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Absolute Validity, Absolute Immunity: Is There Something Wrong with Article 103 of the UN Charter?

Guido den Dekker

Introduction

It is a great pleasure to contribute to the Liber Amicorum in honor of Prof. A.H.A. Soons, carrying the challenging title “What is wrong with international law?” In this paper, I will address the question as to whether there is something “wrong” with the hierarchy-creating rule of Article 103 of the United Nations (UN) Charter, in view of the contrasting interests of effectiveness of UN sanctions together with collective security law versus legal review of decisions in the same framework which have an impact on fundamental human rights and their protection at the domestic level. The implementation of UN sanctions in the Netherlands is no doubt among the areas of specific interest of Professor Soons; witnessed through his contribution to the well-known book on the subject matter, edited by Vera Gowlland-Debbas. Additionally, Professor Soons has been concerned with questions of immunity of international legal persons before the national courts.

I will focus on the role of Article 103 of the UN Charter in the legal practice in the Netherlands by discussing two cases with an emphasis on the decisions by the Netherlands Supreme Court. Central to the first case, that of three “Dutch Iranian” nationals versus the state, is the implementation of specific UN Security Council sanctions in the Netherlands by way of a domestic

1 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
3 See the reference to the expert opinion of Professor Soons, in a case on state immunity United States of America/X, Appeals Court Den Bosch, judgment of 18 November 2008, ECLI:NL:GHSHE:2008:BG5015.
implementation regulation. The second case, the Association Mothers of Srebrenica et al. v. the United Nations, the State of The Netherlands intervening,\textsuperscript{5} concerns the immunity of the United Nations before the Dutch courts. I will link this latter case with the European Court of Human Rights (ECtHR) ruling on this matter\textsuperscript{6} as well as with two other “Srebrenica cases,” in which the Netherlands Supreme Court ruled that the state of the Netherlands can indeed be held responsible under international law for causing the death of three Bosnian Muslim men at the hands of the Bosnian Serbs.\textsuperscript{7}

The Netherlands offers an interesting jurisdiction for the implementation of international law, as it has a relatively “open” legal system.\textsuperscript{8} Known as a moderate monistic system, the Dutch Constitution stipulates the direct application of self-executing provisions of international law, whether they are found in a treaty in force for the Kingdom of The Netherlands (hereinafter also: “the state”) or in binding decisions based on a treaty, which includes UN Security Council Resolutions adopted pursuant to Chapter VII of the UN Charter. The hierarchy in the national Constitution awards international law, in principle, a higher standing within the Dutch legal order in comparison to state-made law. The position of customary international law is somewhat different, in that it can likewise be applicable to legal relationships at the domestic level, but unlike treaties and other promulgated law, customary international law cannot in principle override conflicting national laws, including constitutional provisions. There is no preferential rule available, however, in the event that potentially conflicting rules of international law are applicable concurrently to a case.

In practice, courts in the Netherlands, like domestic courts in many other states, have been called upon to decide cases where obligations originating from UN Security Council resolutions are confronted with rights originating from

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\textsuperscript{6} See St. Mothers of Srebrenica and Others v. The Netherlands, ECtHR, decision of 11 June 2013, appl. no. 65542/12.

\textsuperscript{7} Case of Mustafic et al./State of The Netherlands, Netherlands Supreme Court, judgment of 6 September 2013, ECLI:NL:HR:2013:BZ9228; Case of Nuhanovic/State of The Netherlands, Netherlands Supreme Court, judgment of 6 September 2013, ECLI:NL:HR:2013:BZ9225. The author acted for the victims before the Supreme Court.

international human rights instruments, in particular the European Convention on Human Rights (ECHR),9 and the International Convention on Civil and Political Rights (ICCPR). This is where Article 103 of the UN Charter has come to play a role in defining the primacy of decisions and actions of the United Nations Organization and its organs. It is a reality that actions on behalf of the United Nations, as well as the interpretation and domestic implementation of measures pursuant to Security Council resolutions, take place at the level of the Member States and their organs, whereas the same produce their effects mainly at the level of individuals and groups in society. These individuals have their own views as to the fairness of specific United Nations’ actions or domestic implementation legislation. As we will see, Article 103 of the UN Charter has been invoked by the state to secure the absolute validity (“lawfulness”) of UN-made rules and to guarantee UN functioning, absolutely unhindered by the domestic courts. At first sight, it seems that Article 103 of the UN Charter may be “wrong,” as it would carry an absolute – unquestionable, unchallengeable, perpetual – primacy of primary and secondary UN law, excluding legal protection and effectively placing the United Nations “above the law” in international relations. It raises the question whether Article 103, which has been described as “the cornerstone of the UN Charter,”10 in practice is awarded the function of a rule of absolute legal protection of the UN, and if so, whether and to what extent this could be perceived as “wrong.”

