Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?

*Robert Kolb**

I. Introduction

1. Article 103 of the Charter of the United Nations reads as follows: "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."[1]

This provision – whose main aim is to secure the efficacy of United Nations action in the maintenance of peace by according priority to the obligations incurred under the Charter over other treaty commitments[2] – is replete with a plethora of uncertainties, ranging from the root of its meaning, to points on interpretation. As a result, at present there is no agreement as to the precise scope and effects of Article 103, e.g.:

(1) Some authors limit the scope of the priority rule of Article 103 to "decisions" of the organs of the Organization, namely the Security Council in the field of Chapter VII ac-

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* Professor of International Law at the Universities of Neuchâtel, Berne and Geneva (University Centre of International Humanitarian Law).

[1] On this provision, see R. Bernhardt, Article 103, in: B. Simma (ed.), The Charter of the United Nations – A Commentary, 2nd ed., vol. II, Oxford 2002, 1292 et seq.; T. Flory, Article 103, in: J. P. Cot/A. Pellet, La Charte des Nations Unies, Commentaire, 2nd ed., Paris 1991, 1381 et seq.; L. M. Goodrich/E. Hambro/A. P. Simons, Charter of the United Nations, Commentary and Documents, 3rd ed., New York/London 1969, 614-7; L. Kopelmanas, L'Organisation des Nations Unies, Paris 1947, 165 et seq.; H. Kelsen, The Law of the United Nations, New York 1950, 111 et seq. See further C. Cadoux, La supériorité du droit des Nations Unies sur le droit des Etats membres, RGDIP, vol. 63, 1959, 649 et seq.; J. Combacau, Le pouvoir de sanction de l'ONU, Paris 1974, 268 et seq.; B. Conforti, Cours général de droit international public, R.C.A.D.I., vol. 212, 1988-V, 129 et seq.; P. M. Dupuy, The Constitutional Dimension of the Charter of the United Nations Revisited, Max Planck United Nations Yearbook, vol. 1, 1997, 529 et seq.; R. Kolb, *Ius contra bellum*, Le droit international relatif au maintien de la paix, Basel/Brussels 2003, 148 et seq.; R. H. Lauwaars, The Interrelationship between United Nations Law and the Law of Other International Organizations, Michigan Law Review, vol. 82, 1984, 1604 et seq.; E. Sciso, Gli accordi internazionali confliggenti, Bari 1986, 276 et seq.; E. Sciso, On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties, AJPIL, vol. 38, 1987, 161 et seq. As to the practice of United Nations organs, see the many valuable references in: Repertory of Practice of United Nations Organs, vol. V, New York 1955, 313-320; Supplement I, New York 1958, 411; Supplement II, vol. III, New York 1963, 507; Supplement III, vol. IV, New York 1973, 199-215; Supplement IV, vol. II, New York 1982, 365-371; Supplement VI, vol. VI, New York 1999, 152-157. Further references can be found in the texts quoted.

[2] As to the drafting history of the provision, see Bernhardt (note 1), 1293. Goodrich/Hambro/Simons (note 1), 614 et seq. Repertory ... (note 1), vol. V (1955), 313 et seq.

tion, whereas others extend its reach to an abstract control of compatibility of any treaty with the substantive provisions of the Charter[3].

(2) There is no agreement as to the effects of Article 103 either. Some authors suggest that the provision is limited to a priority rule entailing a suspension of any contrary treaty during the action of the United Nations, e.g. in the context of Chapter VII decisions, whereas for others the provision, notwithstanding its wording, entails the voidness of any contrary treaty obligation.[4]

For some authors, moreover, Article 103 constitutes the very basis of international peremptory norms, identified with the hierarchy of sources contained in the Charter[5]; other scholars, while not relating the two concepts, confront each other and question the exact relationship between international *ius cogens* and Article 103.[6] Moreover, since Article 103 provides that the Charter "obligations" prevail over contrary treaty law its position regarding customary international law is called into question. Do the Charter obligations prevail over general international law[7] as well? The question has been brought under limelight in the case of the sanctions against Southern Rhodesia[8], albeit it has not yet received a proper and accepted answer.

Regarding a seemingly minor problem of interpretation, one may mention the question whether some treaties other than the Charter, which are concluded in fulfilment of the Charter provisions, will also prevail over conflicting treaties. The United Nations Headquarters Agreement of 1947 concluded with the United States of America, where the question arose if the duty of the United States to grant free access to the premises of the Organization prevailed over an extradition treaty comes to mind. The question there seems to have been whether some treaties,

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[3] See e.g. the points mentioned in Bernhardt (note 1), 1297. The present author has expressed on this point as follows: "Si une obligation conventionnelle est en conflit irréversible avec une obligation substantielle de la Charte, il ne peut y avoir que la nullité. Cette obligation substantielle sera le plus souvent également une norme de *ius cogens*, par exemple l'interdiction du recours à la force. (...)En revanche, si une décision du Conseil empêche la mise en uvre d'un traité non incompatible avec la Charte, la suspension temporaire s'impose. Le traité reprend ses droits dès que les mesures du Conseil sont révoquées ou arrivées à expiration. La reprise du traité est automatique. C'est le cas, par exemple, de la Convention de Montréal sur la sécurité de l'aviation civile (1972) pour ce qui est de la Libye, dans le contexte de l'affaire de *Lockerbie* déjà évoquée". See Kolb (note 1), 150.

