The "Supremacy Clause" of Article 103 of the UN Charter and European *Ordre Public*

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Abstract

This article examines the "supremacy clause" of Article 103 of the United Nations (UN) Charter that forces the obligations under the Charter above other treaty duties, consequently backing the UN`s target to universality and preponderance among other international legal regimes. However, the author argues that regional international organizations have the equal right to claim the autonomy of their *ordre public*. Through the scrutiny of the relevant cases of the European Court of Human Rights (ECtHR), it is affirmed in this paper that the European public order implicitly recognizes the "supremacy clause" of article 103 that virtually proclaims the hierarchy of the UN among international organizations. At the same time, it is asserted that article 103 does not intentionally allow the UN to set aside other treaty obligations of its member states and in particular, in the area of human rights. In this regard, the "harmonious interpretation" which was chosen by the ECtHR in the analyzed cases is evaluated as a wise compromise that aims to retain the autonomous nature of different legal regimes from one side, as well as to guard a unique historical mission of the UN that is primarily responsible for maintenance of international peace and security, from another.

Keywords: supramacy clause, UN Charter, ECtHR, regime interaction, human rights

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Extended Summary

This article examines the "supremacy clause" of Article 103 of the United Nations (UN) Charter that forces the obligations under the Charter above other treaty duties, consequently backing the UN`s target to universality and preponderance among other international legal regimes. The UN`s decisive purport to primacy finds its reflection in article 1(4) of the Charter, which provides that the organization has an aim "to be a center for harmonizing the actions of nations in the attainment of these common ends". This important goal derived from the historical background of the UN which was established by victorious powers as an answer to the mass atrocities committed by the Nazis during the Second World War.

Moreover, article 103 of the Charter provides that in the event of a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail over competing norms. In fact, this "supremacy clause" boosts the obligations under the UN Charter above other treaty duties and consequently, backs the UN`s purport to universality and dominance among other international organizations.

The main research question in this article is whether the "supremacy clause" of article 103 virtually proclaims hierarchy among international organizations and allows the United Nations to set aside other treaty obligations of its member states. The author analyzes this issue in the framework of the human rights obligations of the UN member states under the European Convention of Human Rights (ECHR) through the scrutiny of the relevant cases of the European Court of Human Rights (ECtHR), such as *Al Jedda*, *Al Dulimi* and *Nada*.

Consequently, this article also covers the issue of regime interaction between the universal regime that has been created under the UN "umbrella" and the regional international human rights mechanism –ECtHR.

Hence, the author argues that regional international organizations have the equal right to claim the autonomy of their *ordre public*. *Through the* detailed analysis of the mentioned cases of the ECtHR, it is affirmed in this paper that the European public order implicitly recognizes the

"supremacy clause" of article 103 that virtually proclaims the hierarchy of the UN among international organizations. At the same time, it is asserted that article 103 does not intentionally allow the UN to set aside other treaty obligations of its member states and in particular, in the area of human rights. In this regard, the "harmonious interpretation" which was chosen by the ECtHR in the analyzed cases is evaluated as a wise compromise that aims to retain the autonomous nature of different legal regimes from one side, as well as to guard a unique historical mission of the UN that is primarily responsible for maintenance of international peace and security, from another.

Furthermore, the author conclude that even the absence of a formal hierarchical relationship between Charter obligations and obligations stemming from other international treaties does not imply that United Nations law is equal to any other international treaty or subordinated to the primacy of the ECHR or any other regional "constitutional" mechanism. Otherwise, the relevance of the UN, in particular the Security Council, as the main body responsible for maintaining international peace and security, could be undermined.

Introduction

International law is a state-centric legal system, regulating relations first and foremost between states. Thus, in accordance with the classical international stance, states are the major subjects of international law with full legal personality. Consequently, other subjects of international law have international legal personality through the conferral and/or recognition by states as plenary subjects of international law.

Along with the primacy of states as cornerstone of international legal order, international organizations have an increasingly important role in international political dialogue. Being a comparatively recent phenomenon, international organizations have their own international legal personality, i.e. they are intitled by states to hold rights and bear obligations under international law. The fact that states set up international organizations and bestow them with rights and obligations in order to perform certain functions, allows to define them as secondary subjects of international law with a derivative

international personality[1]. It is worth to mention that, this legal personality implies that international organizations possess international rights and bear international duties independently from their member states[2].

Despite the fact that international organizations differ in their structures and functions, they significantly contribute to the cooperation on a wide range of international issues, authorizing states to supply them with the necessary expertise and resources to settle problems of global concern through a permanent forum for international dialogue[3]. Based on this commonly accepted understanding, the International Law Commission (ILC) attempted to provide a single definition of international organizations in article 2(a) of the 2011 Articles on the Responsibility of International Organizations (ARIO) as follows:

"international organization` means an organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to States, other entities."[4]

Yet ILC which used common international customary law principles in setting out the definition of international organizations was silent about their hierarchy, and consequently about possible norm conflict and regime interaction issues. Moreover, there is not any single international document that sheds light on these issues. However, the Charter of the United Nations (UN) might be evaluated as an exception.

