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The Legal Nature of the Security Council

1.1 Applicable Law

It is not our aim in this chapter to set out the overall legal framework of the UN Security Council, a matter covered throughout the book. But we should say a few words at the outset about the various rules of international law applicable to the work of the Council. Article 38.1 of the Statute of the International Court of Justice is a good place to start:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Security Council is first and foremost governed by the Charter of the United Nations,[1] including the Statute of the International Court of Justice.[2] The Charter was adopted at San Francisco on 26 June 1945 and entered into force on 24 October 1945. As at present (January 2022), there are 193 member states of the UN.

[1] For detailed information on UN law, see Higgins et al. (2017b); Chesterman et al. (2016); Simma et al. (2012); Cot et al. (2005); Goodrich et al. (1969).
[2] Zimmermann et al. (2019).

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The Charter may be amended, though this is not an easy task since the entry into force of amendments requires ratification by all five permanent members.[3] It has been amended three times (1963–5, 1965–8, and 1971–3); the amendments concerned enlargement of the membership of the Security Council (from eleven to fifteen members) and the Economic and Social Council (from eighteen to twenty-seven to fifty-four members). In fact, the law of the United Nations has developed mainly through practice.

Being a multilateral treaty, the Charter falls to be interpreted in accordance with the rules on treaty interpretation reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) 'without prejudice to any relevant rules of the organization' (Article 5 of the VCLT).[4]

Acting under Article 30 of the Charter, the Security Council first adopted *Provisional Rules of Procedure* between April and June 1946. They were amended from time to time between 1947 and 1982 (but only occasionally and in minor respects).[5] The Rules continue to be described as 'provisional' some seventy-five years after their adoption. Originally this was because several divisive issues remained outstanding, not least questions related to voting; nowadays perhaps it is also out of a desire to indicate the Council's flexibility on procedural matters.

Since the end of the Cold War much effort has gone into developing the Security Council's working methods;[6] the outcomes are documented in Notes by the President, which since 2006[7] have been consolidated from time to time in '507' documents; at the time of writing, the latest such consolidation is dated 30 August 2017.[8]

It is important to distinguish between meetings of the Council, at which the Council may hold discussions, adopt decisions and make recommendations, and informal meetings of Council members. The latter are not Council meetings and in them Council members

[3] Charter, Arts. 108–9. See Witschel, 'Article 108' (2012); Witschel, 'Article 109' (2012); Winkelmann (2007); Zacklin (1968).
[4] Kadelbach (2012).
[5] S/96/Rev.7, 21 December 1982. On the Provisional Rules of Procedure, see Sievers and Daws (2014) 9–12.
[6] Security Council Report (2007, 2010, 2014, 2017); Sievers and Daws (2014) 12–15, 480–90; Aust (1993); Wood (1996).
[7] Note by the President of the Security Council, S/2006/507, 19 July 2006.
[8] Note by the President of the Security Council, S/2017/507, 30 August 2017.

do not and cannot act on behalf of the Council. They include informal consultations of the members of the Council ('informal consultations of the whole'), which since the 1980s take place very frequently,[9] and the less frequent 'Arria-formula meetings'[10] and 'informal interactive dialogues'.[11]

As of January 2022, the Security Council has adopted more than 2,600 resolutions, many presidential statements, and various other texts (press releases etc.) that may, in a broad sense, be said to form part of the applicable law. Collectively these may be referred to as Security Council 'outcomes'. The interpretation of Security Council resolutions has been the subject of important pronouncements by the International Court of Justice (ICJ).[12]

In addition, there is a considerable number of international conventions that bear on the role of the Security Council. Among the most significant are the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the Rome Statute of the International Criminal Court. The NPT requires states withdrawing from the Treaty to notify the Security Council three months in advance.[13] The Security Council has recognized that it has an integral role of ensuring the maintenance of international peace and security as it relates to the use or threat of use of nuclear weapons[14] and that non-compliance with the NPT may be a threat to international peace and security and warrant Council action.[15] The Rome Statute gives the Security Council the authority of both referral[16] and temporary deferral[17] of situations before the Court, as well as a particular role in situations where the crime of aggression is involved.[18]

In addition to such treaty provisions, the rules of customary international law, as well as general principles of law within the meaning of Article 38.1(*c*) of the Statute of the International

[9] Sievers and Daws (2014) 65–74.
[10] The first Arria-formula meeting took place in 1992, Sievers and Daws (2014) 74–92.
[11] The first informal interactive dialogue took place in 2007, Sievers and Daws (2014) 93.
[12] *Namibia* Advisory Opinion, p. 54, para. 116; *Kosovo* Advisory Opinion, p. 442, para. 94; see also Wood (1998); Wood (2016b); Traoré (2020).
[13] Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, Art. X.
[14] S/RES/984, 11 April 1995. [15] S/RES/1887, 24 September 2009.
[16] Rome Statute of the International Criminal Court, Art. 13(b).
[17] Ibid., Art. 16. [18] Ibid., Arts. 15 *bis* and 15 *ter*.

