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The Law of Treaties and the UN Security Council: Some Reflections

Michael Wood

In a short piece published in 2009, Giorgio Gaja dealt masterfully with the impact of United Nations (UN) Security Council resolutions on state responsibility.[1] The aim of the present contribution is to offer some thoughts on the Security Council's impact on another area of 'secondary rules': the law of treaties.[2]

A comprehensive treatment of the subject could follow the framework and terminology of the Vienna Conventions of 1969 and 1986. It could deal systematically with the Security Council's role in relation to the conclusion and entry into force of treaties; the observance, application, and interpretation of treaties; the amendment and modification of treaties; the invalidity, termination, and suspension of the operation of treaties; the miscellaneous matters dealt with in Articles 73, 74, and 75 of the Vienna Convention of 1969;[3] and matters not dealt with directly in the Conventions, such as the breach or threatened breach of a treaty as a threat to international peace and security, and the enforcement of treaty obligations as a measure to be taken by the Security Council. Each of these topics could make a chapter of its own, for over the years the Security Council (like the other principal organs of the United Nations, not least the International Court of Justice) has dealt extensively with treaties, reflecting the central role that treaties play in contemporary international relations. In addition to the effect of Council action on treaties, a comprehensive account would also consider the impact of treaties on the Council. For example, treaties may make express provision for

[1] G. Gaja, 'The Impact of Security Council Resolutions on State Responsibility', in G. Nolte (ed.), *Peace through International Law: The Role of the International Law Commission* (Heidelberg: Springer Verlag, 2009) 53–60.

[2] There is an important terminological distinction between 'the law of treaties' and 'treaty law'. The former refers to the secondary rules set forth, for the most part, in the Vienna Conventions on the Law of Treaties of 1969 and 1986; the latter refers chiefly to those primary rules to be found in treaties, sometimes known as 'conventional international law' as opposed to customary international law.

[3] Articles 74, 75, and 76 of the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations.

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Council action, as does Article 16 of the Rome Statute of the International Criminal Court; or even appear to encroach upon the prerogatives of the Council, as with the 2010 Kampala amendments to the Rome Statute (concerning the crime of aggression).

One important preliminary point is that many agreements that the Security Council has to deal with are of uncertain status. They are not treaties between states, but take other forms, in particular agreements with non-state actors and with states the legal nature of which is obscure.[4] It would be interesting to consider how far Council action affects or at least clarifies the status of such agreements. On a more general level, it would be interesting to study how far the practice of the Security Council has clarified the legal issues surrounding such agreements. But this is beyond the scope of the present contribution.

Much of the case law and the literature has concentrated on the effect of Article 103 of the UN Charter. But the Security Council's role in respect of treaty obligations is by no means confined to the creation of Charter obligations that prevail over all other obligations. Treaties of various kinds play an important part in the work of the Council. This is an aspect of the Security Council's wider relationship to international law. Indeed, in many respects there is no difference in principle between Council action in respect of rules of conventional international law (treaty law) and Council action in respect of rules of customary international law. They often overlap, as with the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949, or the law of the sea.

1. Beyond the Vienna Convention

The Vienna Convention on the Law of Treaties of 1969 ('Vienna Convention') mentions the Charter of the United Nations in three places: the preamble; article 30(1); and article 75.[5] The preamble, in addition to recalling the principles of international law embodied in the Charter, expresses the belief that 'the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely the maintenance of international peace and security [...]'. The provisions of article 30 (successive treaties) are '[s]ubject to Article 103 of the Charter'; and Article 75 is the somewhat obscure provision entitled 'Case of an aggressor State'.

[4] A prime example are the so-called 'Dayton Accords', implemented by Security Council resolution 1031 (1995) of 15 December 1995 and subsequent resolutions.

[5] The corresponding provisions of the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations are the preamble, Article 30, para. 6 (reflecting the relationship of international organizations to the UN Charter, which is not the same as that of states) and Article 76.

Sir Arthur Watts noted that the Vienna Convention on the Law of Treaties 'is [...] in a number of important respects a less comprehensive treatment of the subject than might appear at first sight'.[6] He did not list compliance and enforcement among the omissions, perhaps with good reason, since such matters may be thought to fall outside the law of treaties *stricto sensu*, being more a matter of international responsibility,[7] though it is not possible to divide international law into watertight compartments. In any event, compliance and enforcement are of central importance for the practical effectiveness of treaties, and it is in this sphere that—when international peace and security are threatened by a breach of treaty—the Security Council has a special role to play.