Some Conceptual Issues regarding Article 103 of the UN Charter

Article 103 of the UN Charter provides that 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. Read in combination with Article 25 of the UN Charter, which contains an obligation for the UN Member States to carry out binding Security Council decisions, Article 103 without a doubt creates a formal hierarchy in treaty law of both primary and secondary UN law, which cannot be altered by the maxims lex specialis derogat legi generali and lex posterior derogat legi priori. One original motive for Article 103, the maxim

pacta tertiis nec nocent nec prosunt, which might otherwise prevent Member States from carrying out action pursuant to the Charter if contrary to treaty obligations held against non-Member States, has lost its meaning as (practically) all States in the world are UN Members.\footnote{11} I leave aside the separate discussion of ius cogens rules, as intra vires action of the UN would not clash with such rules\footnote{12} and their peremptory nature in my view should not be considered the most relevant in this respect. Rather, as a matter of principle, the hierarchy introduced by Article 103 is not meant to set aside “community interests” embodied in the Charter, such as human rights or environmental protection.

As a result of their priority, binding Security Council resolutions can effectively set aside rules of treaty law with which they conflict. Resolution 748 (1992) is among the examples\footnote{13} of the Security Council setting aside a treaty provision, where the Security Council demanded that Libyan nationals be turned over to the United States and the United Kingdom, thereby overriding provisions of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.\footnote{14} Moreover, when the Security Council decided through Resolution 1483 (2003) that only the United Kingdom and the United States were deemed to be “occupying powers” in Iraq, this resolution arguably deviated from existing international law of armed conflict under which the question of whether a party is an “occupying power” is based on facts, not mere designation. A recent example of this priority is Resolution 2118 (2013) in which the Security Council “overruled” the prohibition of transfer of chemical weapons laid down in the Chemical Weapons Convention, for the particular purpose of destroying the chemical weapons stockpile of Syria.\footnote{15}

It is often suggested that obligations imposed by a binding Security Council resolution prevail over all other international laws, including customary international law, although, that interpretation seems to be logical if the principle


\footnote{12} Such action would also serve to maintain the prohibition against the use of force, which is itself a rule having the character of ius cogens (as the ICJ indicated in the Nicaragua case, ICJ Reports 1986, 100).


\footnote{14} International Civil Aviation Organization (ICAO), Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971), 974 UNTS 177.

underlying Article 103 of the UN Charter is itself considered to be a customary rule. However, based on the exact wording of Article 103 of the UN Charter, this may be called into question. The drafters of the UN Charter were reluctant to explicitly include customary international law and other legal sources in the prevalence of the Charter.\textsuperscript{16} It would seem that Article 103 cannot be construed to create a formal hierarchy in the primary sources of international law, nor could it prevent the changing of the substance of the law through constant and uniform state practice and corresponding \textit{opinio iuris}. If, for example, absent of a Security Council mandate under Chapter VII of the Charter, “humanitarian intervention,” or maybe the implementation of a “responsibility to protect” by armed forces,\textsuperscript{17} at some point in time would come to be accepted among the international community at large as a legally valid ground for setting aside the prohibition of the use of force of Article 2(4) of the UN Charter. Under such circumstances, Article 103 could not be invoked to overrule or nullify that newly established rule of customary international law.

In addition, the UN Charter has an in-built safeguard in the provision that the UN Security Council, according to Article 24(2) of the UN Charter in discharging its duties, shall act in accordance with the purposes and principles of the UN. This implies certain limitations on the freedom of action of the Security Council and confirms that the UN Security Council, despite its very broad powers, can also act \textit{ultra vires}. If an interpretation of a resolution renders it unlawful under the Charter, Article 103 cannot remedy that and make “illegal” decisions of the Council prevail over other legal norms. For example, Security Council Resolutions cannot be interpreted to support acts of aggression, and a Chapter VII-mandate to use “all necessary means” cannot be construed as an endorsement by the UN of nuclear, chemical or biological warfare. Likewise, the Security Council cannot compel a state to sign or ratify a treaty without its consent.\textsuperscript{18} The maintenance of international peace and security naturally is at the heart of the purposes and principles of the UN, but so is the promoting and encouraging of respect for human rights as well as the requirement that the UN acts in conformity with the principles of justice.

\textsuperscript{16} See Paulus and Leiss, note 10 at 2116, 2132–2133.


