



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

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# ARTICLE 103, UN CHARTER: ITS MANDATE AND OPERATION

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*“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>*

The UN Charter is considered to revolve around Article 103, not only theoretically but also in its entire construction. It is the source from which the Charter's supreme powers flow; this sense of supremacy is present because, as per the language of the article, it has precedence over obligations arising from all the other international treaties and agreements. The underlying premise of the Article is that the Charter serves as both a frame support and the topmost layer in the hierarchy of standards in International Law.<sup>2</sup> The application of this article, however, strikes up a conversation about certain issues like hindrance to the sovereignty of a state; the UN Charter being a treaty negating the obligations of other international treaties; and the conflict between Article 103 and customary law (*jus cogens*). This paper will majorly discuss Article 103 in relation to these three conflicting ideas.

## State Sovereignty:

Sovereignty is an evolving concept. According to the international law norm of state sovereignty established by the Westphalian sovereignty concept<sup>3</sup>, every state, regardless of size, has equal sovereignty rights and exclusive power over its territory. On the surface, this idea appears to be engraved in the UN Charter as well. The United Nations' first and greatest obligation is to create and maintain a calm and secure environment. The sovereignty of a state and the maintenance of

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<sup>1</sup>“ The United Nations Charter- Article 103” (*United Nations*) <<https://legal.un.org/repertory/art103.shtml>> accessed October 10, 2022

<sup>2</sup> Fassbender B, “The United Nations Charter as the Constitution of the International Community” (*Brill*) April 7, 2009 <<https://brill.com/view/title/16385>> accessed October 10, 2022

<sup>3</sup>“ Westphalian Sovereignty” (*Wikipedia*) August 25, 2022 <[https://en.wikipedia.org/wiki/Westphalian\\_sovereignty#:~:text=Westphalian%20sovereignty%2C%20or%20state%20sovereignty,states%20that%20nothing%20...>](https://en.wikipedia.org/wiki/Westphalian_sovereignty#:~:text=Westphalian%20sovereignty%2C%20or%20state%20sovereignty,states%20that%20nothing%20...>) accessed October 10, 2022

international security are inextricably linked. According to Article 2(1) of the Charter, the UN derives its foundation from the sovereign equality of all its members. However, this is seldom seen in practice. For example, in relation to Article 103, it inserts a supremacy clause in the Charter which affects not only the legal obligations of the member states but also imposes a criminal sanction in the case of a state entering into a treaty whose obligations do not coincide with those of the Charter. This inconsistency in awarding absolute state sovereignty between the provisions of Article 2(1) and Article 103 outlandishly suggests that there is still a lot more research that has to be done on the purpose and mandate when the obligations emanating from the provisions of the UN Charter vary from other international agreements. As aforementioned, a state's sovereignty is absolute and evolving in nature. The UN Charter freezes this evolution and this becomes a point of contention if there is an attempt to amend any of the provisions. However, the decisions taken by the Security Council which subjects the involved states to certain obligations are made with a socio-political point of view. On one hand, the question of whether Article 103 interferes with the state's sovereignty and its ability to enter into international agreements may be answered in the affirmative; however, at the same time, we cannot ignore the argument that the main objective of the United Nations is to maintain peace and security, and in order to fulfil that, the Charter tweaks and protects its own concept of state sovereignty.<sup>4</sup>

### **Scope of the Article 103:**

Now, it is fairly easy to interpret that the treaty, through this particular article, does not put a bar on all the obligations arising from all the international treaties but aims to resolve the conflicts between the treaty obligations of the members of the United Nations. According to Hans Kelsen, in his analysis of Article 103, there are two major types of conflicts with respect to "obligations"<sup>5</sup>, namely

- (1) A conflict between treaty obligations under the present Charter and treaty obligations imposed by treaties signed by members;
- (2) A conflict between treaty obligations under the present Charter and treaty obligations imposed by treaties signed by members and the non-members

