

**REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS  
SUPPLEMENT NO. 12  
(2016 – 2020)**

**Volume VI**

**ARTICLE 103**

(Advance version, to be issued in volume VI of Supplement No. 12 (forthcoming) of the  
Repertory of Practice of United Nations Organs)<sup>1</sup>

**Contents**

Text of Article 103 .....	1
Introductory Note .....	2
<i>I. General Survey</i> .....	2
<i>II. Analytical summary of practice</i> .....	4
A. Discussions about Article 103 in the General Assembly and its subsidiary bodies .....	4
1. The General Assembly .....	4
2. Subsidiary bodies of the General Assembly .....	7
a. The Human Rights Council .....	7
b. The International Law Commission .....	14
c. The Sixth Committee .....	15
B. Discussions about Article 103 in the Security Council .....	20
C. Discussions about Article 103 in the subsidiary bodies of the Economic and Social Council .....	23
D. Proceedings before the International Court of Justice .....	25

**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.

---

<sup>1</sup> In accordance with Annex I of the [annual report of the Secretary-General on the Repertory of Practice of United Nations Organs and Repertoire of the Practice of the Security Council](#), the preparation of this study falls under the primary responsibility of the Office of Legal Affairs. It has been prepared with the assistance of a consultant.

## Introductory Note

1. The structure of this study on Article 103 of the Charter of the United Nations slightly differs from the one in previous *Supplement No. 11*. During the period under review, while reference to the Charter Article continued to be made in various reports and debates of the United Nations, and while no explicit reference thereto was made in any of the resolutions adopted by the United Nations bodies, there were significant developments in the subsidiary bodies of the Economic and Social Council and in proceedings before the International Court of Justice.
2. Accordingly, the structure of the Analytical Summary of Practice of this study does not follow the structure of the previous *Supplement*. It is characterized by the addition of a new heading and is therefore divided into the following four subsections:
  - A) Discussions about Article 103 in the General Assembly and its subsidiary bodies
  - B) Discussions about Article 103 in the Security Council
  - C) Discussions about Article 103 in the subsidiary bodies of the Economic and Social Council
  - D) Proceedings before the International Court of Justice
3. Subsection A addresses first the discussions that took place in the General Assembly, and second the discussions that took place in its relevant subsidiary bodies, i.e., the Human Rights Council, the International Law Commission (thereinafter, ILC) and the Sixth Committee.

## I. General Survey

4. The period under review is characterized by the continuation of the trends that have emerged during the period covered by the previous *Supplement*. Article 103 was notably

repeatedly mentioned in several reports submitted to the General Assembly<sup>2</sup> and to the Human Rights Council.<sup>3</sup> Most of these reports were submitted by the Independent Expert on the promotion of a democratic and equitable international order and, *inter alia*, addressed the tension/conflict that may arise between human rights obligations and other obligations, notably those of an economic nature.

5. It is noteworthy that the invocation of Article 103 in the context of human rights is also a trend that has emerged during the period covered by *Supplement No. 11*, and which has been maintained throughout the period under review.
6. In light of the above, it is appropriate to highlight that, during this period, the Independent Expert on the promotion of a democratic and equitable international order recommended, in one of his reports, that the International Court of Justice should pronounce on the primacy of human rights obligations over trade agreements and investor-State dispute settlements awards.<sup>4</sup> As underlined in *Supplement 11*, a similar request is to be found in a previous report of the same Independent Expert.<sup>5</sup> These requests highlight the development of referring to Article 103 in discussions related to human rights.
7. Additionally, throughout the period under review, most of the above-mentioned reports were taken note of in resolutions adopted by the General Assembly<sup>6</sup> and the Human Rights Council.<sup>7</sup>
8. Furthermore, during this period, Article 103 was directly referred to before the International Court of Justice in the written submissions of States in the advisory proceedings concerning *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and in the oral proceedings in the case concerning *Application of the International Convention for the Suppression of the Financing of*

<sup>2</sup> see [A/72/187](#), pp. 3 and 6, paras. 3, 4 and 12 and [A/75/337](#), p.12, para. 24.

<sup>3</sup> See [A/HRC/33/40](#), pp. 17, 22 and 27, paras. 74, 98 and 8; [A/HRC/36/40](#), pp. 5 and 29-30, paras. 15 and 8 and [A/HRC/37/63](#), pp. 5 and 6, paras. 11 and 14 (b).

<sup>4</sup> See report of the Independent Expert on the promotion of a democratic and equitable international order, [A/HRC/33/40](#), p. 22, para. 98.

<sup>5</sup> See *Repertory*, *Supplement No. 11*, Vol. VI (2010-2015), p. 6, para.14.

<sup>6</sup> GA resolution [72/172](#), p. 4, para. 3.

<sup>7</sup> HRC resolutions [33/3](#), p. 5, para. 16, [36/4](#), p. 2, para. 3 and [45/6](#), p. 3.

*Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*. As such, a former trend seems to re-emerge considering that, in *Supplements No. 6*,<sup>8</sup> *8*,<sup>9</sup> *9*<sup>10</sup> and *10*,<sup>11</sup> the Charter Article was mentioned, on different occasions, before the United Nations principal judicial organ, i.e., the International Court of Justice.

9. Finally, it could be noted that no new trends have developed during the period under review, which is however characterized by the preservation and continuation of the trends that have emerged during the periods covered by previous *Supplements*.

## II. Analytical summary of practice

### A. Discussions about Article 103 in the General Assembly and its subsidiary bodies

#### 1. The General Assembly

10. Throughout the period under consideration, Article 103 was referred to in the context of the consideration by the General Assembly of two reports dedicated to human rights questions. The first one was prepared by the Independent Expert on the promotion of a democratic and equitable international order. The second report was prepared by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.
11. As just mentioned, Article 103 was referred to in the report of the Independent Expert on the promotion of a democratic and equitable international order, transmitted by the Secretary-General to the General Assembly at its seventy-second session in 2017. The report examined the impact of the conditionality of loans from the International Monetary Fund on development and human rights and called upon the Fund to give

---

<sup>8</sup> See *Repertory*, [Supplement No. 6](#), Vol. VI (1979-1984), pp. 153-154, paras. 7-8.

