴

63. At the 1111th meeting, on 9 April 1964, the Security Council adopted by 9 votes to none, with 2 abstentions as resolution 188 (1964) a draft resolution submitted by the Ivory Coast and Morocco, whereby the Council *inter alia* condemned reprisals as incompatible with the purposes and Principles of the United Nations, deplored the British action of 28 March 1964 and deplored all attacks and incidents which had occurred in the area.

4. COMPLAINT BY CYPRUS (LETTER DATED 26 DECEMBER 1963): SECURITY COUNCIL RESOLUTIONS OF 4 MARCH, 13 MARCH, 20 JUNE, 9 AUGUST, 25 SEPTEMBER, 18 DECEMBER 1964; 19 MARCH, 15 JUNE, 10 AUGUST, 17 DECEMBER 1965; AND 16 MARCH, 16 JUNE 1966

64. The initial complaint of Cyprus against Turkey was submitted to the Security Council on 26 December 1963⁶⁵ and was concerned with Turkey's alleged "acts of aggression" and "intervention in the internal affairs of Cyprus" by the threat or use of force against Cyprus' territorial integrity and political independence. The question of Cyprus was considered by the Security Council a number of times during the period under review, either at the request of Cyprus itself or as a result of the submission of reports by the Secretary-General, mainly to consider the maintenance in Cyprus for successive additional periods of time of the United Nations Peace-keeping Force which the Council had decided to establish by its resolution 186 (1964) of 4 March 1964. The Security Council adopted a series of resolutions in most of which it reaffirmed its prior resolutions, called on Member States and the parties

concerned to comply with them, took note of the Secretary-General's reports and extended the stationing in Cyprus of the United Nations Peace-keeping Force for additional periods of time.⁶⁶ During the debates references were made to the following international treaties signed at Nicosia on 16 August 1960: the Treaty of Guarantee, the Treaty concerning the Establishment of the Republic of Cyprus, and the Treaty of Alliance between the Kingdom of Greece, the Republic of Turkey and the Republic of Cyprus.⁶⁷ Allusions were also made to the London and Zurich agreements concerning Cyprus.⁶⁸ In article I of the Treaty of Guarantee, Cyprus undertook to maintain its own territorial integrity and independence, and to prohibit any activity likely to bring about its union with another State or its partition. In article II, Greece, Turkey and the United Kingdom recognized and guaranteed Cyprus's independence, territorial integrity and security and also the state of affairs established by the basic articles of Cyprus's Constitution; they undertook the same obligation as Cyprus with regard to its union with another State or partition. Article IV, to which references were often made, read as follows:

"In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.

"In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty."

65. In the course of the debates, the representative of Turkey maintained that his Government as one of the co-signers of the London Agreement of 1959 and the Treaty of Guarantee of 1960 could not be disinterested in the fact that Turks were being massacred in Cyprus.

66. It was also contended that, under the Treaty of Guarantee, each of the guaranteeing Powers would, in the event of impossibility of concerted action by them, have the right to take individual action with the aim of re-establishing the state of affairs established by the Treaty.

67. The representative of Cyprus stated that if the Treaty of Guarantee could be interpreted as giving Turkey or any other country the right to use force in Cyprus, then the Treaty itself should be considered as invalid under Article 103 of the Charter; but actually

⁶³ By resolution 1949 (XVIII), the General Assembly reaffirmed the right of the peoples of the Territory of Aden to self-determination.

⁶⁴ For text of relevant statements, see S C, 19th yr., 1106th mtg.: Iraq, paras. 64, 68 and 69; USSR, para. 78; United Kingdom, paras. 34, 35, 51 and 57; Yemen, paras. 12-14 and 32; 1108th mtg.: Syria, para. 22; 1109th mtg.: Syria, paras. 76-82; United Kingdom, paras. 14 and 15. See also *Repertoire of the Practice of the Security Council*, Suppl. 1964-65, case 11, p. 220.

⁶⁵ S C, 18th yr., Suppl. for Oct.-Dec., 1963, p. 112, S/5488.