It goes without saying that the United Nations is the world`s pre-eminent international universal organization with broad purposes, among which the primary one is the maintenance of international peace and security.[5]

The UN`s decisive purport to primacy finds its reflection in article 1(4) of the Charter, which provides that the organization has an aim "to be a center for harmonizing the actions of nations in the attainment of these

1 Gleider Hernandez, *International Law*, Oxford University Press, 2019, p. 131, 136.
2 Hersch Lauterpacht, *The development of the law of international organizations by the decisions of international tribunals,* 52 Recueil des Cours, 1976, p. 377, 407.
3 Hernandez, p.159.
4 ILC Articles on the Responsibility of International Organizations` in Report on the Work of its 63rd Session, UN Doc A/66/10 Chap V (9 December 2011).
5 Charter of the United Nations, 1945, URL: https://www.un.org/en/about-us/uncharter (access: 12.04.2023).

common ends".[6] This important goal derived from the historical background of the UN which was established by victorious powers as an answer to the mass atrocities committed by the Nazis during the Second World War. In fact, the world community came to an understanding that threats to international peace and security could be prevented and resolved only through common efforts. Thus, it was decided that "saving succeeding generations from the scourge of war, reaffirming faith in fundamental human rights, in the dignity and worth of the human person…"[7] are bestowed to the United Nations, the main universal intergovernmental platform created for the maintenance of international peace and security.

Besides the fact that article 1 of the UN Charter contains purposes of the Organization with explicit reference to the universality element, this article is not the only and even main avenue for the so-called "supremacy" role of the UN. Thus, article 103 of the Charter provides that in the event of a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail over competing norms. In fact, this "supremacy clause" boosts the obligations under the UN Charter above other treaty duties and consequently backs the UN`s purport to universality and dominance among other international organizations.[8]

As Liivoja mentions, "treaty law itself recognizes the exceptional status of the UN Charter. Both 1969 and 1986 Vienna Conventions on the Law of Treaties refer to the Charter when codifying a number of rules dealing with successive treaties on the same subject matter"[9]. Thus, in accordance with article 30(1) of the 1969 Vienna Convention on the Law of Treaties, "*Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be*

6 Ibid.

7 Ibid.

8 Hernandez, p.153; Rain Liivoja, "The scope of the supremacy clause of the United Nations Charter", *The International and Comparative Law Quarterly*, Vol. 57, 2008, 583-612; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Frederick A. Praeger, 1950; Robert Kolb, "Does Article 103 of the Charter of the United Nations apply only to decisions or also to authorizations adopted by the Security Council?" *Zeitschrift für auslandisches öffentliches Recht and Völkerrecht*, Vol. 64, no 1, 2004, p. 21-35.

9 Liivoja, p. 591.

determined in accordance with the following paragraphs"[10]. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, in its turn, also proclaims the superiority of the UN Charter "*in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty*."[11]

Furthermore, article 103 has not only successfully integrated into general treaty law, the fact that once again proved the supremacy of the UN Charter in treaty relations, but also has been mentioned in Charters establishing other international intergovernmental organizations, such as the Organization of American States, NATO and GATT/WTO.[12]

Thus, the question is whether the "supremacy clause" of article 103 virtually proclaims hierarchy among international organizations and allows the United Nations to set aside other treaty obligations of its member states. The present author will analyze this issue in the framework of the human rights obligations of the UN member states under the European Convention of Human Rights (ECHR) through the scrutiny of the relevant cases of the European Court of Human Rights (ECtHR). Consequently, this article will also cover the issue of regime interaction between the universal regime that has been created under the UN "umbrella" and regional international organizations with their own *ordre public,* in particular in the area of human rights.

Before conducting research in this scope, it is important to figure out which type of decisions of the UN cover the obligations of its member states under article 103, as well as to clarify which UN bodies are empowered to set aside other treaty obligations of member states.

10 Vienna Convention on the Law of Treaties 1969, URL: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (access: 12.04.2023).

11 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, URL: https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf (access 28.12.2022).

12 Liivoja, p. 591-592, 605.

1. Scope of the "supremacy clause": to which type of decisions of the UN bodies article 103 applies?

The main purpose of article 103 of the UN Charter is to provide the efficiency of the UN in the proper execution of its main goal; the maintenance of international peace and security.[13] From this point of view, the "supremacy clause" in article 103 has a potential to be widely assessed as a peremptory (*jus cogens*) norm of international law. The opposite view suggests that article 103 does not constitute the peremptory norm, moreover, it cannot proclaim the superiority of Charter obligations over the *jus cogens* norms (hierarchy of norms) and thus cannot deny the primacy of peremptory (*jus cogens*) norms[14]; some other authors insist that article 103 should be evaluated as a conflict of norms, rather than the hierarchy.[15]

The present author shares the view that the superiority of the Charter's obligations does not revoke the fact that the Charter is an international treaty that is limited by the *jus cogens* norms.[16] Thus, *jus cogens* norms from which no derogation is credible, cannot be rejected by decisions of the UN Security Council.

Another controversial question in the scope of the "supremacy clause" is whether the provision of article 103 covers not only treaty but also customary international law obligations which still has remained unanswered both in judicial practice and legal doctrine.

The question to be asked in this section for the purpose of defining the precise scope of the questioned article is to which type of decisions of the UN bodies the "supremacy clause" could be applied.

