THE SCOPE OF THE SUPREMACY CLAUSE OF THE UNITED NATIONS CHARTER

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Abstract Article 103 of the United Nations (UN) Charter stipulates that the obligations of UN Member States under the Charter prevail, in the event of a conflict, over their obligations under any other international agreement. While this important provision is often mentioned, its precise meaning remains something of a mystery. The present article tries to shed some light on the scope of this 'supremacy clause' by discussing, first, its operation with respect to treaties, and then by looking at its relevance to various other contractual arrangements and to customary international law.

I. INTRODUCTION

Michael Akehurst once observed that 'the whole history of the United Nations has been a series of disputes about the correct interpretation of the Charter'.[1] Indeed, the International Court of Justice (ICJ) has been called upon several times to provide advisory opinions that involve interpreting the Charter,[2] and doubts still linger about the legal basis of such day-to-day affairs as peacekeeping.[3]

One Charter provision that has major potential for controversy is tucked away in Chapter XVI under 'Miscellaneous Provisions' and has, until recently, received perhaps too little attention. This is Article 103 which, in its entirety, reads as follows:

> 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.

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[1] M Akehurst, *A Modern Introduction to International Law* (Allen & Unwin, London, 1970) 202. Having lost none of its relevance, this observation has been retained in subsequent editions, see P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge, London, 1997) 364.

[2] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174; *Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion)* [1948] ICJ Rep 57 (*First Admission Opinion*); *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4 (*Second Admission Opinion*).

[3] See, eg, A Orakhelashvili, 'The Legal Basis of the United Nations Peace-keeping Operations' (2003) 43 Virginia J Intl L 485–524.

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The provision can certainly be read in many ways. Indeed, as Robert Kolb has aptly noted, Article 103 is 'replete with a plethora of uncertainties, ranging from the root of its meaning, to points on interpretation'.[4] Thus, more conservatively minded international lawyers would consider it a simple conflict-of-treaties clause that, despite its importance and uniqueness, does not have any conceptually ground-breaking qualities. Others prefer to read much more into this short passage of legal prose. For example, it

> has been taken to suggest that the aims and purposes of the United Nations—maintenance of peace and security and promotion and protection of human rights—constitute an *international public order* to which other treaty regimes and the international organizations giving effect to them must conform.[5]

More ambitiously minded commentators view Article 103 as an indication that the Charter is the constitution of the world community.[6] Rather tellingly, it has been dubbed the 'supremacy clause', probably with a nod towards the similarly nicknamed provision of the United States Constitution that establishes the supremacy of federal law over State law.[7]

The constitutionalist view of Article 103 appears to be based on the understanding that 'the Charter is the supporting frame of all international law and, at the same time, the highest layer in a hierarchy of norms of international law' which is partly because 'Article 103 of the Charter . . . can only be read to give the Charter priority over all conflicting obligations of states regardless of their formal source'.[8] A closer examination of the provision raises numerous questions, all of which relate to the possible constitutional aspirations of the Charter. Thus, as the texts speaks of 'obligations of the Members', it is not immediately clear whether Article 103 affects the *rights* of the Members and what impact it has on relations with *non-Members*. But the most unexplored issue seems to be the scope of the provision in terms of the sources of international law: does Article 103 deal only with treaties, as its text suggests, or does it also address other potential sources of obligations? This article focuses on precisely this question.

The strategy for dealing with the whole set of connected issues is as follows: the first part of the article looks at the (relatively) less contentious aspects of Article 103, namely the superiority of Charter-based obligations

[4] R Kolb, 'Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 21–35, 21.

[5] D Shelton, 'International Law and "Relative Normativity"' in MD Evans (ed), *International Law* (2nd edn, OUP, Oxford, 2006) 159–85, 178 (emphasis added).

[6] See B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1997) 36 Columbia J Transnational L 529–619, 594 (claiming that art 2(6) and art 103 of the Charter 'give a strong hint of its constitutional character'); see also ibid 577–78.

[7] Constitution of the United States of America (17 September 1787) art VI(2); see also GP Fletcher and S Sheppard, *American Law in a Global Context: The Basics* (OUP, Oxford/New York, 2005) especially 150 et seq and 277 et seq.

[8] Fassbender (n 6) 585–86.

over international agreements. As a general discussion on the operation of Article 103, this also serves as a backdrop for the rest of the article. In the remainder of the article, questions relating to the applicability of Article 103 to various other contractual arrangements and to customary international law are taken up.

II. ARTICLE 103 AS A RULE ON TREATY CONFLICTS

A. '. . . obligations of the Members of the United Nations under the present Charter . . .'

Essentially, Article 103 is a rule prescribing that certain obligations, when in conflict with certain other obligations, prevail over the latter. For the sake of clarity, the 'elements' of this rule are best examined separately.

The phrase 'obligations . . . under the present Charter' includes, first of all, obligations that stem directly from the Charter. The clearest examples include the duty to settle disputes peacefully, arising from Article 2(3), and the obligation to refrain from the use of force, as laid down in Article 2(4). But there are also obligations under the Charter, the precise content of which is determined by an organ of the UN. Most prominently, Article 25 stipulates that Members of the organization 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. In a similar fashion, Article 94 states that every Member 'undertakes to comply with the decision of the International Court of Justice in any case to which it is a party'.

There is little doubt that the duties placed on Members in accordance with the Charter by binding decisions of the organs, are also obligations under the Charter for the purposes of Article 103.[9] This was the central issue in *Lockerbie,* one of the few cases where the effects of Article 103 have been specifically considered. As is well known, the case dealt with the question whether Libya was obliged to extradite two of its nationals who were accused of blowing up an aircraft over the Scottish village of Lockerbie. Libya relied on the 1971 Montreal Convention, arguing that it was only bound to extradite the suspects if it did not prosecute them domestically[10] (something which it

[9] See, eg, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, Separate Opinion of Vice-President Ammoun, para 18 (observing that obligations 'under the Charter', as contemplated by art 103, 'clearly include obligations resulting from the provisions of the Charter and from its purposes, and also those laid down by the binding decisions of the organs of the United Nations'); see also ND White and A Abass, 'Countermeasures and Sanctions' in Evans (n 5) 509–32, 527 ('One effect of Article 103 of the UN Charter seems to be that mandatory sanctions resolutions adopted by the Security Council under Article 41 of the UN Charter result in obligations for member States that prevail over obligations arising under other international treaties.').

[10] See Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (opened for signature 23 September 1971, entered into force 26 January 1973) 974 UNTS 178, art 7 ('The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was

claimed to be doing). At the same time, the Security Council adopted Resolution 748 (1992) demanding that Libya go forward with the extradition. The ICJ came to the conclusion that whatever choice Libya might have had under the Montreal Convention, the Security Council resolution enjoyed priority. This was because all parties to the dispute were, 'as Members of the United Nations . . . obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter'.[11] The Court went on to consider that

> *prima facie* this obligation extends to the decision contained in resolution 748 (1992) [and] . . . in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.[12]

This statement, true as it may be, should not be misread: Derek Bowett has perceptively pointed out that a Security Council decision per se is not to be equated with a 'treaty obligation' of the Charter. Rather, the duty to comply with such a decision may be an obligation under the Charter.[13] At first sight, the distinction may appear artificial, but it is not. No organ of the UN has unlimited competence. While the Security Council's discretion is extremely wide, its powers are limited by the rules of the Charter and, more generally, by the object and purpose of the organization.[14] Hence, an instrument purporting to be a Security Council resolution can be considered a valid 'decision' only if it complies with the Charter.[15] Despite the notorious difficulty of checking such compliance, it is principally clear that ultra vires resolutions do not give rise to any obligation that could come within the scope of Article 103.[16]

committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. . . .').

[11] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK, Libya v US) (Provisional Measures)* [1992] ICJ Reps 3 and 114, paras 39 and 42, respectively.

[12] ibid.

[13] D Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 EJIL 89–101, 92. The same logic would surely apply by analogy to an ICJ decision.

[14] *First Admission Opinion* (n 2) 64 ('The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.'); MJ Herdegen, 'The "Constitutionalization" of the United Nations Security System' (1994) 27 Vanderbilt J Transnational L 135–59, 150 (noting that 'the Security Council, though a political organ, is confined to legally determined powers flowing from a treaty').

