

---

# The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions

Alexander Orakhelashvili\*

## Abstract

*The United Nations Security Council is the most powerful institutional body ever established at the global level. Its existence and powers, as based on the United Nations Charter, firmly evidence the support of the entire international community. At the same time, the will of the international community as a whole can be expressed at different levels and in different ways. In today's international law, there can be little doubt that the international community as a whole attaches special importance and effects to peremptory norms of general international law (jus cogens) and endows them with high status. The interaction between those high-ranking norms and the powers of the Security Council is therefore among the most central issues of international law. In searching for a preferable approach, it is proposed to consider the treaty-based character of the Security Council's powers. The Council is not free of legal limitations, and this conclusion cannot be rebutted even by referring to the classical debate on the interaction between the concepts of peace and justice in international relations, because the General Assembly and Security Council have repeatedly affirmed the relevance of the observance of law in maintaining and restoring international peace and security, notably with regard to the conflicts of the Middle East and Former Yugoslavia. Bearing all this in mind, this article will examine the scope and legal effects of the legal limitations imposed on the Security Council by the operation of peremptory norms.*

## 1 The Relevance of Legal Limitations on the Powers of the Security Council

International organizations are based on constitutions of limited powers derived from the agreement of member states and are thus bound by international law standards.<sup>1</sup>

\* LLM *cum laude* (Leiden); PhD Candidate, Jesus College, Cambridge. E-mail: ao231@cam.ac.uk

<sup>1</sup> T. Franck, *Fairness in International Law and Institutions* (1995), at 218–220; Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic

Some organizations are more powerful than others, but their powers, extensive as they are, nevertheless derive from a constitutive instrument consented to by the member states. Therefore, in accordance with the principle of constitutionality, organizations have a fundamental obligation to secure the lawfulness of their actions and decisions and, inevitably, reviews to determine whether their decisions are in conformity with their constituent instruments must be carried out.<sup>2</sup>

As organizations are based on inter-state agreements, nothing in principle precludes their organs from acting in disregard of ordinary norms of international law (*jus dispositivum*), provided and to the extent that the constituent instrument evidences the intention of member states to enable an organization to act in such manner while exercising its functions. But if a relevant norm is preemptory, then states cannot derogate from it, establishing an organization with the power to act in disregard of *jus cogens*. Therefore, *jus cogens* is an inherent limitation on any organization's powers.

The Security Council is established under the UN Charter as a powerful organ with discretionary powers; it is empowered under Chapters VI and VII to deal with situations endangering peace and security, to take enforcement measures, to bind the UN Member States and to even override certain international obligations. As the Council's decisions are discretionary, they are not as such based on legal judgment and are hence of a political character. Kelsen considered that the Security Council exists to preserve peace and not to enforce law.<sup>3</sup> But the crucial issue is whether this political decision-making is free of legal constraints.

The International Court of Justice clarified that the political character of an organ does not exempt it from the observance of legal provisions which constitute limitations on its powers or criteria for its judgment.<sup>4</sup> Judge Jennings clearly affirmed in *Lockerbie* that

all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.<sup>5</sup>

Consequently, Judge Jennings rejected the view that Security Council resolutions adopted under Chapter VII of the Charter are immune from review according to applicable legal principles. Similarly, in the process of adoption of Resolution 1483

---

Sanctions', 95 *AJIL* (2001) 858; E. Lauterpacht, *The Legal Effect of Illegal Acts of International Organisations* (1965), 89. The International Court affirmed that international organizations are bound by general international law in *WHO Regional Office* [1980] ICJ Rep 90. See also M. Shaw and K. Wellens, *Third ILA Report on Accountability of International Organisations* (2002), at 11–13.

<sup>2</sup> M. Shaw and K. Wellens, *ILA Second Report on Accountability of International Organisations* (2000), at 7, 18.

<sup>3</sup> H. Kelsen, *The Law of the United Nations* (1951), 294.

<sup>4</sup> *Admission* [1947–1948] ICJ Rep 64; Bernhardt, 'Ultra Vires Activities of International Organisations', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (1996), 608.

<sup>5</sup> [1998] ICJ Rep 110; Brownlie, 'General Course', 228 *RdC* (1995) 217, stressing that discretion can exist only within the law.

(2003), which confirmed the status of the occupying powers in Iraq, the President of the Security Council emphasized that the Council's powers

are not open-ended or unqualified. They should be exercised in ways that conform with 'the principles of justice and international law' mentioned in Article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague Regulations, besides the Charter itself.<sup>6</sup>

It is argued that the Council can adopt decisions which have an impact on the rights and duties of state and non-state actors, or it can even act as legislator.<sup>7</sup> Neither the Charter nor its preparatory materials evidence an intention to establish the Council as a legislative organ. The relevant 'legislative' measures, possibly apart from anti-terrorist resolutions, such as Resolution 1373 (2001) prescribing measures to combat international terrorism, have addressed only specific situations, such as that of demarcating the Iraq-Kuwait border. It is therefore difficult to see the Council acting as a legislator. But even if the opposite were true, the Council would not be exempt from legal constraints under the Charter and general international law.