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<sup>4</sup> Reference- "The United Nations and State Sovereignty: Mechanism for Managing International Security" (*Taylor & Francis*) <<https://www.tandfonline.com/doi/abs/10.1080/10361149850750>> accessed October 10, 2022

<sup>5</sup> Kelsen H, "Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements - An Analysis of Article 103 of the Charter (Page- 284-285)" (*Redirecting...*) <[https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals%2Fupitt10&id=286&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals%2Fupitt10&id=286&men_tab=srchresults)> accessed October 10, 2022

A conflict arises only in the situation where either the parties to any two treaties are identical or a state that is party to a treaty enters into another treaty. This is based on logic, as a conflict is only possible if there is any apparent similarity between the obligations, and there will be no conflict if such treaties are signed by different parties. In the first instance, when there is a disagreement between the Charter and duties developing among members under other treaties, this clause provides that if an inconsistent treaty is signed prior to the Charter's execution, it is repudiated. If, on the other hand, such a treaty is signed by member states after the Charter's implementation, Article 103 renders the treaty or accord null and invalid. It is also important to note that, due to the use of the phrase "*present charter*", the scope of the article is narrowed and the only way such a conflicting obligation can be applicable is if there is an amendment to the Charter by way of Article 108. In the second case, where the conflict is between members and non-members, some international law scholars argue that states that enter into such a treaty that is inconsistent with the Charter are breaching a contract and thus committing an illegal act, and that such states should be held legally liable for the same. However, this approach is critiqued by Kelsen, on the ground that it is tenable and it is difficult to ascertain if a state is entering into a treaty which is inconsistent with a treaty previously signed by the state. Calling it an "illegal act" on the part of the state and holding them at a strict pedestal would be manifestly unfair, as the treaty may be entered into by them sincerely and without any malice.<sup>6</sup>

Identifying obligational conflicts requires a closer look at the text of the Charter. The term "obligations" in Article 103 includes not only those obligations that stem directly from the Charter but also indirect ones. A prime example is the direct obligation stipulated by Article 2(3) to the members to settle disputes among them in a peaceful manner. In addition to this, there also exist obligations which are indirectly derived from the other organs of the UN, for example Article 25, which stipulates the members' to take decisions in accordance with the Security Council.<sup>7</sup> So, although Article 103 is clear and unambiguous, in its words, the application of this "supremacy clause" is and will always be a point of contention for international law scholars, as there is no straight-jacket formula.

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<sup>6</sup> Kelsen H, "Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements - An Analysis of Article 103 of the Charter (Page- 284-285)" (*Redirecting...*) <[https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals%2Fupitt10&id=286&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals%2Fupitt10&id=286&men_tab=srchresults)> accessed October 10, 2022

<sup>7</sup> "The Scope of the Supremacy Clause of the United Nations Charter - JSTOR" <<https://www.jstor.org/stable/pdf/20488232.pdf>> accessed October 10, 2022

## Challenges in Application of Article 103

In the recent Al-Jedda case, the House of Lords decided that the authorizations were within the purview of Article 103<sup>8</sup>. The issue concerned the legal ramifications of Peace Council Resolution 1546, which granted coalition troops in Iraq "power to take all necessary measures to assist in the maintenance of security and stability in Iraq in conformity with the letters appended to [the] resolution."<sup>9</sup> Such actions included "internment when... required for imperative reasons of security in Iraq," according to the accompanying letter from the US Secretary of State. Mr. Hilal Al-Jedda was detained by British soldiers because of this. He filed a court complaint alleging that he had been detained in breach of the European Convention on Human Rights (ECHR)<sup>10</sup>, as incorporated into English law by the Human Rights Act 1998. The House of Lords maintained the lower courts' conclusion that authorizations did indeed trigger Article 103, thus triumphing over the ECHR. One of the main reasons was amendments to the security system.<sup>11</sup>