\textsuperscript{18} Even though sometimes very similar results can be obtained by way of mandatory resolutions, an example in point being S/Res/687 (1991) which imposed a nuclear and chemical arms control regime on Iraq which went further than all arms control treaties in force at the time.
and international law. As the ECtHR has put it, referring to Articles 1(1) and 24(2) of the UN Charter:

[...] the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.19

In later case law the ECtHR has specified that the presumption expressed here is rebuttable.20 In a way, it forms the mirror image of the presumption that a State Party has not departed from the requirements of the ECHR when it does no more than implement the legal obligations flowing from its membership of an organization providing “equivalent protection” of Convention rights, which can be rebutted if in the circumstances of a particular case it is considered that the protection of those rights was “manifestly deficient.”21 Other regional courts, witness in particular the numerous rulings and orders at the level of the European Union (EU) since the Kadi and Al Barakaat cases,22 have been called upon to review the legality of restrictive measures implementing UN sanctions, and the Member States concerned have invoked Article 103 of the UN Charter to justify their position. It appears that a lack of comfort vis-à-vis the legal review at the UN level, due to the absence of sufficient procedural guarantees of alleged serious infringements of fundamental rights, is at the heart of the case law of the EU courts. According to that case law, it is for the EU courts to assess whether someone has provided sufficient proof that his placing on a

19 See Al Jedda v. the United Kingdom, ECtHR, judgment of 7 July 2011, appl. no. 27021/08, para. 102.
20 See Nada v. Switzerland, ECtHR, judgment of 12 September 2012, appl. no. 10583/08, para. 172; ECtHR Mothers of Srebenica, note 6 at para. 45.
21 See Bosphorus v. Ireland, ECtHR, judgment of 30 June 2005, appl. no. 45036/98, para. 156.
22 Since 2005, the Court of Justice of the EU and the General Court have each given 11 rulings and numerous orders in cases concerning the same terrorist list on which Kadi and Al Barakaat were placed, see C. Eckes, Case Note to Court of Justice EU Abdulrahin v. Council and Commission, judgment of 28 May 2013, C-239/12 P (2013) 14 EHCR 8 no. 159, 1725.
UN “terrorism list” is not justified and to decide whether his name should be removed from that list. In sum, Article 103 of the UN Charter does not seem to set absolute standards of validity and supremacy, yet doubt still remains. The International Court of Justice (ICJ), on the rare occasions that it used Article 103 of the UN Charter as a reference in its case law, seems to have interpreted the rule in rather absolute terms. The presumptions expressed in the case law of the ECtHR make unlikely the finding that a Security Council Resolution demands that human rights violations be accepted – or in other words, that the UN Organization meant to leave no discretion in human rights protection to the Member States in the implementation of these measures. The Court of Justice of the EU (CJEU) has limited its review of the lawfulness of restrictive measures to the relevant EU decisions and implementation regulations, not including the UN Security Council Resolutions from which they originated. This was premised on the basis that “without the primacy of a Security Council Resolution at the international level thereby being called into question” the requirement that the EU institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such EU measures, in the light of the fundamental rights which are an integral part of the general principles of EU law.

The answer to the above question of “absolute standards” becomes more urgent when the UN falls short of fulfilling its primary functions, e.g. if a UN peacekeeping mission fails to offer the protection which it was supposed to

23 See, in particular, Kadi II, Court of Justice EU, judgment of 18 July 2013, joined cases C-584/10, C-593/10, and C-595/10.
24 See ICJ Nicaragua case (Nicaragua v. USA) ICJ Reports 1984, 392, para. 107; Lockerbie Case, Order of 14 April 1992, ICJ Reports 1992, 16 (Libya v. USA) and 113 (Libya v. UK). Likewise, Dutch lower courts have held that on the basis of Article 103 the law of the UN Charter and therefore of the Security Council prevails over “any other” law, see District Court The Hague, judgments of 31 August 2001, ECLI:NL:RBSGR:2001: AD3266, para. 3.5, and of 26 February 2002, ECLI:NL:RBSGR:2002: AD9602, para. 5.1.
25 As the ECtHR found in Al-Jedda (note 17), para. 109, in the absence of a binding obligation to use internment, there was no conflict of obligations under the UN Charter and Article 5 § 1 ECHR. Even in Al-Dulimi and Montana Management Inc v. Switzerland, ECtHR, judgment of 26 November 2013 appl. no. 5899/08, para. 117 ff, the finding of the ECtHR that the applicable UN Security Council Resolutions did not leave any discretionary room to the Member State as regards the “listing” concerned, did not mean that the resolutions also forced its national courts to refuse making a material assessment of the compatibility of those “listing” measures with fundamental human rights protection in the absence of remedies at the international level.
26 See, inter alia, Hassan and Ayadi, Court of Justice EU, 3 December 2009, Joined Cases C-399/06 and C-403/06; Bank Melli Iran, Court of Justice EU, 16 November 2011, Case C-548/09; Kadi II (note 21); and see Fulmen et al., Court of Justice EU, 28 November 2013, Case C-280/12.
provide to refugees in an armed conflict, or when the Security Council is acting in a “legislative” capacity, e.g. if it establishes sanction regimes pursuant to Article 41 of the UN Charter with measures requiring substantive rule implementation in the law of the Member States, in particular if the objectives of the measures have not been described in detail and there is no clear temporal limitation. Given the focus of this contribution, I will now turn to the cases before the Dutch courts and involving the state of the Netherlands, which help to shed light on the question “how absolute is absolute?” pertaining to the role and application of Article 103 of the UN Charter in legal practice, within the Netherlands.