[4] See e.g., in favor of voidness, E. P. Nicoloudis, La nullité de jus cogens et le développement contemporain du droit international public, Athens 1974, 128-9. J. L'Huillier, Elements de droit international public, Paris 1950, 181. G. Jaenicke, Zur Frage des internationalen Ordre Public, Berichte der deutschen Gesellschaft für Völkerrecht, vol. 7, Karlsruhe, 1967, 96. J. Barberis, La liberté de traiter des Etats et le jus cogens, ZaöRV 30 (1970), 30. Further references in S. Kadelbach, Zwingendes Völkerrecht, Berlin 1992, 28, footnotes 15 and 16

[5] See Conforti (note 1), 129 et seq. See also A. Giardina, The Egyptian-Israeli Peace Agreements and the Other International Obligations of the Parties, Italian Yearbook of International Law, vol. 4, 1978/9, 23.

[6] See e.g. K. Zemanek, The Legal Foundations of the International System – General Course on Public International Law, RCADI, vol. 266, 1997, 229 et seq.

[7] See Zemanek (note 6), 232. Zemanek argues that Article 103 should apply also to customary international law.

[8] See V. Gowland-Debbas, Collective Responses to Illegal Acts in International Law, United Nations Action in the Question of Southern Rhodesia, Dordrecht/Boston/London, 1990.

linked very closely to the Charter may be thought as legally partaking to this last instrument and thus to the hierarchy stated in Article 103.[9]

These examples as to the operation of Article 103 were just but a few, since, as aforementioned, the provision is replete with legal uncertainties.

In this short article, only one specific problem raised by Article 103 shall be the focus of discussion. As it is known, it was initially envisaged that the action of the Security Council under Chapter VII would take, where necessary, the form of binding decisions, and that this would be the ordinary course of action.[10] Quite rapidly, however, the Council found itself unable to act as had been foreseen because of the excessive use of the veto during the cold war. Thus, in the Korean War of 1950, a device of "recommending" or "authorizing" member States to use all necessary means, including the use of force, was resorted to, namely in Resolution 83 of the Security Council (27 June 1950) and in the famous Resolution 377 (V), "Uniting for Peace" of the General Assembly.[11]

This course was later maintained, particularly in the case of the first Gulf War (1990/1).[12] The point which arises therefore is the following: Article 103 envisages that "obligations" flowing from the member States out of the Charter shall prevail over contrary treaties; however, what happens if the Security Council does not "decide" on the use of economic sanctions or of armed force, limiting itself to recommending, or "authorizing", member States to act in a certain way? Does Article 103 apply by extension to such authorizations, or is it confined only to decisions? Must there be a binding obligation under the Charter to trigger its application, or can an authorization be sufficient? If the scope of Article 103 extends to authorized action, by what arguments can the wording of the provision be extensively interpreted that way?

Finally: Is there any legal difference between "recommending" an action and "authorizing" an action? There could be a difference in that an authorization is linked to a "delegation" of powers (or something akin to it) whereas a simple recommendation is not. The question moreover arises if Article 103 can also be applied to recommendations (and not authorizations) of the General Assembly under the Uniting for Peace-scheme?

All these lingering questions have not received yet much attention and even the less adequate answers. It is for this reason that it is proposed to consider them here.

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[9] As to the question of the Headquarter Agreement, see Repertory (note 1), Suppl. III, vol. IV, 208.

[10] See Articles 25 and 48 of the Charter.

[11] See e.g. § 1 of the G.A. Resolution. On the action in Korea, see D. Sarooshi, The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of Its Chapter VII Powers, Oxford 1999, 167 et seq.; F. Seyersted, United Nations Forces in the Law of Peace and War, Leyden 1966, 32 et seq.; D. W. Bowett, United Nations Forces, A Legal Study of United Nations Practice, London 1964, 29 et seq.; H. Kelsen, Recent Trends in the Law of the United Nations, New York 1951, Chapter 2 (printed in the book: The Law of the United Nations, reprint of 2000, New Jersey, 927 et seq.). For a collection of documents and materials, see L. B. Sohn, Cases on United Nations Law, 2nd ed., Brooklyn 1967, 474 et seq.

[12] See Resolutions 660 (1990) and Resolution 678 (1990). See Sarooshi (note 11), 174 et seq.

