

## Hersch Lauterpacht Memorial Lectures

Held at the Lauterpacht Centre for International Law, University of Cambridge, 7<sup>th</sup> – 9<sup>th</sup> November 2006

# THE UN SECURITY COUNCIL AND INTERNATIONAL LAW

by

**Sir Michael Wood, KCMG\***

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### FIRST LECTURE: The Legal Framework of the Security Council (as delivered on 7<sup>th</sup> November 2006)

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1. A former British Ambassador to the United Nations, David Hannay, has referred to the Security Council as “that most mysterious and misunderstood international body”.<sup>1</sup> I am not sure how mysterious it is. But it is certainly misunderstood. If in these lectures I can make the Council less mysterious, and better understood, I shall have achieved my purpose.
2. With some honourable exceptions, many of those writing about the Council pay little regard to actual practice. They introduce domestic law concepts which simply have no place. They confuse legality with legitimacy. They complicate that which is straight-forward. Over the long term, this tends to undermine the Council as an institution, and undermine respect for the law. There are even those who, in my view, seek to “demonize” the Council. For them, the members of the Council are rather like

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<sup>1</sup> Lord Hannay, referring to D Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004).

the Gods of Ancient Greece: they squabble on Mount Olympus; launch the occasional thunderbolt; and generally intervene in the affairs of mortals with unpredictable - sometimes disastrous - results.

3. The main topics of the three lectures are as follows. Today, after a few introductory remarks, I shall consider some of the principal aspects of the legal framework within which the Security Council operates. These include the nature of the Charter and the Council; how to determine when its decisions are binding; and the priority accorded to its decisions by Article 103. Tomorrow I shall deal in more detail with the powers and functions of the Council, the limits on those powers, and the various ways in which the Council may be subject to control. In the third lecture, I shall seek to describe the contribution which the Council has made to the development of the international law on the use of force (the *jus ad bellum*), especially in the face of terrorist threats and humanitarian crises.
4. I have set myself a hard task by choosing as the subject of these lectures, *The UN Security Council and International Law*. Many difficult issues have to be dealt with. The constitutional character of the Charter of the United Nations. Does the Security Council have a legislative or quasi-judicial aspect? The priority of Charter obligations over other obligations. The scope and effect of *jus cogens* norms. The adequacy of the international law on the use of force. A great deal has been written on these matters of late - though that is perhaps less of a problem.
5. I cannot, in the time available, do justice to all the issues. I have selected those which most interest me and which, for the most part, arise in practice. For want of time, I shall not be able to consider such important questions as how to interpret Council resolutions;<sup>2</sup> sanctions (and how to make targeted sanctions fairer); or the legal issues that arise in the international administration of territory.

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<sup>2</sup> See M Wood, "The Interpretation of Security Council Resolutions", 2 *Max Planck Yearbook of United Nations Law* 73 (1998).

6. If I occasionally sound dogmatic, this in part for want of time. Sir Hersch Lauterpacht might or might not have approved. He praised the Permanent Court for “avoiding so far as possible a dogmatic manner in stating the law.”<sup>3</sup> Equally, he praised a League study of Article 20 of the Covenant (on the priority of the Covenant over all other treaties, the study being in the context of the call for sanctions against Italy) for expressing views that were in his words, “unusually definite. ... The answers [he said] were conceived not as a product of academic deliberation concerned with putting both sides of the difficulty, but as an aid to urgent international action of unprecedented significance.”<sup>4</sup> It is in that latter spirit that I see these lectures.
7. The issues I shall be covering are not necessarily at the top of your mind, day-by-day, as you sit in the Council drafting resolution after resolution. (On average there were about 180 resolutions or Presidential statements a year when I was in New York between 1991 and 1994.) But these issues are, or should be, at the back of your mind. You hope they won’t arise in practice and, if they do, that they will go away. It sometimes seems as though they only come to the fore when there is a court case. Or when you give a lecture.
8. I have already hinted at the reasons for my choice of topic. *First*, at a time when there is a pressing need to strengthen multilateralism, it is important to recall the central role of the Council within the collective security system. The Council remains the only body within the international legal system that can make lawful measures to uphold international peace and security that would otherwise violate the law.
9. *Second*, I am concerned that much that is written about the Council is theoretical, negative, and sometimes plain wrong. This can threaten the Council’s effectiveness as a central instrument of multilateralism.
10. A *third*, countervailing concern is that some, politicians, diplomats and commentators alike, downplay, or even write off altogether, the function of law in the

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<sup>3</sup> *The Development of International Law by the Permanent Court of International Justice* (1934), 27.