The “Dutch Iranians” Case and the “Sanctions Regulation Iran”

The case originates from the discriminatory nature of the implementation regulation – namely, the “Sanctions Regulation Iran,” which is an Order of the Netherlands Minister for Foreign Affairs (Sanctieregeling Iran27) – containing a “specialized teaching embargo” by way of domestic implementation as part of the sanctions regime, on the basis of Article 41 of the UN Charter introduced by Security Council Resolution 1737 (2006). Since all UN Security Council sanctions are in substance implemented through EU-regulations within the Member States of the EU, nowadays the adoption of sanctions regulations in the Netherlands is primarily for the purpose of penalization and, occasionally, for designating the authority competent to grant exemptions. In this case, however, despite the applicable EU-implementing regulations (inter alia Regulation (EU) no. 359/2011, Pb L 100), the national sanctions regulation also contained a broadly-worded prohibition, namely that: “specialized teaching or training which can contribute to proliferation sensitive activities of Iran and to the development of systems for the delivery of nuclear weapons shall not be provided to Iranian nationals who have not been granted exemption for this purpose by the Minster of Education, Culture and Science (…).”28 The corresponding paragraph at the UN level which it seeks to implement provides: “[the Security Council] calls upon all states to exercise vigilance and prevent

27 Staatscourant 2012, no. 8001, 17 April 2012, as amended. The Sanctieregeling Iran under scrutiny was introduced in 2007; in later versions (2010, 2012) no change was made to the “specialized teaching embargo” until the adaptation of the text of the Sanctions regulation, in Staatscourant 2013 no. 30733, 1 November 2013.

28 Sanctions Regulation Iran 2007, Article 2a; Sanctions regulation Iran 2012, Article 5(1) (my translation). A list annexed to the Sanctions Regulation describes the designated teaching and training, such as on rocket propulsion and uranium enrichment techniques. I leave out a discussion about the prohibition of access to designated locations which was dropped from the earlier version of the Sanctions Regulation.
specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran’s proliferation sensitive nuclear activities and development of nuclear weapon delivery systems." For the purpose of this paper, on the substance of the case, suffice it to say that three Iranian nationals who also have the Dutch nationality successfully complained in the Dutch courts that this “teaching embargo” of the Sanctions Regulation Iran is inherently discriminatory and contrary to Article 26 of the ICCPR and Article 1 of Protocol Twelve to the ECHR, as it is directed against all Iranians – and only Iranians – in the Netherlands. The mere fact that an exemption from the prohibition could be obtained upon request could not alter its effect since, the courts ruled, the requirement to obtain an exemption, which likewise applies to Iranians only, is discriminatory as well. In brief, since Resolution 1737 (2006) has established a sanctions regime to meet international concerns about the risk of nuclear proliferation sensitive activities and the development of nuclear weapon delivery systems undertaken by (the regime in) Iran, the purpose of the “teaching embargo” is to prevent Iran from doing so with the aid of knowledge and training received in the Netherlands. Against that background, the courts decided that it cannot be considered necessary and proportional to attain that purpose by a categorical prohibition of teaching and training designated courses to Iranians, and thus the Sanctions Regulation Iran was declared invalid. In November 2013 the text of the Sanctions Regulation was amended, in order to comply with the court judgments, to a teaching embargo for “persons” in general and a corresponding requirement to apply for an exemption for all, with the addition that an exemption will be granted by the Minister unless he considers this will carry an unacceptable risk in connection with nuclear proliferation-sensitive activities of Iran.

During the proceedings, the state of the Netherlands invoked Article 103 of the UN Charter before the District Court, the Court of Appeal and the Supreme Court, to support its submission that the Sanctions Regulation Iran is implementing binding UN obligations which prevail over any other obligations and therefore do not leave room for an examination by the courts of its compatibility with other obligations of the state. In all three instances, as it was observed that international law does not prescribe mandatory implementation techniques for the UN Member States to fulfill their obligations pursuant to Security Council Resolutions, the Dutch courts decided that Resolution 1737 (2006) does not require UN Member States to introduce a nationality-based distinction in a national regulation which is unnecessary and not justified. The Supreme Court

30 Cf. Kadi and El Barakaat v Council and Commission, Court of Justice EU, judgment of 3 September 2008, cases C-402/05 and C-415/05, para. 298.
in that respect ruled that the interpretation of Security Council Resolutions must be performed in good faith in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties to see if there is in reality a “conflict,” as required by Article 103 of the UN Charter. The Supreme Court, making reference to the case law of the ECtHR, also stipulated that the fact that the Sanctions Regulation is implementing a binding Security Council Resolution is not sufficient reason to overrule potentially conflicting obligations, as it must in addition be likely that the state has done everything in its power to harmonize the obligations which it considers cannot be combined. After a close examination, the Supreme Court arrived at the conclusion that the state had not provided sufficient proof that it had done so in the instant case, and consequently rejected the appeal of the state.