II. Doctrinal Writings on the Applicability of Article 103 to Authorizations

There are not many authors who have devoted much time to our question. Those who have, touch upon it only in passing, without the benefit of deeper reflection or argument. A review of these authors shows that the opinion is sharply split into two divergent camps.

a) Article 103 Applies only to Binding Decisions

For a series of authors, Article 103 represents a highly exceptional rule: it gives precedence to the acts of a political organization over hard sources of law embodying binding legal obligations. The two scales of the balance are thus unequally loaded. If simple recommendations could override binding commitments under international law, it would mean that a soft and non-binding source would take precedence over a hard and binding source. Moreover, being an exceptional rule, i.e. derogating from established rules of international law, the content of Article 103 must be interpreted in a narrow sense. This course is supported by the wording of Article 103, which speaks of "obligations under the present Charter". The word "obligations", it is claimed, has a clear and unambiguous sense, which is limited to binding norms to the exclusion of recommendations or other non-mandatory acts.

The preceding ideas are very aptly summarized by the acute and always direct writing of J. Combacau: "Que l'habilitation à agir contrairement à ses obligations internationales ne puisse être donnée à un Etat que par un acte juridique incontestable, c'est une évidence ressortant de l'art. 103, qui parle d' 'obligations' en vertu de la présente Charte; seules parmi les obligations dérivées présentent ce dernier caractère celles résultant d'une résolution que le Conseil de sécurité a rendue obligatoire pour ses destinataires en vertu de l'art. 25; les autres invitations ne créent pas d'obligations et ne sauraient l'emporter sur des obligations préexistantes".[13]

To the same effect, one may quote a series of other authors, such as R. Bernhardt[14], S. Marchisio[15], or R. H. Lauwaars.[16]

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[13] Combacau (note 1), 284.

[14] Bernhardt (note 1), 1296: "When UN organs, including the Security Council, adopt non-binding resolutions, Art. 103 is not applicable. This follows from the text of the Article, which speaks only of obligations (meaning legal obligations). However, there are additional reasons for excluding recommendations and other non-binding pronouncements from the scope of Art. 103. This Article represents a partial suspension of the basic international law maxim *pacta sunt servanda*. Such a suspension is only acceptable in the case of a conflict between obligations, the superior or stronger of which should prevail. If a certain measure or form of behaviour is merely recommended without being legally obligatory, existing treaty obligations must be respected and the recommendation cannot be followed."

[15] S. Marchisio, L'ONU – Il diritto delle Nazioni Unite, Bologna, 2000, 234: "Se dalla decisione del Consiglio scaturisce un obbligo, esso prevarrà infatti su eventuali situazioni soggettive incompatibili in forza dell'art. 103, fermo restando, beninteso, che il Consiglio non potrà chiedere di derogare a norme fondamentali del diritto internazionale. Nel caso in cui il Consiglio voglia ottenere

One must contrast all those who plead for an extension of the scope of Article 103 to authorizations of the Security Council with the aforementioned authors.

b) Article 103 Applies also to Authorizations/Recommendations

This position rests on the overriding importance of the Charter and on the measures taken by the Security Council for the maintenance of international peace. Thus, an interpretation that ensures effectiveness to the measures of the Council in the field of maintenance of peace is preferred to one that is liable to sterilize or to thwart that effort. Otherwise the possibility of the Council to proceed with authorizations instead of decisions under Articles 41, and especially 42 – a course which has been condoned by subsequent practice – would in effect be largely rendered nugatory. In one word, "the implementation of UN sanctioned collective measures, even if non-mandatory, should not be obstructed by treaty-obligations"[17]. Or: "Otherwise, the effectiveness of the system of collective security would be severely hampered because the Security Council could not operate unless member States were free from conventional ties with the State against which enforcement action is envisaged. This could lead to the same result as to deny the possibility of Security Council action in the absence of special agreements entirely."[18] In effect, the Council could be hindered by remarkably different treaty commitments of different States able and willing to take up the authorization, which in turn could limit the efficacy of the envisaged action.

Moreover, it is claimed that this larger view corresponds to modern State practice, since States did not oppose such authorizations on the ground of conflicting treaty obligations.[19]

Some other authors argue on the basis of the "permissive effect" to be attributed to recommendations. These permissive effects must be particularly strong in the field of Articles 41 and 42 because of their very subject matter, the maintenance or restoration of international peace. Thus: "[L']effetto permissivo delle raccomadazioni del Consiglio comporta la sospensione tanto di obblighi convenzionali, quan-

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dagli Stati membri comportamenti incompatibili con altri obblighi internazionali di cui essi sono titolari non avrà quindi altra scelta che quella di adottare una decisione obbligatoria."

[16] Lawaars (note 1), 1607: "[T]he definition of 'obligations under the Charter' within the meaning of Article 103 must be confined to those obligations that have been laid down in provisions of the Charter and binding decisions of the Security Council."

[17] Sarooshi (note 11), 151. See generally, ibid., 150-1, 252.

[18] J. A. Frowein/N. Krisch, Article 42, in : Simma (note 1), 759. See also, ibid., Article 39, 729: "The same conclusion seems warranted with respect to authorizations of economic measures under Art. 41. Otherwise, the Charter would not reach its goal of allowing the Security Council to take the action it deems most appropriate to deal with threats to the peace – it would force the Security Council to act either by way of binding measures or by way of recommendations, but it would not permit intermediate forms of action. This would deprive the Security Council of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of Art. 103 to all action under Arts. 41 and 42 and not only to mandatory measures."