Court of Justice, may also play their part in the work of the Security Council.

Judgments and advisory opinions of the ICJ have been important in explaining and developing UN law, including as regards the Security Council,[19] as have those of other international courts and tribunals.[20]

As a further subsidiary means for the determination of the law, writings have sometimes been cited in Council proceedings.

1.2 The Legal Nature of the Security Council

1.2.1 A UN Organ, without Separate Legal Personality

Blokker has written: 'The Charter closely connects the Security Council to other parts of the United Nations. It is far from a loosely embedded "stand-alone" body within the world organization.'[21] And he goes on to affirm: 'An appreciation of the Security Council is incomplete without at least some evaluation of the larger framework of which it is part.'[22]

The Security Council is one of the six principal organs of the UN. The UN itself has international legal personality, distinct from that of its member states, as the ICJ explained in the *Reparation for Injuries* case.[23] The Council, being an organ of the UN and not a separate organization, does not have international legal personality. Its acts are those of the UN. The separate legal personality of the UN has important implications for matters such as the organization's international responsibility[24] and obligations under treaties to which it is

[19] *Lockerbie*, Provisional Measures; *Admission* Advisory Opinion; *Namibia* Advisory Opinion.

[20] *Prosecutor* v. *Tadić* (1995). [21] Blokker (2020) 162. [22] Ibid., 166.

[23] *Reparation* Advisory Opinion, at p. 179 ('the Court has come to the conclusion that the Organization is an international person, . . . it is a subject of international law and capable of possessing international rights and duties, . . .').

[24] See the ILC's Draft articles on the responsibility of international organizations (2011) 40–105. The Articles are annexed to UNGA resolution 66/100, 9 December 2011. Art. 6.1 states that the conduct of an organ of an international organization in the performance of functions of that organ 'shall be considered an act of that organization under international law'. Art. 8 states that the conduct of an organ shall be considered an act of the organization under international law 'even if the conduct exceeds the authority of that organ'. The commentaries to the Articles contain many references to the Security Council.

a party[25] and – in so far as they may be applicable – obligations under rules of customary international law[26] and under general principles of law within the meaning of Article 38.1(*c*) of the ICJ Statute. Separate legal personality is also important for international dispute settlement,[27] and for the position of UN members, including when acting as members of the Council.[28]

Those who adopt a 'constitutional perspective' towards the Charter, or indeed towards other areas of international law, seek to import into international affairs legal concepts from domestic legal systems. The Charter, however, is a treaty among states, a multilateral treaty, now virtually universal, with 193 parties. It is, of course, the constituent instrument, or constitution, of the organization known as the United Nations, and as such sets out the composition and powers of its organs. But that does not mean that it has – or should have – the same characteristics as a national constitution. The Charter does embody certain principles of international law, including those on the peaceful settlement of disputes and the non-use of force, as well as the right of self-defence.[29] And it provides, in Article 103, that in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the

[25] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force).

[26] The extent to which rules of customary international law (for example, customary international human rights law) apply to international organizations remains uncertain. Contrary to the views of some, it was not greatly clarified by the Court's cautious words in the 1980 *WHO* Advisory Opinion, at pp. 89–90, para. 37 ('International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.').

[27] A topic on the settlement of disputes to which international organizations are parties has been included in the ILC's long-term programme of work (see the ILC's annual report to the General Assembly for 2016, A/71/10, 387–99) but has not yet been included in the ILC's current programme of work.

[28] The ILC's Draft articles on the responsibility of international organizations also apply to the international responsibility of a state for an internationally wrongful act in connection with the conduct of an international organization (Art.1.1 and Part Five).

[29] UNGA/RES/2625 (XXV), 24 October 1970, The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ('Friendly Relations Declaration').

Charter prevail. Article 103 is the Charter's chief 'constitutional' element.

None of this, however, makes the Charter 'the constitution for the international community'. The term 'constitution' has no particular meaning in international law.[30] The 'international community' (itself a much-misused term) has little in common with society within a state. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) rightly referred to a flawed 'domestic analogy', which is inappropriate where 'the international community lacks any central government with the attendant separation of powers and checks and balances', and warned that 'the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension'.[31]

1.2.2 A Political Organ, an Executive Organ, a Legislature, a Judicial Body?

According to the Charter, the Security Council is the principal organ of the UN upon which, in order to ensure prompt and effective action, the Members have conferred primary responsibility for the maintenance of international peace and security. Its powers and functions – and their limits – are those set out in the Charter, as developed in practice. In the field of international peace and security, the Council has the power to make recommendations, and to adopt decisions binding on the Members of the UN. By virtue of Article 103, obligations imposed by the Council, being obligations under the Charter, have priority over all other international obligations of states.[32] That is all that needs to be said about the nature of the Council, though some seek to go further.