Part V of Rosalyn Higgins's book *The Development of International Law through the Political Organs of the United Nations*, published in 1963, is entitled 'The Law of Treaties: United Nations Practice'. It is the longest part of the book. The author concluded, even then, that '[t]he contribution being made by the political organs is of enormous significance to the development of the law of treaties'.[8] It is striking that, when dealing with the law of treaties, she focused largely on the practice of the Secretariat: 'United Nations treaty practice differs from the subject-matter of the previous parts in several respects. The political organs most concerned with all the other subjects discussed have been the Security Council and the General Assembly; in the case of treaties, however, the Secretariat has played a vital role.'[9] There are only a few passages in which she refers to the Security Council, but these are interesting and indicate that its practice in this field is not entirely new. The cases she considered include, for example, Egypt's request in 1947 that the Council find the Anglo-Egyptian Treaty of 1936 obsolete,[10] and Tunisia's similar request in 1958 concerning the Franco-Tunisian Conventions of 1955.[11] Were she writing today, the emphasis of Part V might well be on the Security Council, rather than on the Secretariat.

Some 45 years later, in an article in the *Revue Hellénique*, Stefan Talmon examined the way in which the Security Council had used its powers under the Charter 'to take certain treaty actions'.[12] In particular, he asked 'whether there are any legal limits to the Security Council adapting existing treaties to a particular

[6] Sir A. Watts, *The International Law Commission 1949–1998, Volume II: The Treaties* (New York: Oxford University Press, 1999) at 612.

[7] See Article 73 ('shall not prejudice any question that may arise in regard to a treaty [...] from the international responsibility of a State') and Article 30(5) of the Vienna Convention. See also Article 12 (and Commentary) of the Articles on State Responsibility ('regardless of its origin or character') and the corresponding provision of the draft on the responsibility of international organizations (ILC Report 2009, at 77–80, draft Article 9, available at <http://www.un.org/law/ilc>).

[8] R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University Press, 1963) at 346.

[9] Ibid., at 241.

[10] Ibid., at 344–5.

[11] Ibid., at 345.

[12] S. Talmon, 'Security Council Treaty Action', 62 *Revue Hellénique de Droit International* (2009) 65-116, at 66; E. Papastavridis, 'Security Council Resolutions and the Law of Treaties: Lessons of Iraq', 18 *Public Law Applications* (2005) 405–56 [in Greek].

situation, and whether it can prescribe pre-existing treaty provisions to non-state parties'. He also examined 'the consequences if the Security Council formally endorses a certain treaty, and the role it plays in the enforcement and interpretation of treaties'.[13]

The present contribution seeks not to duplicate Professor Talmon's article, which (given the scope attributed by the writer to the notion of 'adapting' treaties) covers much of the field, but rather to offer a few reflections that may usefully be borne in mind when approaching the important topic of the Security Council and treaties.

2. 'Demonization' of the Council

Much of the writing about the Security Council by international lawyers has an air of unreality. It is based neither on the practice of states nor on the practice of the organs of the United Nations, nor yet on decisions of courts and tribunals. It reflects the authors' dogmatic reading of the text of the United Nations Charter, and often attempts, unrealistically, to apply domestic or 'European' constitutional principles to the field of international relations.[14] It seems to be asserted that much that the Council has done since the end of the Cold War is *ultra vires*, beyond its powers under the Charter, or otherwise unlawful. This is not, of course, the case. But if such efforts to 'demonize' the Council were taken seriously, they might eventually harm its standing, weaken the collective security system to which it is central, and thus set back efforts to promote multilateral approaches to international relations.

It is not only writers who tilt at windmills in this way. A major complaint of those states that fear the Council, and wish to see its powers constrained, is that it plays fast and loose with international law. One such accusation is that it ignores or overrides the law of treaties. Not all go as far as Cuba, which in 2002 described the draft that became Security Council resolution 1422 (2002) as 'an

[13] Ibid., at 66.