<sup>4</sup> H Lauterpacht, “The Covenant as the “Higher Law””, 1936 *British Yearbook of International Law*, 57.

work of the Council. They see the Council as a purely political organ, capable of anything – unbound by legal considerations.

11. And *fourth*, there are certain myths surrounding the Council that need to be dispelled. For example, some of the media coverage of the drafting of the recent Security Council resolution on North Korea perpetuated the myth that acting under Chapter VII necessarily means the use of armed force.
  
12. In these lectures, I shall try to confine what I say to the law, and not stray into concepts that are more the preserve of political scientists, such as legitimacy, or democracy, or fairness. Such concepts are highly subjective, and can be used to justify almost any legal conclusions. I am tempted to include “accountability” in this list. It too covers a range of legal and non-legal matters, which are not always clearly distinguished.<sup>5</sup> Of course, in international relations, policy and law are inextricably entwined. Much that you do as a government lawyer is policy. But you need to know (at least in your own mind) when you are dealing with policy, and when you are advising on law.

### **The Council debates international law**

13. In June 2006, the Security Council held a debate on an item which its President, the Foreign Minister of Denmark (anticipating, it seems, these lectures) described as “The Security Council and International Law”. The outcome was rather limited: a Presidential statement in which the Council reaffirmed “its commitment to the Charter... and international law”, and underscored “its conviction that international law plays a critical role in fostering stability and order in international relations and in providing a framework for cooperation among States in addressing common challenges, thus contributing to the maintenance of international peace and security.” The Presidential statement goes on to refer, briefly, to four important matters: the Council’s role in the peaceful settlement disputes, including its relations with the International

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<sup>5</sup> See the 2004 report of the International Law Association on *Accountability of International Organisations*.

Court of Justice; justice and the rule of law in peace-building; ending impunity; and the need for fair and clear procedures for targeted sanctions.

14. The fact that the debate took place at all is probably more interesting than the outcome. The General Assembly itself had recently stressed the importance of international law with repeated references in the 2005 World Summit Outcome Document. Not to be outdone by the Assembly, the Council also wished to highlight what some refer to as a “rules-based international order”.
15. The President of the International Court of Justice took part in the debate. Among other things, Judge Higgins suggested a policy whereby “in all political disputes that threaten international peace and security and where claims of legal entitlement are made, the Council would strongly indicate to the parties that they are expected to have recourse to the Court.” She recalled Article 36, paragraph 3, of the Charter, which provides that in making recommendations for the settlement of disputes, “the Security Council should ... take into account that legal disputes should as a general rule be referred to the International Court of Justice”. She continued, “I am obliged to say that the Security Council has failed to make use of this provision for many years. This tool needs to be brought to life and made a central policy of the Council.”
16. The debate was also notable for Ambassador Bolton’s strong commitment to international law, on behalf of the United States.

## **I. THE NATURE OF THE CHARTER**

17. Those who adopt a “constitutional perspective” to the Charter, or indeed to other areas of international law – “constitutional discourse” seems to be in fashion - seek to import into international affairs legal concepts from various domestic laws. The Charter is a treaty between States, a multilateral treaty with 192 Parties. It is now virtually universal, a relatively recent state of affairs. It is, of course the constituent instrument, or constitution, of the organisation known as the United Nations, and as such sets out the composition and powers of its organs. But that does not mean that it has the same characteristics as a national constitution. The Charter also embodies certain principles

of international law, including those on the peaceful settlement of disputes and the non-use of force, as well as the right of self-defence. And (and this may be its chief “constitutional” element) it provides, in Article 103, that in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the Charter prevail.