[15] See Bowett (n 13) 92–93 ('The Council decisions are binding only in so far as they are in accordance with the Charter.'); Herdegen (n 14) 157 ('The binding effect of mandatory resolutions stands and falls with their validity.'); see also H Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Praeger, New York, 1950) 95 ('The meaning of Article 25 is that the Members are obliged to carry out these decisions which the Security Council has taken in accordance with the Charter.'), cited approvingly by Judge El-Kosheri at para 23 of his Dissenting Opinion to *Lockerbie* (n 11).

[16] See, eg, A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59–88, 69 ('. . . the obligation to comply with the Council's resolutions is conditional upon the Council's compliance

A fog of uncertainty has surrounded the issue as to whether Article 103 has relevance to Security Council resolutions that do not, prima facie, directly oblige States, but rather make recommendations or authorize States to follow a certain course of action. One can reasonably safely exclude from this discussion pure and simple recommendations, as contemplated by Chapter VI of the Charter. Since those have no legally binding force, it is difficult to see how they could justify setting aside legal obligations—how non-law could displace law. However, the same consideration does not apply to 'authorizations' that take the form of Chapter VII 'decisions', since the latter are rendered binding by virtue of Article 25. Consequently, there has been notable scholarly debate on the matter.[17]

In the *Al-Jedda* case, the House of Lords recently sided with the view that authorizations do indeed come within the scope of Article 103.[18] The case concerned the legal effects of Security Council Resolution 1546 (2004), whereby the coalition forces operating in Iraq were given 'the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to [the] resolution'.[19] According to the annexed letter of the US Secretary of State, such measures included 'internment where . . . necessary for imperative reasons of security in Iraq'.[20] This led to the detention by the British forces of Mr Hilal Al-Jedda. He complained before the courts that he had been deprived of his liberty in violation of the European Convention of Human Rights (ECHR),[21] as implemented in English law by the Human Rights Act 1998. The House of Lords upheld the view of the lower courts that authorizations did indeed trigger Article 103, thus prevailing over the ECHR. Changes in the collective security mechanism after the adoption of the Charter were clearly the main reason for such a stance: in the absence of standing forces at the disposal of the organization—as was originally contemplated by Article 43 of the Charter—the Security Council could 'do little more than give its authorisation' to a State for conducting military operations.[22] But one could also argue that, as soon as a State takes up an authorization, it becomes bound by its terms and has an *obligation* to carry out the tasks outlined in the authorization.[23]

There is some evidence to suggest that the notion of obligations 'under the Charter' should be extended even further, beyond the text of the Charter and the binding resolutions of UN bodies. A case in point is an incident from 1963

with the Charter principles: Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms.').

[17] For a convenient overview, and some well-founded conclusions, see Kolb (n 4).

[18] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, paras 33–34 (Lord Bingham), paras 115–17 (Lord Rodger), para 135 (Lord Carswell), para 152 (Lord Brown).

[19] SC Res 1546 (8 June 2004) para 10. [20] ibid Annex.

[21] Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) ETS No 5, art 5.

[22] *Al-Jedda* (n 18) para 33 (Lord Bingham).

[23] Compare ibid para 152 (Lord Brown).

which involved Mr Henrique Galvão, who wished to be heard by the Special Political and Decolonization Committee of the General Assembly (the Fourth Committee) on matters relating to the territories under Portuguese administration. The gentleman in question had, most unfortunately, attained fame a few years earlier by hijacking a cruise liner, and was actively sought by the Portuguese authorities in respect of that offence. This circumstance was considered in the light of Article 11(5) of the UN Headquarters Agreement, according to which the 'authorities of the United States shall not impose any impediments to transit to or from the headquarters district of . . . persons invited to the headquarters district by the United Nations . . . on official business'.[24] The US was perfectly willing to consider Mr Galvão an invitee of the UN within the meaning of this provision and allow him to travel to New York. But it was feared that Portugal might initiate proceedings in US courts for extradition purposes under a bilateral extradition treaty, and that the US might, as a result, be under a legal obligation to extradite Mr Galvão. Hence, a conflict could have arisen between obligations stemming from the Headquarters Agreement and the extradition treaty.

During the discussions in the Fourth Committee, it was suggested that 'obligations under the Charter' should not be given the same narrow meaning as 'obligations under any of the provisions of the Charter'.[25] Furthermore, the capacity of a UN body to hear petitioners was considered a part of the rights and functions of the organization under Chapters XI and XII of the Charter, which deal with non-self-governing territories and the international trusteeship system. Also, the appropriate provision of the Headquarters Agreement was deemed sufficiently wide in scope to accommodate Mr Galvão. Hence, it was held that the US should grant him immunity from arrest, 'notwithstanding the extradition convention with Portugal in view of the provisions of Article 103'.[26]

In practice, therefore, obligations 'under the Charter' seem to include duties of States connected more broadly with the operation of the Charter. There are, however, limits to this, as the *Nuclear Tests* cases demonstrate. The applicants founded the jurisdiction of the ICJ on the 1928 General Act for the Pacific Settlement of International Disputes[27] and, alternatively, on the optional declarations made by both of them and the respondent under Article 36(2) of the Statute of the Court. The respondent sought to defeat the second alternative, under which the jurisdiction would have been clearer. Specifically, the

[24] See Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (signed 26 June 1947, entered into force 21 November 1947) 11 UNTS 11, s 11(5).

[25] Repertory of Practice of United Nations Organs, Supplement No 3 (1959–1966), vol 4, 209 <untreaty.un.org/cod/repertory/art103/english/rep_supp3_vol4-art103_e.pdf> accessed 28 January 2008.

[26] ibid.

[27] General Act of Arbitration for the Pacific Settlement of International Disputes (adopted 26 September 1928, entered into force 16 August 1929) 93 LNTS 342.

respondent argued that since the Statute was an integral part of the Charter, the obligations taken under the optional clause prevailed over those under the General Act by virtue of Article 103. As is well known, the Court did not get to the point of deciding on jurisdiction, as it deemed the claim to be without object. But in a Joint Dissenting Opinion, four judges addressed this matter quite comprehensively. They were not impressed by the reliance on Article 103:

> This argument appears to us to be based on a misconception. The Charter itself places no obligation on member States to submit their disputes to judicial settlement, and any such obligation assumed by a Member under the optional clause of the Statute is therefore undertaken as a voluntary and additional obligation which does not fall within the purview of Article 103. The argument is, in any case, self-defeating because it could just as plausibly be argued that the obligations undertaken by parties to the 1928 Act are obligations under Article 36(1) of the Statute and thus also obligations under the Charter.[28]

But this does not detract from the general point that the notion 'obligations . . . under the present Charter' should be given a relatively wide meaning in the light of the developed practice and the purposes of the organizations.

Two problematic issues should, however, be identified, both relating to the interpretation of Security Council resolutions.[29] First, as the aforementioned Resolution 1546 illustrates, Council resolutions are often not self-contained, but incorporate, by reference, other documents. This does not give rise to any problem of principle, since such incorporation is a common-enough legal technique, but may complicate the interpretation of the resolutions. Secondly, the use by the Security Council of euphemisms—such as 'all necessary means' to signify the permission to use armed force—can make it difficult to establish what the Council has actually authorized. Taken literally, '*all* necessary means' could imply, for instance, a licence to use force without *any* regard for the law of armed conflict. Yet this is probably not (one hopes) what the Council has in mind. Both of these issues lead to an increased need to interpret Security Council resolutions teleologically, potentially putting quite a strain on domestic courts.

B. '. . . their obligations under any other international agreement . . .'

The ordinary meaning of the term 'international agreement' in the English language, at least in the context of international law, is 'treaty'. However, Article 102(1) of the Charter stipulates that '*[e]very treaty and every*

[28] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, para 78.

[29] See generally MC Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Ybk UN Law 73–95.

international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'.[30] Notably, a distinction of some sort is made between 'treaties' on the one hand and 'international agreements' on the other. At the same time, Article 103 only refers to 'international agreements'. The exact meaning of neither of these terms is provided in the Charter.

What possibly explains such terminology is the fact that, at the time the Charter was drafted, some doubts still remained as to whether international agreements concluded in a relatively informal manner—for example by an exchange of notes—could be properly termed treaties.[31] The particular language of the Charter might also have been chosen to accommodate constitutional law issues of some States. Most notably, perhaps, United States law distinguishes between 'treaties', which are concluded with the 'advice and consent' of the Senate, and 'executive agreements', for which the approval of the Senate is not sought. Both are, however, deemed 'international agreements' in US law[32] (and, indeed, 'treaties' under international law).