[14] M. Wood, '"Constitutionalization" of International Law: A Sceptical Voice', in K.H. Kaikabad and M. Bohlinder (eds), *International Law and Power. Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* (Dordrecht: Martinus Nijhoff, 2009) 85–97. These somewhat harsh strictures are not aimed at Talmon, though even he sometimes adopts a rather negative tone (for example at 67 in the paragraph following the Bellinger quotation). His assertion (at 68) that 'the Council's actions are subject to the principle of proportionality' seems to be conjured out of thin air. He does then try to put the genie back in the bottle by immediately adding that, given the Council's wide discretion, there is little scope for it being found to have contravened the principle. And his digression on 'the rule of law' (at 94–96)—essentially a domestic law concept—is of doubtful relevance to a discussion of the Security Council, notwithstanding references to the rule of law at the international level in certain resolutions of the General Assembly (most notably resolution 60/1 of 16 September 2005 [World Summit Outcome] and resolution 61/39 of 4 December 2006 and subsequent annual resolutions on 'The rule of law at the national and international levels').

armed assault on the law of treaties'.[15] Certain *causes célèbres* before the Council, such as resolutions 1373 (2001) (counter-terrorism),[16] 1422 (2002) (International Criminal Court),[17] and 1540 (2004) (counter-proliferation),[18] have led to somewhat less colourful criticisms. But even these should not be taken at face value. Rather than being based on considered opinions of the law, such criticisms mostly reflect strong political feelings, for example, in the case of resolution 1422 (2002) exasperation at the then US Administration's attitude towards the International Criminal Court.[19]

3. Obligations Set Forth in Treaties

The reality is otherwise; just as treaties are an important tool of international relations, so the Security Council is an important actor in relation to treaties. The latest Security Council resolution on Iran, resolution 1929 (2010), adopted on 9 June 2010 with 12 votes in favour, two against (Brazil, Turkey), and one abstention (Lebanon), illustrates this well. In addition to broadening and strengthening the implementation of sanctions targeted at Iran's nuclear programme, the resolution contains a number of provisions directed specifically at Iran's treaty relations (provisions which do not seem to have been controversial, unlike the strengthened sanctions). In the preamble, the Security Council reaffirmed 'its commitment to the Treaty on the Non-Proliferation of Nuclear Weapons, the need for all States Party to that Treaty to comply fully with all their obligations . . .'.[20]

The Council then offered an interpretation of Iran's Safeguards Agreement, when it emphasized that in accordance with Article 39 thereof: 'Code 3.1 cannot be modified nor suspended unilaterally and that the IAEA's right to verify design information provided to it is a continuing right, which is not dependent on the stage of construction of, or the presence of nuclear material at, a facility'.[21]

[15] S/PV.4568 (Resumption I), 10 July 2002, at 14 (cited in S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 65).

[16] Seen as the highpoint of Council 'legislation'.

[17] Followed, one year later, by resolution 1487 (2003) of 12 June 2003. The United States refrained from presenting a third resolution in 2004. Even more controversial were grants of immunity not based on Article 16 of the Rome Statute: see resolutions 1497 (2003) and 1593 (2005). See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 325–34 (with further references).

[18] See D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009) at 238–43.

[19] The citations given by S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 65–66, illustrate this all too clearly, as does the letter from Brazil, Canada, New Zealand, and South Africa, challenging the Council's authority to interpret and change the meaning of treaties (S/2002/754).

[20] Security Council resolution 1929 (2010), second preambular paragraph.

[21] Ibid., tenth preambular paragraph.

In support of the operative provisions concerning inspections at sea, the Council recalled 'that the law of the sea, as reflected in the United Nations Convention on the Law of the Sea (1982), sets out the legal framework applicable to ocean activities'.[22] And it called for 'the ratification of the Comprehensive Nuclear-Test-Ban Treaty by Iran at an early date'.[23]

From the point of view of the law of treaties, the most interesting provision of resolution 1929 (2010) is paragraph 5, in which the Council:

> *[d]ecides* that Iran shall without delay comply fully and without qualification with its IAEA Safeguards Agreement, including through the application of modified Code 3.1 of the Subsidiary Arrangement to its Safeguards Agreement, *calls upon* Iran to act strictly in accordance with the provisions of the Additional Protocol to its IAEA Safeguards Agreement that it signed on 18 December 2003, *calls upon* Iran to ratify promptly the Additional Protocol, and *reaffirms* that, in accordance with Articles 24 and 39 of Iran's Safeguards Agreement, Iran's Safeguards Agreement and its Subsidiary Arrangement, including modified Code 3.1, cannot be amended or changed unilaterally by Iran, and *notes* that there is no mechanism in the Agreement for the suspension of any of the provisions in the Subsidiary Arrangement.