Secondly, the usage of the word "obligation" precludes the possibility of subordinating the instance of authorizations under Article 103. G. Gaja<sup>12</sup> presents this reasoning. Texts, contrastingly, should be taken literally but must be understood using a variety of techniques and approaches. This is especially evident when the text is challenged with later practise, classifications in the legislations or have fundamental political implications that contradict the original objectives. It should be recognised that G. Gaja is correct in not giving the language of Article 103 any petrified status. On another point raised by this provision, he suggests that "the same principle should apply with regard to obligations under general international law, because there would be little reason to treat international obligations differently depending on their source."<sup>13</sup> Further, the language of Article 103 states that the Charter's responsibilities take precedence over the commitments of any other international "agreement." However, this

<sup>8</sup> United Nations High Commissioner for Refugees, "R (On the Application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58" (*Refworld*) <[https://www.refworld.org/cases,GBR\\_HL,48e36f9e2.html](https://www.refworld.org/cases,GBR_HL,48e36f9e2.html)> accessed October 10, 2022

<sup>9</sup> "UNSCR Search Engine for the United Nations Security Council Resolutions" (*UNSCR*) <<http://unscr.com/en/resolutions/1546>> accessed October 10, 2022

<sup>10</sup> "European Convention on Human Rights - European Court of Human Rights" <[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)> accessed October 10, 2022

<sup>11</sup> ECHR, "Al Jeeda vs UK" (*HUDOC*) <[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-105612%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105612%22]})> accessed October 10, 2022

<sup>12</sup> Gaja G, "The Protection of General Interests in the International Community General Course on Public International Law (2011) (Volume 364)" (*Brill* August 1, 2013) <[https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/\\*A9789004255579\\_01](https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789004255579_01)> accessed October 10, 2022

<sup>13</sup> Gaja G, "The Protection of General Interests in the International Community General Course on Public International Law (2011) (Volume 364)" (*Brill* August 1, 2013) <[https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/\\*A9789004255579\\_01](https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789004255579_01)> accessed October 10, 2022

contented because the an agreement, in its strict sense is not international law, but the language of an international law. Once the enormous gate of Chapter VII of the Charter is crossed, the Security Council has much too much discretionary and unrestrained decision-making authority. This may have been admirable in 1945, when the newly formed organisation had to contend with the defunct and impotent League of Nations. Such an astonishing variety of unrestricted presidential authority may be perplexing today, given the extending arm of rule of law constraints. However, this concern, must be sought in the revision of substantive norms on Council action, as well as perhaps in some kinds of judicial review. Article 103 only represents the Council's material powers. If the latter are considered to be excessively substantial, they should be lowered, and so the scope of Article 103 is automatically restricted.<sup>14</sup>

### Article 103 and *Jus Cogens*:

After considering the extent and effect of Article 103 of the UN Charter on a state's sovereignty, the question now becomes whether an obligation deriving from the Charter takes precedence over duties represented by the customary law concept of *jus cogens*, given the constitutional nature of the Charter. The principle of *jus cogens*, in simple words means, a law that is compelling in nature and these law are considered as the most superior laws in all of International laws.<sup>15</sup> It derives its legitimacy through the natural law principles, which holds that the state's sovereignty cannot be absolute as there is no absolute freedom to enter into contractual agreements<sup>16</sup>.