The Council can conceivably adopt decisions impacting on the rights and duties of Member States. The International Court affirmed this in *Namibia*, where it dealt with the status of Namibian territory.<sup>8</sup> Judge Fitzmaurice disagreed with the Court, stating that it is not the Council's task to act so, as it was only designed to adopt measures to preserve and restore peace.<sup>9</sup> The view that the Council is not entitled to modify legal rights, act as a legislature, impose permanent territorial or other settlements has very strong doctrinal support<sup>10</sup> and seems to dominate the doctrinal debate. It is occasionally contended that the Council acting under Chapter VII may legally impose a comprehensive territorial settlement valid in relation to all states; or that it can make similar arrangements such as the establishment of permanent no-fly zones.<sup>11</sup> In the case of the Iraq-Kuwait border, however, the members of the Council took care to emphasize that the Council was merely performing the technical task of demarcating an already existing boundary,<sup>12</sup> as it would not be competent to do more than that.<sup>13</sup>

<sup>6</sup> UN Doc. S/PV.4761, at 11–12.

<sup>7</sup> Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL* (1995) 506 at 520; Szasz, 'The Security Council Starts Legislating', 96 *AJIL* (2002) 901. But see Angelet, 'International Law Limits to the Security Council', in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001), 79, submitting that the Council under Chap. VII can act only as a law-enforcing and not a legislative body.

<sup>8</sup> [1971] ICJ Rep 15.

<sup>9</sup> Dissenting Opinion [1971] ICJ Rep 294, para. 115.

<sup>10</sup> Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1994) 92; Graefrath, 'International Crimes and Collective Security', in K. Wellens (ed.), *International Law: Theory and Practice* (1998), 243; E. Klein, *Statusverträge im Völkerrecht* (1980), 354; Irmscher, 'Legal Framework of the Activities of UNMIK', 44 *German YIL* (2001) 364.

<sup>11</sup> Subedi, 'Objective Regimes and UN Settlements', 37 *German YIL* (1994) 165, at 200–201; Matheson, 'United Nations Governance of Postconflict Societies', 95 *AJIL* (2001) 76, at 84–85, advocates the power of the Council to adopt permanent settlements. For a criticism of Matheson see Kirgis, 'Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making', 95 *AJIL* (2001) 579, at 580–582.

<sup>12</sup> Graefrath, *supra* note 10, at 244; Nolte, 'The Limits on the Security Council's Powers and its Functions in the International Legal System', in M. Byers (ed.), *The Role of Law in International Politics* (2000), 322.

<sup>13</sup> Brownlie, *supra* note 5, at 220.

In performing its tasks under the Charter, the Security Council is perhaps empowered to take decisions affecting the legal rights and duties of state and non-state actors, though this general power is subject to limitations. (The exclusion of the power to effect a permanent settlement is an instance of these limitations.) But this is not the same as having the Security Council exempted from the operation of law. That could not be reconciled with the Charter framework or practice. The ICJ, in *Namibia*, while interpreting the Council's powers broadly, emphasized that the Council is subject to legal standards.<sup>14</sup> The ICTY Appeals Chamber vigorously confirmed that the Council is not *legibus solutus* (unbound by law).<sup>15</sup>

The following analysis focuses upon the nature and scope of *jus cogens* limitations on the Security Council's powers (Sections 2 and 3), the ways in which Council actions could come into conflict with *jus cogens* (Section 4), and the legal consequences of such conflict (Section 5). The legal limitations on the Council's powers have not to date been analysed, at least to our knowledge, with a specific focus on *jus cogens*; this article would appear to be the first attempt at such an analysis, and, as such, it cannot realistically claim to do so comprehensively, examining every aspect, example and precedent of the problem. The article seeks to state certain issues and to resolve some of the questions arising therefrom, bearing in mind the overall effect of peremptory norms.

## 2 The Concept and Relevance of Peremptory Norms

Peremptory norms exist to protect the values and interests that are fundamentally important to the international community as a whole.<sup>16</sup> This phenomenon is due to the link between *jus cogens* and morality, which is the most usual and frequent explanation of a norm's peremptory character.<sup>17</sup> Peremptory norms are explained in doctrine by reference to morality, which may even compensate for the lack of clarity of such norms.<sup>18</sup>

Since peremptory norms safeguard the community interest as opposed to individual state interests, they possess absolute validity; this is in contrast to the relative validity of ordinary or non-peremptory norms.<sup>19</sup> For the same public interest reasons, peremptory norms have a special effect of non-derogability.<sup>20</sup> Their rationale consists in invalidating or prevailing over incompatible acts and transactions in order to ensure

<sup>14</sup> [1971] ICJ Rep 16 at 50–52.