This operative paragraph illustrates an elementary but crucial distinction, observed in the practice of the Council, as regards obligations set forth in a treaty.[24] On the one hand, the obligations set forth in a treaty are binding on the parties to the treaty by virtue of their participation in the treaty; on the other hand, the obligations set forth in a treaty may be binding on states and others for some reason outside the treaty,[25] including because they are made so by mandatory action of the Security Council. In paragraph 5 of resolution 1929 (2010), the Council called upon Iran to act strictly in accordance with *the provisions of* the Additional Protocol to its Safeguards Agreement, which it had signed but not yet ratified. In doing so, the Council did not imply that Iran was already bound by the Additional Protocol as a matter of treaty law, still less did it 'make' Iran a party to the Additional Protocol.

[22] Ibid., nineteenth preambular paragraph. [23] Ibid., twentieth preambular paragraph.

[24] For a similar analysis, see S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 97–108.

[25] A similar point could be made about the 'separate existence' of rules set forth in a treaty and the corresponding rules of customary international law: see ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports* (1986) 14, at 95, para. 178. See also provisions such as Article 3(b) of the Vienna Convention on the Law of Treaties of 1969, which provides that the fact that the Convention does not apply to certain international agreements 'shall not affect [...] the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention'. And see the guidelines in cluster 4.4 (effects of a reservation on rights and obligations outside of the treaty) of the Guide to Practice on Reservations to Treaties, provisionally adopted by the International Law Commission in 2010 (Report of the International Law Commission for 2010, A/65/10, XX–XX, at 170–5).

An earlier example of a similar approach may be found in Security Council resolution 1757 (2007) of 30 May 2007 concerning the Special Tribunal for Lebanon. In that resolution, the Council decided that '[t]he provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007'. The 'annexed document' was the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, which had been signed by the government of Lebanon and the United Nations, but which had not entered into force in accordance with its terms because the Lebanese government had been unable to notify the United Nations that the legal requirements for its entry into force had been complied with. Once again, we see the Council referring to *the provisions of* a treaty, rather than the treaty itself.[26]

In its resolution 1593 (2005) of 31 March 2005, referring 'the situation in Darfur since 1 July 2002' to the Prosecutor of the International Criminal Court, the Security Council decided 'that the Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'. Sudan had signed but not ratified the Rome Statute, but the Council nevertheless imposed upon it obligations to cooperate at least as comprehensive as those it would have if it had been a party.

Perhaps the clearest case of the distinction is to be found in resolution 1718 (2006) of 14 October 2006, in which, following the claim to have conducted a nuclear test made by the Democratic People's Republic of Korea (DPRK), the Council demanded that the DPRK 'immediately retract its announcement of withdrawal' from the Non-Proliferation Treaty (NPT) and that it 'return to the Treaty'; and at the same time decided that 'the DPRK [...] shall act strictly in accordance with the obligations applicable to parties under the Treaty on the Non-Proliferation of Nuclear Weapons and the terms and conditions of its International Atomic Energy Agency (IAEA) Safeguards Agreement', which agreement had also ceased to be in force assuming the DPRK's withdrawal from the NPT was effective.

An example where the Council imposed upon states the terms of a treaty, this time without any mention the treaty itself, is resolution 1373 (2001) of 28 September 2001. Paragraph 1 required all states to comply with provisions corresponding to those in the International Convention for the Suppression of Terrorist Financing of 1999.[27]

[26] B. Fassbender, 'Reflections on the International Legality of the Special Tribunal for Lebanon', 5 *Journal of International Criminal Justice* (2007) 1091–105; 'Current Legal Developments, The Special Tribunal for Lebanon' (with articles by F. Mégret, W.A. Schabas, and B. Elberling), 21 *Leiden J Int'l L* (2008) 483–538; S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 105.

[27] At the time of the adoption of Security Council resolution 1373 (2001), the 1999 Convention had not entered into force. It did so only on 10 April 2002. As of 21 November 2010, it had 173 parties. Security Council resolution 1373 (2001) was to an extent controversial, especially

4. Particular Aspects of Security Council Treaty Action

4.1. The Security Council's role in relation to the conclusion and entry into force of treaties

The negotiation and entry into force of treaties can be slow. The principle of 'free consent'[28] means that key states may stand aside. For these and other reasons, it is sometimes suggested that treaties are not a satisfactory basis for solving pressing problems. But these fears can also be exaggerated, as was shown, for example, in the case of the relatively rapid negotiation and entry into force of the Rome Statute of the International Criminal Court. And treaties undoubtedly have advantages over other methods in terms of clarity and legitimacy.