<sup>9</sup> See *Repertory*, [Supplement No. 8](#), Vol. VI (1989-1994), pp. 152-153, paras. 15-17.

<sup>10</sup> See *Repertory*, [Supplement No. 9](#), Vol. VI (1995-1999), pp. 3-4, paras. 10-12.

<sup>11</sup> See *Repertory*, [Supplement No. 10](#), Vol. VI (2000-2009), pp. 2-3, para.7.

States adequate policy space to fulfil their human rights obligations.<sup>12</sup> With respect to the reference to Article 103, it was made when the Independent Expert addressed the impact of the World Bank and the International Monetary Fund on the international order.<sup>13</sup> He noted the following:

“Some observers think that the Bretton Woods institutions have greater impact on world affairs than all the resolutions of the General Assembly, the Economic and Social Council and the United Nations Conference on Trade and Development (UNCTAD) combined. Whereas, in principle, the Charter of the United Nations should prevail over all other treaties and international agreements (Article 103), the fact is that those institutions are not formally subordinated to the United Nations”.<sup>14</sup>

12. Article 103 was also mentioned when the Independent Expert on the promotion of a democratic and equitable international order made an introductory statement on the above-mentioned report and engaged in an interactive dialogue with several representatives in the Third Committee.<sup>15</sup> He reminded that:

“The United Nations Charter stipulated that its provisions should prevail over all other treaties and international agreements of Member States. However, both in structure and in practice, the international financial institutions were not subordinate to the United Nations”.<sup>16</sup>

The Independent Expert therefore “[...] recommended that the IMF should request an advisory opinion from the International Court of Justice on the correct application of human rights norms to international financial institutions”<sup>17, 18</sup>

---

<sup>12</sup> See the report of the Independent Expert on the Promotion of a democratic and equitable international order, [A/72/187](#).

<sup>13</sup> *Ibid.*, p. 6, para. 12.

<sup>14</sup> *Ibid.*

<sup>15</sup> See [A/C.3/72/SR.22](#), pp. 6-7, paras. 41-53.

<sup>16</sup> *Ibid.*, p. 6, para. 42.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

13. Following the recommendation of the Third Committee,<sup>19</sup> the General Assembly adopted resolution [72/172](#) which, without explicit reference to Article 103, *inter alia*, took note of the report of the Independent Expert of the Human Rights Council on the promotion of a democratic and equitable international order.<sup>20</sup>

14. Reference to Article 103 of the Charter was also made in the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, transmitted by the Secretary-General to the General Assembly at its seventy-fifth session in 2020.<sup>21</sup> The report analyses the interface between human rights and international humanitarian law in counter-terrorism contexts, with a particular focus on counter-terrorism practices that are inconsistent with or undermine the integrity of fundamental rights, duties and protections under those legal regimes.<sup>22</sup>

15. Article 103 was referred to when the Special Rapporteur made observations on human rights and international humanitarian law references in the Security Council's resolutions related to the regulation of counter-terrorism. It was pointed out that:

“[...] it [was] patently clear that the Council has not, either directly or indirectly, indicated any intention to displace either human rights or international humanitarian law treaty rules. Not even a whisper of such an approach has been articulated through, for example, an expansive reading of Article 103 of the Charter”.<sup>23</sup>

16. On 15 October 2020, at the virtual informal meeting of the Third Committee, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism made an introductory statement and responded to questions posed and comments made by the representatives. There was no more action

---

<sup>19</sup> See report of the Third Committee, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, [A/72/439/Add.2](#), pp. 70-75.

<sup>20</sup> See GA resolution [72/172](#), p. 4, para. 3.

<sup>21</sup> See [A/75/478](#), para. 4.

<sup>22</sup> See report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, [A/75/337](#).

<sup>23</sup> *Ibid.*, p.12, para. 24.

within the period under review on the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

## 2. Subsidiary bodies of the General Assembly

### a. The Human Rights Council

17. During the period under review, several references were made to Article 103 of the Charter before the Human Rights Council. On the one hand, the Charter Article was repeatedly mentioned in three reports submitted by the Independent Expert on the promotion of a democratic and equitable international order. On the other hand, Article 103 was mentioned in the report of the Special Rapporteur on the rights of indigenous peoples and in the draft Convention on the Right to Development.
18. As stated above, during the period under review, Article 103 was first referred to in the report of the Independent Expert on the promotion of a democratic and equitable international order, submitted to the Human Rights Council at its thirty-third session in 2016. The report is part of the studies conducted by the Independent Expert on the adverse human rights impact of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order.<sup>24</sup>
19. The Independent Expert underlined that pursuant to “Article 103 [...] all treaties must be compatible with the Charter”<sup>25</sup> and that “[t]o the extent that aspects of trade agreements and WTO directives hinder the achievement of the purposes and principles of the Charter, including human rights and development, they must be revised”.<sup>26</sup> According to him, “[t]hat requires the recognition that human rights are not a barrier to trade, but that trade can be a significant obstacle to the realization of human rights”.<sup>27</sup>
20. The Independent Expert also recommended that the International Court of Justice “should pronounce in appropriate contentious cases or in an advisory opinion on the

---

<sup>24</sup> See report of the Independent Expert on the promotion of a democratic and equitable international order, [A/HRC/33/40](#).

<sup>25</sup> *Ibid.*, p. 17, para. 74.