1.2.2.1 A POLITICAL ORGAN?

The Security Council is often referred to as a 'political' organ. That expression is presumably used to distinguish it from 'legal' organs,

[30] Even within national legal systems, the term is used in many different contexts including, for example, the basic document of a barristers' chambers or a golf club.

[31] *Prosecutor* v. *Blaskić*, para. 40. [32] See Chapter 1.3.

or perhaps technical and administrative ones. The term 'political organ' may carry the unfortunate implication that the Council need pay little attention to the law applicable to its work under the UN Charter, but that is not the case.

1.2.2.2 AN EXECUTIVE ORGAN?

The Appeals Chamber of the ICTY has stated:

> It is clear that the legislative, executive and judicial division of power which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. ... It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. ... Consequently the separation of powers element of the requirement that a tribunal be 'established by law' finds no application in an international law setting.[33]

Some nevertheless seek to situate the Council within the UN in terms of the separation of powers at the national level. In the early days, the Council was sometimes referred to as the 'executive organ' of the UN (perhaps harking back to the Council of the League of Nations). But, to the extent that it acts like an executive branch of government, this is in only one area of UN activity, the maintenance of international peace and security. It does not routinely act as an executive for the other UN organs. It is not like those organs of certain other international organizations which do in effect act as an executive between meetings of the plenary organ.

1.2.2.3 A LEGISLATURE?

A question often asked, particularly since the adoption of resolution 1373 (2001), is whether the Council may act as a legislature or, as it has sometimes been put, as a 'global legislator'.[34] Perhaps the greatest fear of an all-powerful and unconstrained Council comes when this new move towards 'legislation' is combined with a much-expanded concept of what constitutes a threat to international

[33] *Prosecutor* v. *Tadić* (1995), para. 43.
[34] Rosand (2004); Popovski and Fraser (2014).

peace and security.[35] Here, too, the domestic law analogy is not helpful. The question itself is somewhat abstract. It depends on what is meant by 'legislature'. In practical terms, the real question is whether the mandatory decisions contained in resolution 1373 (2001) (measures against the financing of terrorism), resolution 1540 (2004) (non-proliferation), or resolution 2396 (2017) (foreign terrorist fighters and returnees), or other resolutions creating binding rules, were within the powers of the Council, and thus lawfully adopted. Put that way, the answer is clearly 'yes', so long as the subject-matter of the resolution is within the Council's mandate. These resolutions, as it happens, were adopted unanimously and have been repeatedly reaffirmed. No state has seriously suggested that resolution 1373 (2001) was not lawfully adopted. Such concerns as were expressed about resolution 1540 (2004) seem mostly to have been about the policy question 'Should the Council so act?', not 'Is it within its powers so to act?'. In the case of these resolutions, virtually all states are doing their best to comply. So there is no basis in state practice for suggesting that elements of these resolutions were *ultra vires*, quite the contrary. And the same applies to other 'legislative' resolutions adopted by the Council.

The legal argument seems to boil down to this: that, despite the practice, the Council is empowered to act only in relation to a specific situation or dispute. Back in the 1990s, one of the co-authors of this book wrote that

> [w]hile the Security Council has some of the attributes of a legislature, it is misleading to suggest that the Council acts as a legislature, as opposed to imposing obligations on States in connection with particular situations or disputes ... the Council makes recommendations and takes decisions relating to particular situations or disputes. ... it does not lay down new rules of general application.[36]

This described what was then – in the 1990s – Council practice; it was not a statement of legal constraints on the Security Council.

Nowhere does the Charter state in terms that the Council's Chapter VII powers are limited to specific situations. Is this to be implied, for example from the language of Article 39? While breaches of the peace and acts of aggression are likely to be specific, the same cannot be said of threats to the peace. There is nothing in

[35] See Chapter 3. [36] Wood (1998) 77–8.

the language of Article 39 to suggest that the requirement that the Council determine 'a threat to the peace' refers only to a threat that is specific rather than to one that is more general. Such a restrictive interpretation would be contrary to the object and purpose of the Charter if, in fact, there are now threats of a general nature which require urgent and global action of the kind that the Security Council can best take. Normal treaty-making procedures may be too slow; attempts to speed them up have not met with great success. Furthermore, specific acts that may qualify as breaches of the peace or even acts of aggression may require a more general response.

The adoption of 'legislative' resolutions marked a new development. Resolutions 1373 (2001) and 2396 (2017), and resolutions like them, are qualitatively different from what came before, not least in that they address a general threat, not a specific situation or dispute. But that does not make them *ultra vires*. No one doubts that the Council may impose obligations on states in relation to a particular dispute or situation. It may, for example, require them to impose an arms embargo on a particular state. Such a decision of the Council may also be termed 'legislation'. The question is not whether the Council can legislate – it can and regularly does – but whether it is empowered to do so in a general way in order to address a global phenomenon, unrelated to any specific situation or dispute.