Thus, the solution in this case was found by “harmonizing” the international obligations of the state that are potentially at odds with an interpretation of the Security Council Resolution along the principle of non-discrimination, with the interesting result that the national implementation regulation could not remain in force. Generally speaking, Dutch courts tend to construe and apply national law in such a manner that a conflict with rules of international law is avoided. It is interesting to note, in addition, that the Court of first instance in this case considered that if the distinction made in the Sanctions Regulation had been mandatory on the basis of the text of the Resolution, Article 103 of the UN Charter would have prevented the court’s ability to test the Sanctions Regulation against fundamental human rights, such as the prohibition of discrimination. The Court of Appeal in its judgment did not

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32 Supreme court judgment (note 3 above), para. 3.7.2. As far as I can see, this is the first time that the Supreme Court has decided that a Security Council resolution should be interpreted according to the rules of the Vienna Convention on the Law of Treaties.
33 Supreme Court judgment (note 3 above), para. 3.6.3, with reference to (most recently) Nada v. Switzerland (note 18) paras. 163–199.
34 Interestingly, the Supreme Court itself examined the way the state had implemented the Resolution and confronted its findings with alternative implementation techniques chosen by other (European) states, whereas normally the Supreme Court is much more reluctant to examine the facts of the matter.
36 As the District Court (note 3) considered in its judgment (para. 4.6): Since pursuant to Article 103 of the UN Charter a resolution of the Security Council is of a higher order than other treaty provisions, the defence of the state would be successful if Resolution 1737 prescribed mandatorily the contents of the Sanctions Regulation Iran as drawn up by the Dutch State.
follow that reasoning, and instead considered *in obiter* that even if the Security Council Resolution had required the state to make a distinction between Iranians and non-Iranians, this would not have prevented the courts from examining the Sanctions Regulation for compatibility with fundamental rights enshrined in the ECHR and in community law, including the principles of equal treatment and non-discrimination on grounds of nationality. The Court of Appeal made reference to the CJEU, which held in the *Kadi and Al Barakaat* judgment (C-402/05 and C-415/05) that the implementation of Chapter VII-based Security Council Resolutions at the EU level must be “fully reviewed” by the EU-legislator for legality against fundamental rights which are part of the general principles of community law. *A fortiori* the Court of Appeal decided it can review the Sanctions Regulation against those fundamental rights. 37

Even though the Supreme Court, in substance, did not make specific reference to this consideration of the Court of Appeal, it held that the obligation of the state to implement the Resolution does not alter the fact that the state in its implementation regulations must respect its other international obligations, in particular those concerning fundamental human rights. For that reason, the Supreme Court stipulated, with reference to the CJEU in *Kadi and Al Barakaat*, that the Dutch courts have to put the national implementation regulation of Resolution 1737 to review, in principle full review, for compatibility with fundamental human rights that are part of the general principles of community law. 38

The courts in the “Dutch Iranians” case have limited the consequences of their review for compatibility with other international obligations to the national implementation regulation, and did not seek to review the legality of the Security Council Resolution itself. Instead, the potential incompatibility between obligations of the state proved not to be “real” in this event, since the relevant part of the Security Council Resolution could be implemented by the state, with respect for the principles of equal treatment and non-discrimination. A conflict of rules was avoided through interpretation of the law. As a result, there was no ground for the application of Article 103 of the UN Charter. This approach is in conformity with the leading doctrinal view that “conflict avoidance should have primacy to limit the scope of Article 103 to that of a residual norm. Only in case of a clear contradiction that cannot be solved by interpretation shall Article 103 apply.” 39

Moreover, without the Sanctions Regulation Iran, paragraph 17 of Resolution 1737 (2006) of course is binding on the state. It cannot, however, be interpreted any longer as requiring or allowing

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37 Court of Appeal judgment (note 3), para. 5.5.
38 Supreme Court judgment (note 3), para. 3.6.2.
39 See Paulus and Leiss (note 10) at 2123.
a categorical prohibition (with individual exemption possible on request only) of teaching and training Iranians. This is also in conformity with the standard, expressed by Article 1(3) of the UN Charter, that Security Council Resolutions shall in principle be construed as not compelling UN Member States to violate human rights obligations, including those laid down in treaties such as the ECHR, unless clear and explicit language in the resolution in question would indicate so.40 Since the use of interpretation techniques leaves room for maneuver to the national courts to review the domestic implementation and application of UN sanctions, Article 103 of the UN Charter cannot, as such, be considered “wrong” in protecting the absolute validity of Security Council Resolutions in court.