<sup>15</sup> *Tadic*, IT-94-1-AR72 (Appeals Chamber), 35 ILM (1996), paras. 20–28.

<sup>16</sup> *Furundzija* (Trial Chamber, ICTY), 38 ILM (1999), 349; Frowein, 'Jus Cogens', 7 *EPIL* (1984) 329.

<sup>17</sup> The ILC Special Rapporteurs Lauterpacht and Fitzmaurice regarded peremptory norms as expressions of international morality: (1953-II) *YbILC* 155, (1958-II) *YbILC* 41, and so did Judge Schücking in *Oscar Chinn*, PCIJ Rep, Series A/B, No. 63, at 150.

<sup>18</sup> A. McNair, *The Law of Treaties* (1961), 213; H. Lauterpacht, *Collected Papers* (1970), i, 234, at 357–358; A. Cassese, *Self-Determination of Peoples* (1994), 174; Levi, 'The International Ordre Public', 62 *Revue de Droit International* (1994) 56.

<sup>19</sup> Verdross, 'Jus Dispositivum and Jus Cogens in International Law', 60 *AJIL* (1966) 58.

<sup>20</sup> P. Kolb, *Theorie du ius cogens international* (2001), at 172–173.

the paramount superiority of fundamental community values and interests,<sup>21</sup> and to avoid fragmentation of legal relations safeguarding the community interest.<sup>22</sup>

Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (VCLT) refer to *jus cogens* in terms of invalidating and terminating conflicting treaties. The absence of a similar authority on the effect of *jus cogens* with regard to acts and rules other than treaties is sometimes regarded as an indication that *jus cogens* does not apply to non-treaty acts, especially to acts of organs such as the Security Council.<sup>23</sup>

This view is difficult to accept. It is widely and continuously accepted that the content of *jus cogens* ranges far outside the scope of the law of treaties.<sup>24</sup> As Judge Lauterpacht emphasized in *Bosnia*,<sup>25</sup> *jus cogens* unconditionally binds the Security Council. The conceptual basis of this approach is clearly explained in doctrine: the Security Council must respect peremptory norms because the core values protected by *jus cogens* are not derogable or waivable in the sense of *jus dispositivum*.<sup>26</sup> A Council resolution violating *jus cogens* would indeed be a derogation from *jus cogens*, as it would be an attempt to use the UN system for the establishment of a new legal regime through a resolution contrary to *jus cogens*.

### 3 The Nature and Scope of *jus cogens* Limitations on the Security Council's Powers

#### A Substantive Content of *jus cogens* Limitations

##### 1 The Prohibition of the Use of Force

The prohibition of the use of force is undeniably peremptory<sup>27</sup> and hence a full-fledged limitation on the powers of the Security Council.<sup>28</sup> This prohibition, as embodied both under Article 2(4) of the Charter and general international law, is linked to, and qualified by, the powers of the Council, which can authorize the use of force under Chapter VII.

The fact that the Council may authorize force under Chapter VII does not mean that it is free to disregard the basic prohibition of the use of force. The use of force is legal as soon as it is authorized, *inter alia* in compliance with the principle of proportionality; it is illegal unless it is so authorized, and authorization cannot be presumed

<sup>21</sup> Jaenicke, 'Zur Frage des Internationalen Ordre Public', 7 *Berichte des Deutschen Gesellschaft für Völkerrecht* (1967) at 85–87.

<sup>22</sup> Kolb, *supra* note 20, at 96.

<sup>23</sup> Martenczuk, 'The Security Council, the International Court and Judicial Review', 10 *EJIL* (1999) 517.

<sup>24</sup> Jennings, 'General Course', II *RdC* (1967) 564; Suy, 'The Concept of *Jus Cogens* in International Law', in *International Law, Lagonissi Conference: Papers and Proceedings* (1967), 75; J. Dugard, *Recognition and the United Nations* (1987), at 142; J. Crawford, *Creation of States* (1979), at 82. [1993] ICJ Rep 440.

<sup>25</sup> Reinisch, *supra* note 1, 859; Doehring, 'Unlawful Resolutions of the Security Council', 1 *Max Plank YBUNL* (1997) 99.

<sup>26</sup> *Nicaragua* [1986] ICJ Rep 100; [1966-II] *YbILC* 247.

<sup>27</sup> II *UNCLT Official Records* (1986), at 39.

unless there is an explicit intention of the Council. If not, the Council remains bound by the prohibition and its actions must be consistent with it.

