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VIENNA CONVENTION ON THE LAW OF TREATIES

*Eberhard P. Deutsch**

At its opening session in 1949, the International Law Commission of the United Nations agreed that one of its first studies should concern itself with an effort to codify the law of treaties. In eighteen sessions over a period of seventeen years, the Commission held some 300 meetings at which this subject was the principal topic of discussion.

Finally, in 1966, the Commission adopted 75 draft articles on the law of treaties and recommended that the General Assembly of the United Nations convene an international conference of plenipotentiaries to study the draft articles and endeavor to conclude a convention on the subject.[1]

At its twenty-first session, the General Assembly in that year (1966), by its Resolution 2166 (XXI), decided that such a conference should be convened, and in the following year (1967) decided that the first session should be convened at Vienna in March 1968.

At the first session of the conference in Vienna in the spring of 1968, delegations from 103 countries attended. The second and final session met in the same city in April and May of 1969, with representatives from 110 nations participating.

The Convention, as ultimately worked out, was finally adopted on May 23, 1969, by 70 votes for, one (France) against, and 19 abstentions which included all of the Communist countries except Yugoslavia.

As of January 11, 1971, 47 nations had signed the Convention and five nations had become parties by ratification or accession.

It would require excess space and inordinate detail to attempt to describe all of the Convention's provisions. This report will accordingly mention only some of its more salient features.

The Convention on the Law of Treaties is an agreement among nations on the law governing the formation and operation of treaties, how they should be interpreted, amended and terminated and the rules governing their invalidity. It is of particular significance that this codification should have occurred at this time, as nation-states which have only recently come into being frequently complain that they should not be bound by laws in the formation of which they have not played a part. In this instance, they were well represented, and all played an active role in the conferences.

The result is important, not because the large number of developing countries succeeded in altering the fundamental principles of international law governing treaty arrangements among nations, but because they did not. The basic rule that treaties are binding on the parties and cannot be broken was affirmed. Efforts to broaden the grounds for establishing invalidity did not succeed. Satisfactory disposition was made of the problem of dispute settlement which

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1 REPORTS OF THE INTERNATIONAL LAW COMMISSION, 18th sess., 10.

threatened to disrupt the conference. That the contemporary international community could reach agreement on the issues involved is of paramount significance.

Part I of the Convention defines "treaty" and other terms. Part II deals with the capacity of nation-states to conclude treaties, the powers of representatives, and methods by which a nation's consent to be bound by treaties can be determined. A nation which has signed, ratified or consented to be bound by a treaty is obliged to refrain from acts which would defeat its objects and purposes. Part III deals with reservations, entry into force and provisional application; Part IV with the law governing the observance and interpretation of treaties, their effect upon other nation-states, and rules governing their amendment and modification. Part V relates to invalidity, termination and suspension, and procedures for the settlement of disputes. The remaining parts cover succession, depositaries, registration, publication, signature, ratification and other procedural matters.

The Convention is to enter into force, as to the original ratifying or acceding nations, on the thirtieth day after deposit with the Secretary General of the United Nations of the 35th instrument of ratification or accession, and thereafter, as to each subsequently ratifying or acceding nation, on the thirtieth day after such deposit of its appropriate instrument of adherence thereto.[2]

The first important declaration of the Convention is that it is not retroactive. By the terms of article 4, its provisions are to apply, *ex proprio vigore,* only to treaties concluded after the Convention shall have entered into force. A counterpart to this provision is found in article 28 of the Convention, which declares that treaties generally are not applicable to situations which arose, or ceased to exist, before their entry into force.

Under article 19 of the Convention, reservations are admissible in connection with the ratification of, or accession to, a treaty only if not prohibited, or to the extent expressly permitted, by the treaty, and only if not incompatible with its objects and purposes.

It is provided in article 25 that a treaty or part of a treaty may enter into force provisionally if the parties have so agreed; but such provisional entry into force may be terminated by any party thereto by giving notice to the others that it does not intend to became a party.

Article 26 enunciates the basic doctrine of all treaties that they are "binding upon the parties and must be performed by them in good faith."