18. None of this, in my view, makes the Charter “the constitution for the international community”. The term “constitution” has no particular meaning in international law. (Indeed, within a particular national legal system the term is used in many different contexts: the basic document of a barristers’ chambers or a golf club, for example.) The “international community” (itself a much misused term) has little in common with society within a State. The Appeals Chamber of the Yugoslav Tribunal has referred to a flawed “domestic analogy [inappropriate where] the international community lacks any central government with the attendant separation of powers and checks and balances” and warned that “the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension”.<sup>6</sup>

## II. THE NATURE OF THE COUNCIL

19. The United Nations itself has international legal personality, distinct from that of its member States, as the Court found in the *Reparation* case. The Council, being an organ of the United Nations and not a separate organization in its own right, does not itself have legal personality. Its acts are those of the Organization. The separate legal personality of the United Nations has important implications for matters such as the Organization’s responsibility and treaty commitments, as well as for the position of its Members, including when acting as members of the Council
20. I would describe the Council as follows. It is the principal organ of the United Nations upon which, in order to ensure prompt and effective action, the Members of the Organization have conferred primary responsibility for the maintenance of international

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<sup>6</sup> *Blaskić* case, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber, 110 *ILR*, paras. 30-1.

peace and security. Its powers and functions are those set out in the Charter, as developed in practice. It has, in particular, the power to make recommendations, and to adopt decisions binding on the Members of the United Nations. In my view, that is all that needs to be said about the nature of the Council - but others seek to go further.

### **Political organ?**

21. The Security Council is often referred to as a political organ. That expression is presumably used to distinguish it from “legal” organs, or perhaps technical and administrative organs. But the term “political organ” may carry the unfortunate implication that the Council need pay little attention to the law.

### **Executive?**

22. Some seek to situate the Council within the United Nations in terms of the separation of powers at the national level. In the early days in particular, the Council used to be referred to as the “executive organ” of the United Nations (perhaps harking back to the Council of the League). But to the extent that it acts like an executive this is in only one area of United Nations activity, the maintenance of international peace and security. So it is unlike those organs of limited membership in certain international organizations which do act as an executive between meetings of the plenary organ.

### **Legislature?**

23. A question often asked nowadays, particularly since the adoption of resolution 1373 (2001) (on measures against terrorism), is whether the Council may act as a legislature or, as it has been put, as a “global legislator”. Here, too, the domestic law analogy is not particularly helpful. The question itself is somewhat abstract. It depends what is meant by “legislature”. I prefer to look at matters more concretely: were the mandatory decisions contained in resolution 1373 (2001), or those contained in resolution 1540 (2004) (on non-proliferation), within the powers of the Council, and thus lawfully adopted, or not? Put that way, it seems to me that the answer is pretty obvious. Both resolutions, as it happens, were adopted unanimously and have been repeatedly

reaffirmed. No State has seriously suggested that resolution 1373 (2001) was not lawfully adopted. Such concern as was expressed about resolution 1540 (2004) seems mostly to have been about the policy question: “Should the Council so act?”, not “Is it within its powers so to act?” In the case of both resolutions virtually all States are doing their best to comply. So there is no basis in State practice for suggesting that elements of these two resolutions were *ultra vires*, quite the contrary.<sup>7</sup>

24. The legal argument seems to boil down to this: that, despite this practice, the Council is only empowered to act in relation to a specific situation or dispute. About ten years ago, I wrote that “[w]hile the Security Council has some of the attributes of a legislature, it is misleading to suggest that the Council acts as a legislature, as opposed to imposing obligations on States in connection with particular situations or disputes. ... the Council makes recommendations and takes decisions relating to particular situations or disputes. ... it does not lay down rules of general application.”<sup>8</sup> As you will immediately spot - as I noted, with some relief, when I re-read the passage - all I seem to be doing here is describing the then practice of the Council, not stating legal constraints. Others were not so cautious.

25. Nowhere does the Charter state in terms that the Council’s Chapter VII powers are limited to specific situations or disputes. Is this to be implied, for example from the language of Article 39? While breaches of the peace and acts of aggression are by their nature likely to be specific, the same cannot be said of threats. There is nothing in the language of Article 39 to suggest that the requirement that the Council determine “a threat to the peace” refers only a threat that is specific rather than one that is general. Such a restrictive interpretation would be contrary to the object and purpose of the Charter if, in fact, there are now urgent threats of a general nature which require urgent and global action of the kind that only the Security Council can take. Normal treaty-making procedures may be too slow; attempts to speed them up have not met with great success.