The answer turns on whether a general, unspecific threat to international peace and security is sufficient for the invocation of Chapter VII of the Charter. If the Council determines that international terrorism, or the proliferation of weapons of mass destruction, or a combination of the two, is a threat to the peace – hardly a fanciful conclusion – then it may take such measures as it considers necessary to maintain the peace. Depending on the nature of the threat, such measures may be specific, addressed, for example, to the threat emanating from a particular state, or they may be general, addressed, for example, to the global threat from terrorist groups. There is no great principle involved, though the circumstances in which general measures are considered necessary and appropriate may prove to be rare.

Though the Council has expanded the scope of what can be considered a threat to international peace and security, to what extent various issues and situations are matters that fall under the

mandate of the Council remains a divisive issue.[37] Such concerns are understandable. The members of the Council need to exercise caution. If the Council is seen to be acting routinely as a 'world legislator', and is thought to be throwing its weight around in circumstances where this is not justified, states may simply cease to comply with its demands, whatever their legal obligations under the Charter. That would undermine the Council's authority, with very serious consequences for the collective security system across the board.[38]

1.2.2.4 A JUDICIAL BODY?

Some thirty years ago, Elihu Lauterpacht wrote that 'there have been a number of occasions on which ... the Security Council has framed its resolutions ... in language resembling a judicial determination of the law and of the legal consequences said to flow from the conduct of the State that is arraigned'.[39] The examples he gave were those where the Council had held a situation to be unlawful or null and void, and called upon states not to recognize it. They included South West Africa, Southern Rhodesia, Jerusalem and the Occupied Territories, the South African 'Homelands', and the Turkish Republic of Northern Cyprus. He suggested that there was a line to be drawn, 'admittedly imprecise', between 'prescriptions of conduct that are directly and immediately related to the termination of the impugned conduct ... and those findings that ... have a general and long-term legal impact that goes beyond the immediate needs of the situation'. He acknowledged that neither the ICJ (when it had the opportunity in the *Namibia* Advisory Opinion) nor states (other than those directly affected) had objected to such findings. While seemingly still questioning the legality of these 'quasi-judicial' determinations, he conceded that states had acquiesced. His main conclusion was that 'quasi-judicial decisions' should be subject to some kind of judicial review.

[37] See, for example, the various statements made in a debate on 'human rights and prevention of armed conflict' convened by the United States in 2017, PV.7926, 18 April 2017.

[38] Rosand has suggested certain 'safeguards' when the Council legislates (Rosand 2004).

[39] Lauterpacht (1991).

This position is unconvincing, both as a matter of principle and in light of the practice of the Council. The Council made such 'judicial' determinations from the very beginning, for example when it recognized that forces from North Korea (the Democratic People's Republic of Korea (DPRK)) had committed an armed attack against South Korea (the Republic of Korea) in 1950, and recommended that states assist the Republic of Korea to repel the attack.[40] This amounted to a factual and legal determination (the existence of an armed attack), and the consequent legal right stemming from that determination (the right of individual and collective self-defence).

Nothing in the UN Charter or the practice of the Council suggests a distinction between two categories of decisions: prescriptions of conduct as opposed to findings with a general and long-term impact. The Council's action for the maintenance of international peace and security is no longer (if it ever was) confined to immediate steps to restore peace. Much that it does today is longer-term: dispute resolution; protection of civilians; peacekeeping; women and peace and security; peacebuilding; and many more thematic issues. It may deploy a wide range of measures for the peaceful settlement of disputes and the investigation of situations. If it considers it necessary to pronounce upon a legal matter, that surely is within its competence, not least when it calls for the non-recognition of a given situation in order to maintain or restore international peace and security. The real question is how the Council should set about making findings of law, particularly where the factual or legal position is in doubt. That the Council should exercise caution and avoid making factual or legal determinations in haste is undisputed. To argue that if it has done so then it has gone beyond its powers under the Charter is not based on any reasonable interpretation of the Charter. As the ICTY Appeals Chamber has stated: 'Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.'[41] Above all, there is the question of the legal effect of 'quasi-judicial' pronouncements. On rare occasions,

[40] S/RES/82, 25 June 1950; S/RES/83, 27 June 1950; and S/RES/84, 7 July 1950.
[41] *Prosecutor v. Tadić(1995)*, para. 37.

the 'quasi-judicial' determination is a *decision* of the Council and thus must be accepted by all member states, for example when the Council *decided* that Iraq was in material breach of previous Security Council resolutions in 2003,[42] or when the Council *decided* that the continued occupation of Namibia by South Africa constituted a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia.[43]

More often, the pronouncement of a 'quasi-judicial' matter of law or fact could be inconsequential in terms of Council action against a member state, when it does not lead to any operative consequences, for example when the Council found in resolution 496 (1981) that an act of aggression had been committed against Seychelles without taking further action against the aggressor, which it refrained from naming.