Thus, some authors argue that only decisions of the UN Security Council adopted within the framework of the Chapter VII (Action with

13 Kolb, p. 21.

14 Geoffrey Watson, "Constitutionalism, Judicial Review, and the World Court", *Harvard International Law Journal 1*, 1993, p. 521, 522; Jordan Paust, "Peacemaking and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions", *Southern Illinois University*, 1994, p. 131-151.

15 Antonios Tzanakopulos, "Collective Security and Human Rights" in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights*, Oxford University Press, 2012, p. 66.

16 Jordan Paust, p.131-151, 139.

Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression) of the UN Charter are covered by the "supremacy clause".[17] Considering article 103 as "a highly exceptional rule", these scholars except recommendations and other non-binding pronouncements (so-called "soft law") from the scope of this article.

Taking into account the fact that the UN Security Council is the main international body that has been created in the ruins of World War II and aimed to save succeeding generations from the scourge of war and hence, through its Security Council is responsible for the maintenance of international peace and security, some other authors suggest that the "supremacy clause" of the article 103 also applies to authorizations and recommendations of the Security Council.[18]

The present author also shares this point of view, implying authorization of the UN member states to use economic sanctions or military force against a state which violates international law and thus, poses threat to international peace and security. Such a practice exists in the history of the Security Council under articles 41 and 42 of the UN Charter. In terms of historical precedent, the application of coercive measures against Iraq can serve as an illustration of the collective answer to the breach of international peace and security, and thus, a violation of international law. When Iraq attacked Kuwait in 1990, the Security Council adopted a resolution 660 (1990) that determined the fact of a breach of international peace and security (article 39 of the Charter), and further recommended the immediate cessation of aggression (article 40 of the Charter)[19]. In the following resolution 661 (1990) the Security Council noted Iraq's failure to comply with the previous resolution and determined measures to restore the authority of the legitimate government in Kuwait. What followed after the adoption of this resolution was the

17 Rudolf Bernhardt, Article 103, in B.Simma (ed.), *Charter of the United Nations - A Commentary*, 2nd edition, Vol.2, Oxford, 2002; Richard Lauwaars, "The Interrelationship between United Nations Law and the Law of other International Organizations", *Michigan Law Review*, Vol.82, 1984.

18 Vera Gowland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", *EJIL*, Vol.11, 2000; See: Kolb, "Does Article 103 of the Charter of the United Nations apply only to decisions or also to authorizations adopted by the Security Council?".

19 UN Security Council Resolution 660 (1990), URL: http://unscr.com/en/resolutions/660 (access: 12.04.2023).

cessation of all economic relations and the refusal to recognize any occupational government.[20] Resolution 670 (1990), which is of the sole interest in this article, determined that all legal acts by Iraq that contradicted the Security Council resolutions, as well as Articles 25 or 48 of the UN Charter, are null and void. Referring to the "supremacy clause" of article 103, the Council obliged all states regardless of their previous agreements to terminate aviation ties with Iraq.[21] The culmination of the Security Council's collective efforts in the Iraq-Kuwait case has been reached through the military operation of "member states cooperating with Kuwait`s legitimate government" that used "all necessary means" to restore international peace and security in accordance with the resolution 678 (1990) of the Security Council.[22]

Thus, it can be claimed that the collective security mechanism as an element of multilateralism purports that both decisions and authorizations under Chapter VII give a floor to the UN member states to act on behalf of the Organization and to some extent perform its powers.

At the same time there is a fine line, crossing which it is fraught to nullify not merely the legal force of article 103, but also to denounce the entire system of international security. Paradoxically, yet another Iraqi case confirms the above-expressed fear. In 2003 when the United States–led coalition invaded Iraq, the main actors of this campaign United States and the United Kingdom, the permanent members of the UN Security Council, use the "umbrella" of the Council to legitimate to some extent their unilateral action. Thus, in 2002 the Security Council adopted unanimously resolution 1441 that recognized the threat to international peace and security posed by Iraq`s non-compliance with previous resolutions regarding the non-proliferation of weapons of mass destruction and long-range missiles, recalled disarmament obligations of Iraq, as well as required Iraq to

20 UN Security Council Resolution 661 (1990), URL: http://unscr.com/en/resolutions/661 (access: 12.04.2023).

21 UN Security Council Resolution 670 (1990), URL: https://www.refworld.org/docid/3b00f16e10.html (access: 12.04.2023).

22 United Nations Iraq-Kuwait Observation Mission, URL: https://peacekeeping.un.org/sites/default/files/past/unikom/background.html (access: 12.04.2023);
UN Security Council Resolution 678 (1990), URL: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/28/PDF/NR057528.pdf?OpenElement (access: 12.04.2023).

provide United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) access to all required places for inspections.[23] In fact, this resolution did not contain any provision regarding the use of military force. Moreover, the Ambassadors of the US and UK to the UN endorsed the fact this resolution did not include any "hidden triggers" and there was no "automaticity" with respect to resorting to military force. They also specifically emphasized that "if there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in paragraph 12 [of the resolution].[24] Since there was no further resolution that authorized member states to use force, the 2003 military operation in Iraq has been made unilaterally, i.e. without the approval of the Security Council. Noteworthy, the UN Secretary-General Kofi Annan named this operation "an illegal act that contravened the UN Charter" and mentioned that "there should have been a second UN resolution following Iraq's failure to comply over weapons inspections … and it should have been up to the Security Council to approve or determine the consequences".[25]