Whatever the actual concerns, the Soviet delegate observed at the San Francisco conference that the term 'agreement' could mean 'in a technical sense, special instruments other than treaties' and 'in a general sense, all sorts of international agreements'.[33] He added that, in his opinion, the commission that oversaw the drafting of Article 103 had used the term in its general sense.[34] No objections were raised, indicating that the precise designation or characterization of a contractual instrument was seen as immaterial.

A more recent concern is the practice of States when concluding Memoranda of Understanding, or MoUs, which arguably constitute an alternative to treaties. The distinguishing feature, as has been suggested with great conviction,[35] is that MoUs are formulated so as not to be legally binding. Yet, the premise that States can conclude politically or morally binding non-treaties, as opposed to legally binding treaties, is highly problematic in itself.[36] Discarding this controversial distinction inevitably leads to the conflation of all such instruments under the heading of 'treaty' or 'international agreement', subjecting them to the effects of Article 103. But even if the distinction could

[30] Emphasis added. Para 2 adds that a non-registered instrument cannot be relied on before a UN body.

[31] A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge, 2000) 15.

[32] For a succinct overview of the issues involved, see FL Kirgis, 'International Agreements and US Law' *ASIL Insights* (May 1997) <www.asil.org/insights/insigh10.htm> accessed 28 January 2008.

[33] Summary Report of Eighteenth Meeting of Coordination Committee, The United Nations Conference on International Organization (25 April–26 June 1945) Doc WD 314, CO/126, 17 *Documents of the United Nations Conference on International Organization* (22 vols, UN, New York, 1945–1955) 111–18, 112 (UNCIO).

[34] ibid.

[35] See especially Aust (n 31) 26–46.

[36] See J Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, The Hague, 1996).

be maintained, it would be impossible to accept that States could circumvent their obligations under the Charter, and the effects of Article 103, by tweaking the formulation of their agreements to be less treaty-like.

It is therefore hardly surprising that the ICJ has been fairly agnostic when it comes to the precise characterization of a contractual instrument. In the preliminary objections phase of the *South-West Africa* cases, Judge Jessup noted that while Article 103 of the Charter uses the expression 'international agreement', there 'appears to be no reason to interpret this Article as excluding any treaty, convention, accord, or other type of international engagement or undertaking'.[37] He further pointed out that Article 80(1) of the Charter refers to 'international instruments to which Members . . . may . . . be parties', which, in his opinion, 'clearly includes many kinds of international agreements'.[38] A few decades later, in the *Nicaragua* case, the Court itself came to conclude that 'all regional, bilateral, and even multilateral, *arrangements* that the Parties to this case may have made . . . must be made always subject to the provisions of Article 103'.[39] These views further support a relatively liberal approach to interpreting the notion of 'international agreement' in the Charter.

Recently, it has been suggested that certain human rights treaties enjoy a privileged status and are not subject to the rule contained in Article 103. Claims along these lines were made expressly before British courts in the aforementioned *Al-Jedda* case, but were rejected. In the House of Lords, Lord Bingham found that the very formulation of the provision with its reference to 'any other international agreement' left 'no room for any excepted category, and [that] such appears to be the consensus of learned opinion'.[40]

Treaty law itself also recognizes the exceptional status of the UN Charter. Both the 1969 and 1986 Vienna Conventions on the Law of Treaties refer to the Charter when codifying a number of rules dealing with successive treaties on the same subject-matter. The 1969 Convention makes such rules 'subject to' Article 103 of the UN Charter.[41] The 1986 Convention stipulates that the rules in question 'are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall

[37] *South West Africa (Ethiopia v South Africa, Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, Separate Opinion of Judge Jessup, 407 (footnote omitted).

[38] ibid; see also *Namibia opinion* (n 9), Separate Opinion of Vice-President Ammoun, para 18 (noting that 'Article 103 applies both to past and future *commitments*' (emphasis added)).

[39] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392, para 107 (emphasis added).

[40] *Al-Jedda* (n 18) para 35, citing, inter alia, *Lockerbie* (n 11) para 39 and R Bernhardt, 'Article 103' in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP, Oxford, 2002) vol II, 1292–302, 1299–300.

[41] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 30(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.').

prevail'.[42] Article 103 has thus been effectively incorporated into general treaty law by reference.

However, not much can be concluded from this circumstance for the purpose of interpreting Article 103 as neither the Vienna Conventions nor their preparatory materials add anything to the language of the Charter. This lack of elaboration is, moreover, not an historical accident. The International Law Commission (ILC), while drafting the conventions, could not agree on the precise effects of this Charter provision, especially with regard to States which are not Members of the UN. During the preparations of the first Vienna Convention, the prevailing sentiment was that Article 103 did not have an impact on the legal position of non-Members, but it was nonetheless deemed prudent not to take any formal stand on the matter.[43] Accordingly, the ILC placed on record that a reference to the Charter was made 'without prejudging in any way the interpretation of Article 103 or its application by the competent organs of the United Nations'.[44]

The problem inevitably resurfaced when the second Vienna Convention was drafted—this time with regard to treaties concluded with the participation of international organizations, which are not, and cannot be, admitted to the membership of the UN. Again, no agreement was reached on the issue.[45] There was, moreover, the consideration that 'it was not the Commission's function to interpret the Charter', and so the provision that was included in the draft convention was formulated in 'deliberately ambiguous' terms.[46]

C. *'In the event of a conflict . . .'*

Situations coming within the scope of Article 103 are hardly uniform. Agreements that differ from each other in the range of parties and in the time of conclusion give rise to different problems. In a 1969 commentary to the

[42] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (opened for signature 21 March 1986, not in force) (1986) 25 ILM 543, art 30(6).

[43] Humphrey Waldock, Third Report on the Law of Treaties, UN Doc A/CN.4/167 (1964) II Ybk Intl L Commission 5–65, 36–37 (YBILC) ('The more general opinion . . . seems to be that, while article 103 precludes the Member State from executing the treaty which is inconsistent with the Charter, the non-member remains entitled to hold the Member responsible for a breach of the treaty. . . . But . . . it may be advisable for the Commission simply to rest on the language of Article 103 and not to seek to draw from it conclusions as to the effect of the Article on treaties concluded by Members with non-members.' (footnote omitted)).

[44] Draft Articles on the Law of Treaties, Report of the International Law Commission on the Work of its Eighteenth Session, UN Doc A/6309 (1966) II YBILC 172–363, 214.

[45] For the various positions, see Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, Report of the International Law Commission on the Work of its Thirty-fourth Session, UN Doc A/37/10 (1982) II-2 YBILC 1–146, 41.

[46] ibid. This has not prevented some authors from relying on the 1986 Vienna Convention when claiming that the Charter 'takes precedence in relation to treaties concluded by international organizations'. Bernhardt (n 40) 1295.

Charter, Leland Goodrich, Edvard Hambro and Anne Patricia Simmons identified three categories of conflict. A Member of the UN may be faced with a conflict between, on the one hand, its obligations under the Charter and, on the other hand, under an agreement:

> 1) . . . with another member contracted before the entry into force of the Charter;
> 2) . . . with another member contracted after the entry into force of the Charter; and
> 3) . . . with a non-member state, whether [contracted] before or after the entry into force of the Charter.[47]

When analysing these various types of conflict, the distinction between obligations stemming directly from the Charter and the duty to carry out the decisions of UN bodies becomes relevant. It had already been observed at the San Francisco conference that a conflict might arise either

> because of intrinsic inconsistency between the two categories of obligations or as a result of the application of the provisions of the Charter under given circumstances: e.g., in the case where economic sanctions were applied against a state which derives benefits or advantages from previous agreements contrary to said sanctions.[48]

For instance, treaties contemplating the waging of aggressive war, suppressing a people's right to self-determination or planning genocide would clearly be incompatible with Articles 2(4), 1(2) and 1(3) of the Charter, respectively. Hence, there would be an 'intrinsic inconsistency' between the obligations under such an agreement and the Charter. At the same time, economic sanctions applied in accordance with a Security Council resolution could only give rise to what can be called 'incidental inconsistencies'. Charter obligations would be in conflict with the other international agreement only to the extent, and for the time, that those sanctions were in force.

