

# Repertory of Practice of United Nations Organs

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*Repertory of Practice of United Nations Organs*)

### ARTICLE 103

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#### TEXT OF ARTICLE 103

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

#### I. INTRODUCTORY NOTE

1. The general structure of the present study remains the same as in the previous *Supplement*.
  - A) Resolutions adopted that directly referred to Article 103;
  - B) Discussions about Article 103 in Security Council meetings; and
  - C) Discussions about Article 103 in the International Law Commission (hereinafter, ILC).
2. The analytical section of the present study will be divided into three parts:

## II. GENERAL SURVEY

3. During the period under review, the General Assembly adopted six resolutions which directly referred to Article 103.<sup>1</sup>
4. During the same period, the Security Council, by adopting resolution 1422 (2002), *inter alia*, barred the International Criminal Court (ICC), for a twelve month period, “to commence or proceed with investigation or prosecution” of individuals from non-State parties to the Rome Statute of the ICC.<sup>2</sup> The Council renewed its decision for another twelve-month period under resolution 1487 (2003).<sup>3</sup> In the debate of the Council preceding the adoption of resolution 1422, references were made to Article 103, which will be covered in detail in the analytical section.
5. In another meeting of the Security Council, devoted to the consideration of the reports of the subsidiary bodies of the Council on counter-terrorism, a member of the Council, while referring explicitly to Article 103, made the point that this Article should in no way be construed as prevailing or superseding “pre-emptive norms of *jus cogens*”<sup>4</sup>; also, the Article in question did not allow the Council to “take actions that violate the purposes and principles of the Charter...”<sup>5</sup>
6. Article 103 was referred to in the report of a Commission of Experts submitted by the Secretary-General, in 2005, to the President of the Security Council regarding the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999. This report discusses the possibility of extending the jurisdiction of the International Criminal Court to the crimes committed in Timor-Leste by invoking Article 103 of the Charter; this aspect is further discussed in the analytical section of the present study.<sup>6</sup>
7. Article 103 was directly referred to, before the International Court of Justice, in the written proceedings in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Columbia)*<sup>7</sup> and in the oral proceedings in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*.<sup>8</sup> Also, the Article was indirectly referred to during the proceedings in the case concerning *Questions relating to the Obligation to*

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<sup>1</sup> GA resolutions 55/101, 56/152, 57/217, 58/188, 59/204 and 62/166.

<sup>2</sup> SC resolution 1422 (2002).

<sup>3</sup> SC resolution 1487 (2003).

<sup>4</sup> S/PV.5779, p. 23.

<sup>5</sup> *Ibid.*

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<sup>6</sup> Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, S/2005/458, para. 455.

<sup>7</sup> *Territorial and Maritime Dispute (Nicaragua v. Columbia)*, Written Statement of the Government of Nicaragua, 26 January 2004, para. 2.63, p. 79 (available on the ICJ website).

<sup>8</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Provisional Measure, Oral Proceedings, 30 May 2008, p. 26, para. 13 (available at ICJ website).

*Prosecute or Extradite (Belgium v. Senegal)*.<sup>9</sup>

8. As reflected in a report presented by the Secretary-General to the General Assembly at its sixty-second session, regarding the agenda item “The rule of law at the national and international levels,” a delegation suggested that a future study on the topic should take Article 103 into consideration.<sup>10</sup> The opinion that Article 103 was an element of the rule of law at the international level was reiterated in the Sixth Committee.<sup>11</sup>
9. In the report of the International Law Commission (ILC) on the work of its fifty-fourth session (2002), Article 103 was identified as an element of the hierarchy.<sup>12</sup> In the course of the deliberations on the subject in the Sixth Committee, some delegations expressed support<sup>13</sup> for the study of such aspects

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<sup>9</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Oral proceedings, 7 April 2009, CR 2009/10, Belgium, p. 24, para. 26 (available at ICJ website). “This was the first that Belgium had heard about the action in the African Court of Human Rights, but it can only increase our concern about a possible order from a regional court that could prejudice Belgium’s rights in these proceedings, unless provisional measures are indicated and it is accepted, either as a matter of judicial comity or because of the United Nations Charter, that the obligations under such provisional measures prevail.”

<sup>10</sup> Report of the Secretary-General, A/62/121, p. 26.

<sup>11</sup> A/C.6/62/SR.14, p. 9 and A/C.6/64/SR.9, p. 2.

<sup>12</sup> A/57/10, p. 241, para. 512.

<sup>13</sup> Delegations that expressed support included: Sierra Leone (A/C.6/60/SR.17, para. 14); Finland and Austria (A/C.6/60/SR.18, paras. 18 and 30); and the United States of America (A/C.6/60/SR.20, para. 36).

and others expressed reservations “...both about the choice of the aspects to be studied and about the proposed outcome of the Commission’s work.”<sup>14</sup> Subsequently, the issue was touched upon in several annual reports of the ILC;<sup>15</sup> this aspect will be discussed further in the analytical section.