This approach is required by the very rationale of the Charter mechanism of collective security. The authorization of the use of force presupposes a determination that there is a threat to, or breach of, peace, and that forcible measures are required for the maintenance or restoration of peace and security. The Council cannot be presumed to have passed such a two-stage judgment, unless there is clear evidence of the opposite.

## 2 *The Principle of Self-determination and Its Incidences*

The right of peoples to self-determination is undoubtedly part of *jus cogens*,<sup>29</sup> and hence constitutes a full-fledged limitation on the Council's powers.<sup>30</sup> It is sometimes doubted whether certain incidences of this principle, such as the permanent sovereignty over natural resources, are also peremptory: arguably a state, in the exercise of its permanent sovereignty, can conclude contracts derogating from that sovereignty.<sup>31</sup>

But this argument is defective for several reasons. First, the principle of permanent sovereignty is an integral element of the principle of self-determination.<sup>32</sup> Secondly, it is the very essence of the principle that a state should be free to use its natural resources. This normative core is peremptory. Contracts concluded in the exercise of permanent sovereignty over natural resources are not derogations from the principle; rather, there would be a derogation if a state agreed to waive the right to take decisions on all or part of its natural resources. Thirdly, several peremptory norms, such as the prohibition of the use of force or the principle of self-determination itself, enable the protected actor to exercise choice in performance of its rights under that norm. A state could invite other states to intervene in its territory; it could even decide to become part of another state, and none of these cases would involve any breach of the relevant peremptory norms. The peremptory character of the above-mentioned norms is not doubted on this account and the relevance of such argument in terms of the sovereignty over natural resources should be assessed accordingly.

## 3 *Fundamental Human Rights*

The Security Council can never be entitled to infringe upon human rights embodied in universal human rights instruments.<sup>33</sup> This begs the question whether only those rights that are non-derogable under treaties such as the International Covenant on

<sup>29</sup> M. Shaw, *Title to Territory in Africa* (1986), at 91; Gros-Espiel, 'Self-Determination and *Jus Cogens*', in A. Cassese (ed.), *UN Law/Fundamental Rights* (1979), at 167–171; J. Dugard, *Recognition and the United Nations* (1987), at 158ff; Cassese, *supra* note 18, at 171–172. UN Human Rights Commission Res2003/3.

<sup>30</sup> Tomuschat, 'Yugoslavia's Damaged Sovereignty over the Province of Kosovo', in G. Kreijen *et al.* (eds.), *State, Sovereignty and International Governance* (2002), 341.

<sup>31</sup> N. Schrijver, *Sovereignty over Natural Resources* (1997), 375; Aminoil, 66 ILR 518, at 587–588.

<sup>32</sup> According to UNGA Res 1803(1962), the permanent sovereignty over natural resources is 'a basic constituent of the right to self-determination'.

<sup>33</sup> Tomuschat, *supra* note 30, at 340; Bossuyt, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (Working paper), E/CN.4/Sub.2/2000/33, 9; de Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the UN Charter and the Iraqi Sanctions Regime', 14 *LJIL* (2001) 284, at 286–289.

Civil and Political Rights (ICCPR) are peremptory. This is sometimes denied by reference to the wording of relevant instruments or state practice.<sup>34</sup> But then a norm is not *jus cogens* merely because the parties stipulate that no derogation is permitted.<sup>35</sup> It seems crucial whether a given right is derogable by nature: whether it protects the community interest going beyond individual state interests. Rights to personal liberty, fair trial and due process, private or family life, freedom of expression and religion, although derogable under certain treaty instruments, certainly protect the community interest going beyond individual state interests, and the mere fact that they are derogable under human rights treaties does not preclude their peremptory character.

Non-derogability of certain rights emphasizes their special importance in that they may not be set aside, even in very specific circumstances in which the setting aside of other rights is justified. But derogation under Article 53 VCLT and derogation under human rights instruments are different things. Derogation under VCLT is an attempt at an *inter se* nullification of a peremptory norm. It is one thing to derogate from a 'derogable' human right such as the freedom of information in a bilateral agreement and it is another thing to derogate from the same right in terms of national emergency as provided in human rights instruments, subject to substantive standards and supervision by treaty organs. In the latter case, the continuing operation of a given human right is unaffected; but a derogation by a treaty attempts to make that norm inapplicable and inoperative *inter se*, the derogating states deciding when and how to derogate. Thus, a right that is 'derogable' under human rights instruments is not necessarily derogable as *jus dispositivum*.