Against this background, it can be said that Article 103 applies by extension to authorization of the UN Security Council under articles 41 and 42 of the Charter due to their "very subject matter" directly linked with the goal of maintenance or restoration of international peace and security.[26] In this respect, Conforti goes further, suggesting to identify article 103 as a customary rule.[27]

Furthermore, Kolb reminds one of the Reports of the International Law Commission (ILC) which worked on the Draft Articles on Responsibility of States for International Wrongful Acts (ARSIWA), which suggested that "sanctions applied in conformity with the provisions of the Charter

23 UN Security Council Resolution 1441, 2002, URL: https://www.un.org/depts/unmovic/documents/1441.pdf (access: 12.04.2023).

24 UN Security Council Verbatim Report 4644, 8 November, 2002, URL: https://www.un.org/depts/unmovic/documents/1441.pdf (access: 12.04.2023).

25 Iraq war illegal, says Annan, BBC News, 16 September, 2004, URL: http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (access: 12.04.2023).

26 Kolb, p. 25.

27 Benedetto Conforti, "Consistency among Treaty Obligations" in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, 2011, p. 189.

would certainly not be wrongful in the legal system of the UN, even though they might conflict with other treaty obligations incumbent upon the State applying them… This view would, moreover, seem 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 measure is merely recommended".[28]

Another justification for the extension of provisions of article 103 was provided by Bernhardt who underlines the so-called "constitutional dimension" of the UN Charter and stresses: "article 103 must be seen in connection with article 25 and with the character of the Charter as the basic document and "constitution" of the international community"[29].

In this respect, it could be argued that article 25 of the UN Charter which endowed the member states with the obligation "to accept and carry out the decisions of the Security Council in accordance with the Charter" [30] allows to make a conclusion that "supremacy clause" of the article 103 refers not only to decisions, authorizations and recommendations of the Security Council under the Chapter VII but also under Chapter VI (Pacific Settlement of Disputes).

This understanding is based on the main aim and historical mission of the UN which performs through the competence of the UN Security Council – maintenance of international peace and security, which represents an international public order (*ordre public*) commonly accepted by the international community. At the same time, it is fairly warned by Liivoja that "when interpreting Article 103, one should be particularly careful not to put too much emphasis on the idea of the Charter as a "world constitution". The problem is that, in such constitutional interpretations, Article 103 seems to be one of the main indicators of the constitutional character of the Charter".[31]

The analysis regarding the UN bodies whose decisions are covered by the "supremacy clause" of article 103, might be continued with the

28 Kolb, p. 26.
29 Bernhardt, para 21.
30 Charter of the United Nations, 1945, URL: https://www.un.org/en/about-us/uncharter (access: 12.04.2023).
31 Liivoja, p. 612.

assumption that not only the Security Council but also General Assembly resolutions fall within the scope of this article. Hence, there is a quite common practice, when the Security Council is blocked by the veto right of the permanent member states and consequently, as a "victim" of the geopolitical interests of the latter, paralyzed to perform its functions. For these situations, Kolb reminds that the UN General Assembly adopted the Resolution 377(V) – "Uniting for Peace" that let it to recommend the use of military force by the UN members, and in fact, exempt them from legal liabilities under other international treaties due to the fact that they perform collective measures under the UN "umbrella"[32]. Thus, against this background, it can be suggested that not all resolutions of the General Assembly, but only resolutions adopted in connection with the historical mission of the UN and directly linked to the collective security mechanism could be covered by the "supremacy clause" of article 103.

While recognizing the historical destiny of the UN expressed in a multilateral approach towards the maintenance of international peace and security, it may be put forward that Article 103 passes "the test for universality" inherent in the very idea of the UN. However, the question of hierarchy between the UN and other international organizations, as well as the issues of possible norm conflict and regime interaction have been left open.

2. The "supremacy clause" of article 103 in human rights context: the case studies of ECtHR

The previous observations indicate that the exceptional role of the UN provides the superiority of the Charter obligations namely through the provisions of article 103. However, judicial practice and legal doctrine are dazzled with the allegation that other legal orders could claim their independence and in particular, in the human rights context.

As Istrefi puts it, "while judicial bodies worldwide have been struggling to balance human rights and subordination to the UN supremacy,

32 Kolb, p. 23; The Report of the Collective Measures Committee, General Assembly Official Records: sixth edition, Supplement 13 (A/1891), NY, 1951, URL: https://digitallibrary.un.org/record/704433 (access: 12.04.2023),

this has been particularly sensitive for European courts where protection of fundamental rights is of paramount importance in the hierarchy of norms".[33]

In this section, the present author tries to shed light on the "supremacy clause" of article 103 within the regime interaction and in the human rights context through the analysis of the respective cases of the European Court of Human Rights (ECtHR).