The perceived need for speed has led some to look for ways of improving the multilateral treaty-making process,[29] and even to seek other ways of developing rules of international law and imposing obligations on states. For some, acting through the Security Council has seemed an attractive option, at least in certain fields such as counter-terrorism, non-proliferation, and piracy. The then Legal Adviser to the State Department expressed it well:

> [T]he Council has invoked its Chapter VII authorities to create specific legal frameworks to address threats to international peace and security. While these frameworks typically incorporate specialized bodies of law as part of the legal foundation of the Council's response, there are cases in which the Council has adapted these bodies of international law in order to meet the threat. [...] Council action can have the effect of tailoring a specialized body of law to better work in a specific set of circumstances.[30]

The Security Council, like any other political organ, may encourage the negotiation of a treaty. This it did, for example, in resolution 635 (1989) of 14 June 1989, which was a joint Czechoslovak–United Kingdom initiative following the Lockerbie incident. The Council urged the International Civil Aviation Organization 'to intensify its work [...] on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection'.[31]

In another field, the Council has requested states to enter into Status of Forces/Mission Agreements (SOFAs, SOMAs), and has sometimes required them to

among some authors; it was seen as a primary example of the Council asserting a 'legislative' function.

[28] 1969 Vienna Convention on the Law of Treaties, preamble.

[29] See the activity of the United Nations General Assembly and the International Law Commission in 1978–79 on the item 'Review of the multilateral treaty-making process': General Assembly resolution 32/48 of 8 December 1977, *YILC* (1979), vol. II(2), 187–8.

[30] Cited by S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 67. See also M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Post conflict Issues after the Cold War* (Washington D.C.: United States Institute of Peace Press, 2006).

[31] The Convention on the Marking of Plastic Explosives for Detection was opened for signature on 1 March 1991, and entered into force on 21 June 1998.

apply the UN Model Agreement provisionally, pending the conclusion of such agreements.[32]

The question is sometimes asked whether the Security Council can impose an obligation upon a state to become party to a treaty—or even make a state party to a treaty. This has remained a largely theoretical question, since—perhaps out of respect for the principle of consent that underlies the law of treaties—the Council has refrained from doing this.[33] But it is difficult to see that it would necessarily be acting *ultra vires* if it did. The Council has frequently called upon states generally,[34] and in some cases individually,[35] to become or consider becoming parties to particular treaties, for example, the counter-terrorism conventions. But it has avoided imposing an obligation to do so, probably for policy reasons rather than out of conviction that it lacked the power. Whether this is because '[t]he Council can impose obligations, it cannot impose treaties'[36] remains an open question. In any event, the Council has not shied away from imposing the obligations set forth in a treaty.

4.2 Breach or threatened breach of treaty as a threat to international peace and security, and the enforcement of treaty obligations as a measure to be taken by the Security Council

The importance of the performance of treaties in good faith (*pacta sunt servanda*) for the maintenance of international peace and security hardly needs restating.[37] It is reflected in the preambles to the United Nations Charter ('respect for the obligations arising from treaties') and the Vienna Convention itself. It is, of course, those treaties that are most sensitive for states that are most likely to be relevant for the maintenance of international peace and security, such as

[32] See, for example, Security Council resolutions 1626 (2005) of 19 September 2005, para. 9 (Liberia); 1671 (2006) of 25 April 2006, para. 4 (DRC); 1769 (2007) of 31 July 2007, para.15(b) (Sudan).

[33] It is misleading to suggest that the Special Court for Lebanon was 'established by Agreement whose entry into force was imposed by a Chapter VII resolution': D. Shraga, 'Mixed or internationalized courts', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 424.

[34] As in its many resolutions in the field of terrorism: see, for example, resolution 1377 (2001), annex (Ministerial Declaration on the Global Effort to Combat Terrorism), in which the Council 'called on all states to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism'. More generally, see the resolutions listed by S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 96.

[35] In resolution 687 (1991), para. 7, the Council invited Iraq to ratify the Biological Weapons Convention of 1972; in resolution 1029 (1995), preamble, the Council called for Iran to ratify the Additional Protocol to its Safeguards Agreement at an early date.

[36] S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 98.

[37] See the contributions by A. Vermeer-Künzli, P. Escarameia, and G. Hafner, in G. Nolte (ed.), *Peace through International Law: The Role of the International Law Commission*, *supra* note 1, 67–121.

boundary treaties and those in the fields of arms control and non-proliferation, immunities, and international criminal law.