Under article 31 of the Convention, treaties are to be construed in accordance with the ordinary meaning of their terms, "in their context" and in the light of the treaty's objects and purposes. For the purpose of interpretation, the context of a treaty is to comprise, in addition to the text, preamble and annexes, any agreement relating to the treaty which was made between all of the parties in connection with the conclusions of the treaty and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to it. In addition, the following is to be taken into account together with the context: any subsequent agreement between the parties regarding interpretation or application, subsequent practice

2 Articles 82-84 of the Vienna Convention on the Law of Treaties.

in the application of the treaty which establishes agreement regarding interpretation, and relevant rules of international law applicable to the relations between the parties.

At the conference, the United States tried to include the preparatory work of the treaty and the circumstances of its conclusion (what we would call "legislative history") among the primary guides to interpretation. In this effort, the United States was unsuccessful. Article 32 provides that recourse to *supplementary* means of interpretation, including such preparatory work and circumstances, may be had (and by inference may only be had) in order to confirm the meaning resulting from the application of article 31, or to determine the meaning, when the interpretation according to article 31 leaves the meaning ambiguous or leads to a result which is manifestly absurd or unreasonable.

The Convention contains two important articles which may give rise to questions when the document is before the Senate for advice and consent to ratification. The first of these is article 27, which states simply that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

This would appear to be an inevitable corollary of the basic provision in article 26 that treaties are "binding upon the parties and must be performed by them in good faith," and seems unnecessary in view of that provision. Indeed, it was not included in the draft articles prepared by the International Law Commission during its long study of this subject. Nevertheless, its impact on our constitutional system must be recognized. For example, it would prevent justifying nonperformance by the United States on the ground that the Supreme Court had held a provision of a treaty to be invalid as in conflict with a constitutional limitation. Despite such a ruling, the invalid treaty provision would be binding on the United States in international law and its performance would be required.

Suppose, for example, that a treaty should be made between the United States and Mexico in which the parties agreed not to permit inflammatory subversive broadcasts across their common border. If the treaty should be held by the Supreme Court of the United States to be violative of the free-speech guaranty of the first amendment, it would still be binding on the United States vis-à-vis Mexico under international law as expressed in article 27 of the Vienna Convention.

Another significant provision is that contained in article 46 of the Convention. This provides that "a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

One may readily postulate a conceivable situation arising out of the International Anti-Dumping Code, concluded by the United States with seventeen other nations in Geneva on June 30, 1967. All of those seventeen nations treated the document as a formal treaty requiring parliamentary approval, which they gave it. The United States alone dealt with the document as an executive agreement. It was reported that, because certain of its provisions were in direct con-

flict with corresponding provisions of Congressional tariff acts, the Code was not submitted to the Senate for its advice and consent for fear of adverse action by that body.[3] If such a situation should arise following the entry into force of the Vienna Convention on the Law of Treaties as to the United States, the Code would be held binding on this country even if the Supreme Court of the United States should hold that it was invalidly adopted as an executive agreement without the advice and consent of the Senate. From the text of the Constitution and the long practice of the United States in relation to executive agreements, it would appear difficult to establish that such a constitutional transgression was "manifest."

The background of article 46 has been reviewed thoroughly in an article by Ambassador Richard D. Kearney,[4] who led the United States delegation at the Vienna conference. Prior to and at the conference, many nations supported the view that an agreement made on behalf of a government by a person officially designated as authorized to make it, is fully binding on that government. This was the view taken by our State Department in 1950. Other states, notably developing countries, taking a "monist" point of view, saw a serious danger in drawing a distinction between the international validity of a treaty and its internal validity. There was little support for the latter position at the conference, however, with the main differences being between those countries contending that internal limitations on the capacity of nation-state representatives to conclude treaties should not invalidate their state's consent to be bound, and those insisting on adding the qualification: "unless the violation of its internal law was manifest." After the former had been defeated by a vote of 56 to 25 with 7 abstentions, the final article was adopted by a vote of 93 in favor, none against and 3 abstentions.