⁶⁶ S C resolutions 187 (1964), 192 (1964), 193 (1964), 194 (1964), 198 (1964), 201 (1965), 206 (1965), 207 (1965), 219 (1965) and 220 (1966). The last resolution adopted during the period under review was resolution 222 (1966) of 16 June 1966.

⁶⁷ See United Nations, *Treaty Series*, vol. 382 (1960), Nos. 5475 and 5476, pp. 3 and 8; and vol. 397 (1971), No. 5712, p. 287, respectively.

⁶⁸ After the Agreement concluded at the London Conference on Cyprus on 19 February 1959 (Her Majesty's Stationery Office — Miscellaneous No. 4 1959, CMND 679) and in accordance with measures agreed to at that Conference, action was taken both in Cyprus and in London to prepare for the transfer of sovereignty (*ibid.*, CMND 1093, July 1960) and for the conclusion of the treaties signed at Nicosia on 16 August 1960.

the Treaty did not give Turkey, or any other guarantor State, the right to interfere and destroy the independence and integrity of Cyprus which the guarantor States were supposed to guarantee. In conformity with Article 103, the representations and measures provided for in the Treaty of Guarantee must be peaceful measures, including recourse to the Security Council or to the General Assembly, not the use or the threat of use of force.

68. In the view of some members of the Council, a pretext had been advanced on the basis of the Zurich and London agreements for interference in Cyprus by a foreign Power and for restricting the sovereignty of the Republic of Cyprus. But if in any of the Treaties with regard to Cyprus there was, in the view of any of its parties, a limitation to the independence and the sovereignty of Cyprus, then such a treaty would not be valid. Furthermore, Member States were subject to the obligations under the United Nations Charter of which the provisions of Article 103 and, in particular, Article 2, paragraphs 1, 3, 4 and 7, were relevant. The obligations to refrain in international relations from the threat or use of force and not to interfere in the internal affairs of other States actually nullified the obligations and rights emanating from sources other than the Charter. Therefore, under Article 103, no international agreement could legalize something which was illegal under the terms of the Charter.

69. The representative of Turkey pointed out that should there be a conflict between the treaties regarding Cyprus and Article 103 of the Charter, the proper resort for testing the validity of any treaty was not the Security Council but the many judicial organs and instances available to Member States. Moreover, the treaties with regard to Cyprus had been registered with the United Nations under Article 102 of the Charter, and no one at the time of such registration, certainly not Cyprus, had ever thought of raising the question of a conflict under Article 103.

70. It was pointed out by another representative that the Treaty of Guarantee constituted an integral part of the organic arrangements that established the Republic of Cyprus and assured its independence, territorial integrity and security as well as respect for its Constitution. The Treaty could not be abrogated, invalidated or modified by the Security Council but only by agreement of all of the signatories themselves or in accordance with its terms.

71. The representative of Cyprus reiterated that if article IV of the Treaty of Guarantee was to be interpreted as giving the guarantors the right to intervene in Cyprus by force, then that article would itself become void by virtue of Article 103 of the Charter as being contrary to the prohibition against the use of force laid down in Article 2 (4) of the Charter. No departure from that principle could be permitted by treaty or otherwise; the use of armed force was not any less unjustifiable if it was allegedly for the purpose of maintaining any given constitutional system. Among other reasons, because of the fact that the prohibition of the use of force was absolute under the Charter, the Treaty of Guarantee did not exist so far as Cyprus was concerned. Finally, with respect to the matter of interpretation of article IV of the Treaty of Guarantee

and of Article 103 of the Charter, the International Court of Justice was not required to look into it, since Article 103, one of the clearest provisions of the Charter, prescribed that the obligations under the Charter prevailed over the obligations under international agreements. If it were true that the Security Council or the General Assembly had no authority to denounce or invalidate treaties, it must also be agreed that those organs could have no authority to sanction or confirm them.⁶⁴

72. The basic resolution adopted by the Security Council on the question was resolution 186 (1964). Its main provisions with respect to the obligations of the parties and of Member States, either under the international treaties concerned or the Charter, were in the second and third preambular paragraphs and in operative paragraphs 1, 2 and 4. After having considered the positions taken by the parties in relation to the treaties signed at Nicosia on 16 August 1960 and having recalled the relevant provisions of the Charter, and in particular Article 2 (4), concerning the prohibition of the threat or use of force in international relations, the Council called on all Member States, in conformity with their obligations under the Charter, to refrain from any action or threat of action likely to worsen the situation in the sovereign Republic of Cyprus or to endanger international peace; asked the Government of Cyprus, which was responsible for maintaining law and order, to take all additional measures to stop violence and bloodshed in Cyprus and recommended establishment with the consent of Cyprus of a United Nations Peace-keeping Force in Cyprus.