The first case which represents the sole interest in this framework is *Al-Jedda v. United Kingdom*. Thus, this landmark ECtHR`s judgment addressed the list of important issues such as dual attribution of conduct (to states and international organizations), conflict of norms in international law, regime interaction (UN and ECtHR), and finally, the possibility of UN Security Council resolutions to set aside human rights obligations of states (under other legal regime) in accordance with article 103 of the Charter.[34]

Before moving on with the analysis of this case in regard to the "supremacy clause" of article 103 in the human rights context, a short introduction and main outcomes of the case are required.

The applicant in *Al-Jedda* made a complaint that he had been illegally detained by British troops in Iraq in violation of article 5[35] of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[36] The UK government denied the claim and submitted that "he was detained at a time when United Kingdom forces were operating as part of a Multinational Force authorized by the United Nations Security Council (UNSCR 1511) and subject to the ultimate authority of the United Nations".[37]

The ECtHR found the UK responsible for the actions of its troops in Iraq:

33 Kushtrim Istrefi, "The Application of Article 103 of the United Nations Charter in the European Courts: the Quest for Regime Compatibility on Fundamental Rights", *European Journal of Legal Studies*, Vol.6, Issue 2, 2012, p. 83.

34 Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", *EJIL*, Vol.23, No 1, 2012, p. 122.

35 Right to Liberty and Security (author`s note).

36 Application no. 27021/08, 7 July 2011 (hereinafter Al-Jedda). URL: https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22887954%22],%22itemid%22:[%22001-105612%22]} (access: 12.04.2023)

37 Ibid, para 64.

"The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multinational Force had been present in Iraq since the invasion and had been recognized already in Resolution 1483, which welcomed the willingness of member States to contribute personnel. The unified command structure over the Force, established from the start of the invasion by the United States of America and the United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States of America and the United Kingdom, through the Coalition Provisional Authority (CPA) which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States of America was requested to report periodically to the Security Council about the activities of the Multinational Force, the United Nations did not, thereby, assume any degree of control over either the Force or any other of the executive functions of the CPA".[38]

As it could be observed, the ECtHR used an "effective control test" famously enshrined in the Draft Articles on the Responsibility of International Organizations (DARIO) prepared by the International Law Commission (ILC), and fixed as follows:

"The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."[39]

Thus, testing the conduct of the UK troops in the spirit of DARIO, the ECtHR declared that the UN Security Council had neither effective control nor ultimate authority over the actions of British troops within the MNF, and thus applicant`s illegal detention was not attributable to the UN, but to the UK.[40]

38 Ibid, para 80.

39 Draft Articles on the Responsibility of International Organizations (DARIO), URL: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (access: 12.04.2023)

40 Marko Milanovic, "European Court Decides Al-Skeini and Al-Jedda", *EJIL*, URL: https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/ (access: 12.04.2023).

Now, we are turning to the main question asked in this section, namely whether the UN Security Council resolution prevailed over ECHR`s obligations of member states by virtue of article 103 of the UN Charter.

As has been already mentioned, the UK government denied the applicant`s claim, considering the fact that preventive detention was authorized by the UN Security Council in accordance with Resolution 1546 which prevailed over article 5 of the ECHR.

Guided by the historical mission of the UN which was marked by the present author in the previous section of this article, ECtHR answered to this justification, as follows:

> *"In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations [set out in paragraph 76 above]. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms". Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law."*[41]

This so-called "interpretative presumption" created by the ECtHR in the case of *Al-Jedda* represents a significant interest in the framework of regime interaction and an attempt to find harmony between norms of international law, as well as avoid legal obstacles with the fulfillment of obligations under different legal regimes.

41 Al-Jedda.

Although the ECtHR has found the solution for potential problems that could be raised within the legal regime interaction and thus, negatively affect the accomplishment of human rights obligations, it has not directly addressed the question of the superiority of the UN Charter obligations over ECHR by virtue of article 103.

Acknowledging the fact that the ECtHR has created a "very strong" interpretative presumption, Milanovic asserts that the Court`s silence in regard to the supremacy clause of article 103 "speaks volumes", as it is difficult for the ECtHR "to accept that Security Council can displace the ECHR, the "constitutional instrument of European public order" of which it is the ultimate guardian.[42]

A similar approach towards regime reconcilability through "harmonious interpretation" of the UN Security Council resolution was used by the ECtHR in *Nada v. Switzerland*. In this case, the applicant claimed that the ban on entering (or transiting) through the Swiss territory which had been inflicted on him due to the sanction regime of the UN Security Council violated article 5 of the ECHR (Right to liberty and security), as well as article 8 (Right to respect for private and family life) and Article 13 (Right to an effective remedy).[43]

Switzerland requested the ECtHR to recognize the claim inadmissible "as being incompatible *ratione personae* ("by reason of the person") with the Convention", arguing that contested measures had been based on the UN Security Council Resolutions, "which, under Articles 25 and 103 of the United Nations Charter, were binding and prevailed over any other international agreement".[44]

ECtHR dismissed this objection and declared that:

"*The measures in issue were therefore taken in the exercise by Switzerland of its "jurisdiction" within the meaning of Article 1 of the Convention. The impugned acts and omissions are thus capable of engaging the respondent State's*

42 Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", *EJIL*, Vol. 23, No 1, 2012, p. 138.