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<sup>7</sup> See also resolution 1422 (2002), in which the Council requested the International Criminal Court not to commence or proceed with investigation or prosecution of any case involving officials of a peace-keeping contributor not party to the Rome Statute; but I do not have time to go into this today.

<sup>8</sup> See the article at note 2 above, at p.77.

26. The adoption of “legislative” resolutions is, admittedly, a new development. Resolutions 1373 (2001) and 1540 (2004) are qualitatively different from what went before, not least in that they address a general threat, not a specific situation or dispute. But that does not make them *ultra vires*. No one doubts that the Council may impose obligations on States in relation to a particular dispute or situation. It may, for example, require them to impose an arms embargo on a particular State. Such a decision of the Council may well be termed “legislation.” The question is not whether the Council can legislate – it can and regularly does – but whether it is empowered to do so in a general way, unrelated to any specific situation or dispute. The answer turns on whether a general, unspecific, threat to international peace and security is sufficient for the invocation of Chapter VII. If the Council determines that international terrorism, or the proliferation of weapons of mass destruction, or a combination of the two, is a threat to the peace – a not wholly fanciful conclusion in present circumstances - then it may take such measures as it considers necessary to maintain the peace. Depending on the nature of the threat, such measures may be specific, addressed, for example, to the threat emanating from North Korea, or they may be general, addressed, for example, to the global threat from terrorist groups. I do not see any great principle involved here, though the circumstances in which general measures are considered necessary and appropriate may prove to be rare.
27. Perhaps the greatest fear of an all-powerful and unconstrained Council comes when this new move towards “legislation” is combined with a much expanded concept of security, and linkages are made between the various threats. Such concerns are understandable. The members of the Council do need to exercise caution. If the Council is seen to be acting routinely as a “world legislature”, and is thought to be throwing its weight around in circumstances where this is not justified, States may simply cease to comply with its demands, whatever their legal obligations under the Charter. That would undermine the Council’s authority, with very serious consequences for the collective security system across the board. Eric Rosand has

suggested certain “safeguards” when the Council legislates. I shall not repeat them here, but I commend his article.<sup>9</sup>

### **Judicial or quasi-judicial body?**

28. I now need to say a word about the suggestion that the Security Council engages in quasi-judicial activities. This is covered in Sir Eli’s own Lauterpacht lectures.<sup>10</sup> He suggested that “there have been a number of occasions on which ... the Security Council has framed its resolutions ... in language resembling a judicial determination of the law and of the legal consequences said to flow from the conduct of the State that is arraigned.” The examples he gives are those where the Council has held a situation to be unlawful or null and void, and called upon States not to recognize it. They include South West Africa, Southern Rhodesia, Jerusalem and the Occupied Territories, the South African “Homelands”, and the Turkish Republic of Northern Cyprus. Sir Eli suggests that there is a line to be drawn, “admittedly imprecise”, between “prescriptions of conduct that are directly and immediately related to the termination of the impugned conduct ... and those findings that ... have a general and long-term legal impact that goes beyond the immediate needs of the situation.” He accepts that neither the International Court (when it had the opportunity in the *Namibia* opinion), nor States (other than those directly affected) have objected to such findings. While seemingly still questioning the legality of these “quasi-judicial” determinations, he concedes that States have acquiesced. His main conclusion is that “quasi-judicial decisions” should be subject to some kind of judicial review.

29. I must admit to being not wholly convinced, both as a matter of principle, but especially in light of the practice of the Council (including its practice since Sir Eli gave his lectures). Nothing in the practice of the Council suggests a distinction between two categories of decisions: prescriptions of conduct and findings with a general and long-term impact. The Council’s action for the maintenance of international peace and security is no longer (if it ever was) confined to immediate steps to restore peace. Much

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<sup>9</sup> E Rosand, “The Security Council as “Global Legislator”: *Ultra Vires* or *Ultra Innovative*?”, 28 *Fordham International Law Journal* 101 (2005).