The attitude of the UN Human Rights Committee expressed in General Comment 29 confirms such an approach:

The enumeration of non-derogable provisions in article 4 [of the ICCPR] is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms . . . the category of peremptory norms extends beyond the list of non-derogable provisions as given in Article 4, paragraph 2 [of the ICCPR]. States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

The rights which limit the Security Council's powers are not just the non-derogable rights under human rights instruments. Freedom from retroactive laws or civil imprisonment, freedom of thought, religion and conscience nevertheless bind the Council as non-derogable rights.<sup>36</sup> The ICTY Appeals Chamber in *Tadić* gives the impression that the right to fair trial is an unconditional limitation on the Council's

<sup>34</sup> Higgins, 'Derogations under Human Rights Treaties' [1976–1977] *BYIL* 282; I. Sinclair, *The Vienna Convention on the Law of Treaties* (1986), 217.

<sup>35</sup> *YbILC* II-1966, 248; Dhokalia, 'Problems Relating to *Jus Cogens*', in S. Agrawala (ed.), *Essays on the Law of Treaties* (1972), 168; Leonetti, 'Interprétation des traités et règles impératives du droit international général (*jus cogens*)', 24 *ÖZÖR* (1973) 99.

<sup>36</sup> de Wet, *supra* note 33, at 286.

powers and that its observance was a *sine qua non* for the validity of the Council's measures such as the establishment of that Tribunal.<sup>37</sup>

The Council's compliance with economic and social rights is also crucial for the legality of its measures, especially economic sanctions.<sup>38</sup> The General Comment No. 8 of the UN Committee on Economic and Social Rights clarifies that the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 'virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions' under Chapter VII.<sup>39</sup> It is particularly noteworthy that the Committee speaks in terms of a normative hierarchy. It focuses on two separate legal regimes: the regime underlying economic sanctions based on the Charter and economic and social rights, and it concludes that the former is subject to the latter.

The argument that all human rights are peremptory is not without foundation, though it may seem exaggerated to those adhering to a 'traditional' restrictive approach of identification of *jus cogens*. A relevant criterion is whether a right protects the community interest as distinct from individual state interests: from this perspective perhaps all human rights would be peremptory. Perhaps in this spirit Judge Tanaka referred to the peremptory nature of human rights law in general, without qualifying this statement in terms of the particular categories of rights.<sup>40</sup> In any case, the scope of *jus cogens* in human rights law is not limited to rights that are non-derogable under specific treaties and this is important for construing the scope of human rights limitations on the powers of the Security Council.

#### 4 Humanitarian Law

Humanitarian law protects not state interests but human beings as such. According to the ICTY, the objective, or non-reciprocal, nature of humanitarian law obligations stems from their *erga omnes* character in the sense of *Barcelona Traction*.<sup>41</sup> The basic rules of humanitarian law are peremptory.<sup>42</sup> Moreover, humanitarian law outlaws agreements adversely affecting its operation and protects basic rights of human persons, which are classic examples of *jus cogens*.<sup>43</sup>

The UN is bound by humanitarian law, which must be complied with in every circumstance by its forces engaged in hostilities. The relevant rules are embodied in the Geneva Conventions, such as the rules protecting civilians and their property, and

<sup>37</sup> *Tadić* (Appeals Chamber), paras 41–47; de Wet and Nollkaemper, 'Review of Security Council Decisions by National Courts', 45 *German YIL* (2002) 182–184.

<sup>38</sup> Reinisch, *supra* note 1, at 861–863.

<sup>39</sup> ICESCR Committee, General Comment No. 8 (1997), para. 7.

<sup>40</sup> Dissenting Opinion, *South-West Africa* [1966] ICJ Rep 298.

<sup>41</sup> *Kupreskic*, IT-95–16-T, Judgment of 14 Jan. 2000, paras. 518–519.

<sup>42</sup> Sassoli, 'State Responsibility for Violations of Humanitarian Law', 84 *IRCR* (2002) 413–414.

<sup>43</sup> *Ibid.*, at 414; de Wet, *supra* note 33, at 288.



those distinguishing between military and non-military objectives.<sup>44</sup> The Chapter VII economic sanctions are subject to peremptory norms, particularly the fundamental humanitarian rules, such as the principles of proportionality and necessity.<sup>45</sup> All this implies an obligation not to deprive civilians of access to the goods necessary for their survival, and respective duties of the occupying powers.<sup>46</sup> Any sanctions regime is governed by humanitarian norms essential for the survival of the civilian population, to secure food, water, shelter, medicines and medical care.<sup>47</sup>

## **B The Interaction of Substantive *jus cogens* Limitations with the Powers of the Security Council**

After outlining the substantive standards of *jus cogens* applicable to the acts of the Security Council, we need to examine the interaction between those standards and those acts. Peremptory norms apply to the acts of the Council in different ways: they are embodied in the UN Charter; they apply to the Council as a treaty-based organ through the law of treaties; and they have a direct, or autonomous, effect on the Council's decisions.