10. Article 103 was referred to in some of the draft articles and commentaries thereto adopted by the ILC under the following topics: “Responsibility of States for internationally wrongful acts”,<sup>16</sup> “Effects of armed conflicts on treaties”,<sup>17</sup> and “Responsibility of international organizations”.<sup>18</sup> A detailed account of these references will be provided in the analytical section.

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<sup>14</sup> A/C.6/60/SR.18, para. 53.

<sup>15</sup> A/58/10, p. 272, para. 421, and p. 273, para. 427; A/59/10, pp. 302-304, paras. 352-358; A/60/10, pp. 221-225, paras. 480-493; and A/61/10, p. 420.

<sup>16</sup> Adopted on second reading by the ILC during its fifty-third session, in 2001; A/56/10, p. 59.

<sup>17</sup> Adopted on first reading by the ILC during its sixtieth session in 2008; A/63/10, p. 86.

<sup>18</sup> Adopted on first reading by the ILC during its sixty-first third session, in 2009 (A/64/10), pp. 20 and 39.

### III. ANALYTICAL SUMMARY OF PRACTICE

#### A) Resolutions adopted that directly referred to Article 103

11. Six resolutions adopted by the General Assembly regarding “Respect for the purposes and principles contained in the Charter”, *inter alia*, directly referred to Article 103:

“...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...”<sup>19</sup>

This language appeared in all these resolutions.

#### B) Discussions about Article 103 in Security Council meetings

12. In a Security Council meeting regarding the renewal of the United Nations Mission in Bosnia and Herzegovina (UNMIBH), some delegates called for indefinite and automatic renewal of the effect provided for in article 16 of the Rome Statute of the International Criminal Court (ICC). This proposal was summarized by a delegate as follows:

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<sup>19</sup> GA resolutions 55/101, 56/152, 57/217, 58/188, 59/204 and 62/166.

“It has now been proposed that Article 16<sup>20</sup> [of the Rome Statute] be indefinitely and automatically renewed. It has also been argued that it is within the Security Council’s authority to do so. Article 103 of the Charter provides for Charter obligations to prevail in the event of a conflict between Charter obligations and other international obligations. The question here is whether it is desirable for the Council to take such action.”<sup>21</sup>

13. The Security Council subsequently adopted resolution 1422<sup>22</sup> which, without reference to Article 103, *inter alia* barred the ICC, for a twelve-month period, “to commence or proceed with investigation or prosecution” of individuals from non-State parties to the Rome Statute of the ICC.<sup>23</sup> The Council

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<sup>20</sup> Article 16 of the Rome Statute, *Treaty Series*, vol. 2187, 1-38544, p. 100. This provision states: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

<sup>21</sup> S/PV.4568, p. 23.

<sup>22</sup> SC resolution 1422 (2002).

<sup>23</sup> *Ibid.*, par. 1: “Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or

renewed its decision for another twelve-month period under resolution 1487 (2003).<sup>24</sup>

14. In 2005, the Secretary-General submitted to the Security Council the report of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999. In that report, the Commission of Experts discussed the possibility of extending the jurisdiction of the ICC to encompass the crimes committed in Timor-Leste.<sup>25</sup> An argument presented by the Commission was that Chapter VII and Article 103 of the Charter would provide a way in which the Security Council could extend the “temporal jurisdiction” of the ICC to include the crimes committed in Timor-Leste.<sup>26</sup> The Commission’s argument reads as follows:

“The first argument interprets Chapter VII and article 103 of the United Nations to establish a legal basis upon which the Security Council could legitimately extend the scope of the temporal jurisdiction of the ICC...”<sup>27</sup>

The basis for that argument was that a Security Council resolution would

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prosecution of any such case, unless the Security Council decides otherwise.”

<sup>24</sup> SC resolution 1487 (2003), para. 1.

<sup>25</sup> Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, S/2005/458, para. 448.

<sup>26</sup> *Ibid.*, para. 455.

<sup>27</sup> *Ibid.*

prevail under Article 103 if the resolution conflicted with provisions in the Rome Statute.<sup>28</sup>

15. The Security Council did not take any action on this aspect of the report.

### **C) Discussions about Article 103 in the ILC**

16. During the fifty-seventh session of the Commission (2005), its Study Group on the topic “Fragmentation of international law” discussed a preliminary report on “Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflicting rules”.<sup>29</sup> The report, *inter alia*, identified as a weakness of Article 103 the fact that obligations under that Article were formally limited to States members of the United Nations.<sup>30</sup>

17. During the discussions of that preliminary report in the Study Group, it was acknowledged that a hierarchy at the international level is derived from rules being “...recognized as superior or having a special or privileged status because of their content, effect, scope of application, or on the basis of consent among parties.”<sup>31</sup> In comparing the different effects of *jus cogens*, *erga omnes* obligations and Article 103, the Study Group noted that the effect of Article 103 was that the conflicting rule would become inapplicable.<sup>32</sup>

18. The conclusions of the Study Group on the Fragmentation of International Law,

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<sup>28</sup> *Ibid.*, para. 456.