5. THE SITUATION IN THE REPUBLIC OF THE CONGO: SECURITY COUNCIL RESOLUTION 161 (1961) OF 21 FEBRUARY 1961

73. Under resolutions 143 (1960) of 14 July 1960 and 145 (1960) of 22 July 1960, the Security Council called on Belgium to withdraw its troops from the Congo. By resolution 146 (1960) of 9 August 1960, the Council *inter alia* called on Belgium to withdraw its troops from the province of Katanga, and called on all Member States, in accordance with Articles 25 and 49 of the Charter, to accept and carry out the decisions of the Council. On 21 February 1961, by resolution 161 (1961), the Council urged that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries. It also reaffirmed its previous decisions and those adopted by the General Assembly.

⁶⁴ For text of relevant statements, see S C, 18th yr., 1085th mtg.: Cyprus, paras. 6, 16, 19 and 61-65; Turkey, paras. 38-43; S C, 19th yr., 1095th mtg.: Cyprus, para. 99; Turkey, para. 191; United Kingdom, paras. 36-40; 1096th mtg.: USSR, paras. 41, 54 and 55; United States, para. 74; 1097th mtg.: Cyprus, paras. 137-139; Czechoslovakia, paras. 49 and 50; 1103rd mtg., Cyprus, paras. 33-35; S C, 20th yr., 1192nd mtg.: Cyprus, para. 68; 1193rd mtg.: Turkey, para. 33; 1234th mtg.: Cyprus, paras. 65 and 69; Turkey, paras. 123-126 and 137; 1235th mtg.: Cyprus, paras. 130 and 132-137.

74. On 22 February 1961, the Secretary-General, in a *note verbale* to the representative of Belgium,⁶⁵ pointed out that Council resolution 161 (1961), like the earlier resolutions on the Congo, must be regarded as a mandatory decision that all Member States were legally bound to accept and carry out in accordance with Article 25 of the Charter. The juridical consequence was that all Member States concerned were under a legal obligation to adapt their national legislation to the extent necessary to give effect to the decision of the Council. In view of the peremptory character of the Council's resolution, the Secretary-General stated that he must then request, in keeping with the responsibility imposed on him by the Council, that the Belgian Government take the steps called for by resolution 161 A (1961).

75. The representative of Belgium contended in a *note verbale* to the Secretary-General that Belgium's military forces had in fact been withdrawn from the Congo by the end of August 1960. As for the "political advisers", however, they had been chosen by the Congolese authorities from among a large number of Belgian agents made available to them for purposes of administrative assistance under article 250 of the Congolese *Loi fondamentale*, which had constitutional force and could be modified only by the Congolese authorities.⁶⁶

76. In his *note verbale* dated 2 March 1961 to the representative of Belgium, the Secretary-General stated, with respect to the views of the Belgian Government about foreign political advisers, that he was unable to accept the Government's contention that it was unable to control its nationals in such posts. He said:

"After consultations with his Advisory Committee, the Secretary-General maintains that bilateral arrangements for the placement of Belgian officials and agents under the provision of article 250 of the *Loi fondamentale* cannot override the obligations of Belgium under the peremptory decisions of the Security Council for the maintenance of international peace and security, calling for the withdrawal and evacuation of the Belgian nationals specified in the Security Council resolution. The applicability of Article 103 of the Charter in this respect will assuredly have been noted by the Government of Belgium."⁶⁷

Copies of that *note verbale* were sent by the Secretary-General to the President of the Republic of the Congo and by the Special Representative of the Secretary-General in the Congo to Mr. Tshombe.⁶⁸

⁶⁵ S C, 16th yr., Suppl. for Jan-March 1961, p. 178, S/4752, annex I.