The Case of the Mothers of Srebrenica against the United Nations

It does not happen very often that a provision of primary UN Charter law is the subject of review by a national court for compatibility with other treaty obligations. In the case of the Mothers of Srebrenica versus the United Nations, with the state of the Netherlands intervening, the immunity of the UN41 was confronted in court with the right to a fair trial,42 and the prohibition of genocide of the 1948 Genocide Convention.43

The idea that a national court can deny an international organization its immunity from domestic jurisdiction in case of a manifest “denial of justice” finds its origin mainly in the well-known Waite and Kennedy and Beer and Regan cases of the ECtHR.44 In domestic courts, an often presumed interpretation of these ECtHR judgments – which in fact is not supported by their contents – suggests that domestic courts are (allowed and) required to “step in” by denying immunity to an international organization, in the event that alternative remedies are lacking. Some national courts have even required the availability of “effective” remedies, which certainly goes beyond the ECtHR’s dictum.45

40 Cf. Al-Jedda v. UK (note 17) at paras. 76, 102; also Nada v. Switzerland (note 18) at para. 169ff.
42 Article 6 of the ECHR.
43 UN General Assembly, Prevention and punishment of the crime of genocide, 9 December 1948, A/RES/260.
44 See Waite and Kennedy v Germany, ECtHR, judgment of February 18 1999, appl. no. 26083/94; Beer and Regan v. Germany, ECtHR, judgment of 18 February 1999, appl. no. 28934/95.
The Dutch courts would also be exceeding their competence if they should seek to decide whether the immunities accorded to the United Nations by Article 105 of the UN Charter and the 1946 Convention are really “necessary” for the proper functioning of the organization.46 Given the focus of this contribution, I will refrain from commenting extensively on the issue of immunity here.

The principal question raised in the case at hand was whether the UN enjoyed immunity before the Dutch courts in a civil law action for damages based on the failure of the United Nations to prevent genocide, as well as lack of access to a court of law in violation of Article 6 of the ECHR and Article 14 of the ICCPR. The case was initiated on behalf of (the relatives of) some 6,000 victims of the 1995 Srebrenica genocide, which took place despite the fact that Srebrenica had been declared a “safe area” by the United Nations Security Council.47 Further to this, the Dutch battalion of the UN peacekeeping force UNPROFOR was present in the area specifically to protect the Muslim civilian population against the Bosnian Serb policies of so-called ethnic cleansing. The District Court decided, in accordance with established practice,48 that the UN enjoyed absolute immunity from jurisdiction based on an interpretation of Article 105(1) of the UN Charter as specified in Article II(2) of the 1946 Convention, according to which the UN shall enjoy immunity from “every form of legal process.” The state of the Netherlands, intervening in the proceedings on behalf of the United Nations which did not appear in court, argued that its obligations pursuant to the UN Charter had priority over any other international law. This was used as a first line of defense against the claimant’s submissions on the peremptory status of the prohibition of genocide and the right of access to a court of law, whilst invoking Article 103. The District Court rejected that argument, adopting the view that the rule of Article 103 does not always and immediately bring relief in the event of conflicting obligations of a peremptory nature (ius cogens) or conflicting human rights obligations of an international customary nature.49 To put it differently, the District Court decided on the basis of absolute immunity of the United Nations and not in connection with Article 103, since the primacy of UN Charter obligations does not necessarily extend to peremptory norms and

46 This conclusion was reached by the Netherlands Council of State (Raad van State) in its judgment of 3 March 2010, ECLI:NL:RVS:2010:BL6245, para. 2.4.5, with reference to the well-known Manderlier case, Appellate Court of Brussels, judgment of 15 September 1969, Revue critique de jurisprudence belge 1971, 449.
48 See Ziegler, “Article 105” in Simma et al. (note 10) 2165–2166.
49 Judgment in first instance (note 4) at para. 5.16.
customary international law. The Court of Appeal rejected the state’s argument based on Article 103 in even stronger language. Article 103, according to the Court of Appeal, was not meant to set aside without question fundamental human rights which are recognized both in customary international law and in conventions. An increased attention for, and recognition of, human rights can be detected in the development of international law and the UN Charter itself promotes respect for fundamental human rights. Accordingly, as the Court concluded, this makes it implausible that Article 103 was meant to impair the enforcement of such fundamental rights. Unlike the District Court, the Court of Appeal decided to balance the immunity of the UN against the right to a fair trial, and after lengthy consideration, reached the conclusion that sufficient alternative means to seek redress were available for the claimants, *inter alia* because they could bring a case against the state of the Netherlands itself. Furthermore, the Court of Appeal decided that the allegations of the claimants regarding the failure to prevent genocide were serious, but not serious enough to warrant setting aside the immunity of the UN for compelling reasons. This stretched reasoning of the Court of Appeal portrays immunity of jurisdiction not as a procedural privilege, but rather a provisional right conditional on the availability of alternative remedies or even dependent on the seriousness of the allegations made on the substance of the dispute. It, perhaps most probably, was the result of the court wanting to reach the desired outcome, namely to protect the unhindered functioning of the United Nations, albeit without the application of Article 103 of the UN Charter.