<sup>29</sup> A/60/10, paras. 480-493.

<sup>30</sup> *Ibid.*, para. 482.

<sup>31</sup> *Ibid.*, para. 487.

<sup>32</sup> *Ibid.*, para. 492.

of which the Commission took note at its fifty-eighth session, in 2006, contain the following findings in respect of Article 103 of the United Nations Charter:

- “A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the Charter by virtue of which (...)”<sup>33</sup>
- “The scope of Article 103 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”<sup>34</sup>.
- “It is also recognized that the United Nations Charter itself enjoys special character owing to the fundamental nature of some of its norms, particularly its principles and purposes and its universal acceptance.”<sup>35</sup>
- “A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of

such conflict and to the extent of such conflict.”<sup>36</sup>

19. Article 103 was referred to by the ILC in a number of draft articles and commentaries thereto adopted during the period under review. The topics in question were: “Responsibility of States for internationally wrongful acts”,<sup>37</sup> “Effects of armed conflicts on treaties”,<sup>38</sup> and “Responsibility of international organizations”.<sup>39</sup>
20. Under the topic “Responsibility of States for internationally wrongful acts”, draft article 59, entitled “Charter of the United Nations”, states:

“These articles are without prejudice to the Charter of the United Nations.”<sup>40</sup>

Article 103 is referred to in the commentary to article 59, which reads:

“In accordance with article 103 of the Charter, [i]n 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,

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<sup>33</sup> A/61/10, p. 420, para (34).

<sup>34</sup> *Ibid.*, p. 420, para. (35) (footnote omitted).

<sup>35</sup> *Ibid.*, p. 420, para. (36) (footnote omitted).

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<sup>36</sup> *Ibid.*, p. 421, para. (41b)).

<sup>37</sup> Draft articles adopted on second reading by the ILC during its fifty-third session, in 2001; A/56/10, p.59.

<sup>38</sup> Draft articles adopted on first reading by the ILC during its sixtieth session, in 2008; A/63/10, p. 86.

<sup>39</sup> Draft articles adopted on first reading by the ILC during its sixty-first session, in 2009; A/64/10, pp. 20 and 39.

<sup>40</sup> A/56/10, p. 365.

their obligations under the present Charter shall prevail.”<sup>41</sup>

The commentary further explains that the impact of Article 103 is not limited to the treaty obligations:

“[...] The focus of article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the Articles, as for example in the *Lockerbie* cases. More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the Articles cannot affect and are without prejudice to the Charter of the United Nations. The Articles are in all respects to be interpreted in conformity with the Charter of the United Nations.”<sup>42</sup>

21. Concerning the draft articles adopted by the ILC on the Effects of armed conflicts on treaties, mention should be made of draft article 14, entitled “Decisions of the Security Council”, which provides:

“The present draft articles are without prejudice to the legal effects of decisions of the Security Council in

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

accordance with the provisions of Chapter VII of the Charter of the United Nations.”<sup>43</sup>

The commentary to that draft article cites the full text of Article 103.<sup>44</sup> It further provides:

“In addition to the rights and obligations contained in the Charter itself, Article 103 covers duties based on binding decisions by United Nations bodies. In particular, the primacy of Security Council decisions under Article 103 has been widely accepted in practice as well as in doctrine. Draft article 14 leaves open the variety of questions that may be implicated as a consequence of Article 103.”<sup>45</sup>

22. Under the topic “Responsibility of international organizations”, draft article 4, entitled “Elements of an internationally wrongful act of an international organization”, reads:

“There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) Is attributable to the international organization under international law; and  
(b) Constitutes a breach of an international obligation of that international organization.”<sup>46</sup>

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<sup>43</sup> A/63/10, p. 131.

<sup>44</sup> *Ibid.*, p. 131, para (3).

<sup>45</sup> *Ibid.*, p. 132.

<sup>46</sup> A/64/10, p. 55.

23. The commentary to this draft article addresses the question of whether the “obligation,” referred to in (b) above, applies with respect to member or non-member States. The commentary states:

“...With regard to non-member States, Article 103 of the United Nations Charter may provide a justification for the organization’s conduct in breach of an obligation under a treaty with a non-member State.”<sup>47</sup>

24. Draft article 66 on the Responsibility of international organizations provides:

“These articles are without prejudice to the Charter of the United Nations.”<sup>48</sup>

25. The commentary explains that draft article 66 replicates draft article 59 on State responsibility. The commentary further provides:

“The reference to the Charter includes obligations that are directly stated in the Charter as well as those flowing from binding decisions of the Security Council, which according to the International Court of Justice similarly prevail over other obligations under international law on the basis of Article 103 of the United Nations Charter.”<sup>49</sup>

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<sup>47</sup> *Ibid.*, p. 56, para. (5).

<sup>48</sup> *Ibid.*, p. 182.

<sup>49</sup> *Ibid.*, p. 182, para. (1).