That said, if one were to take the Council's assertion at face value, it would entail the international legal responsibility of the state involved, exposing it to legal consequences such as reparation.

The Council itself said as much when, following an attack against Tunisia in 1985, in resolution 573 (1985) it condemned 'the act of armed aggression perpetrated by Israel'.[44] In this instance, it added that it considered that 'Tunisia has the right to appropriate reparations as a result of the loss of human life and material damage which it has suffered and for which Israel has claimed responsibility.'[45] While this assertion was not binding, it was a legal determination by the Security Council based on its assessment of the facts and Israel's admission.

It is important to note that 'quasi-judicial' determinations that are not *decisions* of the Council are not binding as such. What is binding is any enforcement action taken by the Council in its decisions, whether based on these facts and legal determinations or not. The factual and legal assertions, on the other hand, in these instances remain a matter of objective assessment. While such a statement by the Council may carry much weight, for example before a court or tribunal, the latter may still reach factual and legal conclusions different from those reached by the Council, which on many occasions has to act very swiftly.

[42] S/RES/1441, 8 November 2002, para. 1.
[43] S/RES/269, 12 August 1969, para. 3. [44] S/RES/573, 4 October 1985, para. 1.
[45] Ibid., para. 4.

This seems to be the balance struck in the Kampala amendments to the Rome Statute with respect to the role of the Security Council in relation to the crime of aggression.[46] Under the new Article 15 *bis*, the practical effect of a Security Council determination that an act of aggression has occurred is that it enables the International Criminal Court (ICC) Prosecutor to proceed immediately with an investigation.[47] Otherwise, the Prosecutor must wait for six months and obtain the authorization of a pretrial chamber as is required in all other circumstances.[48] Article 15 *bis* clarifies, however, that a determination that an act of aggression has occurred by any 'organ outside the Court' – including, of course, the Security Council – is without prejudice to the Court's independent judgment.[49] Here, the Council's legal determination carries some weight and has practical effect, but is ultimately subject to the independent determination of the Court itself.

It is true that the Council does not always pronounce itself on the facts and their legal consequences for other member states. But there is no legal reason preventing the Council from doing so. In some instances, these 'quasi-judicial' determinations enhance, rather than detract from, the authority of the Council since determining that a breach of international law occurred could provide legitimacy and justification for consequent measures taken by the Security Council. On the other hand, if one were to accept the argument that the Council is not the correct UN organ to make such determinations, that would mean that the organ with the primary responsibility for the maintenance of international peace and security should remain silent when illegal uses of force occur. Furthermore, collective security measures under Article 42, it is recalled, are to be taken only when the Council considers that measures not involving the use of armed force would be inadequate. The Council thus has the power, under Article 41, to take any measures not involving the use of armed force in order to avoid resort to Article 42. These measures must include the ability to make legal determinations which, though of potential serious consequence, are not more imposing on states than other enforcement measures available to the Council that fall short of the use of force.

[46] Resolution RC/Res. 6, 11 June 2010. [47] Rome Statute, Art. 15 *bis*, para. 7.
[48] Rome Statute, Art. 15 *bis*, para. 8. [49] Rome Statute, Art. 15 *bis*, para. 9.

1.3 Priority of Charter Obligations (Article 103)

Article 103 is the cornerstone of the Charter's collective security system; it is an essential component in ensuring that the Security Council is able to exercise effectively its primary responsibility for the maintenance of international peace and security and thus ensure prompt and effective action by the UN.[50] Article 103 provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Together with Article 25, this means that the Council has the authority to take legally binding decisions with which all member states must comply. 'This extraordinary power . . . gives the Council the ability to alter the international legal landscape instantaneously.'[51]

Article 30 of the VCLT recognizes the absolute priority of the rule in Article 103.[52] Article 103 has occasionally been referred to expressly, often implicitly, in other international agreements.[53] While perhaps a useful reminder, the inclusion of such a reference is not, of course, necessary in order for Charter obligations to prevail, at least among members of the UN. The same goes for explicit or implicit references to Article 103 in resolutions of the Security Council.

The International Law Commission (ILC) has noted the significance of Article 103 when considering topics other than the law of treaties.[54] Its Study Group on Fragmentation considered the effect of Article 103 in some detail, which the Group's report explained as

[50] Wood (2011); Paulus and Leiß (2012); Kolb (2014). [51] Ratner (2004) 592.

[52] Art. 30(1) of the VCLT begins: 'Subject to Article 103 of the Charter of the United Nations, . . .'. See also Art. 30(6) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986: 'The preceding paragraphs 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 prevail.'