⁶⁶ *Ibid.*, p. 180, S/4752, Annex II.

⁶⁷ *Ibid.*, p. 191, S/4752/Add.1.

⁶⁸ *Ibid.*, pp. 193 and 195, S/4752/Add.1, sections II and III. In a *note verbale* dated 4 March 1961, to the Secretary-General, the representative of Belgium repeated and stressed that, contrary to what the Secretary-General believed, the existing assignments of "political advisers" did not derive from bilateral arrangements between Belgium and the Congo but from the exercise of the free choice of agents by the Congolese authorities in conformity with article 250 of the *Loi fondamentale*. The Belgian Government, nevertheless, while fully respecting Congolese sovereignty, would use its best endeavours with the Congolese authorities to make them pay due regard to the Council's resolutions mentioned by the Secretary-General (*ibid.*, p. 198, S/4752/Add.2).

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

77. During the work of the International Law Commission and of the Sixth Committee of the General Assembly on the draft articles of the law of treaties, Article 103 of the Charter was commented on in connexion with the question of treaties conflicting with a peremptory norm of general international law (*jus cogens*), and also with the question of the application of successive treaties relating to the same subject-matter.

1. CONSIDERATION OF THE QUESTION BY THE SIXTH COMMITTEE (EIGHTEENTH SESSION)⁶⁹

78. During the consideration of the Report of the International Law Commission on the work of its fifteenth session,⁷⁰ it was stated that the Commission had taken an important step by recognizing the existence of peremptory norms of general international law. The Charter embodied several incontrovertible norms of public international law, such as the prohibition of the use of force in international relations and the obligation to respect fundamental human rights, and Article 103 had made those norms peremptory so far as the Member States were concerned. Thus the Charter, as a quasi-universal law-making instrument, had made the idea of *jus cogens* very much a reality of international law. Those remarks were made with reference to a draft article 37, reading as follows:

"A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."⁷¹

79. One representative considered that draft article 37 meant that a treaty which contained a provision contemplating, directly or by implication, the threat or use of force against the political independence or the territorial integrity of a State would have no validity. Thus, the only valid treaties were those which were in conformity with and did not contravene those principles and rules of international law which were in the nature of *jus cogens*. Unjust treaties, including those which, while ostensibly fair, were really instru-

⁶⁹ G A (XVIII), Annexes, a.i. 69; *ibid.*, 6th Com., 780th-793rd mtgs.

⁷⁰ G A (XVIII), Suppl. No. 9. The Session was held 6 May-12 July 1963.

⁷¹ That draft article became, after amendments, article 53 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969 (A/CNF.39/27 (mimeographed)). Article 53 read as follows:

"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."

ments of exploitation and economic subjugation, conflicted with the Preamble of the Charter and the Purposes and Principles of the United Nations, especially with Article 1 (2). Draft article 37 seemed completely in accordance with the principle embodied in Article 103 of the Charter.

80. Another point of view was that there was not yet any generally recognized criterion by which to identify a general rule of international law as having the character of *jus cogens*. The application of draft article 37 and the articles logically related to it might lead to difficulties. Thus, draft article 45, which stipulated that any existing treaty in conflict with a newly emerged peremptory norm of general international law became void and terminated⁷² also presented difficulties, as it would be difficult to determine when a new rule of law had become sufficiently established to be a peremptory rule. Article 103 of the Charter appeared to provide a more flexible and constructive solution in the event of a conflict between certain provisions of a treaty and a peremptory norm of international law.

81. A number of representatives emphasized the opinion already expressed that the United Nations Charter contained several incontestable norms of international public law and that Article 103 made those norms obligatory, at any rate for Member States.