Ambassador Kearney says in conclusion in his above article (the article 43 of which he speaks having become article 46 in the final text):

> The history of Article 43 demonstrates that the text finally chosen was the culmination of an extended review of all possible courses of action. Is the solution that has been finally worked out the best available solution? It is certainly not the rule that would have the greatest appeal to either the fervid nationalist or the perfervid internationalist. But the all-or-nothing approach of true believers rarely supplies a workable formula for a work-aday world. When the desirable aim of upholding the stability of the international treaty structure collides with the laudable end of placing some domestic checks and balances upon the making of international commitments, the reasonable solution should be a compromise that protects both sets of interests to the maximum extent.
>
> The essential decision in reaching such a compromise is allocation of the burden of proceeding. Should the weight of making the argument fall upon the State that relies on its internal law to defeat a commitment or upon the latter's appearance of authority to undertake the commitment?
>
> The decision underlying Article 43 is to accord *prima facie* validity to

3 *See* Public Law 90-634, 82 Stat. 1347 (1968), which suspended certain provisions of the Anti-Dumping Code. *See also* Long, *United States Law and the Anti-Dumping Code,* 3 INT'L LAW. 464 (1969).

4 Kearney, *Internal Limitations on External Commitments—Article 46 of the Treaties Convention,* 4 INT'L LAW. 1 (1969).

> the appearance of authority subject to the limitation of an objectively evident violation of a fundamentally important internal law. The review of the problem has demonstrated above all that this solution is amply supported, not only by legal theory, but by consideration of practical consequences.
>
> Article 43 is designed for a world in which the *coup d'état* and the suspension of constitutions are endemic, but also where international business cannot be suspended until constitutional rule is restored. It is designed for a world in which assaults upon international commitments are a standard weapon in the armory of aspiring politicians. Given the facts of contemporary international existence, Article 43 represents the most reasonable rule for a world in which reason is not yet supreme.[5]

Those who contend that the internationally binding character of treaties must always be subject to domestic constitutional disabilities may well ponder the difficulties of such a position in connection with our rights against other countries. If claims under treaties were subject to being met with contentions that the treaty is not binding on the country against which the claim is made because of some internal-law limitation, the stability of an international legal order would be jeopardized. Indeed, it is difficult to see how there could be any stability at all if such a self-denying principle were universally operative. According to Ambassador Kearney's report, there fortunately appears to have been no support at the conference for such an extreme position.

It is accordingly suggested that it is very much to the advantage of the United States to ratify the Vienna Convention without reservations since, if the United States ratifies with reservations, under the principle of reciprocity, every other ratifying nation, large or small, would have the same right to avoid its treaty obligations by "invoking the provisions of its internal law as justification for its failure"; and the only penalty which could be imposed on the United States for its own failure to comply with the terms of a treaty held invalid by the Supreme Court would be the payment of damages, with the continuing right to denounce and to withdraw from such an agreement should it permit withdrawal.

Another important provision of the Vienna Convention is that of article 52, which states that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." This principle would surely raise interesting legal questions as to the intergovernmental agreements between the Soviet Union and Czechoslovakia made during the 1968 invasion of the latter country by forces of the former.

Also of special interest and importance is article 56, to the effect that a treaty containing no provision for denunciation or withdrawal is not subject thereto unless it can be shown that the contrary was intended, directly or by implication, and then on not less than twelve months' notice.

Under article 60, a material breach of a treaty by a party thereto generally entitles the other party or parties to terminate or suspend its operation in whole or in part; but this is not to apply to provisions "in treaties of a humanitarian char-

5 *Id.* at 21.

acter," especially such as those which prohibit "any form of reprisals against persons protected by such treaties."

Another provision of great consequence to the stability of treaties, particularly those relating to the developing world in which conditions frequently change rapidly, is article 62 dealing with change of circumstances. Such a change, not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from a treaty unless the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is radically to transform the extent of obligations still to be performed. A fundamental change of circumstances may not, however, be invoked as a ground for termination or withdrawal if the treaty establishes a boundary or if the fundamental change is the result of an international breach by the party invoking it. Of particular interest in this context is the provision of article 63, to the effect that severance of diplomatic or consular relations is not to change the legal effect of a treaty between the parties, except insofar as the existence of such relations "is indispensable for the application of the treaty." To the same effect is the text of article 74, which declares "that the severance or absence of diplomatic or consular relations . . . does not prevent the conclusion of treaties between" states; and that "the conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations."