<sup>26</sup> *Ibid.*

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

*erga omnes* obligations of States to comply with the human rights treaty regime”.<sup>28</sup> He explained that “[n]o trade agreement, investor-State dispute settlement or investment court system may obstruct the fulfilment of human rights treaty obligations”<sup>29</sup> and that “[t]he supremacy clause of the Charter of the United Nations (Article 103) [...], override[s] conflicting trade agreements and arbitral awards”.<sup>30</sup>

21. It is noteworthy that this is the second time that the Independent Expert on the promotion of a democratic and equitable international order has recommended that the International Court of Justice be requested to pronounce, on the primacy of human rights obligations over trade agreements and investor-State dispute settlements awards.<sup>31</sup>
22. Lastly, in his questionnaire “on the impact of WTO agreements, rules and practice on human rights, particularly food security”<sup>32</sup>, the Independent Expert stated that there is “incoherence”<sup>33</sup> between Article 103 of the UN Charter and WTO law. Whereas, Article 103 is a “supremacy clause”,<sup>34</sup> according to which, “[...] any conflict with other treaties must give precedence to the UN Charter”,<sup>35</sup> “[...] WTO law operates outside the UN system”.<sup>36</sup> Consequently, the Independent Expert stated that there was a need to address this incoherence “[...] so that WTO rules are fully compatible with UN constitutional law”.<sup>37</sup> He further asked member and observer States of the WTO, inter-governmental organizations and civil society organizations whether their “government[s] [would] support the primacy of human rights law over trade agreements”<sup>38</sup> and whether “[...] this issue of priorities [should] be raised by the international community, e.g. in the UN General Assembly or before the International Court of Justice by advisory opinion”.<sup>39</sup>

---

<sup>28</sup> *Ibid.*, p. 22, para. 98.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> See *Repertory*, [Supplement No. 11](#), Vol. VI (2010-2015), p. 6, paras.14-18.

<sup>32</sup> Report of the Independent Expert on the promotion of a democratic and equitable international order, A/HRC/33/40, p. 26

<sup>33</sup> *Ibid.*, p. 27, para. 8.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*



23. Following an interactive dialogue that took place during its 1st and 2nd meetings,<sup>40</sup> the Human Rights Council adopted, at its 38th meeting,<sup>41</sup> resolution [33/3](#),<sup>42</sup> which, *inter alia*, without explicit reference to Article 103, took note of the report of the Independent Expert on the promotion of a democratic and equitable international order.<sup>43</sup>
24. In addition, reference to Article 103 of the Charter was made in a second report which was also submitted by the Independent Expert on the promotion of a democratic and equitable international order to the Human Rights Council at its thirty-sixth session in 2017. The report was part of the Independent Expert's research into the impact of the financial and economic policies pursued by international organizations and other institutions on a democratic and equitable international order and focused on the World Bank.<sup>44</sup>
25. Article 103 was therefore referred to when addressing the impact of the World Bank on the international order. The Independent Expert stated that “[s]ome observers contend that the Bank and IMF have a greater impact on world affairs than all the resolutions of the United Nations General Assembly and the Economic and Social Council combined”.<sup>45</sup> He explained that “[w]hile the supremacy clause in Article 103 of the Charter of the United Nations stipulates that the Charter shall prevail over all other international agreements, the fact is that the Bretton Woods institutions are not subordinated to the General Assembly and the Security Council and that they will continue to have a determining effect on world affairs, including the enjoyment of civil, cultural, economic, political and social rights”.<sup>46</sup>
26. In its annex III, the report contained the Tilburg-GLOTHRO Guiding Principles on the World Bank Group, the IMF and Human Rights, which refer, in their paragraph 8, to Article 103 of the Charter. It was provided that:

---

<sup>40</sup> See report of the Human Rights Council on its thirty-third session, [A/HRC/33/2](#), p. 14, paras. 56-58.

<sup>41</sup> See *Ibid.*, pp. 25-26, paras. 133-136.

<sup>42</sup> See HRC resolution [33/3](#), p. 5, para. 16.

<sup>43</sup> Formal summary records of the Human Rights Council meetings were not available. The Division of Conference Management at Geneva decided to postpone indefinitely the preparation of summary records for the Human Rights Council and its Advisory Committee (see *A/66/6* (Sect.2), para. 2.56(a)).

<sup>44</sup> See report of the Independent Expert on the promotion of a democratic and equitable international order, [A/HRC/36/40](#).

<sup>45</sup> *Ibid.*, p. 5, para. 15.

<sup>46</sup> *Ibid.*

“As members of the UN [,] the member States of the two [International Financial Institutions have legally committed themselves to uphold the purposes and principles of the UN Charter, including the promotion of respect for human rights. According to Article 103 of the UN Charter, the obligations of States under the Charter, including obligations in the field of human rights, take primacy over other international obligations”.<sup>47</sup>

27. This understanding of Article 103, according to which States’ obligations under the Charter, including obligations in the field of human rights, prevail over other obligations under international economic law, is in line with the trend that has emerged during the period covered by *Supplement No. 11*.

28. Following an interactive dialogue that took place during its 8th and 9th meetings,<sup>48</sup> the Human Rights Council adopted, at its 39th meeting,<sup>49</sup> resolution [36/4](#),<sup>50</sup> which, without explicit reference to Article 103, took “[...] note of the report of the Independent Expert on the promotion of a democratic and equitable international order, and welcome[d] the work conducted by him”.<sup>51</sup>

29. The third report mentioned above, which was also prepared by the Independent Expert on the promotion of a democratic and equitable international order, was submitted to the Human Rights Council at its thirty-seventh session in 2018. This report was the Independent Expert's final report on the studies conducted during the last six years of his mandate. Its purpose was to survey his six previous reports to the Council as well as his six reports to the General Assembly and to make recommendations on issues addressed under the mandate.<sup>52</sup>

---

<sup>47</sup> *Ibid.*, pp. 29-30, para. 8.

<sup>48</sup> See report of the Human Rights Council on its thirty-sixth session, [A/HRC/36/2](#), p.21, paras. 104-106.

<sup>49</sup> *Ibid.*, pp. 26-27, paras. 134-139.

<sup>50</sup> See HRC resolution [36/4](#), p. 2, para. 3.

<sup>51</sup> Formal summary records of the Human Rights Council meetings were not available. The Division of Conference Management at Geneva decided to postpone indefinitely the preparation of summary records for the Human Rights Council and its Advisory Committee (see [A/66/6](#) (Sect.2), para. 2.56(a)).

<sup>52</sup> See report of the Independent Expert on the promotion of a democratic and equitable international order, [A/HRC/37/63](#).

30. Article 103 of the Charter was referred to when the Independent Expert described what he considers to be “a democratic and equitable international order”. He defined it as “[...] one in which the Charter of the United Nations is recognized as the world constitution, and the International Court of Justice operates as the world constitutional court, with due deference to the Charter’s “supremacy clause””.<sup>53</sup> As explained in the report, the Independent Expert uses the term “supremacy clause” to refer to Article 103 of the Charter of the United Nations.