### *1 The Purposes and Principles of the UN*

Article 24 of the UN Charter requires that the Council shall comply with the purposes and principles of the United Nations. Article 25 makes the binding force of the Council's acts conditional upon such compliance. Bowett emphasizes that the Council's decisions are binding only if they are in accordance with the Charter.<sup>48</sup> The ordinary meaning of Articles 24 and 25 establishes compliance with *jus cogens* as the necessary condition for a binding and valid Security Council action.<sup>49</sup> Not least so, as the UN's purposes and principles overlap in scope with peremptory norms. The clearest examples are Article 2(4) prohibiting the use of force and Article 51 relating to the inherent right to self-defence, which cannot be overridden by the Council's action. The Preamble and Article 1 of the Charter affirm that the principle of self-determination is part of the purposes and principles of the Organization. Fundamental human rights also form part of the principles of the Charter.<sup>50</sup>

### *2 The Law of Treaties*

The law of treaties codified in VCLT 1969, also embodying customary law, applies to constituent instruments of international organizations, such as the UN Charter.<sup>51</sup>

<sup>44</sup> UN Secretary-General's Bulletin on 'Observance by United Nations Forces of International Humanitarian Law', UN Doc ST/SGB/1999/13; Institute of International Law, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Session of Zagreb, 1971.

<sup>45</sup> Shaw and Wellens, *supra* note 1, at 11, 15.

<sup>46</sup> Gasser, 'Collective Economic Sanctions and International Humanitarian Law', 57 *ZaöRV* (1997) 885–887; Reinisch, *supra* note 1, at 860–861.

<sup>47</sup> Gasser, *supra* note 46, at 882; Bossuyt, *supra* note 33, at 10.

<sup>48</sup> Bowett, *supra* note 10, at 92; Bossuyt, *supra* note 33, at 7.

<sup>49</sup> Scott *et al.*, 'A Memorial for Bosnia', 16 *Michigan JIL* (1994) 126.

<sup>50</sup> Doehring, *supra* note 26, at 98; *Namibia* (Advisory Opinion) [1971] ICJ Rep 57; *Tehran Hostages* [1980] ICJ Rep 42.

<sup>51</sup> Art. 5 VCLT.

The Charter is subject to the effect of Articles 53 and 64 VCLT, dealing with voidness and termination of treaties conflicting with jus cogens. But Articles 53 and 64 do not exhaustively govern the interplay between a treaty and jus cogens. States violate jus cogens not only by inserting explicit clauses in treaties, but also – and predominantly – by the manner in which they exercise their rights and prerogatives under a treaty not explicitly conflicting with jus cogens.

Therefore, jus cogens is relevant not only for validity, but also ‘as a climate of interpretation of the intention of the parties’.<sup>52</sup> While concluding a treaty, states cannot be presumed to authorize acts contrary to jus cogens, unless a treaty contains an explicit clause to that effect (in which case the entire treaty would be void). As the International Law Commission (ILC) emphasized, states cannot escape the operation of jus cogens, particularly its invalidating power, through the establishment of an international organization.<sup>53</sup> Consequently, it must be presumed that a treaty-based institution is not endowed with powers to act in contravention to jus cogens or to override its operation. Acts contrary to jus cogens are beyond the powers of an institution (*ultra vires*).

Therefore, the provisions of the UN Charter on the powers of the Security Council have to be interpreted and executed in a way that is compatible with jus cogens; they must be deemed to contain respective implicit limitations on that organ’s powers. The same is true of institutions other than the UN. The measures of the World Trade Organization are subject to jus cogens. In the event of conflict, jus cogens enjoys primacy either through the duty to adopt interpretation of the WTO agreements compatible with jus cogens or through invalidating a contrary WTO provision.<sup>54</sup>

The European Commission on Human Rights affirmed that state parties to the European Convention on Human Rights (ECHR) are responsible for violations of the Convention, even if the relevant act or omission results from compliance with other international obligations, and especially noted that this limits the effect of obligations assumed within, and powers of, international organizations. Otherwise, the Commission continued, ‘the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character’.<sup>55</sup> In *Matthews*, the European Court of Human Rights considered that the Treaty on European Union and the acts of EU organs are subject to scrutiny in terms of their compatibility with the ECHR.<sup>56</sup> In addition, it must be noted that the European Commission has clearly affirmed that the ECHR obligations are peremptory, and moreover has done so in the

<sup>52</sup> W. Jenks, *The Prospects of International Adjudication* (1964), 458.

<sup>53</sup> II UNCLT *Official Records* (1986), 39; the relevance of jus cogens is affirmed by the principle that states cannot delegate to an international organization more powers than they themselves can exercise. In addition, after an institution is established, its powers are qualified by subsequent development of jus cogens: de Wet and Nollkaemper, *supra* note 37, at 181–182; Shaw and Wellens, *supra* note 1, at 11, affirming that if the Members transfer to an international organization the power to impose coercive economic measures, their obligation to comply with peremptory norms is not affected.