This schema works the other way around as well. Take, for instance, the EC Treaty:[49] under ordinary circumstances, it is in complete compliance with the UN Charter; but should the European Community adopt secondary legislation compelling EU Member States to act inconsistently with their obligations under the UN Charter, there would be an 'incidental inconsistency'.

Now it is possible to return to the first situation identified by Goodrich and colleagues, namely, the conflict of obligations caused by an earlier treaty and involving only UN Member States. As regards intrinsic inconsistencies,

[47] LM Goodrich, E Hambro and AP Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, Columbia UP, New York/London, 1969) 614.

[48] Report of the Rapporteur of Committee IV/2, as approved by the Committee, Doc 933, IV/2/42(2), 13 UNCIO 703–12, 708.

[49] Treaty Establishing the European [Economic] Community (signed 25 March 1957, entered into force 1 January 1958) OJ C 325/33 (consolidated version, 24 December 2002).

Article 103 is actually irrelevant. The Charter clearly superseded any pre-existing arrangements between Member States through a simple operation of treaty law (*lex posterior derogat legi priori*).[50] One delegate at the founding conference emphasized this point by stating that 'all inconsistent obligations contained in treaties between Member states would be abrogated *ipso facto*, the necessary consent having been obtained here at San Francisco'.[51] Accordingly, when it comes to treaties predating the Charter and involving only UN Member States, Article 103 is relevant only in so far as incidental inconsistencies are concerned.

In the second situation, it is a treaty between UN Member States but concluded after the Charter entered into force, that leads to a conflict. Article 103 makes it impossible to apply such a treaty, seemingly guaranteeing that Member States are unable to 'contract out' of the Charter regime. But, as far as intrinsic inconsistencies are concerned, the general law of treaties may again solve the problem. Any fundamental deviation from the Charter by means of a treaty concluded between the Member States would amount to an amendment of the Charter *inter se*. As the Charter does not explicitly prohibit such amendments, they are arguably permissible if in accordance with the general law of treaties.[52] The latter appears to set two limitations.[53] First, a treaty can be amended among some of its parties only if that does not affect the rights and obligations of the other parties. Secondly, the amendment must not be incompatible with the effective execution of the object and purpose of the treaty as a whole. Since the Charter establishes an international organization, there is very little room for amendments that could conceivably meet these requirements. Every rule of the Charter in some way either affects all Members or contributes to the effective execution of its object and purpose. In any case, abiding by these criteria should itself rule out the conclusion of *inter se* agreements that could create obligations *inconsistent* with those under the

[50] Compare 1969 Vienna Convention (n 41) art 30(3) ('When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.'); see also Kelsen (n 15) 113 ('As to treaties concluded between Member states the provision of Article 103 is superfluous. For according to general international law, such treaty, if concluded before the Charter has come to force, is abrogated by the Charter . . .').

[51] Summary Report of Sixth Meeting of Committee IV/2, Doc 419, IV/2/19, 13 UNCIO 602–3, 603.

[52] But see Kelsen (n 15) 113 (arguing that such treaties are 'null and void under Article 108 and 109 of the Charter' because the Charter can only be amended in accordance with these provisions).

[53] See 1969 Vienna Convention (n 41) art 41(1) ('Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.').

Charter.[54] Thus, again, one may conclude that Article 103 is relevant only for incidental inconsistencies.

The third situation, involving non-parties, has been characterized as 'highly problematic'.[55] The underlying question about the status of non-Members vis-à-vis the UN has generated some academic discussion[56] and, as was noted earlier, led the ILC into a dead end. As a matter of principle, a treaty does not bind third parties.[57] This fundamental rule of treaty law is, in the words of Lord McNair, supported by '[b]oth legal principle and common sense.'[58] But from time to time it is argued that in the light of 'the special character of the United Nations as an organization concerned primarily with the maintenance of peace and security in the world' and because of its extensive membership, the UN Charter is an 'exception'.[59] The claim to exceptionality relies largely on Article 2(6) of the Charter, which provides that

> [t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with [the] Principles [of the UN] so far as may be necessary for the maintenance of international peace and security.

But this clause does not attempt to bind non-Members: it is the *organization* that is placed under an obligation. Clearly there would be nothing to prevent the UN, and its Members for that matter, from using all legally available avenues for securing the cooperation of non-Members.[60]

In any event, the thesis that the Charter binds non-Members is difficult to confirm or disprove in practice. The fundamental principles of the Charter (in particular peaceful settlement of disputes and the prohibition of the use of force) are also part of customary international law. It is almost impossible to tell whether non-Members adhere to these principles due to a perceived obligation under the Charter, or because of an obligation under customary law.

Thus, the possible compliance of non-Members with the Charter can best be tested in the context of applying Security Council resolutions. Here one finds

[54] Compare *First Admission Opinion* (n 2) Dissenting Opinion of Judge Zoričić, 105–6, and Dissenting Opinion of Judge Krylov, 114–15 (on whether an agreement to support the admission of certain States to the UN could be in conflict with art 4 of the Charter which lays down the conditions of admission).

[55] Kelsen (n 15) 116.

[56] See, eg, J Soder, *Die Vereinten Nationen und die Nichtmitglieder* (Röhrsheid, Bonn, 1956), JA Frowein, 'The United Nations and Non-Member States' (1970) 25 Intl J 333–44.

[57] See 1969 Vienna Convention (n 41) art 34; 1986 Vienna Convention (n 42) art 34. For a discussion, see, eg, M Fitzmaurice, 'Third Parties and the Law of Treaties' (2002) 6 Max Planck Ybk UN Law 37–137.

[58] Lord McNair, *The Law of Treaties* (Clarendon, Oxford, 1961) 309.

[59] See, eg, I Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford, 2003) 660–61, citing Kelsen (n 15) 85–86.

[60] See Sir Gerald Fitzmaurice, 'Fifth Report on the Law of Treaties,' UN Doc A/CN.4/130, (1960) II YBILC 69–107, 88 ('[T]he fact that a third State is not, and cannot be under any direct obligation in the matter, not being a party to the treaty concerned, does not of itself absolve the parties to the treaty, so far as they are able, and can do so without any illegality, from endeavouring to secure that the third State conforms its conduct or action to the provisions of the treaty.').

contradictory evidence: on the one hand, Switzerland, before becoming a Member of the UN, made clear on a number of occasions that it joined the sanctions imposed by the Security Council *ex gratia* or imposed similar sanctions 'independently'.[61] On the other hand, the Security Council has on numerous occasions adopted resolutions addressed to 'all States'.[62] The best reconciliatory explanation appears to be that while the Charter, and thereby Security Council resolutions, do not give rise to any binding obligations on the part of non-Members, the organization may nonetheless call upon such States to contribute to the implementation of its decisions.[63] According to this line of thought, non-Members would not have obligations capable of activating Article 103.[64]

But there appears to be little practical value in examining this problem in much more detail since virtually all States in the world have joined the UN. There is room, though, for the argument that even if non-Members are not themselves obliged to accept the primacy of Charter obligations, they must at least recognize that Member States of the UN must do so. In particular, parties to the Vienna Conventions who are not Members of the UN could be legally obliged to tolerate whatever inconveniences and losses are be caused to them by virtue of Members being bound by Article 103.[65] As a matter of strict legal principle, perhaps they might be considered estopped from denying the role of the Charter.[66]

D. '. . . their obligations under the present Charter shall prevail.'

Finally, there is the term 'prevail'. The purpose of this phrase is relatively clear: in case of conflicting obligations, the Charter-based obligation is the one to be performed. But are incompatible obligations (or, rather, the norms producing them) permanently set aside or is their operation merely suspended?

According to the preceding discussion, Article 103 primarily applies to incidental inconsistencies. The main scenario of its implementation therefore involves a Security Council resolution—more often than not, one on

[61] See, eg, GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff, Dordrecht, 1993) 61, fn 77.

[62] See Wolfgang Graf Witzthum, 'Article 2(6)' in Simma (n 40) vol I, 140–48, 141.

[63] *Namibia Opinion* (n 9) 126 ('As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon [by the Security Council] to give assistance in the action which has been taken by the United Nations with regard to Namibia.').

[64] However, resolutions, where they are called upon to implement sanctions, could conceivably be qualified as authorizations, with the attaching consequences. Discussed in the text at nn 17–20 above.

[65] E Sciso, 'On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties' (1987) 38 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht 161–79, 168.