<sup>10</sup> E Lauterpacht, *Aspects of the Administration of International Justice* (1991).

that it does today is long-term: dispute resolution; peace-keeping; peace-building. It may deploy a wide range of measures for the peaceful settlement of disputes and the investigation of situations. If it considers it necessary to pronounce upon a legal matter, that surely is within its competence, not least when it calls for the non-recognition of a situation in order to maintain or restore international peace and security. The real question is how the Council should set about making findings of law, particularly where the factual or legal position is in doubt. Above all, there is the question of the legal effect of “quasi-judicial” pronouncements. It is, I think, this last point that was of particular concern to Sir Eli.

30. My overall conclusion on the nature of the Security Council is as follows. The use of domestic law analogies in international law is often misleading, as is evident from much of the “rule of law” debate, including that in the Sixth (Legal) Committee during the current session of the General Assembly. It is not particularly helpful to seek to encapsulate the nature of the Council in a short phrase, especially one derived from domestic systems. Those who do so often go on to deduce further legal or political consequences: that as an executive it is uncontrolled; that as a legislature it lacks democratic legitimacy; that as a quasi-judicial body it should follow certain “rule of law” principles and be subject to judicial review. But in my view these lines of argument start from a false premise.

### **III. THREE MYTHS ABOUT CHAPTER VII**

31. Before turning to look in more detail at certain aspects of Chapter VII of the Charter, I should like to try to dispel three myths. *First*, it is not the case that a resolution adopted under Chapter VII is thereby legally binding - though the converse may be true, a resolution not adopted under Chapter VII will (in any event, generally) not be legally binding. The Council’s powers under Chapter VII are expressly stated to be to “make recommendations, or decide what measures shall be taken”. The Council may make recommendations or demands which, while they may be of great significance (such as resolution 242 (1967) on the situation in the Middle East) and impose political obligations, are not legally binding.

32. *Second*, it is not the case that when the Council acts under Chapter VII, this invariably, or even commonly, involves or implies the immediate or eventual use of military force. The taking or authorising of armed force is only one of a range of measures that may be taken under Chapter VII, including investigations, recommendations to the parties, economic sanctions, establishing *ad hoc* international criminal tribunals, and administering territory.
33. *Third*, the fact that a resolution adopted under Chapter VII is mandatory, that is to say, imposes legal obligations, does not mean that States are entitled to use force to enforce the resolution, any more than the fact that a State is in breach of a treaty means that force can be used against it. Only if they otherwise have a legal basis to use force for that purpose, such as Council authorization or self-defence, may States do so.

#### **IV. WHEN ARE COUNCIL RESOLUTIONS BINDING?**

34. Before considering how we can tell whether provisions of a Security Council resolution are legally binding or not, I shall make one general point relevant to the interpretation of Security Council resolutions. There is no equivalent in New York of the legislative draftsmen you get in a national system, or indeed of the kind of legal-linguistic proofing that happens in Brussels. It is left entirely to the members of the Council, and especially those who have legal advisers on their delegations, to do the best they can, often under severe time and political pressure. The Secretariat lawyers are not generally involved at all. As a result, while some drafting practices are apparent, they are liable to change without warning or explanation. And regrettably, the Council is often inconsistent in its use of language.
35. There may be cases where it is politically convenient not to be clear whether the provisions of a Security Council resolution are legally binding or not, if only to achieve a consensus. Ambiguity is often the price of agreement, with Security Council resolutions as with treaties. You may wonder if this really matters. After all, non-binding resolutions of the Council may have considerable political weight. And they are not without legal effect, even if one would not necessarily in all circumstances go as far as Judge Lauterpacht, who in the *Voting Procedures* case said that “[a] Resolution

recommending ... a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation .... The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith.”