The case then took a radical turn at the Netherlands Supreme Court. The Supreme Court *did* apply Article 103 of the UN Charter. It serves as an important stepping stone for the court’s conclusion that the UN enjoys absolute immunity before the domestic courts, and that, in brief, it is not for the national courts to balance immunity against other obligations of the state, including the right of access to a court of law, also when considered in combination with very serious allegations on the merits of the case, including alleged violations of peremptory norms. According to the Supreme Court, the immunity of the UN is absolute, and upholding this immunity in court is part of the obligations of UN Member States, which on the basis of Article 103 shall prevail in the event of a conflict with obligations under any other international agreement. Possible “fair trial” exceptions based on (interpretations of) ECtHR *Waite and Kennedy* and *Beer and Regan* are not applicable to the UN, according to the Supreme Court, since there are no references to Articles 103 and 105 of the UN Charter or Article II of the 1946 Convention to be found in the relevant ECtHR

50 Judgment in appeal (note 5) at para. 5.5.
51 Supreme Court judgment (note 5) at para. 4.3.6.
case law. The Supreme Court added that it can be concluded from ECtHR *Behrami and Saramati* that, considering the importance of missions taking place pursuant to Security Council Resolutions on the basis of Chapter VII of the UN Charter in the interest of international peace and security, the ECHR cannot be interpreted in a manner that would subject the acts and omissions of the Member States which are covered by UN Security Council Resolutions pursuant to Chapter VII of the Charter, to the scrutiny of the ECtHR.52

In my view, the above connotes that the combination of Articles 103 and 25 and Chapter VII of the Charter, rather than its Article 105 and the 1946 Convention, offers an explanation as to why UN immunity must be absolute in nature and scope. Eventually, the protection of the effective functioning of the UN collective security system (as it has developed in practice), notably through the use of coercive measures as a counterpart to the prohibition of the unilateral use of force, account for the Article 103-based priority of Charter obligations over conflicting obligations under any other international agreement. It is interesting to note that, in addition to this, the Supreme Court observed with reference to the ICJ *Jurisdictional Immunities Case*,53 that there is also no rule of customary international law that makes the entitlement of an international organization to immunity, dependent upon the existence of effective alternative means of redress.54 Hence it would seem that the Netherlands Supreme Court has taken into account the fact that customary international law can escape the priority rule of Article 103 of the UN Charter. The ECtHR in its decision of 11 June 2013 confirmed that the judgment of the Netherlands Supreme Court is not incompatible with the obligations of the state under the ECHR, as the granting of immunity to the United Nations served a legitimate purpose and was not disproportionate.55 It seems to me that the ECtHR, which neither pronounced itself on the nature of UN immunity nor applied Article 103 of the UN Charter to the case, in its decision has considered that, on the one hand, UN immunity does not prevent the domestic courts from examining the implications of that immunity for the right of access to justice enshrined in Article 6 of the ECHR and customary international law. However, on the other hand, it can trust in the (rebuttable) presumption that the UN Security Council, in exercising its functions, does not intend to impose any obligation on Member States to breach fundamental principles of human

52 Cf. *Behrami v. France*, ECtHR, appl. no. 71412/01, and *Saramati v. France, Germany and Norway*, appl. no. 78166/01, decision of 2 May 2007, para. 146–149.
54 Supreme Court judgment (note 5), at paras. 4.3.13–4.3.14.
55 Decision of ECtHR (note 6) at para. 169.
In addition, the ECtHR has made explicit in para. 164 of the decision, that in the absence of an alternative remedy, the recognition of immunity is not *ipso facto* constitutive of a violation of the right of access to a court. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule. With regards to international organizations, the ECtHR stipulates, its judgments in *Waite and Kennedy* and *Beer and Regan* cannot be interpreted in such absolute terms either.

In sum, though the ECtHR did not use the exact same wording as the Netherlands Supreme Court, namely that UN immunity of domestic jurisdiction is “absolute,” it is clear that the possible challenging of this notion before the national courts is merely theoretical and that respecting UN immunity is not as such dependent on access to a court of law. Besides Article 105 of the UN Charter and the 1946 Convention, in the background, Article 103 seems to have played a role in this outcome in connection with Articles 24(2) and 25 and Chapter VII of the UN Charter. In other words, the importance of the unhindered functioning of the UN (Security Council) in the maintenance of international peace and security through UN peacekeeping missions can be seen as the basis for these rulings at the level of the (most) fundamental “values” in international relations. It seems to me that the ECtHR has found sufficient comfort in the object and purpose of the UN Charter and its collective security system, including the guarantees held within it against *ultra vires* actions of the Security Council that would infringe on international human rights law. This amenity accepts the priority of UN immunity in the organization’s Chapter VII functionality, also in the absence of possible remedies against the United Nations at any level.