82. It was pointed out that until the rule laid down in draft article 37 was adopted, Article 103 of the Charter constituted the most far-reaching text applicable to the question of conflict between a treaty and norms of international law. That Article had established the rule that there was a hierarchy of norms in international law and that the norms laid down in the Charter should in all cases prevail. But draft article 37 represented a substantial advance over Article 103 of the Charter, for it not only recognized the existence of peremptory norms of general international law, but also provided a penalty for derogation from such norms. Thus, in draft article 37, the principle of *jus cogens* had been established for the first time in a legal text as a basis for deciding the nullity of a treaty. Draft article 37 went further than Article 103 of the Charter also by clarifying the conditions governing the moral acceptability of treaties.⁷³

83. By resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended *inter alia* that the International Law Commission should continue the work of codification of the law of treaties.

⁷² That draft article, after amendments, became article 64 of the Vienna Convention on the Law of Treaties. It read as follows:

"Emergence of a new peremptory norm of general international law (*jus cogens*)"

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

⁷³ For text of relevant statements, see G A (XVIII), 6th Com., 781st mtg.: Netherlands, para. 2; 783rd mtg.: Cyprus, para. 18; 784th mtg.: Ukrainian SSR, paras. 8-13; 786th mtg.: United Kingdom, paras. 4 and 5; 791st mtg.: United Arab Republic, para. 16; 792nd mtg.: Morocco, para. 17; Uruguay, paras. 23 and 24.

2. CONSIDERATION OF THE QUESTION BY THE SIXTH COMMITTEE (TWENTIETH SESSION)

84. In the course of the discussion in the Sixth Committee of the Reports of the International Law Commission on the work of its sixteenth and seventeenth sessions,⁷⁴ it was recalled that some delegations had made reservations concerning the alleged supremacy of peremptory norms of general international law over other rules of law. In the absence of criteria to ascertain whether a rule of international law was a part of *jus cogens*, the application of such a concept would be difficult and hence disputable. The only principles that could be regarded without hesitation as having pre-eminence were those embodied in the Charter, but even in that case they derived their authority from conventional law.

85. Another view was that the prohibition of the threat or use of force, respect for the territorial integrity and political independence of States, the principle of the self-determination of peoples, the sovereign equality of States, the prohibition of intervention in the internal affairs of States, and respect for human rights and fundamental freedoms were peremptory rules, embodied in the Charter to which there could be no exceptions and which had acquired the character of *jus cogens* and the status of constitutional precepts. Consequently, the rule of *pacta sunt servanda* could not redeem an international agreement which violated the provisions of the Charter, since Article 103 stated that the obligations arising from the Charter should prevail over obligations assumed under any other international agreement. Article 103 clearly brought out the constitutional character of the Charter, the provisions of which should prevail over any international convention concluded before or after the Charter came into force, although some treaty experts considered that there were certain limitations to the application of the provisions of the Charter to treaties concluded between Members and non-members of the United Nations. A similar view was expressed in connexion with draft article 55⁷⁵ concerning the rule *pacta sunt servanda*. It was observed that, in interpreting that rule, one should bear in mind all the other provisions under which a treaty might not come into force, or might be invalidated or terminated, where it conflicted with a peremptory norm of general international law. That rule was in agreement with the rules laid down in Article 2 (2) of the Charter by which Member States were bound to fulfil in good faith the obligations they had assumed "in accordance with the present Charter". Thus, the duties imposed on the Members of the United Nations were subject to the condition that such obligations must have been assumed in accordance with the Charter. Consequen-

⁷⁴ G A (XIX), Suppl. No. 9; G A (XX), Suppl. No. 9. The sessions of the International Law Commission were held 11 May-24 July 1964 and 3 May-9 July 1965, respectively.

⁷⁵ That draft article became after amendment, article 26 of the Vienna Convention on the Law of Treaties. It read as follows:

"*Pacta sunt servanda*"

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

tly, a treaty could not come into force or establish obligations within the meaning either of draft article 55 or of Article 2 of the Charter, if it had been concluded under the threat or use of force or provided for the unlawful use of force, or contained provisions intended to deprive a State of its sovereignty or independence, for such provisions were incompatible with rules of general international law, as they were contrary to the principles laid down in the Charter.