With regards to the connection between Article 103 and the *jus cogens*, many scholars have commented that, on the technical basis, there is a limit to the application of Article 103 of the Charter to other treaties entered into by the member states; it leaves open the possibility of soporiferous by certain customary laws<sup>17</sup>. Similarly, as per Geoffrey Watson, the reasoning of the supremacy clause is confined to inconsistent treaty obligations because, as expressed in the article, "other international agreements" provide that customary law prevails over the charter<sup>18</sup>. Also, in a genocide case in the year 1991, *Lockerbie* stated with respect to the Security Council

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<sup>14</sup> (Academic.oup.com) <<https://academic.oup.com/book/35064/chapter/299005575?login=true>> accessed October 10, 2022

<sup>15</sup> Wallace RMM, "International Law" (Google Books) <[https://books.google.com/books/about/International\\_Law.html?id=cKA6AQAAIAAJ](https://books.google.com/books/about/International_Law.html?id=cKA6AQAAIAAJ)> accessed October 10, 2022

<sup>16</sup> Ejlil, "Articles" (*EJIL*) <<http://ejil.org/article.php?article=2025&issue=101>> accessed October 10, 2022

<sup>17</sup> Perez AF, "The Perils of Pinochet: Problems for Transnational Justice and a Supranational Governance Solution" (*Catholic Law Scholarship Repository*) <<https://scholarship.law.edu/scholar/188/>> accessed October 10, 2022

<sup>18</sup> Watson GR, "Constitutionalism, Judicial Review, and the World Court" (*Catholic Law Scholarship Repository*) <<https://scholarship.law.edu/scholar/398/>> accessed October 10, 2022

resolutions that the provision of Article 103 does not extend either to ascertaining the hierarchy of principles nor to a conflict between the Security Council and the principle of jus cogens. This demonstrates that the ambit of Article 103 is not universal and the customary law of jus cogens acts as a limitation to the power extended to the provision<sup>19</sup>. One could also make the general argument that the Charter is subject to jus cogens on the ground that it is an international treaty. Given that there is little evidence in the actual wordings of Article 103 to imply the inference of customary international law, the concept of jus cogens will prevail for the purposes of the provisions' implementation in international law.<sup>20</sup>

## Conclusion

In conclusion, as Benedetto Conforti puts it, "[the] constitutional aspect of the United Nations Charter should not be exaggerated. The Charter is and remains a treaty." It can be successfully interpreted through this that even though the Charter depicts certain constitutional elements, the ambit and application of them should extend only to the subsequent international agreements. Moreover, the evolved sovereignty maintained by the UN Charter is acceptable as it is a matter of international peace and security as long as, in order to respect a member state's sovereignty, the Charter provides legal justification for the sanctions of criminal nature against such states for fulfilment of the obligations. The relevance of Art. 103 is expected to increase in accordance with the broader trend toward increasing diversification, if not fragmentation, of international law and the increased exercise of Chapter VII powers by the Security Council. It serves a crucial, possibly constitutional<sup>21</sup>, purpose in preserving the integrity and coherence of the international legal system under the auspices of the UN Charter<sup>22</sup>. Nonetheless, notwithstanding the Charter's predominance over other accords under Art. 103, many governments appear to consider it an ordinary treaty<sup>23</sup>. The absence of direct impact and supremacy of UN law inside the domestic

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<sup>19</sup> Paust JJ, "Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions" (SSRN June 20, 2014) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2456439](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456439)> accessed October 10, 2022