[19] Ibid., 729, 759.

to di obblighi da diritto internazionale generale."[20] In other words, the effect would not really be permissive if any contrary treaty or customary obligation obstructed it. In such a case, it would not be appropriate to speak of "permissive effect", since there would be nothing to permit: if there are no contrary legal obligations, the State may in any case act out of its sovereignty without the necessity of any doctrine of permissive effects. The perspective here leans slightly towards international responsibility: permissive effect means that a State acting according to the authorization will not incur international responsibility for its actions. The International Law Commission (ILC) has also expressed this idea during its codification of State responsibility. The Commission states in one of its reports: "[S]anctions applied in conformity with the provisions of the Charter would certainly not be wrongful in the legal system of the United Nations, even though they might conflict with other treaty obligations incumbent upon the State applying them. (...) This view would, moreover, seemed to be valid not only in cases where the duly adopted decision of the Organization authorizing the application of a sanction is mandatory for the Member States but also where the taking of such measures is merely recommended."[21]

One can also invoke, more generally, the fact that Chapter VII decisions or recommendations take place within a framework devoted to one of the most eminent pillars of international public order: the maintenance and restoration of international peace. It has been accepted in the last few years (albeit current developments constitute a serious drawback) that the law regulating the use of force and the powers of the Security Council in this field are at the apex of the international legal system. This apex has often been identified with *ius cogens*.[22] The regulation of peaceful relations is the condition for the development of all other parts of international law.[23] Therefore, special allowance for a broader reach of Article 103, beyond technicalities of the written law, may be teleologically warranted.

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[20] L. Forlati Picchio, La sanzione nel diritto internazionale, Padova 1974, 228-9. The same result is reached by B. Conforti, Le Nazioni Unite, 5th ed., Padova, 1996, 276, who holds that the scope of Article 103 is limited to rendering obligatory the execution of decisions and to assure their primacy; Article 103 does, however, not extend to recommendations, which are governed only by the doctrine of "permissive effects". The problem is here solved by a distinction as to the scope of application of Article 103.

[21] Yearbook of the ILC, 1979-II/2, 119, § 14. See also YbILC, 1979-II/1, 43-4 and YbILC, 1979-I, 57.

[22] See e.g. the eloquent words on the importance of Article 2 § 4 of the Charter expressed by O. Schachter, International Law in Theory and Practice: General Course of Public International Law, RCADI, vol. 178, 1982-V, 133; L. Henkin, General Course of Public International Law, International Law, Politics, Values and Functions, RCADI, vol. 216, 1989-IV, 146; E. Jiménez de Aréchaga, International Law in the Past Third of A Century, RCADI, vol. 159, 1978-I, 87.

[23] As was very aptly said by M. Bourquin some eighty years ago: "Nous touchons ici au cur même du problème international. Devant cette question [le maintien de la paix], tout recule au second plan, parce que, en définitive, tout est conditionné par elle. La guerre n'est pas seulement une monstrueuse aberration. Elle est l'obstacle qui rend impossible toute organisation solide de la communauté internationale. Quand elle éclate, l'armature du droit se déchire; quand elle prend fin, les souvenirs et les appréhensions qu'elle laisse continuent d'empoisonner l'atmosphère. Aucun résultat décisif ne peut

Among the authors recognizing that Article 103 also applies to authorizations of the Security Council one may mention V. Gowland-Debbas[24], M. Virally[25] or J. Dugard[26]; the present author may also be added to the preceding.[27]

III. Practice on the Applicability of Article 103 to Authorizations

1. State Practice. There are not many instances in State practice where the question interesting us has been addressed or clearly dealt with. In fact, recent practice has not raised the problem at all; , the contrary treaties have been simply set aside without any controversy, and thus without mention in the documented practice.[28]

It is often claimed that practice mainly discloses an absence of opposition by States to the full execution of authorizations; this includes the attitude of refraining from invoking contrary treaty or customary obligations[29]. If this is true, the enlargement of the scope of Article 103 would have been secured by a negative practice, i.e. a prolonged course of abstentions, accompanied by an *opinio iuris*. The question that may, however, be asked is if there were many cases from which such an abstention could manifest itself and where an *opinio iuris* could be deduced. As if the abstention is due simply to the fact that the problem of conflict of obligations has hardly ever arisen in practice, one is not liable to attach many consequences to it, for it would not be engrafted on anything, but rather on the void. Conversely, if there were even very few instances of conflict, but the course of conduct held had been uniform, namely abstention to invoke contrary obligations under treaty or general international law, the process of enlargement of Article 103 by subsequent practice (or custom) may be admitted.