36. It is, nevertheless, important, and not only for lawyers, to be able to distinguish between those provisions of Security Council resolutions which are legally binding and those which are not. The Charter itself makes a clear distinction between mandatory and non-mandatory acts of the Council. It should be possible for outsiders (and indeed those on the Council) to be able to ascertain whether a provision of a resolution is binding or not. The distinction can be important in practice for many reasons. First and foremost, Governments do need to know whether they are under a legal obligation to do or abstain from doing something, or whether they have a more or less free hand in the matter. And that is not only because it could be relevant in international or domestic court cases, but for many other reasons. What Ministers say in Parliament, for example. Equally they need to know whether other States are under a legal obligation to act in a certain way. Another context in which it can be critically important to know whether a provision of a resolution is mandatory is in the application of Article 103 (which operates to give priority to obligations under the Charter). Knowing whether a provision is binding may also be important for domestic law implementation.
37. The Court of First Instance of the European Communities drew attention to the distinction between recommendations and decisions of the Council in the recent cases of *Hassan* and *Ayad*, in the following terms:

“ ... Article 39 of the Charter of the United Nations draws a distinction between 'recommendations', which are not binding, and 'decisions', which are. In this case, the sanctions provided for by paragraph 8(c) of Resolution 1333 (2000) were indeed adopted by way of 'decision'. Likewise, in paragraph 1 of Resolution 1390 (2002) the Security Council 'decide[d]' to continue the measures 'imposed' by that provision....”

38. So how do we know when a provision of a Security Council resolution imposes legal obligations or gives an authorization, rather than being recommendatory? Article 25 provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” To determine whether the Council has taken a decision that is mandatory under Article 25 it is necessary to interpret the resolution or series of resolutions in question. I suggest that what you are looking for are the following three elements. *First*, a determination by the Council, under Article 39 of the Charter, of the existence of a threat to the peace, breach of the peace, or act of aggression. *Second*, evidence that the Council is indeed acting under Chapter VII. And *third*, that the Council has taken a decision within the meaning of Article 25. I make these suggestions rather tentatively, because at the end of the day there are no hard and fast rules. There are only elements that give greater or lesser clarity. And one can think of an even wider range of elements that may aid clarity and provide evidence of the intention of the Council and its members, such as, for example, statements made by members of the Council before or after the adoption of a resolution, in which they may indicate whether they consider the resolution to give rise to legal obligations. Whatever elements one draws upon, clarity is important, especially when legal obligations are at issue, and when the courts may be involved. Building up a consistent and transparent practice would have considerable merit.
39. The clearest case is when the Council expressly includes each of these three elements in the resolution, that is to say, when the resolution in question (or an earlier closely related one) states that the Council has determined that such-and-such is, or continues to be, a threat to the peace; that it is “acting under Chapter VII” or under a specific provision in Chapter VII, such as Article 41; and that it “*decides*” that something shall be done. A recent example where all three elements were present is resolution 1718 (2006) on the Democratic People’s Republic of Korea.
40. At this point I was planning to look a little more closely at each of these three elements, but in view of the time I must move on to Article 103 of the Charter. There is, however, one point that should be mentioned, since it is a matter of great controversy. There is a difference of view as to whether binding decisions may be taken

exclusively under Chapter VII of the Charter (as the United Kingdom and France said in the Security Council debate following the *Namibia* Advisory Opinion), or whether they may be taken under other provisions of the Charter, and notably under a general empowerment under Article 24 (as the Court opined in *Namibia*<sup>11</sup>). The significance of this debate should not be overstated. In practice, nowadays, the Council acts under Chapter VII when it intends to impose obligations.

## V. ARTICLE 103

41. Article 103 is in a sense the cornerstone of the Charter. It reads:

“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.”

Combined with Article 25, this “means that the Council has the authority to make legally binding decisions with which States must comply in all circumstances.” In one author’s words, “[t]his extraordinary power ... gives the Council the ability to alter the international legal landscape instantaneously.”<sup>12</sup>

42. Article 30 of the Vienna Convention on the Law of Treaties recognizes the absolute priority of the rule in Article 103. Article 103 has occasionally been referred to expressly, often implicitly, in other international agreements. While perhaps a useful reminder, the inclusion of such a reference is not, of course, necessary in order for Charter obligations to prevail, at least as between Members of the United Nations. The same goes for explicit or implicit references to Article 103 in resolutions of the Security Council.<sup>13</sup>

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<sup>11</sup> Para. 110.

<sup>12</sup> S Ratner, “The Security Council and International Law”, in: D Malone (ed.), at note 1 above.

<sup>13</sup> See, for example, the reference to international peace and security in Article 297 of the Treaty establishing the European Community (formally Article 224 of the Treaty of Rome).