[66] R St J Macdonald, 'Fundamental Norms in Contemporary International Law' (1987) 25 Canadian Ybk Intl L 115–49, 122–23 ('. . . a non-member may be estopped from denying or may have acquiesced in the precedence of the Charter by reason that it knew or should have known that the state with which it had contracted had limited its competence.').

sanctions—conflicting with an existing agreement of some sort, perhaps on trade or friendly relations. It would make little sense to say that sanctions cause the conflicting trade agreement to be null and void. Also, given that sanctions are supposed to be temporary, it would be unreasonable for Article 103 to have permanent legal effects.[67]

Furthermore, the Vienna Conventions refer to Article 103 when dealing with the *application* of successive treaties relating to the same subject-matter, which may be contrasted to the approach the Conventions take to *jus cogens*. If a treaty conflicts with a peremptory norm *ab initio*, the 'treaty is *void*',[68] and, '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm *becomes void and terminates*.'[69]

The more reasonable argument is, then, that Charter-based obligations simply take precedence over other treaties, should conflicts arise.[70] This reading would also be more in line with the intentions of the drafters who considered that 'it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof'.[71]

Yet both earlier and subsequent agreements may be void in the light of the rules of the Charter which are recognized as corresponding to peremptory rules of international law (prohibition of the use of force being the prime example[72]). This is, however, the effect of the general principles on the operation of *jus cogens*. It has nothing to do with Article 103: a treaty contemplating aggressive war would be void due to a conflict with *jus cogens* with or without Article 103. The instances involving *jus cogens* should not, therefore, be extrapolated into meaning that the UN Charter has a general capacity of voiding treaties, *by virtue of Article 103*.

[67] See J Klabbers, 'Straddling Law and Politics: Judicial Review in International Law' in R St J Macdonald & DM Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, Leiden/Boston, 2005) 809–35, 834.

[68] 1969 Vienna Convention (n 41) art 53 (emphasis added).

[69] ibid art 64 (emphasis added).

[70] See Goodrich et al (n 47) 519 ('. . . this Article does not provide for the automatic abrogation of obligations inconsistent with the terms of the Charter. The rule is put in such form as to be operative only when there is an actual conflict.'); Humphrey Waldock, Second Report on the Law of Treaties, UN Doc A/CN.4/156 (1963) II YBILC 36–94, 55 ('The conflicting treaty may be unenforceable, if to enforce it involves a violation of the Charter; but it is not void.'); compare DP O'Connell, *International Law* (2nd edn, Stevens & Sons, London, 1970) vol 2, 274 ('The Article carefully avoids stating that the inconsistent treaty is invalid, and it may be that its only effect is to prevent members form invoking the inconsistent treaty before United Nations organs.').

[71] Report of the Rapporteur of Committee IV/2 (n 48) 707; see also H Lauterpacht, 'The Covenant as the "Higher Law"' (1936) 17 British Ybk Intl L 54–65, 58 ('The expression "abrogates" means in effect "is superior to"—now and for the future.').

[72] See Draft Articles on the Law of Treaties (n 44) 247 ('. . . the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.'), referred to, rather carefully, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, para 190.

E. Interim Conclusion

Neither the Charter, nor the references to it in the Vienna Conventions, allow prima facie one to say much more about the obligations that the Charter prevails over. In all of the leading cases, the effect of Article 103 has been limited to superseding other treaties. In *Lockerbie,* the conflict was with the Montreal Convention and, in *Al-Yedda,* with the ECHR. The same also holds true for the infamous pair of cases decided by the Court of First Instance of the European Communities—*Yusuf* and *Kadi.*[73] Both dealt with sanctions that were applied in the European Community legal order in a way that conflicted with the rights of individuals under the ECHR.

Thus, it remains unclear whether Article 103 deals, for instance, with private law contracts, unilateral acts and customary international law, which certainly also create obligations for States. Rudolf Bernhardt, the author of the leading commentary on Article 103, is of the opinion that 'it would not be correct to assume that obligations under the Charter do not also prevail in relation to these obligations'.[74] This proposition—carefully crafted through a double negative—will be considered in more detail in the following parts of this article.

III. THE APPLICATION OF ARTICLE 103 TO OTHER CONTRACTUAL ARRANGEMENTS

First, it should be considered whether contracts concluded with the participation of States could be seen as 'international agreements' for the purposes of the Charter. Of course, States conclude all sorts of contracts with different entities, giving rise to different problems.

Contracts drawn up exclusively between States are not uncommon. For instance, it has been the practice of some States to grant loans to other States under agreements that explicitly provide that the applicable law is that of the borrowing State.[75] Such contracts are certainly not treaties for they are not 'governed by international law'.[76] Yet it is apparent from the earlier discussion of 'international agreements' that this notion is not used in any precise sense in the Charter: it does not refer to agreements of a particular type, but rather to a broad range of instruments whereby States commit themselves. Furthermore, it may be ventured that an inter-State contract, subject to domestic law, is both 'international' (as in 'between nations') and

[73] Case T–306/01 *Yusuf and Ali Barkaat Int'l Foundation v Council and Commission* [2005] ECR II-3533; Case T–315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

[74] Bernhardt (n 46) 1298–99.

[75] See, eg, Agreement between the Government of Denmark and the Government of Malawi on Danish Government Loan to Malawi (signed 1 August 1966) 586 UNTS 3 art 12 ('Unless otherwise provided for in the Agreement, the Agreement and all the rights and obligations deriving from it shall be governed by Danish law.').

[76] See 1969 Vienna Convention (n 41) art 2(1)(a).

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.

understood as including unilateral engagements of an international character which have been accepted by the state in whose favour such an engagement has been entered into'.[81] However, the ICJ came to suggest in the *Nuclear Tests* cases that the binding legal force of a unilateral declaration does not depend on the reactions of other States.[82] This casts at least some doubts on the simple analogy between such declarations and agreements.

However, in many domestic legal systems, certain promises are enforceable by law. Such promises are usually considered to be a matter for contract law, whether because they constitute 'unilateral contracts' or otherwise.[83] Thus it could be suggested that both agreements and unilateral promises give rise to 'contractual obligations', making a strict distinction between the instruments involved, at least for the purposes of Article 103, less tenable. Indeed, unilateral acts may become indistinguishable from agreements if made in a mutual fashion. Moreover, if obligations that States acquire by means of mutual consent must give way to Charter obligations, then obligations they take upon themselves unilaterally should probably do so a fortiori.

The extent of Article 103 finds some clarification in the practice of the UN. Most importantly, the Security Council, while dealing with the Iraq–Kuwait situation, laid the ground for a very interesting habit of using the language of Article 103 when imposing sanctions. Thus, in Resolution 661 (1990), the object of which was to impose a trade embargo on Iraq, the Council '*[c]all[ed] upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution'.[84] In due course, the Council started to routinely use language whereby it called upon States, and often also upon international organizations, to act in accordance with the particular resolution, 'notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted' prior to the effective date or the date of adoption of the resolution.[85]

[81] Report of the Rapporteur of Committee IV/2 (n 48) 705.

[82] *Nuclear Tests (Australia v France)* (n 28) para 43, and *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, para 46 (taking the view that no 'subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect').

[83] See, eg, AL Corbin, vol 1, *Corbin on Contracts* (8 vols, West, St Paul, 1950–51) 25 et seq, 347 et seq and 631 et seq; WW McBryde, *The Law of Contract in Scotland* (Green & Sons, Edinburgh, 1987) 13–27; GH Treitel, *The Law of Contract* (11th edn, Sweet & Maxwell, London, 2003) 67 et seq.

[84] UNSC Res 661 (6 August 1990) para 5 (emphasis added).

[85] See UNSC Res 670 (25 September 1990) (Iraq) para 3; UNSC Res 748 (31 March 1992) (Libya) para 7; UNSC Res 757 (30 May 1992) (Bosnia and Herzegovina) para 11; UNSC Res 841 (16 June 1993) (Haiti) para 9; UNSC Res 864 (15 September 1993) (Angola/UNITA) para 20; UNSC Res 883 (11 November 1993) (Libya) para 12; UNSC Res 917 (6 May 1994) (Haiti) para

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.