86. The Chairman of the International Law Commission (ILC) at the seventeenth session pointed out to the Sixth Committee that the Commission's view, on the basis of Article 103 of the Charter, was that the principles of the Charter should prevail in the event of conflict with the rules of positive international law, not only as criteria for contractual obligations but also as sources of international law.⁷⁶

87. By resolution 2045 (XX) of 8 December 1965, the General Assembly recommended *inter alia* that the International Law Commission should continue the work of codification of the law of treaties.

3. CONSIDERATION BY THE SIXTH COMMITTEE (TWENTIETH SESSION) OF THE REPORT OF THE SPECIAL COMMITTEE ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES⁷⁷

88. The Sixth Committee examined at the twentieth session of the General Assembly the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States on its work during the session it held in Mexico City from 27 August to 1 October 1964.⁷⁸ By resolution 1966 (XVIII), the Assembly had decided *inter alia* to study three principles of international law, one of which was "the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter".

89. During the debate in the Sixth Committee, that principle was examined in connexion with the application of the United Nations Charter, particularly of Article 2 (2) and also of the third paragraph of the Preamble. In considering the scope of that principle, some representatives spoke mainly of the legal obligations directly imposed by the Charter and of the obligations flowing from the operation of United Nations organs. Others saw the principle as applying to treaty obligations in general, and the question was raised whether it also applied to obligations deriving from rules of customary international law.

90. Several representatives stressed that the only obligations covered by the principle were those which were freely entered into and were compatible with the Charter and with international law. The place to be given to the Charter in the formulation of that principle was laid down in Article 103. In view of the

provision that obligations assumed by Member States under the Charter prevailed over their obligations under any other international agreement, due recognition must be given to the criterion of the legality of the obligations assumed by States under international agreements. It must even be asked if, in the declaration of that principle, the pre-eminent part played by the Charter referred solely to the obligations assumed under international agreements or whether it should be extended to the other obligations of States derived from customary rules and other sources of international law.

91. It was observed that the rule *pacta sunt servanda* could apply only in the context of the provisions of the Charter. The obligations arising from treaties which conflicted with obligations under the Charter, such as, for example, obligations sanctioning aggression, colonial domination or inequality among States, unequal treaties, treaties imposed by force or fraud, or treaties lawfully terminated, would not be covered by the principle of good faith. Similarly, treaties purporting to establish a right of intervention by one State in the internal affairs of another State would be null and void by virtue of Article 103 because such treaties would conflict with three cardinal principles of the Charter, namely, the sovereign equality of States, non-intervention and the prohibition of the threat or use of force. The development and codification of the principle laid down in Article 2 (2) of the Charter required a binding legal interpretation of Article 103.⁷⁹

92. At its 1404th plenary meeting, on 20 December 1965, the General Assembly adopted resolution 2103 (XX) under which it requested the Special Committee *inter alia* to consider further the three principles set forth in paragraph 5 of General Assembly resolution 1966 (XVIII), among which was the principle of good faith laid down in Article 2 (2) of the Charter.

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

1. REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTEENTH SESSION (11 MAY-24 JULY 1964)⁸⁰

93. At the sixteenth session of the International Law Commission, its Special Rapporteur submitted a report on the application, effects, revision and interpretation of treaties. The Commission considered the report and adopted provisional drafts of articles for a law of treaties on those topics, with commentaries on each of the draft articles from 55 to 73. Draft article 63, paragraph 1, adopted by the Commission read as follows:

"Application of treaties having incompatible provisions"

⁷⁶ For text of relevant statements, see G A (XX), 6th Com., 847th mtg.: Cyprus, paras. 34-36; 849th mtg.: Ecuador, para. 37; France, para. 21; 851st mtg.: Chairman of the ILC, para. 29.

⁷⁷ The Special Committee was established by General Assembly resolution 1966 (XVIII) of 16 December 1963.

⁷⁸ G A (XX), Annexes, a.i. 90 and 94, A/5746.

⁷⁹ For text of relevant statements, see G A (XX), 6th Com., 875th mtg.: Yugoslavia, para. 31; 891st mtg.: Ecuador, para. 55; 892nd mtg.: Cyprus, paras. 7-20; G A (XX), Annexes, a.i. 90 and 94, A/6165, paras. 2 and 62-65.