être acquis aussi longtemps que le monde reste ployé sous sa menace. Toute l'histoire de l'humanité l'atteste: guerres privées, guerres civiles, guerres internationales, peu importe; le refoulement de la guerre est la condition *sine qua non* du progrès social.", RCADI, vol. 35-I, 1931, 173-4. Or, in the very apodictic terms of H. Kelsen, Peace Through Law, Chapel Hill 1944, 13: "As long as it is not possible to remove from the interested States the prerogative to answer the question of law and transfer it once and for all to an impartial authority, namely an international court, any further progress on the way of the pacification of the world is absolutely excluded."

[24] Gowland-Debbas (note 8), 419 et seq.; V. Gowland-Debbas, The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance, EJIL, vol. 11, 2000, 371.

[25] M. Virally, L'Organisation mondiale, Paris 1972, 188.

[26] J. Dugard, United Nations Resolutions on Apartheid, South African Law Journal, vol. 83, 1966, 58.

[27] Kolb (note 1), 148-9.

[28] I have not ventured into any exhaustive research into this State practice, but a cursory look did not reveal any instances. Moreover, the specialists of UN law whom I consulted did not know of any recent case raising the problem.

[29] See namely Frowein/Krisch (note 18), 729, 759.

Thus, for example, in the case of the sanctions against Southern Rhodesia in 1966 by Resolution 221 (9 April 1966) of the Security Council, Great Britain, the former colonial power, was invited to oppose by all necessary means the delivery of petroleum to the port of Beira (Mozambique) if that petroleum was bound to Southern Rhodesia. Some days before that decision had been taken, British ships had stopped a Greek ship on the high seas, on suspicion that it was to deliver petroleum to Southern Rhodesia. This act encountered the firmest protest by the Greek government. However, once the Resolution had been passed, when the British stopped a second Greek ship under similar conditions, no protests were voiced by the Greek Government.[30] This instance shows that an authorization to act by the Security Council under Chapter VII of the Charter was considered as overriding a contrary customary law rule relating to the freedom of the high seas and the exclusive jurisdiction of the flag State.

However, not all instances of State practice are along these lines. In 1983, the Dutch Government published a Note in which it refused to apply sanctions against South Africa as recommended by the Security Council. In its view, that course would have conflicted with its treaty obligations under the EEC and ECSC Treaties, as well as those under the Benelux Economic Union and the GATT-Treaty. It may be noteworthy that a group of Dutch public international law professors published a Commentary at that time reaching the opposite conclusion and contesting the governmental note's soundness in international law. However, it remains that the Dutch government had given precedence to its treaty commitments over a measure recommended by the Security Council.[31]

The present author has no knowledge of further precedents of State practice in the last years.

2. Judicial Practice. We may ignore at this juncture the many pronouncements of the International Court of Justice on the legal effect of recommendations, such as those expressed in the *Certain Expenses* case (1962) or in the *Namibia* case (1971).[32] They deal with recommendations in general and not specifically with those under Chapter VII, which are of sole interest here.

It is the European Court of Justice that has rendered the clearest precedents of interest for us. The key-case seems to be *Centro-Com Srl v. HM Treasury and Bank of England* (1997).[33] The case had to deal with sanctions to be applied with respect to the territory of the former Yugoslavia according to Security Council Resolution 757 (1992). The precise facts of that case need not concern us here, since the pronouncement which is of interest for us forms an *obiter dictum* formulated in § 60. The Court there recalls that a member State is bound not to take a measure contrary to EC-law if the international convention from where it flows does not

[30] See RGDIP, vol. 71, 1967, 472 et seq.

[31] On this precedent, see Lauwaars (note 1), 1604-5, 1616 et seq.

[32] On these precedents, see e.g. H. Thierry, Les Résolutions des organes internationaux dans la jurisprudence de la Cour internationale de Justice, RCADI, vol. 167-II, 1980, 393 et seq.

[33] Case no. C-124/95, Judgment of 14 January 1997, ECJ Reports, Part I, 1997-1, 81 et seq.

oblige, but only allows, that State to act in a way contrary to EC-law[34]. This *dictum* can be found in an earlier case, *Ex parte Evans Medical Ltd and Macfarlan Smith Ltd* (1995)[35] at § 32. The case dealt with commercial exchange of psychotropic substances for medical purposes and the obligations arising under the 1961-Treaty on drugs.

It appears that this jurisprudence of the ECJ is explained by one of its most traditional functions: it seeks to protect the European legal order against unilateral measures of member States[36], and apparently when the unilateral measure is based on a recommendation arising out of an international treaty also. The member States should not be allowed to free themselves unilaterally from the obligations of the EC-Treaties; and to do so, moreover, in a divergent and non-coordinated fashion, according to the idiosyncrasies of each of them when choosing the degree of performance of the recommendation at stake. The very foundation of the *dicta* quoted seems thus indeed to be a brake on unilateralism, excluding divergent impacts on the obligations under the EC-Treaty. These *dicta* may thus be of limited importance when it comes to decide if a member State can put aside treaty-obligations of other type than the EC legal order.