31. Furthermore, when enumerating what should be generally recognized as principles of international order, based on the work of the mandate holder, the Independent Expert, *inter alia*, mentioned the following:

“(b) The Charter takes priority over all other treaties (Article 103);

(c) [...] The international human rights treaty regime takes priority over commercial and other treaties...”.<sup>54</sup>

32. As stated in paragraph 17 above, Article 103 was also mentioned in the report of the Special Rapporteur on the rights of indigenous peoples which was submitted to the Human Rights Council at its thirty-third session in 2016. The report provides an analysis of the impacts of international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, on the rights of indigenous peoples.<sup>55</sup> Reference to Article 103 was made in an arbitral award, the content of which was summarized in the text of the report.

33. Accordingly, Article 103 of the Charter was implicitly referred to when the Special Rapporteur provided examples of investor-State dispute settlements involving indigenous peoples’ rights. The Special Rapporteur observed that the respondent State in the *South American Silver Mining v. the Plurinational State of Bolivia* proceedings before the Permanent Court of Arbitration, , argued that “customary international law recognizes the primacy of human rights over investor protections, citing the ruling of

---

<sup>53</sup> *Ibid.*, p. 5, para. 11.

<sup>54</sup> *Ibid.*, p. 6, para. 14 (b) and (c).

<sup>55</sup> See report of the Special Rapporteur on the rights of indigenous peoples, [A/HRC/33/42](#).

the Inter-American Court of Human Rights in *Sawhoyamaya v. Paraguay* and Article 103 of the Charter of the United Nations”.<sup>56</sup>

34. The report was further the subject of an interactive dialogue that took place at the 17th and 18th meetings<sup>57</sup> of the Human Rights Council.<sup>58</sup>
35. As to the draft Convention on the Right to Development and commentaries thereto, which was also mentioned in paragraph 17 above, it was prepared by the Drafting Group of the Human Rights Council's Working Group on the Right to Development at its twenty-first session in 2020.<sup>59</sup> The Convention aims to “promote and ensure the full, equal and meaningful enjoyment of the right to development by every human person and all peoples everywhere, and to guarantee its effective operationalization and full implementation at the national and international levels”.<sup>60</sup>
36. It must be noted that the references to Article 103 in the draft Convention were made in footnotes 47 and 312.
37. Footnote 47 is linked to the commentary to draft preambular paragraph ten which states the following:

“Recalling the obligation of States under the Charter to take joint and separate action in cooperation with the Organization for the promotion of higher standards of living, full employment and conditions of economic and social progress and development; solutions of international economic, social, health and related problems; international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction of any kind”.<sup>61</sup>

---

<sup>56</sup> *Ibid.*, p. 12, para. 47 (f).

<sup>57</sup> Formal summary records of the Human Rights Council meetings were not available. The Division of Conference Management at Geneva decided to postpone indefinitely the preparation of summary records for the Human Rights Council and its Advisory Committee (see A/66/6 (Sect.2), para. 2.56(a)).

<sup>58</sup> See report of the Human Rights Council on its thirty-third session, [A/HRC/33/2](#), p. 19, paras. 94 and 98-99.

<sup>59</sup> See draft Convention on the Right to Development, with commentaries, [A/HRC/WG.2/21/2/Add.1](#).

<sup>60</sup> See Article 1 of the draft Convention on the Right to Development, [A/HRC/WG.2/21/2](#), p. 6.

<sup>61</sup> See [A/HRC/WG.2/21/2/Add.1](#), p. 11.

38. The drafters explained in footnote 47 that “[a]n added benefit of highlighting that the duty of international cooperation is a Charter obligation is to reinforce its superior normative hierarchy in international law flowing from article 103 of the Charter”.<sup>62</sup>

39. Article 103 was also referred to in footnote 312 which is linked to the commentary to paragraph 1 of draft article 21, entitled “International peace and security”. Draft paragraph 1 states:

“States Parties reaffirm their existing obligations under international law to promote the establishment, maintenance and strengthening of international peace and security in consonance with the principles and obligations contained in the Charter of the United Nations, including the peaceful settlement of disputes”.<sup>63</sup>

40. The drafters explained in the commentary that the aim of the words “in consonance with the principles and obligations contained in the Charter of the United Nations” is “to reinforce principles such as non-intervention, prohibition of the threat or use of force, [...], as well as the concrete obligations undertaken by States related to peace and security”.<sup>64</sup> The drafters then highlighted the following in footnote 312:

“It may be noteworthy in this context that article 103 of the UN Charter establishes the superior normative hierarchy of obligations thereunder over obligations under any other international agreement”.<sup>65</sup>

41. At its 36th meeting, on 6 October 2020,<sup>66</sup> the Human rights Council adopted resolution [45/6](#), entitled “The right to development”, which, without explicit reference to Article 103, *inter alia*, noted “[...] with appreciation the submission of the draft legally binding instrument on the right to development with commentaries by the Chair-Rapporteur of the Working Group”.<sup>67</sup> Owing to the restrictions linked to the coronavirus disease

---

<sup>62</sup> *Ibid.*, footnote 47.

<sup>63</sup> *Ibid.*, draft Article 21, para.1, pp. 68-69.

<sup>64</sup> *Ibid.*, p. 69, para. 2.

<sup>65</sup> *Ibid.*, footnote 312.

<sup>66</sup> See report of the Human Rights Council on its forty-fifth session, [A/HRC/45/2](#), p. 41, paras. 221-227.

<sup>67</sup> HRC resolution [45/6](#), p. 3.

(COVID-19) pandemic, the consideration of the draft Convention took place only in 2021, which is beyond the period under review.<sup>68</sup>

#### **b. The International Law Commission**

42. During the period under review, the ILC referred to Article 103 in the context of the topic “Peremptory norms of general international law (*jus cogens*)”.<sup>69</sup> At its seventy-first session in 2019, the Commission adopted draft conclusion 16 entitled “Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)” and the commentary thereto.