⁸⁰ G A (XIX), Suppl. No. 9.

"1. Subject to Article 103 of the Charter of the United Nations the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs."⁹¹

In the commentaries made by the Commission on draft article 63, attention was called to the difference between the case of a conflict between a treaty with a rule of *jus cogens*, which was an independent principle governed by the provisions of draft articles 37 and 45,⁹² and the fact that a treaty was incompatible with the provisions of an earlier treaty binding on some of the parties thereto. The latter case raised primarily questions of priority of application rather than of validity. Mention was made also of clauses found in certain treaties claiming priority for their provisions over those of any other treaty. A case in point was Article 103 of the Charter.

94. The Commission noted that in the discussion which had taken place in 1963 it had been suggested that the overriding character of Article 103 should find expression in draft article 63 of the law of treaties. Without prejudging in any way the interpretation of Article 103 or its application by the competent organs of the United Nations, the Commission decided to recognize in draft article 63 the overriding character of Article 103 with respect to any treaty obligations of Members, and paragraph 1 of that draft article, accordingly, provided that the rules laid down in the draft article for regulating the obligations of States parties to successive treaties which were incompatible with one another were subject to Article 103.⁹³

2. REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS EIGHTEENTH SESSION (4 MAY-19 JULY 1966)

95. In the commentary made by the Commission on draft article 26,⁹⁴ express reference was made *inter alia* to the overriding application of Article 103 of the

Charter in the determination of the rights and obligations of States parties to successive treaties relating to the same subject-matter.

96. It should be borne in mind that the rules set out in the text of the provision as provisionally adopted in 1964⁹⁵ were formulated in terms of the priority of application of treaties having incompatible provisions and that, on re-examining the article at its eighteenth session, the Commission felt that, although the rules might have particular importance in cases of incompatibility, they should be stated more generally in terms of the application of successive treaties relating to the same subject-matter.

97. Referring to the existence of clauses which were not infrequently contained in treaties with a view to regulating "the relation between the provisions of the treaty and those of another treaty relating to the matters with which the treaty deals", the Commission commented *inter alia* as follows:

"(3) Pre-eminent among such clauses is Article 103 of the Charter of the United Nations which provides: '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 precise effect of the provision in the relations between Members of the United Nations and non-member States may not be entirely clear. But the position of the Charter of the United Nations in modern international law is of such importance, and the States Members of the United Nations constitute so large a part of the international community, that it appeared to the Commission to be essential to give Article 103 of the Charter special mention and a special place in the present article. Therefore, without prejudging in any way the interpretation of Article 103 or its application by the competent organs of the United Nations, it decided to recognize the overriding character of Article 103 of the Charter with respect to any treaty obligations of Members. Paragraph 1 accordingly provides that the rules laid down in the present article for regulating the obligations of parties to successive treaties are subject to Article 103 of the Charter."⁹⁶

⁹¹ Draft article 63, paragraph 1, became, after amendments, article 30, paragraph 1, of the Vienna Convention on the Law of Treaties. It read as follows:

"Application of successive treaties relating to the same subject-matter"

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

⁹² For text of draft article 37, see para. 78 above. Draft article 45 became, after amendments, article 64 of the Vienna Convention. For text of article 64, see foot-note 72 above.

⁹³ G A (XIX), Suppl. No. 9, paras. 2 and 5.

⁹⁴ In the 1964 draft that article was numbered 63. Draft article 26 became article 30 of the Vienna Convention. For text of draft article 63(1) and article 30(1) of the Convention, see, respectively, para. 93 and foot-note 81 above.

⁹⁵ See para. 93 above.

⁹⁶ G A (XXI), Suppl. No. 9, p. 45, paras. (1)-(3). At its 892nd meeting on 18 July 1966, the International Law Commission decided to recommend that the General Assembly convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties (adopted by the Commission at its 893rd meeting on 18 July 1966) and to conclude a convention on that subject (*ibid.*, p. 10, paras. 36-38). By its resolution 2166 (XXI) adopted on 5 December 1966, the General Assembly decided to convene a conference of plenipotentiaries in accordance with the Commission's recommendation.