Moreover, the ECJ did not concretely consider the consequences of resolutions where the Security Council acts under Chapter VII. True, in the *Centro-Com* case, it manifestly dealt with such a resolution. However, the Court did not express itself on the specific obligations flowing out of that resolution; it left this question to the member State, just reminding, *obiter*, that simple recommendations will not dispense from the observation of the EC-law. This being said, it appears nonetheless that the ECJ disfavours the idea of giving a larger reading to Article 103 by extending it to "authorizations", at least insofar as the EC-order is concerned.

3. Institutional Practice. When Resolution 377 (V) ("Uniting for Peace") was passed in 1950, it allowed the General Assembly to recommend the use of force by member States if the Security Council was itself blocked by the veto and if the Council, by procedural vote, handed the question over to the Assembly. In addition, a *Collective Measures Committee* was established in order to coordinate the action taken and to address controversial questions. In its report, the Committee clearly[37] stated "in the event of a decision or recommendation of the United Nations to undertake collective measures ... (d) States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures".[38] It would therefore seem that the

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[34] "Il convient d'ailleurs de rappeler que, lorsqu'une convention internationale permet à un Etat membre de prendre une mesure qui apparaît contraire au droit communautaire, sans toutefois l'y obliger, l'Etat membre doit s'abstenir d'adopter une telle mesure."

[35] Case no. C-324/93, Judgment of 28 March 1995, ECJ Reports, Part I, 1995-3/4, 563 et seq.

[36] On this function, see D. Simon, L'interprétation judiciaire des traités d'organisations internationales, Paris 1981, 211 et seq., 501 et seq.

[37] Notwithstanding the political attempt of J. Combacau, according to his strictly positivistic obedience, to down-tune the relevance of the statements of the Committee: Combacau (note 1), 284-5.

Committee favoured the broader view on the scope of application of Article 103, and moreover extended it to recommendations of the General Assembly under the Uniting for peace-scheme.

To our knowledge, there are no further statements on this question in the United Nations practice.

IV. Evaluation of the Elements and Preferable Solution

Two questions will be addressed in the first place: (1) the influence of the exact legal basis of the authorization, including the authorizing organ; and (2) the influence of the conduct of the States authorized with respect to the terms and spirit of the authorization. The first question raises several points as to the legal specificities of "authorizations" such as those at stake with respect to simple recommendations. The second question is related to the precise meaning of the word "obligations" under Article 103, and to aspects such as the necessity to act in conformity with the letter and spirit of the authorization in order to claim the benefit of the said provision. Both series of questions may have some influence over the subject matter of this paper.

1. The Legal Basis of the Authorization. It is well known that many United Nations organs, and especially the General Assembly, can recommend to the States, conduct on many different subject matters and that they actually do so. Moreover, since the *Namibia* case (1971)[39], it has also been admitted by the International Court that the Security Council can take binding decisions outside of Chapter VII, whenever it deems necessary to do so; the legal basis of such binding force would then directly rest on Article 25 of the Charter. Thus, the Security Council could, if it deemed necessary, impose binding decisions in different matters where it possesses jurisdiction; but it could be asked whether the Council could use the device of Article 25 in order to, for example, impose a binding settlement in a dispute. It is doubted that such a course could be taken, since that would completely transform the character of Chapter VI by a sort of *coup d'Etat*, and constitute a major intrusion into the sovereignty of States; moreover, the Security Council is not armed to settle disputes, since it is not an organ providing the necessary guarantees under the rule of law requirement: why should a State relinquish its rights for political compromises if that action is not situated in the framework of urgency action as foreseen in Chapter VII?[40]

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[38] General Assembly Official Records, VI Assembly, Supplement 13, 33, § 265, no. 14, and point (i) (d).

[39] See ICJ Rep., 1971, 52-3, § 113-4. Legal writings have expressed doubts as to that view, see J. Delbrück, Article 25, in: Simma (note 1), 455 et seq. The holding of the Court has, however, also been endorsed: see e.g. E. Jiménez de Aréchaga (note 22), 119 et seq.

[40] See Kolb (*supra*, note 1), 84 et seq., 122 et seq. I. Brownlie, International Law at the Fiftieth Anniversary of the United Nations – General Course on Public International Law, RCADI, vol. 255, 1995, 211 et seq.

Coming to the question of Article 103, it may be easy to respond that it does not apply to the first category of cases (general recommendations of organs of the UN, including the Security Council) and that, however, it does apply to the second category of cases (binding measures decided by the Security Council directly under Article 25). The question to be asked for the present purposes is whether there is a specific class of recommendations, namely, the "authorizations", which would form an exception to that simple rule.

Some peculiar features that characterize these authorizations.

First, they are based on Chapter VII and are most directly addressed to the maintenance and restoration of peace. Leaving aside Article 40 of the Charter, their basis is to be found either in Articles 41 or 42, or in some unwritten law under Chapter VII.

Second, as has already been recalled, the "authorizations-delegations", being based on Chapter VII requirements, are directly linked with the core-elements of international public order.