[53] For example, the Convention on International Civil Aviation Art. 3 *bis* (a), states that the 'provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations', implicitly acknowledging their supremacy. See Convention on International Civil Aviation as amended by Protocol relating to an amendment to the Convention on International Civil Aviation (Art. 3 *bis*), 2122 UNTS 337.

[54] See text from note 59 on for the relationship between Art. 103 and *jus cogens*.

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follows: 'What happens to the obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not one of validity but of priority. The lower ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103.'[55] The Study Group's conclusion 35 reads:

> The scope of Article 103 of the Charter of the United Nations extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council. 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.[56]

Article 103 has been considered in a number of court decisions.

In its 1984 *Nicaragua* v. *US* Judgment on jurisdiction and admissibility, the ICJ observed that 'all regional, bilateral, and even multilateral, arrangements … must be made always subject to the provisions of Article 103 of the Charter of the United Nations'.[57]

In its *Lockerbie (Provisional Measures)* Orders, the ICJ held that the obligations of the members of the UN under the Charter, which prevailed over other obligations by virtue of Article 103, included obligations imposed by mandatory decisions of the Security Council:

> 39. Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, 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.[58]

[55] A/CN.4/L. 682, 13 April 2006, paras. 328–60, at 333. Art. 103 contrasts with Art. 20 of the Covenant of the League of Nations, under which the Members of the League agreed that 'this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof'. The Study Group's analytical report was finalized by its Chair, Martti Koskenneimi. The UN General Assembly took note of both the conclusions and the analytical study, UNGA/RES/61/34, 4 December 2006, para. 4.

[56] A/CN.4/L. 682, 13 April 2006, paras. 182–3.

[57] *Nicaragua* v. *US* (1984), at p. 440, para. 107.

[58] *Lockerbie Provisional Measures (Libya* v. *UK)*, at p. 15, para. 39; *Lockerbie Provisional Measures (Libya* v. *US)*, at p. 126, para. 42.

This has been described as 'an extensive interpretation of the powers of the Security Council when acting under Chapter VII'.[59] Few would agree with that. The Court's interpretation reflects a fundamental aspect of the Charter's collective security system, and follows from the ordinary meaning of the language of Articles 25 and 103. It represents the constant practice and understanding of the Council and of states.

More recent case law on the relationship between Article 103 and other international obligations, from other international courts and bodies, has addressed a different issue: the relationship between obligations under the Charter and *jus cogens* norms. The *Yusuf* and *Kadi* cases before the Court of First Instance of the European Communities concerned the compatibility of European Community regulations restricting assets with various provisions of the European Convention on Human Rights (ECHR). The Court of First Instance held that the obligations of the member states of the European Union (EU) to enforce sanctions required by a Chapter VII Security Council resolution prevailed over fundamental rights protected by the European legal order. The Court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution – other than to check, indirectly, whether it infringed *jus cogens*. Higgins has remarked that '[t]his raises a whole series of different issues, including whether it is the Luxembourg Court that holds any power of judicial review of Security Council resolutions, if such power indeed exists'.[60]

The Court of Justice of the European Union (CJEU), however, took an entirely different approach. Rather than trying to assess how states are to uphold fundamental rights under EU law in light of an overriding obligation imposed by the Security Council, the Court took what may be described as a 'dualist' approach,[61] reviewing regulations taken to implement the Security Council resolutions solely under EU law, independently of whether another international legal obligation prevailed.[62]

[59] *Genocide* case, Separate Opinion of Judge *ad hoc* Lauterpacht, at p. 439, para. 99.
[60] Higgins (2006) at 801.
[61] Kokott and Sobotta (2012).
[62] *Yusuf and Kadi* v. *European Council*. See also Advocate General Poiares Maduro's Opinion, holding that 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty' (para. 24).

The Human Rights Committee adopted essentially the same approach in *Sayadi* v. *Belgium*, a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), concerning the imposition of sanctions by the Security Council on a married couple at the behest of Belgium and their implementation under Belgian and EU law.[63] Disregarding Article 103 altogether, the Committee took the view that

> [w]hile the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.[64]

In taking this siloed approach, including on the merits of the complaint, it also dismissed the relevance of Article 46 of the ICCPR, which states that the ICCPR shall not 'be interpreted as impairing the provisions of the Charter of the United Nations', opining that what was at issue was Belgium's actions, not the UN Charter.[65] This allowed it simply to ignore Article 103 and focus exclusively on the ICCPR.[66]

The jurisprudence of the European Court of Human Rights (ECtHR) is more nuanced, though, in practice, it also serves to limit the significance of Article 103. The case of *Al-Jedda* concerned a person detained in 2004 by British forces acting as part of the Multi-National Force – Iraq (MNF), under a mandate conferred by the Security Council, on the ground that his detention was necessary for imperative reasons of security in Iraq. The Council resolution specifically provided the MNF with 'authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution . . . setting out its task'. The annexed letters stated that the MNF 'was prepared to undertake a broad range of tasks, . . . including . . . internment where this is necessary for imperative reasons of security'. Al-Jedda challenged his detention, arguing that it was unlawful under Article 5 of the ECHR.