<sup>54</sup> Marceau, ‘WTO Dispute Settlement and Human Rights’, 13 *EJIL* (2002) 753.

<sup>55</sup> Application No. 13258/87, *M & Co v. FRG*, 9 Feb. 1999, 33 YB ECHR (1990) 51–52.

<sup>56</sup> Application No. 24833/94, *Matthews v. UK*, ECHR, 18 Feb. 1999, paras. 26–35.

context of normative conflict between different sets of obligations – a classical field of application of jus cogens.

The conclusion based on the law of treaties is that a treaty such as the UN Charter cannot be construed as authorizing any organ to act in violation of jus cogens. The most likely objection to such argument is Article 103, according to which in the event of conflict between the Charter obligations, arguably including Council decisions and obligations of members under other international agreements, the former prevail over the latter. But whatever the outcome, the obligation to comply with the Council's resolutions is conditional upon the Council's compliance with the Charter principles: Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms.

In addition, Article 103 makes the Charter prevail over international agreements, freeing states from legal liability for any non-performance of their other agreements due to compliance with UN coercive measures, but this is not the case for the general international law,<sup>57</sup> of which jus cogens is a part. The clear text does not support the opposite view, and those who wish to see Article 103 as making the Charter prevail over general international law cannot rely on evidence, but only on wishful thinking.

Judge Lauterpacht in *Bosnia* clarified that 'the relief which Article 103 may give the Security Council in case of one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and jus cogens.'<sup>58</sup> It only needs to be added that, even if Article 103 were to extend to general international law and not merely to agreements, it would still be a treaty provision and hence be unable to prejudice the operation of jus cogens. Judge Lauterpacht's reference to hierarchy of norms confirms that the effect of jus cogens derives from its normative superiority, rather than from empirical ways of construction.

### 3 Direct and Autonomous Effect of jus cogens

Direct and autonomous effect is the most usual way jus cogens applies to conflicting acts and transactions. Under this perspective, jus cogens applies to the acts of the Security Council directly and immediately, as distinguished from applicability through the UN Charter or treaty interpretation.<sup>59</sup> The direct and immediate effect of jus cogens means that the Council's acts are subject to it in the same way as the acts of any other actor.

The VCLT 1986 confirms that international organizations are bound by jus cogens in the law of treaties (Articles 53 and 64). In the case of states, it is clear that besides the law of treaties, their acts and actions are also subject to jus cogens. Therefore, the fact that organizations are bound by jus cogens with regard to the validity of treaties, invites the argument that peremptory norms also apply to their unilateral acts or

<sup>57</sup> Bowett, *supra* note 10, 92; L. Goodrich, E. Hambro, and A. Simmons, *The Charter of the United Nations* (1969), at 615–616; Gasser, *supra* note 56, at 881; Sassoli, *supra* note 42, at 264, making a similar point in terms of both customary law and jus cogens.

<sup>58</sup> Separate Opinion [1993] ICJ Rep 440. See also Shaw and Wellens, *supra* note 1, at 13.

<sup>59</sup> Angelet, *supra* note 7, submitting that jus cogens can bind the Council either by virtue of the principle *nemo plus juris transfere quam ipse habet*, or just by virtue of the nature of jus cogens.

actions. Of course, one may argue that organizations have different capacities and are subject to different constraints than states, but this is not enough to exempt their acts from the immediate effect of jus cogens. The ILC and the 1986 Vienna Conference did not hesitate to extend to international organizations the operation of jus cogens in terms of coercively imposed treaties and treaties *contra juris cogentis*, even if the difference in capacities was mentioned there as well.<sup>60</sup>

The reasoning of Judge Lauterpacht in *Bosnia* seems to focus on the autonomous effect of jus cogens on Resolution 713 (1991), which imposed the arms embargo on the former Yugoslavia. Judge Lauterpacht seems to refer to the immediate and direct effect of the prohibition of genocide, as a peremptory norm, on that resolution, and not to any intermediate modality bringing about such effect.<sup>61</sup>

## 4 The Normative Conflict between a Security Council Resolution and jus cogens: The Practice of the Security Council

### A *The Concept of Normative Conflict*

Whether a Security Council resolution offends against jus cogens depends on whether there is a normative conflict between a peremptory norm and a resolution. The meaning of a 'conflict' with jus cogens should be clarified by means of reference to the literal meaning of that term;<sup>62</sup> this refers to what is prohibited by a peremptory norm and is contrary to it. Derogation means an attempt to legitimize acts contrary to jus cogens and thus to hinder the integral and non-fragmentable operation of a peremptory norm, to aim at a result that is outlawed under a peremptory norm, to allow or oblige states to do what peremptory norms prohibit or abstain from what peremptory norms require.