Third, these authorizations constitute more than recommended courses of action in the sphere of questions where, under the law member States have original jurisdiction. For example: the United Nations may recommend a course of action as to the economic cooperation, the treatment of prisoners, the hygienic conditions, etc. In all these matters, the jurisdiction rests with the States, and it is for this reason that the Organization attempts to influence that jurisdiction by a recommendation and not with Chapter VII "authorizations". The jurisdiction as to the maintenance of peace, and especially the forcible measures under Article 42, are out of the jurisdiction of States: Article 2 § 4 of the Charter, and Article 2 § 7 are clear in this respect. Moreover, the "authorizations" attempt, to some extent, to "delegate" some powers of the organizations itself.[41] Their aim is precisely to turn the difficulty of the lack of means of the United Nations to act itself, e.g. through the armed forces to be put at its disposal under Article 43 of the Charter.[42] Thus, the "authorizations" under Chapter VII mean that member States will act in the name and on behalf of the Organization, whereas in the case of general recommendations, there is simply a course of conduct suggested more or less strongly to the States in the context of their own jurisdiction.

This can also be seen in the conditions elaborated by legal writings for such "authorizations-delegations"[43]: (1) there must be a power, explicit or implied, which is capable of the delegation; (2) some powers cannot be delegated, such as the determination that a threat to the peace, a breach of the peace or an act of aggression under Article 39 exists; (3) broad powers of discretion should not be delegated (no *carte blanche*); (4) the United Nations, especially the Security Council, must retain ultimate control over the action taken, that control being exercised mainly through periodical reports to be submitted by the authorized and acting

[41] See on that point the seminal study of Sarooshi (note 11), 3 et seq.

[42] As it is known, such forces were never put at the disposal of the Security Council.

[43] See Sarooshi (note 11), 20 et seq.

States. There is thus a responsibility of the States acting, for they are not acting solely in their own name, but, at least, also on behalf of the United Nations. The point is not, at this juncture, to discuss to what extent such conditions have been respected in practice (since obviously they have not been constantly respected). The point is rather to show that there are significant differences of legal construction between the "authorizations-delegations" and the general recommendations. In one word: the "authorizations-delegations" are more than the simple recommendations; their legal nature and density is greater. Consequently, it is possible to envision some special treatment of this class of legal acts, and thereby, also in respect of Article 103.

Conversely, the organ deciding on the aforementioned delegation does not seem to be decisive. The criterion is the exercise of Chapter VII-powers, either directly through the Security Council, or indirectly through the General Assembly. It is not the organ, which is decisive, but the legal basis of the powers exercised (Articles 41 and 42). In other words, the criterion is not *ratione personae* but *ratione materiae*. This was also the basis of the reasoning of the *Collective Measures Committee* already presented.[44]

2. The Conduct of the States Empowered with Respect to the Authorization. There are two aspects that may be worth mentioning here:

a) First, it has been suggested[45] that although there is no obligation to take up a delegation of Chapter VII powers, once a State does take up such a delegation, it is under a duty to exercise the powers in a certain way until the objective specified by the Council has been achieved. In other words: you are free to eat the cake or not, but once you start eating it, you must eat the entire cake. Accordingly, for the purposes of Article 103, it could be argued that once the delegation is taken up by a State, it does indeed have an "obligation" (or several obligations) under the Charter, which then prevail(s) over conflicting treaty obligations. It has sometimes been added that such authorizations are not mandatory for the authorized States (i.e. action must not be made), but are in effect mandatory for the States being the target of the recommended measures: they are bound to suffer the intervention precisely because the authorization provides a legal title to that effect.[46]

This doctrine flows out of a strict understanding of the "authorizations-delegations", showing precisely how they can be considered a tighter notion than simple recommendations. In the first place, it can be read as implying that once a delegation is taken up, there is an "obligation" in the full and usual sense of the term. Alternatively, it can also be read as to enlarge the notion of "obligation" contained in Article 103: this term would then not only cover obligations in the classical

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[44] See above, note 38.

[45] See Sarooshi (note 11), 150. The author presents that opinion, indicating that it has not his personal preference. See also L. A. Sicilianos, quoted in the next footnote.

[46] See e.g. L. A. Sicilianos, H exousiodotisi tou Simbouliou asfalias tou OHE gia tin xrisin bias (=The Authorization of the Security Council of the United Nations to use force), Athens 2003, 273 et seq.

sense, but also collateral obligations, e.g. obligations of respecting the conditions of the delegations, of reporting, etc. These interpretations are not impossible to defend, albeit they seem somewhat contrived. However, if one admits that the "authorizations-delegations" as such fall under Article 103, there is no need to seek further concrete obligations within them in order to have them covered by the said Article.