Ensuring compliance with treaties, and their enforcement, are not matters dealt with in the Vienna Convention, except peripherally in article 60 (Termination as a consequence of breach) and article 73 (State responsibility). The Security Council naturally has an important role (though so far more potential than actual) in securing compliance with treaties, and where necessary their enforcement. This is so not only in those cases, largely in the arms control and non-proliferation fields, where the Council's role is expressly or implicitly recognized in the treaty.[38]

4.3 Article 103 of the Charter

Article 103 of the Charter has a direct bearing on treaty obligations. It 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.'

In recent years, this key provision of the Charter has assumed increasing importance, and has been much discussed in the courts[39] and in the literature. It is not intended, on this occasion, to re-examine in detail the many interesting issues to which this provision gives rise. My own conclusions were set out, a few years ago, as follows:[40]

> 51. [...] Overall, it may be said that [Article 103] should not be interpreted narrowly if it is to have the effect intended by the drafters of the Charter [...].
>
> 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[41] is impeccable. Any other position,

[38] For example, Treaty on the Non-Proliferation of Nuclear Weapons, Article 10; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, Article VI; Chemical Weapons Convention 1993, Article XII(4); Comprehensive Test Ban Treaty 1996, Article V(4). See also Convention on the Prevention and Punishment of the Crime of Genocide, Article VIII.

[39] See, for example, House of Lords, *R (on the Application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; Grand Chamber of the European Court of Human Rights, *Al-Jedda v United Kingdom*, hearing of 9 June 2010. See also M. Wood, 'Detention During International Military Operations: Article 103 of the UN Charter and the *Al-Jedda* Case', 47 *Military Law and the Law of War Review* (2008), vol. 1-2.

[40] Hersch Lauterpacht Memorial Lectures 2006, 'The UN Security Council and International Law', First Lecture ('The Legal Framework of the Security Council'). The lectures are available on the website of the Lauterpacht Centre for International Law, University of Cambridge. An expanded version of the lectures will be published by Cambridge University Press as a book within the *Hersch Lauterpacht Memorial Lectures* series.

[41] *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, A/CN.4/L.682 and Add.1, reproduced in A. Pronto and M. Wood, *The International Law Commission 1999–2009: Volume IV* (Oxford: Oxford University Press, 2010) 626–814.

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 mandatory resolutions of the Security Council, since by virtue of Article 25 (and Article 48) such obligations are 'obligations [. . .] under the present Charter'. *Lockerbie* is authority for this, and has been followed in the European and English cases [. . .].

54. *Third*, in order to be effective Article 103 must apply equally to action taken under authorizations of the Council. This question was canvassed at length in the *Al-Jedda* case [. . .].

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 international law subsist in parallel with obligations under treaties [. . .].

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 [. . .].

The effect of Article 103 is sometimes described as 'adapting' treaties, sometimes as justifying a breach of treaty. This distinction, drawn by Talmon,[42] seems somewhat unreal. Talmon gives as examples of 'adaptation' the resolutions on Lockerbie, those in 2003–2004 on Iraq concerning the Hague Regulations and the Fourth Geneva Convention, those on the International Criminal Court, and on the United Nations Convention on the Law of the Sea. As examples of resolutions justifying a breach he cites resolution 820 (1993) of 17 April 1993, which requires states to prevent Serbian shipping on the Danube notwithstanding the Danube Convention, and resolution 1333 (2000) of 19 December 2000 concerning Afghanistan, under which all states were required to deny certain aircraft landing, taking off, or overflight.

5. Conclusion

As suggested above, those who would 'demonize' the Security Council have, among other things, picked on what they see as the Council's disregard for both the law of treaties and treaty law. It is hoped that enough has been said to

[42] S. Talmon, 'Security Council Treaty Action', *supra* note 12, at 86–9.

show that such accusations are largely unfounded. The Council has shown self-restraint, as indeed it should, in its approach to treaties, only 'interfering' to the extent necessary for the maintenance of international peace and security (as in the fields of terrorism and non-proliferation). And most such 'interference' can be readily explained and analysed by having regard to the distinction between Council action that affects treaty obligations as such (as is the case under Article 103, though even then only to a limited extent), and Council action that imposes obligations set forth in a treaty (*the provisions of* a treaty), but not the treaty itself. In reality, 'Security Council treaty action' can be a useful tool in the challenging task of maintaining and restoring international peace and security, and should not be seen as an attack on the law.