43. The International Law Commission's Study Group on Fragmentation considered Article 103 with some care, and the report, finalized by the Special Rapporteur, Martti Koskenneimi, and recently published on the web, contains some useful material. By way of example, I would draw attention to what it says about the effect of Article 103: "What happens to the obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not one of validity but of priority. The lower ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103."<sup>14</sup>
44. In the 1984 *Nicaragua* judgment on jurisdiction and admissibility, the International Court of Justice observed that "all the regional, bilateral and even multilateral arrangements ... must always be subject to the provisions of Article 103 of the Charter of the United Nations." Article 103 has been considered in some recent court decisions: the *Lockerbie (Provisional Measures)* Order of 1992; the *Kadi* and other judgments of the Court of First Instance of the European Communities; and the *Al-Jedda* judgments of the Divisional Court and the Court of Appeal in London. The European and English cases are under appeal.
45. In its *Lockerbie (Provisional Measures)* Order, the International Court held that the obligations of the Members of the United Nations under the Charter, which prevailed over other obligations by virtue of Article 103, included obligations imposed by mandatory decisions of the Security Council. This has been described as "an extensive interpretation of the powers of the Security Council when acting under Chapter VII".<sup>15</sup> Extensive or not, the Court's interpretation reflects a fundamental aspect of the Charter's collective security system. It seems clearly to follow from the ordinary meaning of the language of Articles 25 and 103 of the Charter. And it represents the constant practice and understanding of the Council and of States.
46. The *Yusuf* and *Kadi* cases before the Court of First Instance of the European Communities, now before the Court of Justice of the European Communities, concern the compatibility of European Community regulations restricting assets with various

<sup>14</sup> A/CN.4/L. 682, paras.328-360, at 333.

<sup>15</sup> Judge *ad hoc* Lauterpacht, *Genocide Convention* case, para. 39.

provisions of the European Convention on Human Rights. The Court of First Instance held that the obligations of the members of the Union to enforce sanctions required by a Chapter VII Security Council resolution prevailed over fundamental rights as protected by the Community legal order. The Court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution - other than to check, indirectly, whether it infringed *jus cogens*. Judge Higgins has remarked that “[t]his raises a whole series of different issues, including whether it is the Luxembourg Court that holds any power of judicial review of Security Council resolutions, if such power indeed exists.”<sup>16</sup> The Court has recently given judgment in two further cases (*Hassan* and *Ayadi*), in the course of which it helpfully summarized its findings in *Yusuf* and *Kadi*.

47. The decision of the English Court of Appeal of 29 March 2006 in the *Al Jedda* case is of particular interest. Mr Al-Jedda was detained in October 2004 by British forces acting as part of the Multi-National Force in Iraq (MNF), under a mandate conferred by the Security Council, on the ground that his detention was necessary for imperative reasons of security in Iraq. The Council resolution specifically provided the MNF with “authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution ... setting out its tasks”. The annexed letters stated that the MNF “was prepared to undertake a broad range of tasks, ... including ... internment where this is necessary for imperative reasons of security.”

48. Mr Al-Jedda challenged his detention, arguing that it was unlawful under Article 5 (1) of the European Convention on Human Rights as scheduled to the United Kingdom’s Human Rights Act 1998. The Defence Secretary argued that the detention was lawful both under Iraqi law and under international law, and that it did not contravene the Human Rights Act. The unanimous judgment of the Court of Appeal accepted the overriding effect of the obligations under the Security Council resolutions. The relevant Security Council resolutions on Iraq were made under Chapter VII of the Charter, in particular Article 42. Under Article 103 of the Charter, obligations upon

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<sup>16</sup> R Higgins, “A Babel of Judicial Voices? Ruminations from the Bench”, 55 *ICLQ* 791, at 801 (2006).

Member States created by the Charter prevailed over their obligations under any other international agreement.

49. Mr Al-Jedda argued that Article 103 had no application because, *first*, the Council resolution placed no obligation on the United Kingdom; and, *second*, Article 103 did not apply when two obligations created by the Charter (that is, the resolution and the Charter's human rights provisions) were in conflict. The Court referred to the *Lockerbie* and *Kadi* cases, as well as to academic literature supporting the proposition that under Article 103 all obligations under the Charter (including those created by a binding Security Council resolution) prevailed over any other international obligations. The Court concluded that there was nothing in the Charter creating a parallel obligation to give effect to Mr Al-Jedda's human rights, and therefore the Secretary of State was correct when he argued that resolution 1546 (2004) qualified obligations under human rights conventions in so far as it was in conflict with them.