b) Second, the application of Article 103 to such "authorizations-delegations" may depend to some extent on the way in which the authorized State(s) act. They may act in conformity with the letter and spirit of the authorization, displaying a genuine deference to the collective aims and control of the United Nations; or, on the reverse, they may act at some variance from it, turning the authorization into a title for self-interested action with a loose subordination to the Organization. This distinction could be taken up in the context of application of Article 103. Thus, as the present author said elsewhere: "[L]'effet de l'article 103 pourrait être limité aux Etats qui agissent en fait selon l'autorisation, et éventuellement seulement tant qu'ils restent dans le mandat conféré. L'article 103 ne doit en effet pas servir à ouvrir la priorité aux entreprises qui ne s'inscrivent pas dans l'intérêt collectif, mais dans le sillage des intérêts particuliers."[47] It is known that in the case of Iraq, the United States and the United Kingdom pursued for years (and are still pursuing) the policy of obtaining *carte blanche*-authorizations from the Security Council in order to cloak their action with some legitimacy without incurring any control or limitation by the Organization.[48] It may be doubted if such selfish action under the disguise of the collective system deserves the sanction of priority of Article 103. The aim of this provision is to give precedence to "multilateralism" and not to "unilateralism" in disguise. In order to make legally operational what has been said, it would be necessary to elaborate on the exact limits of the delegations and the powers of the delegated States: the violation of the delegation-rules would then be the basis for excluding the application of Article 103. If the delegation-rules are not sufficiently specified in this field, it will be difficult to apply the proposal limiting the scope of Article 103. Too many uncertainties would remain, and the whole question would become a political play-tool provoking legal uncertainty.

It may be worth mentioning that *ius cogens*-norms of international law cannot be overridden either by decisions of the Security Council or, *a fortiori*, by "authorizations-delegations". This statement, generally accepted by public international lawyers, raises a series of difficult questions: e.g., to what extent can the Security Council dispense obligations under the law of occupation when it consolidates the presence of a foreign army in a State[49] with a resolution? To what extent can the

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[47] Kolb (note 1), 149.

[48] See Sarooshi (note 11), 174 et seq. See also P. Picone, La 'guerra del Kosovo' e il diritto internazionale generale, Rivista di diritto internazionale, vol. 83, 2000, 309 et seq.; P. Picone, La guerra contro l'Iraq e le degenerazioni dell'unilateralismo, Rivista di diritto internazionale, vol. 86, 2003, 329 et seq.; L. A. Sicilianos, L'autorisation par le Conseil de sécurité de recourir à la force: une tentative d'évaluation, RGDIP, vol. 106, 2002, 5 et seq., 30 et seq., 42 et seq.

[49] See e.g. Resolution 1511 of 2003 in the context of Iraq.

Security Council dispense with other obligations as to warfare and protected persons (e.g. prisoners of war), if international humanitarian law is held to be largely of peremptory nature?[50] One may mention here the problem of sanctions and their humanitarian impact.

V. Conclusion: Final Evaluation

It is submitted in this paper that Article 103 should apply to "authorizations-delegations" for the reasons already developed:

– The overriding necessity of efficient action of the United Nations in the field of Chapter VII, which could otherwise be hampered[51];

– The fact that the "authorizations-delegations" have in practice been accepted as a valid substitute to enforcement action by decisions (argument of functional equality).

– The public order character of the area at stake.

– The insufficiency of a literal interpretation of Article 103, namely of the word "obligations", which, in its intimate relation to Chapter VII, is to be understood functionally, reflecting the developments and serving the aims of the substantive law under articles 39 ff.

– The fact that "authorizations-delegations" are a category which is neither to be subsumed under the heading "recommendation", neither under the traditional heading "obligation". Its *sui generis* character prompts the duty to seek its localization under the text and spirit of Article 103 afresh, without being stopped *in limine litis* by a word with no absolute legal meaning ("obligations").

– The doctrine of permissive effects of "authorizations-delegations", which would be nullified or at least essentially weakened if any contrary obligation under international law could set it aside.

– Seemingly slight preponderant practice – even if no firm conclusions can be drawn from it –, especially the absence of objections when a State acted in conformity with an "authorization-delegation" and thereby infringed some international legal duty.

It is also submitted that the scope of Article 103 should be limited to cases where the authorized States act in respect of the wording and spirit of the "authorizations-delegations", as explained above.

The question as to the applicability of Article 103 to "authorizations" is of considerable theoretical and practical interest and will probably receive some fresh developments in the next years. This will be true only if "multilateralism" is not bur-

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[50] See e.g. E. David, Principes de droit des conflits armés, 2nd ed., Brussels 1999, 85 et seq.; R. Kolb, *Ius in bello,* Le droit international des conflits armés, Basel/Brussels 2003, 223 et seq. On the specific problem raised in the text, see also C. Dominicé, L'article 103 de la Charte des Nations Unies et le droit international humanitaire, in: L. Condorelli/A. M. La Rosa/S. Scherrer (eds.), Les Nations Unies et le droit international humanitaire, Paris 1996, 175 et seq.

[51] This position corresponds to the most intimate spirit of the Charter.

ied by the powerful governments of the days, thinking they can go to war whenever they please, without control and without constraints. If such a course prevails, it will be not only Article 103 that will be brushed away, but the whole law of the Charter. The result would then be the ushering in a realm of violence and barbarity spreading rapidly and of unforeseeable magnitude, until experience brings back some more principled action, along the lines of what was, and is, attempted in the Charter of the United Nations.