Articles 53 and 64 of the Vienna Convention deal with the international-law concept of *jus cogens*—described as "a peremptory norm of general international law . . . accepted and recognized by the international community . . . as a norm from which no derogation is permitted and which can be modified only by a subsequent norm . . . having the same character." Article 53 states that "a treaty is void if, at the time of its conclusion, it conflicts with a permanent norm of general international law"; and article 64 provides "if a new peremptory norm . . . emerges, any existing treaty which is in conflict with that norm becomes void and terminates. . . ." In this connection, it is stipulated under article 71 of the Convention that if a treaty is declared void as of its inception under article 53 as contrary to a peremptory norm of international law, the parties must re-establish the *status-quo-ante*. If, on the other hand, the treaty becomes void because in conflict with an emerging new peremptory norm under article 64, the parties are relieved of further obligations thereunder; but their prior rights and obligations *inter se* remain effective—only, however, so long as these are not themselves in conflict with the new peremptory norm.

Under article 65, a party invoking asserted grounds of invalidity, or for termination or suspension of, or withdrawal from, a treaty, must give formal notice to the other parties of the position which it is taking. If objection is entered to such a position, the parties must endeavor to resolve their dispute in accordance with any agreements they may have among themselves governing settlement of disputes, or in the absence of any such agreements, under the terms of article 33 of the Charter of the United Nations on "Pacific Settlement of Disputes." Failing settlement within twelve months under the foregoing provisions, either party may, under article 6, submit a dispute arising under articles 53 or 64 (*jus cogens*) to the International Court of Justice, unless the parties

agree to submit the dispute to arbitration instead; or either party may submit a dispute as to any other matter for conciliation under the procedure established in the Annex to the Convention.

That Annex provides that each party to the Convention, and each other member of the United Nations, may nominate two "qualified jurists" as conciliators for five-year terms; and the aggregate roster of the persons so nominated is to constitute what is called "the list." Whenever a dispute subject to conciliation arises under article 6, each side to the dispute appoints one conciliator of the nationality of one of the states on that side who need not be on "the list," and one other conciliator, not a national of any of those states, but who must be chosen from "the list." The four conciliators so chosen are to appoint a fifth from "the list," and he is to act as chairman. Any appointment not made as so required is to be made by the Secretary General of the United Nations either from "the list" or from the International Law Commission. The five persons so appointed constitute the "Conciliation Commission." It is to determine its own procedure and may hear the parties and make findings and recommendations by majority vote; and it is to make every effort to conciliate the dispute.

The Conciliation Commission must make its report within twelve months of its constitution, and this report, including any conclusions stated therein regarding the facts or questions of law, shall not be binding on the parties, and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

It should finally be noted that under article 73 of the Convention, its provisions are to be without prejudice to "any question that may arise in regard to a treaty from a succession of States, or from the international responsibility of a State, or from the outbreak of hostilities between States."

The foregoing brief outline of the more important phases of the Vienna Convention on the Law of Treaties, and of a few of the interesting problems to which it may well give rise, should suffice to indicate its overall vast scope and significance. Ambassador Kearney has referred to it as "the most far-reaching codification effort in the field of international law that has thus far been attempted."[6]

It is frequently difficult, and at times even impossible, to negotiate a bipartite treaty which is eminently satisfactory to both sides; and it is clearly far more difficult to negotiate a multipartite convention which does not embody some provisions unacceptable, in greater or lesser degree, to most, if not all, of the several parties involved. It is felt, however, that the Vienna Convention on the Law of Treaties is a remarkable document which should be acceptable to the United States, and the United States should ratify the document without reservations as a tremendously significant overall step forward toward universal understanding among the nations of the world.

6 Kearney, *supra* note 4, at 1.