[63] *Sayadi* v. *Belgium*. [64] Ibid., para. 7.2. [65] Ibid., para. 10.3.
[66] For more, see Milanovic (2009b).

In the domestic proceedings in London, the Court of Appeal accepted the overriding effect of the obligations under the Security Council resolutions. The relevant Security Council resolutions on Iraq were adopted under Chapter VII of the Charter, in particular Article 42. Under Article 103 of the Charter, obligations upon member states created by the Charter prevailed over their obligations under any other international agreement.[67]

The House of Lords agreed with the lower court.[68] Like the Court of Appeal, it rejected Al-Jedda's argument that the resolution authorized certain actions but placed no obligation on the United Kingdom to act, so Article 103 was not applicable. Lord Bingham referred to 'a strong and to my mind persuasive body of academic opinion which would treat Article 103 as applicable where conduct is authorized by the Security Council as where it is required'.[69] He then quoted from the Simma commentary on the UN Charter, stating that the opposite conclusion would compromise 'the very idea of authorizations as a necessary substitute for direct action by the SC'.[70]

With respect to the specific action, Lord Bingham opined:

> It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.[71]

Lord Bingham did recognize that there are certain boundaries or limitations to the applicability of Article 103: first, when the UK exercises its powers under the Security Council resolution, 'it must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention';[72] and second, Article 103 results in the prevalence of obligations under the UN Charter for all treaty obligations, including human rights obligations, 'save where an obligation is *jus cogens*'.[73]

The ECtHR did not opine on the legal implications of conflicting obligations under the UN Charter and the ECHR. Nor did it opine on whether Article 103 applies to conduct based on Security

[67] *R (Al-Jedda)* v. *Secretary of State for Defence* (2006), paras. 76–84.
[68] *R (Al-Jedda)* v. *Secretary of State for Defence* (2007). [69] Ibid., para. 33.
[70] Ibid., quoting Frowein and Krisch (2002) 729. [71] Ibid., para. 34.
[72] Ibid., para. 39. [73] Ibid., para. 35.

Council authorizations. Instead, the Court introduced the notion of harmonious interpretation between Security Council resolutions and human rights:

> [T]he Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[74]

The Court found that resolution 1546 (2004) did not 'explicitly or implicitly' require 'the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge' and that, therefore, the UK violated article 5 of the ECHR.[75]

In *Nada* v. *Switzerland*, concerning a resident of Campione d'Italia, a Swiss enclave surrounded by Italy, the ECtHR conceded that the travel ban imposed on Nada – which meant that he could not leave the enclave for years – under the Security Council's 1267 sanctions regime could not be solved by harmonious interpretation as in *Al-Jedda*.[76] The Court nevertheless found that 'Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the United Nations Security Council'.[77] Accordingly, it examined whether, within this 'limited latitude', Switzerland's actions were necessary and proportionate, that is, 'the possibility of recourse to an alternative measure that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out'.[78] The Court concluded that Switzerland failed to strike the right balance as it notified the 1267 Sanctions Committee that its

[74] *Al-Jedda* v. *United Kingdom* (2011), para. 102. [75] Ibid., para. 109.
[76] *Nada* v. *Switzerland*, para. 172. Resolution 1267, para. 7 itself was explicit that the sanctions regime was to be implemented 'notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement'.
[77] Ibid., para. 180. [78] Ibid., para. 183.

domestic investigations concluded that the suspicions against Nada were unfounded only four years after the fact and did not apply for potential humanitarian exceptions from the sanctions on his behalf.[79]

In a third case, *Al-Dulimi* v. *Switzerland* of 2016, the ECtHR appears to have stretched 'harmonious interpretation' to its limits.[80] The case concerned Switzerland's application of an assets freeze pursuant to the Security Council mandated Iraq sanctions regime. The Court noted that resolution 1483 (2003) did not contain any explicit language on limiting respect for human rights[81] and, moreover, since the resolution

> does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided … In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny.[82]

The Court did not accept the Swiss Federal Court's approach, which merely verified the identity of the applicants before approving the implementation of the assets freeze.[83] It took the view that '[t]he applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary'.[84] This, despite the fact that 'the Court accepts that the Federal Court was unable to rule on the merits or appropriateness of the measures entailed by the listing of the applicants', which was at the Security Council's discretion.[85]

[79] Ibid., paras. 181–99. For a critique of the judgment, see Milanovic (2012).
[80] *Al-Dulimi* v. *Switzerland*, see Milanovic (2016).
[81] *Al-Dulimi* v. *Switzerland*, para. 140. [82] Ibid., paras. 146–7.
[83] Ibid., para. 150. [84] Ibid., para. 151. [85] Ibid., para. 150.