43 Application no. 10593/08, 12 September 2012 (hereinafter Nada). URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-113118%22]} (access: 12.04.2023).

44 Ibid, para. 102.

responsibility under the Convention. It also follows that the Court has jurisdiction ratione personae to entertain the present application".[45]

Thus, according to the ECtHR, the impugned acts relate to the national implementation of UN Security Council resolutions by the Swiss government and thereby, the alleged violations of the ECHR are attributable to the state.[46]

While not explicitly analyze the issue of the "supremacy clause" of article 103 mentioned by Switzerland in its submissions to the ECtHR, the latter asserted:

"When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavor to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonized as far as possible so that they produce effects that are fully in accordance with existing law".[47]

Despite the fact that the ECtHR used harmonized approach as in *Al-Jedda*, at the same time it distinguished these two cases in the sense of interpretation of the UN Security Council resolutions, namely through the rejection of the interpretative presumption:

"However, in the present case it observes that, contrary to the situation in Al-Jedda, where the wording of the resolution in issue did not specifically mention internment without trial, Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, the above-mentioned presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in that Resolution".[48]

The ECtHR found that Switzerland violated article 8 of the ECHR, as a sovereign state which enjoyed "some latitude" in implementing the

45 Ibid, para. 122.
46 Ibid, para. 121.
47 Ibid, para. 170.
48 Ibid, para.172.

UN Security Council resolutions[49]. Further, the ECtHR evaluated the interference of the state as "necessary in a democratic society" that has a legitimate aim and is maintained in accordance with a "pressing social need".[50]

Then the ECtHR continued with an evaluation of measures that should be conducted by the Swiss government in order to avoid the alleged violation, namely the timely information to the Sanctions Committee on the concussion of internal investigation and consequently, the deletion of Mr. Nada`s name from the UN Security Council sanctions list[51], as well as consideration of some personal (medical) circumstances of the applicant that should be led to the alleviation of the situation.[52]

In fact, the ECtHR avoids again the issue of the norm conflict between the UN Security Council resolution from one side and ECHR from another side through harmonious interpretation[53], and thus provided the possibility of the co-existence of different legal regimes.

The ECtHR remained constant in this position in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, marked with several milestone legal consequences.[54] In this case, two applicants – an Iraqi national, Khalaf M. Al-Dulimi and Montana Management Inc. company, of which Al-Dulimi is the managing director, issued a complaint against Switzerland. They claimed that "confiscation of their assets by the Swiss authorities pursuant to a resolution of the United Nations Security

49 Ibid, para. 180.

50 Ibid, para. 181.

51 Ibid, para. 188.

52 Ibid, para. 195-196.

53 Marco Milanovic "European Court Decides Nada v. Switzerland", EJIL, URL: https://www.ejiltalk.org/european-court-decides-nada-v-switzerland/ (access: 12.04.2023); *Thienel T.* "Nada v Switzerland: The ECtHR Does Not Pull a Kadi (But Mandates It for Domestic Law)", Invisible College, URL: https://invisiblecollege.weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/ (access: 12.04.2023).

54 Anne Peters "The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi", EJIL, URL: https://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/ (access: 12.04.2023); Marco Milanovic "Grand Chamber Judgment in Al-Dulimi v. Switzerland", EJIL, URL: https://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/#more-14398 (access: 12.04.2023).

Council had been ordered in the absence of any procedure complying with Article 6[55] of the Convention".[56]

The Grand Chamber applied interpretative presumption and declared that:

"*The Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law. Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention*".[57]

Applying again the interpretative presumption as Peters fairly noticed for "a human rights-friendly" implementation[58], the ECtHR declared inapplicable article 103 of the UN Charter:

"*… in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter*".[59]

All that remains to be said is that the ECtHR as a regional human rights mechanism implicitly recognized the superior character of article

55 Right to fair trial (author`s note).

56 Application no. 5809/08, 21 June 2016 (hereinafter Al-Dulimi). URL: https://hudoc.echr.coe.int/eng?i=001-164515#{%22itemid%22:[%22001-164515%22]} (access: 12.04.2023).

57 Ibid, para. 140.

58 Anne Peters "The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi", EJIL, URL: https://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/ (access: 12.04.2023)

59 Al-Dulimi, para. 140.

103 and hence, de-facto keeps up subordination between treaties – the UN Charter and the ECHR, as well as between international (universal and regional) intergovernmental institutions.

At the same time, ECtHR constantly avoids to make a clear stance on the issue of norm conflict between article 103 of the Charter and ECHR, as might be assumed in order to secure its status as an independent legal regime, i.e. "*European public order*". At this point, it is also worth to mention the fact that this line was started by the ECtHR before the analysis of this article's cases and beyond article 103. In fact, the ECtHR also tended to follow this tendency with regard to attribution of conduct. Thus, in its landmark decision of *Behrami and Behrami v. France, and Saramati v. France, Germany and Norway*, regarding the conduct of armed forces placed in Kosovo at the disposal of the United Nations Interim Administration Mission in Kosovo (UNMIK) or authorized by the United Nations (Kosovo Force (KFOR)), concluded that the key element was whether the UN Security Council "retained ultimate authority and control so that operational command only was delegated".[60] The ECtHR considered that the operation of KFOR was based on UN Security Council resolution and consequently, "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN…"[61]. In doing so, the ECtHR used the wording of Article 7 of the Draft articles on the responsibility of international organizations adopted by the ILC in 2011[62] and applied the "effective control" test, and finally declared "the UN has a legal personality separate from that of its member states"[63] and that the UN, being not a Contracting Party to the ECHR cannot be placed under the control of its regime, the fact that makes the application incompatible *ratione personae*.