The ensuing problem, from the perspective of the victims of actions in the context of UN peacekeeping missions, is that the UN cannot be held accountable in (any) court. Yet this could to an important extent be solved if it was generally accepted that the troop-contributing Member States that caused the damage to the victims, depending on the facts of the matter, cannot escape responsibility for their actions alongside the United Nations. At present, the main rule is still that command and control over UN peace missions, as subsidiary organs of the UN, (should) rest with the UN. However, the *exclusivity of*
such command and control in connection with questions of international responsibility does not exclude the possibility of dual attribution of the disputed conduct in a UN peace mission, namely to both the UN and to the troop-contributing Member State. With the Netherlands Supreme Court deciding (in September 2013) on international law, the aforementioned cases concerning specific events on the compound of Dutchbat in Srebrenica display this concept, in particular Article 7 of the Draft Articles on the Responsibility of International Organizations (DARIO) in conjunction with Article 48(1) of the DARIO. If the disputed conduct is considered to be unlawful, the troop-contributing State in question can be held responsible by judgment of its own courts. In line with this, the Netherlands Supreme Court confirmed the appellate court’s ruling that the state of the Netherlands is responsible for causing the death of three Bosnian Muslim men at the hands of the Bosnian Serbs in Srebrenica.

With this interpretation of the law in mind, the absolute immunity of the UN – be it de facto or de jure – can have a meaningful counterpart in the possible attribution of the disputed conduct in a UN peacekeeping mission to the Member State which has exercised “effective control” over that conduct. Overall, the effective functioning of the UN to maintain international peace and security requires a clear and rigorous rule of immunity. After all, the disputing of immunity of jurisdiction before a national court is among the type of legal procedures that this same immunity was meant to prevent in the first place. Against this background, Article 103 of the UN Charter cannot as such be considered “wrong” in protecting the absolute immunity of the UN in the courts of law.

Concluding Remarks

The practical application of Article 103 of the UN Charter has raised important questions about the scope of protection that the UN enjoys from this priority rule before a court of law. In this paper I have tried to argue why Article 103 is not as such “wrong” in protecting both the absolute validity of Security Council Resolutions establishing a sanctions regime and the absolute immunity of the UN before the national courts. As has been illustrated by the case of the “Dutch Iranians,” international law leaves sufficient room for maneuver for the national

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60 Supreme Court judgments (note 7) at paras. 3.11.2 and 3.9.4.

61 Cf. Article 7 DARIO.
courts to establish through interpretation if there is in reality a “conflict” of obligations that would trigger the application of Article 103. In a concrete case, the domestic implementation and application of UN sanctions can be the subject of review by the national courts, using interpretation techniques to accommodate fundamental human rights protection. In general, there is also a presumption against the application of Article 103 to the detriment of human rights protection, since human rights are inherent in the UN Charter’s purposes and principles, binding the Member States and the Security Council. In addition, most fundamental human rights can be deemed to exist also in unwritten law. The courts in the Netherlands have been receptive to the idea that customary international law can escape the priority rule of Article 103 of the UN Charter. The thought that Article 103 would enable the State to escape the national court’s review of its compliance with human rights law in the implementation of binding Security Council Resolutions, is clearly unwarranted.

The importance of the protection, through Article 103 (and the broad wording of Article 105 of the UN Charter read in conjunction with the 1946 Convention), of the absolute immunity of the UN before the national courts has been illustrated by the cases regarding the events in Srebrenica in 1995. The idea that UN functionality under Chapter VII of the UN Charter justifies immunity also in the absence, at any level, of possible remedies against the UN, appears to have been accepted by the ECtHR as well. The unhindered functioning of the UN (Security Council) in the exercise of its primary responsibility in conflict areas around the globe calls for this “absolute” solution. It is to be welcomed in this regard, that the absolute immunity of the UN may under certain circumstances be counterbalanced to some extent by the possibility of holding the troop-contributing Member State responsible in its own courts on the basis of its “effective control” over the disputed conduct during the UN peace mission (as the Netherlands Supreme Court has decided in two cases in September 2013). To be sure, the conclusion that the priority rule of Article 103 of the UN Charter is not “wrong” in no way denies that the better solution for the UN and its Member States is to avoid any serious conflict with other international legal obligations whenever possible. Also from the perspective of human rights protection there can be very little wrong with that.