43. Draft conclusion 16 states:

“A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)”.<sup>70</sup>

44. Article 103 is referred to in the commentary to draft conclusion 16, and reads:

“[...] If rules of international law that are inconsistent with peremptory norms of general international law (*jus cogens*) cannot be created through treaties, customary international law and unilateral acts, it follows that such rules cannot be created through resolutions, decisions or other acts of international organizations either. Resolutions, decisions or acts of the Security Council, however, require additional consideration since, pursuant to Article 103 of the Charter of the United Nations, obligations under the Charter prevail over other rules of international law”.<sup>71</sup>

---

<sup>68</sup> See decision OS/14/101 adopted by the Human Rights Council on 7 December 2020.

<sup>69</sup> Draft conclusions adopted on first reading by the ILC during its seventy-first session, in 2019, [A/74/10](#), pp. 188-189.

<sup>70</sup> *Ibid.*, p. 188.

<sup>71</sup> *Ibid.*, commentary (4), p. 189.

45. The commentary continues to clarify that, “[...] considering the hierarchical superiority of peremptory norms of general international law (*jus cogens*), the Commission considered it important to highlight that draft conclusion 16 applies equally to binding resolutions, decisions and acts of the Security Council”.<sup>72</sup>
46. The commentary further explains, in one of its footnotes, that “[w]hile [Article 103] speaks only of international agreements, it has been interpreted as applying to customary international law and certainly to resolutions, decisions and acts of other international organizations”.<sup>73</sup>

### c. The Sixth Committee

47. Throughout the period under review, Article 103 of the Charter was in some instances referred to when the Sixth Committee examined the reports of the ILC, namely when it considered the topic “Peremptory norms of general international law (*jus cogens*)”. The Charter Article was also referred to when the Sixth Committee examined the agenda item “Effects of armed conflicts on treaties” with a view to examining, *inter alia*, the question of the form that might be given to the articles on the topic.
48. At the seventy-first session of the General Assembly, in 2016, the Sixth Committee from 24 to 28 October, 1 to 3 and 11 November, considered the report of the ILC on the work of its sixty-eighth session.
49. During the debate, one member of the Committee implicitly referred to Article 103 when he addressed the element of hierarchical superiority contained in paragraph 2 of draft conclusion 3, which was proposed by the Special Rapporteur in his first report on *jus cogens* and provides:

“Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable”.<sup>74</sup>

---

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, footnote 857.

<sup>74</sup> See first report on *jus cogens* by Dire Tladi, Special Rapporteur, [A/CN.4/693](#), p. 45.

The member accordingly asked if “[...] the contention that *jus cogens* norms were superior to other norms of international law, [...] implied that *jus cogens* should prevail over the Charter of the United Nations and the relevant resolutions of the Security Council”.<sup>75</sup>

50. At its seventy-second session, in 2017, the Sixth Committee considered agenda item 86 “Effects of armed conflicts on treaties” with a view to examining, *inter alia*, the question of the form that might be given to the articles on the topic. In the course of the deliberations, one delegation “[...] questioned the interpretation given of Article 103 of the Charter in the commentary to article 16<sup>76</sup> as applying not only to rights and obligations under the Charter itself, but also to obligations under binding decisions taken by United Nations bodies”.<sup>77</sup> The delegation expressed the following opinion:

“Legally speaking, Article 103 was designed to resolve conflicts between provisions of the Charter and obligations arising from other international treaties”.<sup>78</sup>

51. During the same session, the Committee examined the report of the ILC on the work of its sixty-ninth session. When addressing the topic of peremptory norms of general international law (*jus cogens*), one member expressed her delegation's “[...] conviction that, in the event of a conflict between norms of *jus cogens* and obligations under the Charter of the United Nations, *jus cogens* norms remained superior”.<sup>79</sup> The delegation's position was that “[t]he obligations under the Charter would only prevail if the conflict was between those obligations and obligations under any other international agreement, as stipulated in Article 103 of the Charter”.<sup>80</sup>

<sup>75</sup> [A/C.6/71/SR.24](#), p. 17, para. 90.

<sup>76</sup> See also *Repertory*, [Supplement No. 11](#), Vol. VI (2010-2015), p. 14, para. 44.

<sup>77</sup> [A/C.6/72/SR.17](#), p. 6, para. 33.

<sup>78</sup> *Ibid.*

<sup>79</sup> [A/C.6/72/SR.26](#), p. 8, para. 48.

<sup>80</sup> *Ibid.*



52. The Sixth Committee continued its consideration of the topic at its seventy-third session in 2018. Article 103 was referred to by several delegations when considering paragraph 1 of draft conclusion 17, which states:

“Binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*)”.<sup>81</sup>

The main concern of the delegations was whether to retain or to delete the explicit reference to the decisions of the Security Council in the text of the draft conclusion. The views expressed were divergent.

53. On the one hand, one delegation indicated that “[i]t was [...] critically important to retain in the text of draft conclusion 17 an explicit reference to decisions of the Security Council”<sup>82</sup> and that, “[i]n view of the hierarchy of international obligations established in Article 103 of the Charter of the United Nations, the Commission should not shy away from recognizing that the Security Council was also bound by *jus cogens* norms”.<sup>83</sup>

54. Another delegation, while also agreeing with draft conclusion 17, stated that “[...] the role of non-derogation from peremptory norms would be equally applicable to Security Council resolutions”.<sup>84</sup> The delegation's statement continued as follows:

“[...] Article 103 of the Charter of the United Nations, which affirmed that in the event of a conflict between the obligations under the Charter and the obligations under any other international agreement, obligations under the Charter would prevail, would not apply in the event of a conflict between *jus cogens* norms and Charter obligations, and [...] *jus cogens* norms would therefore prevail”.<sup>85</sup>

---

<sup>81</sup> See third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, [A/CN.4/714](#), p. 67.

<sup>82</sup> [A/C.6/73/SR.25](#), p. 7, para. 40.

<sup>83</sup> *Ibid.*

<sup>84</sup> [A/C.6/73/SR.27](#), p. 18, para. 117.