IV. THE APPLICATION OF ARTICLE 103 TO CUSTOMARY INTERNATIONAL LAW

A. Preparatory Materials

The clear meaning of 'international agreements', as interpreted in the context, does not by any stretch of the imagination encompass customary international law (nor, for that matter, general principles of law). Even if bilateral or regional custom can be assimilated to some type of a tacit agreement, the same can hardly be said about general custom.[88] Notwithstanding any fundamentally consensual underpinnings that may be found in customary law, the agreement analogy must be completely disregarded when custom produces *erga omnes* obligations that are not owed by one State to another but by States to the international community as a whole.

Here, a short excursus to the drafting history of the Charter seems pertinent, especially as the supremacy clause did not appear out of thin air. A somewhat similar provision can be found in Article 20(1) of the Covenant of the League of Nations:

> The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.[89]

According to Hans Kelsen, this provision only dealt with international agreements:

> The distinction between 'obligations' and 'understandings' ('obligations' and 'ententes') is useless since in both cases it is a question, according to an aim of the legislator which can hardly be doubted in the present instance, of *contractual obligations*.[90]

A supremacy clause was not directly foreseen in the Dumbarton Oaks proposals, which were the legislative initiative for the Charter. Most probably this was due to the pressure of time—there were 'difficulties over more

[88] The relevance of consent seems to be greater in case of special custom, bringing it perhaps closer to agreements than general custom. Compare A D'Amato, *The Concept of Custom in International Law* (Cornell University Press, Ithaca/London, 1971) 233–63, but especially 250–51 ('. . . we might think of treaties as a highly formal type of 'special custom,' or indeed we might view special custom as an informal treaty. Either way we have rules evolved by particular states that concern themselves only, that indicate their mutual agreement.').

[89] Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 195.

[90] H Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant* (Geneva Research Centre, Geneva, 1939) 149 (emphasis in the original). Kelsen continues by explaining that '[t]his results from the fact that the words *inter se* refer both to "obligations" and to "understandings" and that in addition, in the French text the verb "contracter" is used in the second part of [the] paragraph . . . and applies both to "obligations" and to "ententes"'. ibid.

important provisions'.[91] As a result, one of the technical committees at the San Francisco conference—Committee IV/2 that dealt with 'legal problems', to be exact—was tasked to figure out whether a provision along the same lines should be included in the Charter.

The question was indeed of the 'whether' or 'if' variety—the Committee set itself an agenda where this particular issue was initially formulated as follows:

> Should the Charter provide that Members (a) Agree that all obligations *inter se* which are inconsistent with the charter are abrogated? (b) Agree to take immediate steps to secure release from any other obligation which is inconsistent with the Charter? (c) Agree not to undertake any obligation inconsistent with the Charter.[92]

The inclusion of a clause similar to that of Article 20 of the Covenant was, thus, by no means taken for granted. In fact, some delegates expressed serious doubts about its necessity quite far into the discussions.[93] In particular, the Australian delegation took the view that 'on the whole it was not necessary to insert any express provision in the Charter and that the matter could probably left to the ordinary customary law of nations'.[94]

In all likelihood, the Australian delegate was referring to the impact of the general law of treaties, mentioned earlier, which would make a later treaty prevail over an earlier one between the same parties. A similar principle applies, moreover, to earlier customary law, in so far as it is generally permissible to 'contract out' of customary rules. Therefore, there is little doubt that, to the extent that the Charter conflicted with any pre-existing international law, it took precedence in the legal relations between Member States, with or without Article 103.

Despite the doubts that were expressed, several proposals were made for at least some provision on the supremacy of Charter obligations to be put in the text. Those were, by and large, based on the above-cited part of the League Covenant.[95] But in some respects, other delegates agreed with the Australian representative. Committee IV/2 was able to place on record a 'general disposition to accept as evident' the rule that the Charter would supersede previous inconsistent obligations.[96] Consequently, no express

[91] RB Russell, *A History of the United Nations Charter: The Role of the United States 1940–1945* (The Brookings Institution, Washington DC, 1958) 387.

[92] Agenda for the Second Meeting of Committee IV/2, Doc 153, IV/2/3, 13 UNCIO 574–75, 575 (line breaks omitted, italics substituted for underlining).

[93] Summary Report of Sixth Meeting of Committee IV/2, Doc 419, IV/2/19, 13 UNCIO 602–3, 602 ('. . . certain delegated expressed the belief that no text should be inserted in the Charter regarding inconsistent obligations . . .').

[94] Revised Summary Report of Fourteenth Meeting of Committee IV/2, Doc 873, IV/2/37(1), 13 UNCIO 653–56, 654.

[95] Report of the Rapporteur of Committee IV/2 (n 48) 707.

[96] ibid.

language on this matter was included in the Charter. Similarly, the Committee considered the rule prohibiting Members from entering into engagements inconsistent with the terms of the Charter to be 'so evident that it would be unnecessary to express it in the Charter'.[97] And yet the Committee found, in the end, that it was 'necessary to incorporate in the Charter a provision regarding inconsistency between the obligations of members under other treaties and under the Charter itself, if only because the omission of such a provision could give rise to inaccurate interpretations'.[98] This kind of a 'just in case' attitude speaks in favour of a careful interpretation of the provision.

The relationship between the Charter and sources of international law other than treaties was also explicitly addressed at San Francisco in the context of drafting what later became Article 103. Towards the end of the conference, the Advisory Committee of Jurists came up with a revision of the text of the draft article. The Committee suggested dropping any reference to 'international agreements' and put forward a text that expressed the superiority of Charter-based obligations over 'any other international obligations to which [the Members of the UN] are subject'.[99]

This caused some dispute in the Coordination Committee, which was overseeing the preparation of the final text. The Chinese representative, in particular, felt that 'the new wording would widen the sense' of the proposed article and questioned whether the technical committee really had that in mind.[100] The Secretary of Committee IV/2 commented that 'if the sense of [the draft article] were broadened to include *obligations under international law*, the change would be one of substance'.[101] The Soviet representative, who was also a member of the Advisory Committee of Jurists, opined, on the other hand, that 'Committee IV/2 had felt the Charter should be the prevailing source of international law, not only for conventions, but also for other obligations'.[102] To solve the controversy, the Coordination Committee decided to ascertain the views of the members of Committee IV/2 as to whether the new language involved a change of substance.

It remains unclear what conclusion, if any, the members of Committee IV/2 reached: there are no records of Committee meetings after this issue was raised. However, two days after the debate in the Coordination Committee, Commission IV (to which Committee IV/2 belonged) adopted the unchanged

[97] ibid.

[98] ibid. See also Russell (n 91) 922 ('The United States position was that, if the Covenant had not contained Article 20, it would be better to omit the subject from the Charter.').

[99] Text revised by the Advisory Committee of Jurists at its Seventh Meeting, Doc WD 296, CO/102(2), 18 UNCIO 342 ('In the event of a conflict between the obligations of the members of the United Nations under the present Charter and any other international obligations to which they are subject, their obligations under the present Charter shall prevail.')

[100] Summary Report of Eighteenth Meeting of Coordination Committee (n 33) 113–14.

[101] ibid 114 (emphasis added).

[102] ibid.

draft article.[103] Subsequently, the Coordination Committee and the plenary session adopted the same text without further discussion.[104]

Therefore it may be concluded that plans to make the article in question cover *all* obligations under international law were *rejected* when the text of the Charter was adopted. Indeed, as regards the original—and, at the same time, final—language of the text, Commission IV observed in its report that it probably reflected the highest degree of consensus available.[105]

B. Subsequent Practice

Subsequent affirmations of the principle expressed by Article 103 are numerous. In addition to the Vienna Conventions on the Law of Treaties, the primacy of the Charter in treaty relations has been mentioned in several instruments establishing international organizations and regimes. A good example is the Charter of the Organization of American States (OAS), which provides in the relevant part that '[n]one 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'.[106] The North Atlantic Treaty—the constitutive document of NATO—and instruments of the GATT/WTO have clauses in the same genre.[107] In at least one instance, a provision amounting to a reproduction of Article 103 was inserted not in the constitutive instrument of the organization, because the organization predated the UN, but in a special agreement between the UN and that organization. This is the case of the Universal Postal Union.[108]

The provisions just referred to do not add anything substantive to the meaning of Article 103. Their primary effect is to render Article 103 of the Charter inapplicable by avoiding any conflicting obligations altogether.

[103] Summary Report of Second Meeting of Commission IV, Doc 1153, IV/12(1), 13 UNCIO 104.

[104] Summary Report of Forty-first Meeting of Coordination Committee, Doc WD 441, CO/205, 17 UNCIO 382; Report of Ninth Plenary Meeting, Doc 1210, P/20, 1 UNCIO 631.