In her dissenting opinion, Judge Nußberger described the Court's basing itself on 'harmonious interpretation' as 'a "fake harmonious interpretation" that is not in line with basic methodological requirements of international treaty interpretation'.[86] She took the view that decisions of the Security Council prevail 'unless the arbitrariness of a measure ordered by the Security Council is so plain to see that no State governed by the rule of law could agree to implement it', and explained that the Swiss courts met this standard when they ensured the applicants' identity and that the assets frozen were, indeed, theirs.[87]

In the authors' view, Article 103 cannot be interpreted in a way that would deprive it of the practical effect intended by the drafters of the Charter; the jurisprudence of the CJEU – and of the ECtHR – goes too far in that direction. At the same time, Jenks was right when he said that 'Article 103 cannot be invoked as giving the United Nations an overriding authority which would be inconsistent with the provisions of the Charter itself'.[88]

The following points aim to summarize the basic position in law.[89]

First, the effect of Article 103 is not to invalidate the conflicting obligation but merely to set it aside to the extent of the conflict.[90] Any other position, for example that the conflicting obligation is or becomes void, is not borne out in practice and in most cases would make no sense. Thus, for example, if a sanctions regime is incompatible with rights of navigation under the Danube Convention, it is obvious that the effect of Article 103 is not to void provisions of the Danube Convention, even for the target state, but merely to give priority to the Charter obligations while they subsist.

Second, Article 103 applies to obligations imposed by the mandatory provisions of Security Council resolutions, since by virtue of Article 25 (and Article 48) such obligations are 'obligations ... under the present Charter'.[91]

Third, in order to be effective Article 103 must apply equally to action taken under Council authorizations, as was rightly concluded by the House of Lords in the *Al-Jedda* case.[92]

[86] Ibid. See also the separate opinion of Judge Keller.
[87] Ibid. For further critique, see Milanovic (2016). [88] Jenks (1953) 439.
[89] Wood (2011) 253–4. [90] A/CN.4/L. 682, 13 April 2006, para. 333.
[91] *Lockerbie* Provisional Measures (*Libya* v. *UK*), at p. 15, para. 39.
[92] *R (Al-Jedda)* v. *Secretary of State for Defence* (2007), para. 33.

Fourth, it is generally accepted that the priority which Article 103 affords to the Charter over international agreements is equally applicable to rules of customary international law (general international law).[93] This is indeed essential if the purposes of the Charter in the field of the maintenance of international peace and security are to be achieved.

Fifth, there are no exceptions to the obligations under treaty and customary international law over which Charter obligations prevail, other than (according to a widely held but by no means unanimous view) *jus cogens* norms (peremptory norms of general international law).[94] Any such *jus cogens* exception is, in any event, more theoretical than real,[95] and the matter remains open.[96]

Hersch Lauterpacht wrote an article in 1936 entitled 'The Covenant as the "Higher Law"'. It is about Article 20 of the Covenant of the League of Nations, the Covenant equivalent of Article 103. He points out that prior to September 1935 (when sanctions were applied against Italy), Article 20 'was seldom mentioned'. Article 103 was likewise seldom mentioned until the Council became more active at the end of the Cold War. Hersch Lauterpacht says of Article 20, in powerful language, that it 'is a perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members'. The same may be said of Article 103 of the Charter. Like so much of Lauterpacht's writing, his words are as relevant today as when they were written.

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Our overall conclusion on the nature of the Security Council is as follows. The use of domestic law analogies in international law is often misleading. It is not particularly helpful to seek to encapsulate the nature of the Council in a short phrase, especially one derived from domestic systems. Those who do so often go on to deduce further legal or political consequences: that as an executive it is

[93] A/CN.4/L. 682, 13 April 2006, paras. 182–3; Paulus and Leiß (2012), MN 68, and sources quoted therein.
[94] *Genocide* case, Separate Opinion of Judge *ad hoc* Lauterpacht, at p. 440, para. 100; Paulus and Leiß (2012) MN 19, 70, and sources quoted therein.
[95] But see Lemos (2020) for a different conclusion. [96] Costelloe (2021).

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uncontrolled; that as a legislature it lacks democratic legitimacy; that as a quasi-judicial body it should follow certain 'rule of law' principles and be subject to judicial review. These lines of argument start from a false premise.

Rather, the Security Council is the UN organ with the primary responsibility for the maintenance of international peace and security. Its powers and functions are those set out in the Charter, as developed in practice. Its aim is to ensure 'prompt and effective action by the United Nations'. As explained later in this book, in these regards it has a broad discretion not subject to judicial review.

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