<sup>85</sup> *Ibid.*

The delegation was further of the opinion that “[...] resolutions of the Security Council that were inconsistent with international law and the provisions of the Charter did not create any obligations for States”.<sup>86</sup>

55. On the other hand, Article 103 was also referred to in opposition to draft conclusion 17, paragraph 1. It was stated by one delegation that:

“Draft conclusion 17, paragraph 1, was not only illogical, since it stated that binding resolutions did not establish binding obligations, but also ran counter to the Preamble and Articles 25 and 103 of the Charter of the United Nations, which were considered peremptory norms. The idea was not to specify the type of resolutions that the Security Council should formulate, but to point out that Member States should implement them in accordance with peremptory norms of international law”.<sup>87</sup>

56. A third view was also expressed:

“Draft conclusion 17, which stated that binding resolutions of international organizations, including Security Council resolutions, were invalid if they conflicted with a *jus cogens* norm, should be analysed to determine its impact on actions taken under Chapter VII of the Charter of the United Nations and on the application of Article 103 of the Charter. That would provide greater clarity on the question of whether a Charter obligation overrode an obligation that constituted a *jus cogens* norm”.<sup>88</sup>

57. As provided in the section above, at its seventy-first session, in 2019, the ILC adopted on first reading the draft conclusions on “Peremptory norms of general international law (*jus cogens*)”. Draft conclusion 16 states:

“A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law

---

<sup>86</sup> *Ibid.*

<sup>87</sup> *A/C.6/73/SR.26*, p. 13, para. 89.

<sup>88</sup> *Ibid.*, p. 11, para. 77.

if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)”.<sup>89</sup>

58. This draft conclusion was discussed by the Sixth Committee during the seventy-fourth session of the General Assembly. During the debate, Article 103 was referred to on 28, 29 and 31 October 2019. The main concern of the delegations was whether to retain or to delete the reference to the Security Council resolutions in the commentary to draft conclusion 16. Accordingly, the views expressed were divergent as to the implications and interpretation of Article 103 of the Charter.

59. On the one hand, one delegation referred to Article 103 when it expressed opposition to the explicit reference to the relationship between Security Council resolutions and *jus cogens* in the commentary to draft conclusion 16. The delegation noted that:

“[...] it was [...] suggested in the commentary that resolutions of the Security Council required additional consideration since, pursuant to Article 103 of the Charter of the United Nations, obligations under the Charter prevailed over other rules of international law. Nonetheless, it was inappropriate to make an explicit reference to the relationship between Security Council resolutions and *jus cogens* in the commentaries. [...] It was simply inconceivable that such resolutions would conflict with *jus cogens*”.<sup>90</sup>

Therefore, the delegation suggested that “references to Security Council resolutions be removed from the commentaries to the draft conclusions”.<sup>91</sup>

60. Moreover, another delegation reiterated its concern about draft conclusion 16.<sup>92</sup> The following was noted:

“While the draft conclusion no longer expressly included Security Council resolutions, the commentary made it clear that the draft conclusion would apply to such resolutions and could invite States, irrespective of Article 103 of the

---

<sup>89</sup> See [A/74/10](#), p. 188.

<sup>90</sup> [A/C.6/74/SR.23](#), p. 10, para. 54.

<sup>91</sup> *Ibid.*

<sup>92</sup> See [A/C.6/74/SR.24](#), p. 13, para. 65.

Charter of the United Nations, to disregard or challenge binding Security Council resolutions by relying on even unsupported *jus cogens* claims. While [the] delegation appreciated the statement in the commentary that resolutions, decisions or acts of the Security Council required additional consideration, it remained highly concerned that the draft conclusion could have quite serious implications, not least because there was no clear consensus on which norms had *jus cogens* status”.<sup>93</sup>

61. On the other hand, two delegations expressed the opposite position when they indicated a preference to see an explicit reference to the Security Council resolutions in draft conclusion 16. The following arguments were advanced:

“Given the hierarchy of international obligations created by Article 103 of the Charter of the United Nations, the Commission should not shy away from recognizing that the Security Council was also bound by *jus cogens* norms”.<sup>94</sup>

“[...] the hierarchical superiority of rules of *jus cogens* applied equally to the resolutions, decisions and other acts of United Nations bodies, in particular the Security Council. Article 103 of the Charter of the United Nations provided only that the obligations under the Charter prevailed over obligations under any other international agreement. Therefore, in the event of a conflict between *jus cogens* norms and the obligations under the Charter, *jus cogens* norms prevailed”.<sup>95</sup>

## **B. Discussions about Article 103 in the Security Council**

62. This study is characterized by the continuation of the trend that has emerged during the periods covered by *Supplements No. 10* and *11*. According to this trend, no reference to Article 103 is to be found in any of the resolutions adopted by the Security Council. During the period under consideration, Article 103 was referred to, on two different occasions, when the Security Council examined the item entitled “Maintenance of international peace and security”. The Charter Article was further mentioned when the

---

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, p. 18, para. 94.

<sup>95</sup> [A/C.6/74/SR.27](#), p. 5, para. 26.

Council examined, also on two different occasions, the agenda item “Threats to international peace and security caused by terrorist acts”.

63. During the 7621st meeting of the Security Council, held on 15 February 2016, devoted to the agenda item “Maintenance of international peace and security”, two members of the Council, while explicitly referring to Article 103, pointed out the role and the relevance of the Charter to the maintenance and promotion of international peace and security.<sup>96</sup>

64. The first member stated that the maintenance of international peace and security “[...] does not entail only the establishment of new codes of conduct for members of the Council, [...], but rather strict respect for the rules that already exist and the principles that guide the Council and that are set out in the Charter, which is above any other instrument, as established in Article 103”.<sup>97</sup> As to the second member, its representative stated that “[t]he Charter of the United Nations, over the decades, has stood the test of time”<sup>98</sup> and that “[i]t is as relevant today as it was more than 70 years ago when it was adopted”.<sup>99</sup> The member further explained that “[i]ts pre-eminence as an international treaty is reinforced by its Article 103, which places the obligations of Member States under the Charter over and above their obligations under any other international treaty”.<sup>100</sup>

65. At its 8007th meeting, held on 20 July 2017, regarding the agenda item “Threats to international peace and security caused by terrorist acts”, the Security Council adopted resolution [2368 \(2017\)](#) on measures related to the Islamic State in Iraq and the Levant (ISIL) and Al-Qaida.<sup>101</sup> Following the adoption of the resolution, which urges for more international cooperation in cutting off terrorist funding, preventing terrorists from travelling and stopping terrorist groups from acquiring arms, a member of the Council regretted the decision of the Council to omit reference to Article 103 in the text of the resolution. Its representative’s statement reads as follows:

---

<sup>96</sup> [S/PV.7621](#), pp. 47 and 75.