It would seem to the present author that the specification of the UN as "an organization of universal jurisdiction fulfilling its imperative collective

60 Draft articles on the responsibility of international organizations, URL: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (access: 12.04.2023)

61 Application no. 71412/01 and 78166/01, 2 May 2007, para. 133. URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-80830%22]} (access: 12.04.2023)

62 Ibid, para. 141.

63 Ibid, para. 144.

security objective"[64] used by the ECtHR, in this case, sounds as one more piece of evidence of acknowledgment by the ECtHR of the UN's supreme role in the de-facto hierarchy of international organizations conditioned by the historical mission of the latter.

For the sake of an argument, one could oppose that the historical destination of the UN does not imply that obligations of states bearing under its Charter could set aside obligations resulting from other international (in particular, human rights) treaties which also have legally binding force. Furthermore, the Charter of the UN has not been accepted as "world constitution", while ECHR is beginning to be recognized as a constitutional instrument of the European public order.

Noteworthy, the constitutionalism issue is specifically addressed in the concurring opinion of Judge Pinto De Albuquerque, joined by judges Hajiyev, Pejchal and Dedov in *Al-Dulimi* case. They pointed out that the UN Charter does not yet answer to the requirement of "the double function of a Constitution, as the foundational, non-derived source of law and the primary limit to the exercise of public power and the use of public force".[65] Furthermore, judges argued that the absence of effective constitutional control of the UN bodies, and first of all over the Security Council, as well as the non-binding character of the UN Human Rights Committee`s decisions (recommendations) under the first optional protocol to the International Covenant on Civil and Political Rights testify the lack of human rights protection within the UN system. "*Thus, the Charter of the United Nations has not yet acquired the nature of a Constitution for the international community and consequently there is no hierarchical relationship between Charter obligations and obligations resulting from other international treaties and agreements, most notably human rights treaties*".[66]

On the contrary, the judges highly evaluated the ECHR constitutional character, specifically addressing "the direct, supra-constitutional effect" of the latest on the national legal orders of the member states, and the fact that "the Convention is subordinated neither to domestic constitutional rules,

64 Ibid, para. 151.
65 Ibid, Concurring opinion, para. 8.
66 Ibid, Concurring opinion, para. 8.

nor to allegedly higher rules of international law, since it is the supreme law of the European continent. In the Council of Europe's own internal hierarchy of norms, United Nations law is equal to any other international agreement and subordinated to the primacy of the Convention as a constitutional instrument of European public order".[67]

Frederic Megret supports this approach in the framework of the special character of human rights obligations, evaluating international human rights mechanisms as "constitutional". Noteworthy, he also referred to the description of the ECHR by the ECtHR as a "constitutional instrument of the European public order", but at the same time brought examples of other human rights treaties which also serve as "part of governance structures" or "normative foundations of particular political communities".[68]

Following this line, as ECHR is a "constitutional" instrument of the European public order, the African Charter on Human and Peoples` Rights is a "constitutional" mechanism of the African Union, whilst the American Convention on Human Rights could be assessed as a "constitutional" instrument of the Organization of American States.

All of the above-mentioned examples are regional human rights mechanisms that possess to some extent "legislative" functions for the relevant political union. Hence, a similar approach could be successfully taken towards universal human rights treaties that have been adopted under the UN "umbrella", such as for example, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).[69]

Moreover, the exististence of *erga omnes* obligations[70] makes the "constitutionalism" test and "competition" between different legal regimes irrelevant, as in view of the significance of the human rights involved, "all States can be held to have a legal interest in their protection."[71]

67 Ibid, para 59.

68 Frederic Megret, "Nature of obligations" in *International Human Rights Law* by Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran. Oxford University Press, 3rd edition, 2018, p. 91.

69 Ibid, 91.

70 Obligations "toward the international community as a whole", see Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), 1970, *ICJ Report 3*, para 33.

71 Hernandez, p. 65.

In the view of the present author, the comparative analysis of different legal orders through the scrutiny of its legal instruments (the UN Charter and ECHR), on the subject of their "constitutional" nature, has a potential to undermine the binding nature of Security Council resolutions from one side, and lead judges to decide which legal order prevails over the other. Since there is no formal hierarchy between legal orders, the mentioned apprehension could threaten the universality of international law. Hence, in the regime interaction cases the harmonious interpretation seems to be a wise compromise that could keep the relevance and autonomous nature of different legal orders.

Conclusion

It is submitted in this article that despite the absence of a formal hierarchy between international intergovernmental organizations the UN remains the universal and supranational platform of cooperation of the member states due to its historical mission and vital goals bestowed to it after the end of World War II. Article 103 of the UN Charter serves as evidence for this statement. Thus, the "supremacy clause" of Article 103 forces the obligations under the UN Charter above other treaty duties and consequently backs the UN`s target to universality and preponderance among other international legal regimes.