[105] Report of the Rapporteur of Committee IV/2 (n 48) 706 ('After careful consideration of the texts and of the solutions . . . proposed, [the Committee] has concluded that the text herewith submitted probably represents the maximum of agreement attainable while at the same time expressing in satisfactory form the general principle which the Charter should incorporate.').

[106] Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, art 132.

[107] North Atlantic Treaty (signed 4 April 1949, entered into force 24 August 1949) 34 UNTS 243, art 7; Multilateral Agreement on Trade in Goods (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art 21(c); General Agreement on Trade in Services (signed 15 April 1994, entered into force 1 January 1995), 1869 UNTS 183, art 14*bis*; Agreement on Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299, art 73(c).

[108] Agreement between the United Nations and the Universal Postal Union (adopted 15 November 1947, entered into force 1 July 1948) 19 UNTS 119, art VI(2) ('As regards the Members of the United Nations, the Union agrees that in accordance with Article 103 of the Charter no provision in the Universal Postal Convention or related agreements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations.').

Surely, if the OAS Charter or the Postal Convention may not be interpreted in any way that would cause a conflict between the obligations of States under that instrument and the UN Charter, no conflict could possibly arise. Hence, Article 103 would not have to be applied.

The practice of UN bodies is of more interest. A particularly important instance is the adoption of the 1980 Friendly Relations Declaration by the General Assembly. While the basic idea of restating and reaffirming the principle contained in Article 103 was not directly disputed, there arose a question of its scope:

> 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 law and other sources of international law.[109]

The answer may be found between the lines of the final text of the Declaration. It includes a principle to the effect that 'States shall fulfil in good faith the obligations assumed by them in accordance with the Charter', which is worded as follows:

> Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.
>
> Every State has the duty to fulfil in good faith its obligations under the *generally recognized principles and rules of international law*.
>
> Every State has the duty to fulfil in good faith its obligations *under international agreements* valid under the generally recognized principles and rules of international law.
>
> Where obligations arising *under international agreements* are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.[110]

The fourth paragraph essentially restates Article 103, retaining the original reference to 'international agreements'. The second and the third paragraphs make a clear distinction between duties to fulfil obligations under general international law and under international agreements by addressing them separately. Hence, the Assembly did not opt for conflating various sources of law for the purposes of the rule contained in Article 103.

No change in this 'policy' appears in later resolutions, either. In the 1984 Declaration on the Strengthening of International Security, the Assembly

> *[s]olemnly reaffirm[ed]* that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under

[109] Repertory, Supplement No 3 (n 25) vol 4, 214.

[110] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (emphases added).

> any other international agreement, their obligations under the Charter shall prevail.[111]

Very similar language, complete with an explicit reference to Article 103, may be found in the 1987 Declaration on the Principle of Refraining from the Threat or Use of Force[112] and in the 2001 resolution on promoting respect for human rights and solving international humanitarian problems.[113] Resolutions similar to the latter have been adopted in subsequent years, all with similar language on Article 103.[114]

In none of these instances, nor in the resolutions of the Security Council mentioned earlier, has there been any reference to customary international law, in clear connection with Article 103. Thus, the practice of the General Assembly and the Security Council seem to provide little support for the claim that obligations under the Charter prevail over obligations under customary law by virtue of Article 103.

In the interests of completeness, it should be mentioned that a surprising change in the habitual text of Security Council sanction decisions occurred in Resolution 1343 (2001) on the situation in Liberia. In the relevant part of that resolution, the Council

> *[c]all[ed] upon* all States and all relevant international and regional organizations to act strictly in accordance with the provisions of this resolution *notwithstanding the existence of any rights or obligations entered into* or any licence or permit granted prior to the date of adoption of this resolution.[115]

As compared to the previously used texts, the words 'conferred or imposed by any international agreement or any contract' are missing. What significance could be attached to this omission? It appears that none. There are good reasons to believe that this was an oversight of the drafters. First, there is

[111] Declaration on the Strengthening of International Security, UNGA Res 2734 (XXV) (16 December 1970) para 3.

[112] Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, annexed to UNGA Res 42/22 (18 November 1987) para 4 ('*Confirm[ing]* that, in the event of a conflict between the obligations of the Member States of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail in accordance with article 103 of the Charter').

[113] Respect for the Purposes and Principles Contained in the Charter of the United Nations to Achieve International Cooperation in Promoting and Encouraging Respect for Human Rights and for Fundamental Freedoms and in Solving International Problems of a Humanitarian Character, UNGA Res 55/101 (2 March 2001) preamble ('*Taking into account* that, in accordance with Article 103 of the Charter, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail').

[114] UNGA Res 56/152 (13 February 2002); UNGA Res 57/217 (27 February 2003); UNGA Res 58/188 (22 March 2004); UNGA Res 59/204 (23 March 2005). In this latest resolution the operative words '*Taking into account*' were replaced with '*Bearing in mind*'.

[115] UNSC Res 1343 (7 March 2001) para 22 (second set of italics added).

nothing in the preparatory material of the resolution to account for a policy change.[116] Secondly, it is questionable whether 'rights and obligations' or even 'customary law', as opposed to legal instruments, can be 'entered into'. Thirdly, the terminology of the other authentic texts suggests a contractual relationship, in conformity with earlier practice.[117] Finally, a draft resolution submitted by the UK and US in 2004 again uses the phrase 'any international agreement . . . or . . . any contract entered into or any licence or permit granted'.[118]

C. *Judicial Opinions and Doctrine*

The reader will recall that, in the *Lockerbie* cases, the ICJ held that the duty to extradite individuals in accordance with a Security Council resolution prevailed over the provisions of the Montreal Convention that gave the State concerned the right to opt for its own prosecution. However, Judge Oda pointed out that the entire problem could be couched in quite different terms:

> [A]lthough a State which has jurisdiction in respect of criminal proceedings against any person who happens to be in a foreign territory is free to request the territorial sovereign to extradite that person . . ., the immediate question put by Libya is whether or not the coercive reinforcement of that request could be deemed contrary to international law. This . . . relates to protection of sovereign rights under general international law but not to the interpretation and application of the Montreal Convention, which is the subject matter of the present case.[119]

In the opinion of José Alvarez, 'Judge Oda seemed to be suggesting that the Council might have violated customary international law, and, significantly, he did not add that Article 103 of the Charter licenses the Council to do so with impunity.'[120] (Whether this is really what Judge Oda meant may be questioned, but the problem raised is important.) Thomas Franck has mused, along similar lines, that it would be 'interesting to speculate what might have happened had Libya . . . brought its action "under general international law"'.[121] Since the jurisdiction of the Court was based on the Montreal

[116] See UNSC Verbatim Record (7 March 2001) UN Doc S/PV.4287.

[117] The relevant part reads 'nonobstant l'existence de droits acquis ou d'obligations *contractées*' in French and 'independientemente de los derechos y obligaciones *contraídos*' in Spanish (emphases added).

[118] UNSC Draft Resolution (21 April 2004) UN Doc S/2004/313, para 11.

[119] *Lockerbie* cases (n 15), Declaration of Acting President Oda, part III.

[120] JE Alvarez, 'Judging the Security Council' (1996) 90 AJIL 1–39, 29.

[121] TM Franck, 'The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?' (1992) 86 AJIL 519–23, 522.