<sup>97</sup> *Ibid.*, p. 47.

<sup>98</sup> *Ibid.*, p. 75.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> See SC resolution [2368 \(2017\)](#).

“We are [...] confounded by the fact that the text does not include a reference to Article 103 of the Charter of the United Nations, which is something that we insisted upon. Article 103 refers to the primacy of the Charter over other international treaties. The relevance of such a reference [is] based on the need to enhance the authority of the Security Council’s binding decisions with regard to sanctions and to ensure that they are fully implemented nationally by all branches of Government”.<sup>102</sup>

66. Additionally, at the 8059th meeting of the Security Council, held on 28 September 2017, in connection with the Council’s consideration of the same agenda item, i.e., “Threats to international peace and security caused by terrorist acts”, a delegation implicitly referred to Article 103 of the Charter when it addressed the Council’s counter-terrorism resolutions. The delegation expressed that it was convinced that the members of the Council “[...] have to extract better results from the Council’s counter-terrorism resolutions, create a climate that demands more from States on the enforcement front and establish the conditions necessary for strengthening the capabilities of national counter-terrorism systems”.<sup>103</sup> The delegation continued its statement by reminding that “[...] Member States have agreed to comply with Security Council resolutions and implement them strictly, and that obligations based on the Charter of the United Nations prevail over all others”.<sup>104</sup>

67. Furthermore, Article 103 was referred to at the 8699th meeting of the Security Council, held on 10 January 2020, in connection with the Council’s consideration of the item “Maintenance of international peace and security”. The reference to the Charter Article was made in order to demonstrate that “[t]he entire legal order that regulates international relations and its security structure is built on the principles of the Charter of the United Nations”.<sup>105</sup> The delegation therefore stated the following:

---

<sup>102</sup> [S/PV.8007](#), p. 3.

<sup>103</sup> [S/PV.8059](#), p. 8.

<sup>104</sup> *Ibid.*

<sup>105</sup> [S/PV.8699 \(Resumption 1\)](#), p. 2.

“Notwithstanding the discussion around Article 103, we believe that the United Nations Charter is the international treaty that prevails in the case of conflicting obligations under other treaties. It must always be respected and implemented — never undermined”.<sup>106</sup>

### **C. Discussions about Article 103 in the subsidiary bodies of the Economic and Social Council**

68. During the period under review, Article 103 was mentioned in the context of the consideration by the Permanent Forum on Indigenous Issues of a study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law. The Article was additionally referred to when the Committee on Economic, Social and Cultural Rights adopted general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. Whereas the study is dedicated to the examination of the trend in the behaviour of States to diminish the standards in the United Nations Declaration on the Rights of Indigenous Peoples, the general comment seeks to clarify the duties of States parties to the International Covenant on Economic, Social and Cultural Rights in situations where corporate activities have negatively affected these rights.

69. As indicated above, Article 103 was first referred to in a study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law. The study was submitted to the Permanent Forum on Indigenous Issues by two of its members at its fifteenth session in 2016. It examines the trend in the behaviour of States to diminish the standards in the United Nations Declaration, including actions to devalue indigenous peoples’ status, rights and participation and concludes that those actions are inconsistent with the purposes and principles of the Charter of the United Nations, as well as the rights and obligations affirmed in the United Nations Declaration and other international human rights law.<sup>107</sup>

---

<sup>106</sup> *Ibid.*

<sup>107</sup> See study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law, [E/C.19/2016/4](#).

70. Reference to Article 103 of the Charter was made when the authors explained that international organizations are subject to the rule of law and are compelled by any obligations incumbent upon them. It was provided that “[w]hether through joint or separate action, States parties cannot evade their international human rights obligations by acting through international organizations”<sup>108</sup> and that “[a]ccording to Article 103 of the Charter, in the event of conflict between the obligations of States under the Charter and those under any other international agreement, the Charter obligations would prevail”.<sup>109</sup>
71. At its 2nd and 8th meetings, on 9 and 13 May 2016, the Permanent Forum on Indigenous Issues considered agenda item 3, entitled “Follow-up on the recommendations of the Permanent Forum”. For its consideration of the item, the Forum had before it the Study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law”.<sup>110</sup> After its consideration of the study, the Permanent Forum recommended that “[...] all funds, programmes and specialized agencies of the United Nations system and other intergovernmental forums begin to reform their respective procedural rules, with the full and effective participation of indigenous peoples, with the aim of ensuring compliance and consistency with the human rights affirmed in the Declaration”.<sup>111</sup>
72. As previously mentioned, the Committee on Economic, Social and Cultural Rights adopted, at its sixty-first session, in 2017, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. The general comment seeks to clarify the duties of States parties to the International Covenant on Economic, Social and Cultural Rights in situations where corporate activities have negatively affected these rights, with a view

---

<sup>108</sup> *Ibid.*, p. 3, para. 9.

<sup>109</sup> *Ibid.*

<sup>110</sup> See report of the Permanent Forum on Indigenous Issues on its fifteenth session, [E/2016/43-E/C.19/2016/11](#), p. 19, para. 77.

<sup>111</sup> *Ibid.*, p.8, para. 15.



to preventing and addressing the adverse impacts of business activities on human rights.<sup>112</sup>

73. The Committee referred to Article 103 of the Charter when it addressed the obligation of States to respect economic, social and cultural rights and the potential conflict that may arise between States' obligations under the Covenant and their obligations under trade or investment treaties. It was therefore indicated that “[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations”.<sup>113</sup> Accordingly, “States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude”.<sup>114</sup>

#### **D. Proceedings before the International Court of Justice**

74. Throughout the period under review, Article 103 was directly referred to before the International Court of Justice in the written statements submitted by the United Kingdom of Great Britain and Northern Ireland, the Republic of Serbia, the Republic of Cyprus and the Republic of Mauritius in the advisory proceedings concerning *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. .