Contemporaneously, the present author argues that regional international organizations have the equal right to claim the autonomy of their *ordre public*. *Through the* scrutiny of the relevant cases of the ECtHR, it is affirmed in this paper that the European public order implicitly recognizes the "supremacy clause" of article 103 that virtually proclaims the hierarchy of the UN among international organizations. At the same time, it is asserted that article 103 does not intentionally allow the UN to set aside other treaty obligations of its member states and in particular, in the area of human rights.

In this regard, the harmonious interpretation approach which was chosen by the ECtHR in the analyzed cases is evaluated by the present author as a wise compromise that aimed to retain the autonomous nature of different legal regimes, as well as to guard a unique historical mission of the UN that is primarily responsible for maintaining international peace and security.

The author concludes that besides the fact that the UN Charter has not been accepted as a "world constitution" and unlike ECHR does not include a list of concrete human rights, the creation of the UN should be assessed as a starting point in the so-called international human rights era. In fact, the internationalization of human rights started with the formation of the UN as an answer to the gross and systematic violations of human rights during World War II. The argument that the UN does not have its own "constitutional" mechanism like other international (regional) organizations seems unconvincing since the adoption of the Universal Declaration of Human Rights (despite its "soft law" nature) and the aftermath of 1966 Human Rights Covenants with their Additional Protocols inaugurated the era of international universal human rights protection, despite the fact that decisions of the UN human rights treaty bodies have non-binding character.

Furthermore, taking into account the special character of human rights treaties, as well as *erga omnes* status of certain human rights obligations, the "constitutionalism" test and "competition" of different orders lost their relevance.

Finally, even the absence of a formal hierarchical relationship between Charter obligations and obligations stemming from other international treaties does not imply that United Nations law is equal to any other international treaty or subordinated to the primacy of the ECHR or any other regional "constitutional" mechanism. Otherwise, the relevance of the UN, in particular the Security Council, as the main body responsible for maintaining international peace and security, could be undermined. This scenario, in its turn, has the potential to disrupt the very nature and significance of international law and destroy the collective security system which has been created within the UN.

Bibliography

Bernhardt, Rudolf. "Article 103", *Charter of the United Nations - A Commentary* (ed.), B.Simma, 2nd edition, Vol. 2, Oxford, 2002.

Conforti Benedetto, "Consistency among Treaty Obligations", in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press.

Gowlland-Debbas Vera "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", *EJIL*, Vol. 11, 2000.

Hernandez, Gleider, *International Law*, Oxford University Press, 2019.

Istrefi, Kushtrim "The Application of Article 103 of the United Nations Charter in the European Courts: the Quest for Regime Compatibility on Fundamental Rights", *European Journal of Legal Studies*, Vol. 6, Issue 2, 2012.

Kelsen, Hans, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Frederick A. Praeger, 1950.

Kolb, Robert "Does Article 103 of the Charter of the United Nations apply only to decisions or also to authorizations adopted by the Security Council?" *Zeitschrift für auslandisches öffentliches Recht and Völkerrecht*, Vol. 64, no 1, 2014.

Lauterpacht, Hersch. *"The development of the law of international organizations by the decisions of international tribunals"*. 52 Recueil des Cours, 1976.

Lauwaars, Richard. "The Interrelationship between United Nations Law and the Law of other International Organizations", *Michigan Law Review*, Vol. 82, 1984.

Liivoja, Rain. "The scope of the supremacy clause of the United Nations Charter", *The International and Comparative Law Quarterly*, Vol. 57, 2008.

Megret, Frederic. "Nature of obligations", in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds.), *International Human Rights Law*. Oxford University Press, 3rd edition, 2018.

Milanovic, Marko. "Al-Skeini and Al-Jedda in Strasbourg", EJIL, Vol. 23, No 1, 2012.

Milanovic, Marko. "European Court Decides Al-Skeini and Al-Jedda", EJIL: TALK, 2011, *https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/*. (access: 12.04.2023)

Milanovic, Marko. "European Court Decides Nada v. Switzerland", EJIL: TALK, 2012, *https://www.ejiltalk.org/european-court-decides-nada-v-switzerland/* (access: 12.04.2023)

Milanovic, Marko. Grand Chamber Judgment in Al-Dulimi v. Switzerland, EJIL: TALK, 2016, *https://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/#more-14398* (access: 12.04.2023)

Paust, Jordan. "Peacemaking and Security Council Powers: Bosnia-Herzegovina raises international and constitutional questions", Southern Illinois University, 1994.

Peters, Anne. "The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi", EJIL: TALK, 2016 *https://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/* (access: 12.04.2023)

Thienel, Tobias. "Nada v Switzerland: The ECtHR Does Not Pull a Kadi (But Mandates It for Domestic Law)", Invisible College, 2012,

https://invisiblecollege.weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/. (access: 12.04.2023)

Tzanakopulos, Antonios. "Collective Security and Human Rights", in Erika de Wet and Jure Vidmar (eds.), *Hierarchy in international law: the place of human rights*, Oxford University Press, 2012.

Watson, Geoffrey. Constitutionalism, Judicial Review, and the World Court, *Harvard International Law Journal*, 1, 1993.