Convention alone, such arguments, or arguments relating to the customary nature of the *aut dedere* rule,[122] could not have been entertained.[123]

So the Court did not, and could not, pronounce on the combined effect of Articles 25 and 103 on customary international law. But of course many scholars have availed themselves of the opportunity to comment on the scope of Article 103 in this connection. Antonio Perez has carefully observed that '[t]echnically, the effect of Article 103 of the Charter is limited to other treaties of Member States, leaving open the theoretical possibility of supervening customary international law'.[124] Other writers have been more straightforward. According to Derek Bowett,

> [i]t is true that this reasoning is confined to the supremacy of a Council decision over inconsistent *treaty* rights or obligations, because Article 103 is concerned solely with compatibility between Charter obligations and obligations 'under any other international agreement'. Accordingly the reasoning would not apply where a member relied on its rights under general international law.[125]

Similarly, Geoffrey Watson has said:

> Article 103, relied on so heavily by the majority [of the Court], provides that Charter obligations prevail over 'other international agreements'; it does not provide that Charter obligations prevail over *jus cogens* and other forms of customary international law.[126]

As regards the relationship between the Charter and *jus cogens*, the situation is arguably more straightforward. It is worth recalling here that the reasoning of *Lockerbie* reverberated in the provisional measures stage of the *Genocide* case. One of the questions raised was whether Security Council Resolution 713 (1991), which prohibited the shipment of weapons to the parties of the Yugoslav conflict whilst the Bosnians Serbs were armed and Bosnian Muslims were not, contributed to the genocide of the latter. The Court considered this far-fetched. But Judge *ad hoc* Lauterpacht made an important *obiter* that the doctrine of the supremacy of Security Council resolutions, enunciated in *Lockerbie*, would be inapplicable if a Council

[122] See P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck Ybk UN Law 1–33, 13, fn 36 ('It should be noted that one of the highly controversial issues raised by the Order of the Court in the Lockerbie Case is that it does not even consider the fact that the rule "aut dedere, aut judicare", embodied in the Montreal Convention (over which Resolution 748 prevails on the basis of Charter Article 103) is most probably at the same time a customary rule.').

[123] *Lockerbie* cases (n 15), Declaration of Acting President Oda, part III ('The claim on the ground of the violation of sovereign rights would have instituted a totally different litigation, and whether or not the Court has jurisdiction to deal with that issue is certainly a different matter.').

[124] AF Perez, 'The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution' (2000) 28 Denver J Intl L & Policy 175–221, 211, fn 139.

[125] Bowett (n 13) 92.

[126] GR Watson, 'Constitutionalism, Judicial Review, and the World Court' (1993) 34 Harvard Intl L J 1–45, 25, with a reference to Franck (n 121) 521–22.

resolution were in contradiction with the prohibition of genocide, universally accepted as being a *jus cogens* norm:

> The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*.[127]

This suggests that *jus cogens* is a limitation on the powers of the Security Council, as Article 103 cannot establish the primacy of a Charter obligation over *jus cogens*.[128] More generally, one could make the argument that Charter provisions, in so far as they are not themselves reflective of *jus cogens*, are subject to *jus cogens*, because the Charter is, after all, a treaty.[129] In any event, if *jus cogens* norms are, by definition, norms *from which no derogation is possible*, it would be nonsensical to stipulate that Security Council resolutions are an exception—this argument would involve a complete discarding of the very concept of *jus cogens*.

But, in the light of the findings of the previous sections, it is even doubtful whether Article 103 has an impact on ordinary custom. It is rather telling that a number of important commentators, who have discussed the effects of Article 103 in general, have made no mention of any other source of law beside treaties. For example, Goodrich and colleagues,[130] Hans Kelsen[131] and Alf Ross[132] refer neither to customary law nor to general principles of law in this context.

Contemporary scholars have, indeed, specifically questioned the superiority of the Charter over customary law on the basis of Article 103.[133] Some have been quite straightforward in dismissing such a possibility. For example, Alexander Orakhelashvili writes:

> Article 103 makes the Charter prevail over international agreements, freeing states from legal liability for any non-performance of their other agreements due

[127] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 325, Separate Opinion of Judge Lauterpacht, para 100.

[128] See also Herdegen (n 14) 156 ('... the peremptory norms of international law provide insurmountable limitations upon both the conferment and the exercise of competence flowing from the Charter.').

[129] See also JJ Paust, 'Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions' (1994) 19 Southern Illinois University L J 131–51, 139 ('The fact that Article 103 of the Charter compels a primacy of member obligations under the U.N. Charter over more ordinary treaties does not deny the relevance of customary *jus cogens* as norms preempting any international agreement.' (footnotes omitted)).

[130] See n 47 and accompanying text.

[131] Kelsen (n 15) 111–21.

[132] A Ross, *Constitution of the United Nations: Analysis of Structure and Function* (Ejnar Munksgaard, Copenhagen, 1950) 33–34.

[133] White and Abass (n 9) 521 ('Article 103 gives obligations arising out of the UN Charter pre-eminence over obligations arising under any other international treaty, though it is not clear that this affects member States' customary rights.').

> to compliance with UN coercive measures, but this is not the case for the general international law, of which *jus cogens* is a part. The clear text does not support the opposite view, and those who wish to see Article 103 as making the Charter prevail over general international law cannot rely on evidence, but only on wishful thinking.[134]

At the same time, it must be readily admitted that several eminent jurists are of the opinion that Charter obligations do prevail over obligations deriving from all other sources of international law. In this connection, Rudolf Bernhard emphasizes the constitutional dimension of the Charter:

> Article 103 must be seen in connection with Art. 25 and with the character of the Charter as the basic document and 'constitution' of the international community. Therefore the ideas underlying Art. 103 are also valid in case of conflicts between Charter obligations and obligations other than those contained in treaties.[135]

Martti Koskenniemi came to a similar conclusion in his report to the ILC on the fragmentation of international law, but formulated it in more pragmatic terms: 'the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law'.[136] As the underlying practice it not examined in detail, there are insurmountable difficulties in assessing this view more thoroughly. But the practice examined in this article, which is admittedly limited to instances where reliance on Article 103 has been reasonably explicit, is at odds with such a conclusion. It is also important to note that the ILC *en banc* took a somewhat more careful view:

> Given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations *may* also prevail over inconsistent customary international law.[137]

In the light of the divergence of opinion, it is not surprising that courts have tried to tiptoe around the question of the applicability of Article 103 to customary law. The issue came up in the early stages of the *Al-Jedda* case where counsel for Mr Al-Jedda suggested that 'Article 103 did not bite customary law, of which freedom from arbitrary detention form[ed] part (though it [was] not *jus cogens*)'.[138] But, conveniently for the Court, 'he accepted that the

[134] Orakhelashvili (n 16) 69.

[135] Bernhardt (n 46) 1299.

[136] M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (13 April 2006) para 345.

[137] Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.702 (18 July 2006) para 35 (emphasis added).

[138] *R (Al-Jedda) v Secretary of State for Defence* (HC) [2005] EWHC 1809 (Admin) para 114.

commentators [were] split on the issue and he did no pursue the point with any vigour'.[139]

In contrast, in the *Yusuf* and *Kadi* cases, the Council and Commission expressly argued that Article 103 'makes it possible to disregard any other provision of international law, whether customary or laid down by convention, in order to apply the resolutions of the Security Council'.[140] The Court of First Instance was careful enough not take a view on the matter of customary law, observing merely that the obligations of UN Member States under the Charter 'clearly prevail over every other obligation of domestic law and of international treaty law'.[141]

V. CONCLUDING REMARKS

There is precious little in the text of Article 103 to suggest that customary international law falls under its scope. Indeed, the *travaux préparatoires* lead to the opposite conclusion. The application of the provision, at least when it has been directly invoked, also provides little support for the claim.

Justifications for a broader interpretation have a tendency to be based on the arguably constitutional nature of the Charter. Undoubtedly there are good reasons for viewing the Charter as having at least some constitutional dimensions but, as Benedetto Conforti has put it, '[t]he constitutional aspect of the UN should not be exaggerated. The Charter is and remains a treaty'.[142] As regards Article 103 in particular, its meaning should also not be exaggerated: according to Paul Reuter, it 'was essentially meant to provide a legal justification for the suspension of treaties decided on as a "sanction" against member States'.[143] Indeed, significant legal consequences that might be ascribed to this provision are better explained by general principles on the relations between different sources of international law.

Furthermore, when interpreting Article 103, one should be particularly careful not to put too much emphasis on the idea of the Charter as a 'world constitution'. The problem is that, in such constitutional interpretations, Article 103 seems to be one of the main indicators of the constitutional character of the Charter. Hence, there is a danger of using a specific reading of Article 103 to justify what is presumed in order to elicit such a reading. And, with all due respect, that would be something from the repertoire of Baron Münchhausen.

[139] ibid.

[140] *Yusuf* and *Kadi* (n 73) paras 207 and 156, respectively.

[141] *Yusuf* and *Kadi* (n 73) paras 231 and 181, respectively.

[142] B Conforti, *The Law and Practice of the United Nations* (2nd edn, Kluwer Law International, The Hague/London/Boston, 2000) 10; see also G Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue' (1997) 8 EJIL 1–28.

[143] P Reuter, *Introduction to the Law of Treaties* (2nd edn, Kegan Paul, London/New York, 1995) 147.