75. In its submission, the United Kingdom expressed the view that the Court should exercise its discretion and not respond to the questions put to it in the request of the General Assembly,<sup>115</sup> Nevertheless, it offered some considerations if the Court decided to answer the first question asked by the Assembly, which read as follows:

“Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the

---

<sup>112</sup> See General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, [E/C.12/GC/24](#).

<sup>113</sup> *Ibid.*, p. 5, para. 13.

<sup>114</sup> *Ibid.*

<sup>115</sup> See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statements of the United Kingdom of Great Britain and Northern Ireland, 15 February 2018, pp. 101-116 (available on the ICJ website).

Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?”<sup>116</sup>

76. The United Kingdom referred to Article 103 to argue that there was no right to self-determination under international law in 1968. It stated:

“The United Kingdom had consistently, throughout the 1950s and 1960s, objected to references to a ‘right’ of self-determination in UN instruments. And when it came to the adoption of the two Covenants, the United Kingdom emphasised that its obligations under the Charter cannot be expanded or modified by the content of Common Article 1, including its reference to a ‘right’. When the United Kingdom signed the two Covenants on 12 September 1968, it made in each case the following declaration, which has not been withdrawn: by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail”.<sup>117</sup>

77. Additionally, Article 103 of the Charter was referred to in the written statement of Serbia, in which it submitted that the Court had jurisdiction to issue the requested advisory opinion and that there was no reason to decline the exercise of its jurisdiction.<sup>118</sup> Serbia further argued that the decolonization of Mauritius was not lawfully completed<sup>119</sup> and that “[.] it [was] irrelevant that the United Kingdom concluded a treaty with the United States, for long term, and established military installations at the Chagos Archipelago”.<sup>120</sup> According to Serbia, “[o]bligations under

---

<sup>116</sup> See GA resolution [71/292](#), p. 2.

<sup>117</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statements of the United Kingdom of Great Britain and Northern Ireland, 15 February 2018, pp. 141-142, para. 8.71 (available on the ICJ website).

<sup>118</sup> See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statements by the Republic of Serbia, 27 February 2018, paras. 7-28 (available on the ICJ website).

<sup>119</sup> See *Ibid.*, paras. 29-44.

<sup>120</sup> *Ibid.*, para. 46.

the Charter of the United Nations, in accordance with Article 103, have prevalence over obligations under any other international agreement”.<sup>121</sup>

78. Moreover, in its written statement, Cyprus reiterated that the Court had jurisdiction to render the advisory opinion requested by the General Assembly, and that there were no compelling reasons preventing it from exercising its jurisdiction.<sup>122</sup> It also took the position that self-determination “[.] was and is binding upon the United Kingdom, as on all other UN Member States; and the United Kingdom, along with all other UN Member States, is under a continuing and-by virtue of Article 103 of the UN Charter-supreme obligation to act in accordance with that principle”.<sup>123</sup> Cyprus further recalled the full text of Article 103 of the Charter, according to which “[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, their obligations under the present Charter shall prevail”.<sup>124</sup>

79. Lastly, in its written comments, Mauritius argued that the Court had jurisdiction to render the advisory opinion<sup>125</sup> and that the decolonisation of Mauritius was not lawfully completed when it was granted independence in 1968.<sup>126</sup> As to Article 103, it was referred to by Mauritius in order to refute the argument of the United Kingdom which suggested that a settlement agreement concluded in 1982 waived the right of Chagossians to resettle in the Chagos Archipelago. The following was argued:

“[...] the settlement agreement, which concerns the private rights of individuals, has no bearing on the right of Mauritius to develop and implement a resettlement programme. It cannot relieve the administering power, in accordance with its obligations under Article 73, from its obligation to take no action that would obstruct such resettlement efforts. Indeed, construing the private settlement agreement as an obstacle to resettlement would be inconsistent with Article 103

---

<sup>121</sup> *Ibid.*

<sup>122</sup> See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statement Commenting on Other Written Statements submitted by the Republic of Cyprus, 11 May 2018, pp. 2-3, paras. 2-7 (available on the ICJ website).

<sup>123</sup> *Ibid.* p. 4, para. 11.

<sup>124</sup> *Ibid.*

<sup>125</sup> See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, pp. 31-70 (available on the ICJ website).

<sup>126</sup> See *Ibid.*, pp. 71-137.

of the U.N. Charter, which provides that, “[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, their obligations under the present Charter shall prevail”<sup>127</sup>.

80. During the period under review, Article 103 was also invoked in the oral proceedings in the case concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*. During the oral hearings concerning Ukraine’s request for indication of provision measures, the Russian Federation argued, *inter alia*, that the Court lacked jurisdiction to hear the case due to Ukraine’s failure to negotiate in good faith to set up an arbitral tribunal to solve the dispute, as required under the International Convention for the Suppression of the Financing of Terrorism. Instead, “Ukraine had, time and again, taken the position that an *ad hoc* chamber of this Court should be created which Ukraine perceived to constitute an arbitral tribunal within the meaning of [the Convention]”<sup>128</sup>. According to the Russian Federation, Ukraine’s position that the implementation and enforcement of a possible arbitral award would fall within the Security Council’s powers under Article 94 of the UN Charter, irrespective of the voting requirements provided in the Charter, was inconsistent with Article 103. It read as follows:

“Ukraine had further insisted that with regard to any such action to be eventually taken by the Security Council, the voting requirements, as laid down in the Charter for any action by the Security Council, ought to be disregarded. Ukraine hereby effectively wanted to circumvent the relevant Charter provisions which enjoy supremacy vis-à-vis other treaty régimes by virtue of Article 103 of the Charter.”<sup>129</sup>

---

<sup>127</sup> *Ibid.*, p. 189, para. 4.131.

<sup>128</sup> See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Verbatim records of the hearing held on 6 March 2017, para. 68

<sup>129</sup> *Ibid.*, para. 71.