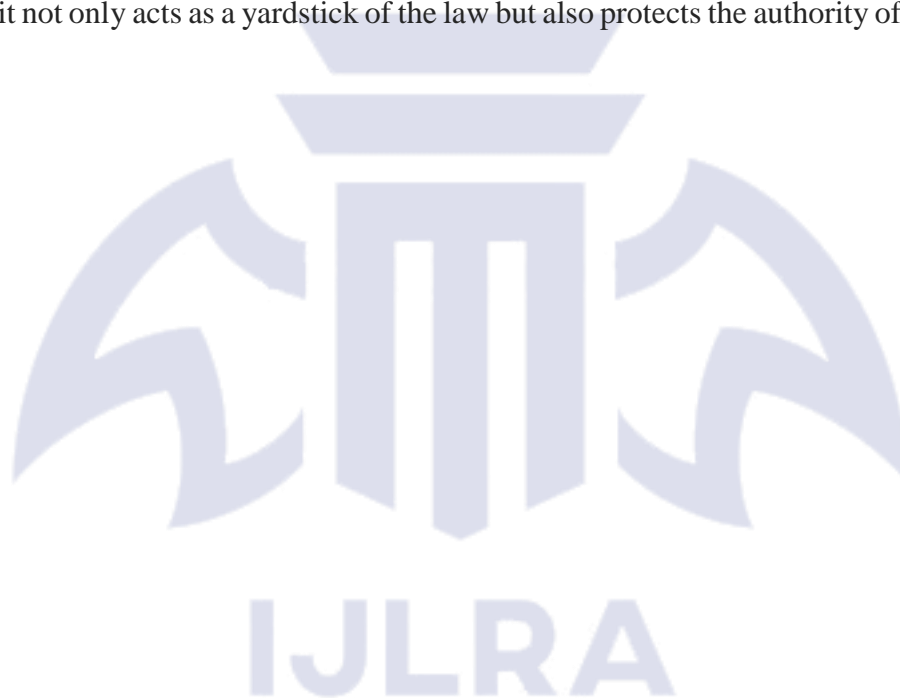
<sup>20</sup> "The Scope of the Supremacy Clause of the United Nations Charter - JSTOR" <<https://www.jstor.org/stable/pdf/20488232.pdf>> accessed October 10, 2022

<sup>21</sup> Dupuy P-M, "The Constitutional Dimension of the Charter of the United Nations Revisited" (Brill January 1, 1997) <[https://brill.com/view/journals/mpyo/1/1/article-pxix\\_.xml?language=en](https://brill.com/view/journals/mpyo/1/1/article-pxix_.xml?language=en)> accessed October 10, 2022

<sup>22</sup> Abi-Saab G, "Ordre Juridique International" (Google Books March 16, 2001) <[https://books.google.com/books/about/Ordre\\_Juridique\\_International.html?id=IlhBWqzs7aUC](https://books.google.com/books/about/Ordre_Juridique_International.html?id=IlhBWqzs7aUC)> accessed October 10, 2022

<sup>23</sup> "NATO, the UN and the Use of Force: Legal Aspects" (Academic.oup.com) <<https://academic.oup.com/ejil/article/10/1/1/600881>> accessed October 10, 2022

legal order, and potentially even within regional transnational legal systems, poses a considerably bigger danger to the UN's power than challenges to the bindingness of a single Security Council resolution, as in the Lockerbie Cases<sup>24</sup>. In reality, it appears less significant to consider Art. 103 as an indication of hierarchy in the powers between the Charter and any other international treaty, or as a mere conflict rule excluding the Charter's application to later-in-time and *lex specialis* regulations. In any event, Article 103 is a crucial Charter principle that ensures the Charter's priority over all other inter-state treaties. A competent interpretation of the United Nations Charter in light of relevant general international law and much more so of ordinary international law in light of the Charter, will make the deployment of Art. 103's "big stick" unusual, if not superfluous. Thus, Art. 103 principally acts as a rule of interpretation of international law in accordance with the Charter; it not only acts as a yardstick of the law but also protects the authority of the Charter.<sup>25</sup>



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<sup>24</sup> Wessendorf N, "The Charter of the United Nations: A Commentary" (*Google Books* November 22, 2012) <[https://books.google.com/books/about/The\\_Charter\\_of\\_the\\_United\\_Nations.html?id=5LUoAwAAQBAJ](https://books.google.com/books/about/The_Charter_of_the_United_Nations.html?id=5LUoAwAAQBAJ)> accessed October 10, 2022

<sup>25</sup> Leiaë JR and Paulus A, "Ch.XVI Miscellaneous Provisions, Article 103" (*Oxford Public International Law*) <<https://opil.ouplaw.com/view/10.1093/law/9780199639779.001.0001/law-9780199639779-chapter-122#law-9780199639779-note-5487>> accessed October 10, 2022