50. Counsel for Mr Al-Jedda also relied on the argument that the resolution placed no obligation on the United Kingdom, so Article 103 had no application. On this, the Court of Appeal cited at length, and with approval, the commentaries on Articles 39 and 103 in the Simma book on the Charter,<sup>17</sup> and concluded by saying

“If the Security Council, acting under Chapter VII, considers that the exigencies posed by a threat to the peace must override, for the duration of the emergency, the requirements of a human rights convention (seemingly other than *ius cogens*, from which no derogation is possible), the UN Charter has given it power to so provide. The Security Council has primary responsibility for the maintenance of international peace and security, and one of the purposes of the United Nations, by which it is bound to act, is to take *effective* collective measures for the prevention and removal of threats to the peace .... There is no need for a member state to derogate from the obligations contained in a human rights convention by which it is bound in so far as a binding Security Council resolution overrides those obligations.”

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<sup>17</sup> B Simma (ed.), *The Charter of the United Nations. A Commentary* (2<sup>nd</sup> ed., 2002).

51. I shall end by stating briefly my conclusions on Article 103. Overall, it may be said that the provision should not be interpreted narrowly if it is to have the effect intended by the drafters of the Charter. At the same time, Jenks was clearly right when he said that “Article 103 cannot be invoked as giving the United Nations an overriding authority which would be inconsistent with the provisions of the Charter itself.”
52. *First*, the effect of the article is not to invalidate the conflicting obligation, but merely to set it aside to the extent of the conflict. The analysis in the Report of the International Law Commission’s Study Group is impeccable. Any other position, for example, that the conflicting obligation is or becomes void, is not borne out in practice and in most cases would make no sense. Thus, if a sanctions regime is incompatible with rights of navigation under the Danube Convention, it is obvious that the effect of Article 103 is not to void provisions of the Danube Convention, even for the target State, but merely to give priority to the Charter obligations while they subsist.
53. *Second*, the article applies also to obligations imposed by the mandatory provisions of Security Council resolutions, since by virtue of Article 25 (and Article 48) such obligations are “obligations ... under the present Charter.” *Lockerbie* supports this, and has been followed in the European and English cases to which I have referred.
54. *Third*, in order to be effective Article 103 must apply equally to action taken under Council authorizations. The question was canvassed at length in the *Al-Jedda* case, the Court of Appeal concluding that it did so apply.
55. *Fourth*, it is generally accepted that the priority which Article 103 affords to the Charter over international agreements is equally applicable to rules of customary international law (general international law). This is indeed essential if the purposes of the Charter in the field of the maintenance of international peace and security are to be achieved, for example where obligations under customary law subsist in parallel with obligations under treaties. Under most circumstances, in any event, obligations under the Charter, being treaty obligations, would supersede obligations under customary law in the event of conflict. I am not aware of case-law (yet) on this point.

56. *Fifth*, there are no exceptions to the obligations under treaty and customary law over which Charter obligations prevail, other than (according to a widely held view) *jus cogens* norms (peremptory norms of general international law). Any such exception is, I believe, more theoretical than real, as I will explain in tomorrow's lecture.
57. Hersch Lauterpacht wrote an article in the 1936 *British Yearbook of International Law* entitled "The Covenant as the "Higher Law"". <sup>18</sup> It is about Article 20 of the Covenant of the League, the Covenant equivalent of Article 103. He points out that prior to September 1935 (when sanctions were applied against Italy), Article 20 "was seldom mentioned." Article 103 was likewise seldom mentioned until the Council became active with the end of the Cold War. He says of Article 20, in rather powerful language, that it "is a perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant *unhampered by any treaties between Members*". The same could be said of Article 103 of the Charter. Like so much of Hersch Lauterpacht's writing, this article reads as though it could have been written today.

**Sir Michael Wood, KCMG**  
7<sup>th</sup> November 2006

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<sup>18</sup> See note 4 above.