A normative conflict necessarily involves an objective and dynamic interplay between the two different norms, in our case a peremptory norm and a provision in a Security Council resolution. It matters not only whether they conflict on the surface, but also whether they contradict each other with the effects they have and the results they require. Exactly in this aspect the emergence of conflicting rights and duties of states is most likely. Not only the clear wording and the stated intent of a resolution should be studied, but also the necessary result of possible application following from, or compatible with, the wording of its relevant clauses, because the Council may conceal its intent to offend against jus cogens through stating totally neutral purposes or even the purpose of maintenance or restoration of peace and security. The involvement of a Security Council resolution in such situation would involve a derogation

<sup>60</sup> For the reasoning of such extension see 1986 UNCLT Official Records, II, 37ff.

<sup>61</sup> Separate Opinion [1993] ICJ Rep 440–441. Judge Lauterpacht did not link the issue of jus cogens to the observance of the Charter and did not examine the intention of the drafters.

<sup>62</sup> 'To come into collision, to clash; to be at variance, be incompatible. (Now the chief sense.)', *The Oxford English Dictionary* (1989), iii, 713.

from jus cogens consisting in an attempt to exempt a given situation from the general regime of an applicable peremptory norm and subject it to a regime designed by the Council.

## **B Specific Types of Normative Conflict of the Security Council Resolution with jus cogens**

### *1 The Council's Implicit Support for the Breach of a Peremptory Norm*

The Security Council, aware of the fact that a violation of a peremptory norm is taking place, might nevertheless adopt a decision supporting the cause of a state which acts in violation of jus cogens. This can happen when the Council positively adopts a certain attitude or measures without explicitly stating the intention to contravene jus cogens.

A clear example is the adoption of Resolutions 731 (1992) and 748 (1992), which demanded that Libya extradite to the United States or the United Kingdom two suspects in relation to the Lockerbie aircraft bombing and imposed the air and arms embargo on Libya to induce it to comply. While demanding extradition, the US and the UK had embarked upon the policy of the threat to use force against Libya to induce it to comply with their demands, which clearly contradicts the peremptory prohibition of the use or threat of force. Professor Brownlie, as a counsel for Libya before the ICJ in *Lockerbie*, demonstrated that such threats were made at the various levels of UK and US Governments and were directed at Libya.<sup>63</sup> This happened even though the Council itself had not considered that the situation required authorization of the use of force. The Council was not asked to authorize the use of force under Chapter VII, and the threats took place in a bilateral context only; nor were these threats subsumable under Article 51 of the Charter. But Resolution 748 unconditionally supported the action and attitude of states demanding extradition, and the Council's attitude resulted in an approach that even if circumstances did not warrant authorization of force under Chapter VII, it supported the threat or potential use of force on a bilateral basis. The Council was aware that threats were aimed at inducing Libya to adopt a certain line of behaviour, but it supported and demanded precisely the same line of behaviour from Libya, backed this demand with coercive measures and acted in a way to promote the success of those unlawful threats of the use of force. It is not suggested that the Council was duty-bound to condemn the threat of the use of force, but it had no power to adopt the attitude and measures supporting such threat.

Another issue of conflict with jus cogens is that Resolution 748 was adopted despite the contention that the extradition could deprive the suspects of their right to fair trial, as Libya expressed doubts that fair trial would be possible in Scotland or the United States.<sup>64</sup> But the Council did not examine whether this issue and the compliance with its resolution could result in a serious human rights violation.

<sup>63</sup> CR 97/21, and CR 97/24 (Brownlie).

<sup>64</sup> Brownlie, CR 97/24.

The Council acted in ways that supported a breach of jus cogens also in cases where a differentiation is required between the conduct of states in terms of the legal merits of such conduct. But the Council has nevertheless acted in an indiscriminate way. At the early stage of the conflict in Cyprus, the Council acted non-selectively as it did not distinguish between aggressor and victim. As a political organ, the Council is perhaps not obliged to condemn every act of aggression, but it is a different question whether the Council can deprive a state of its inherent right to self-defence. In Resolution 193 (1964) the Council demanded the cessation of the use of force in a non-selective way. Turkey was called upon to cease the use of force and bombardment of Cyprus and Cyprus was required 'to order forces under its control to cease firing immediately'. At a later stage of the conflict, after the Turkish invasion, the Council, by Resolution 354 (1974), demanded that all parties cease firing and hostilities. This demand was obviously addressed not only to Turkey, but also to Cyprus. In both cases the Council did not duly respect the Article 2(4) prohibition. Use of force by Turkey was contrary to Article 2(4), while Cyprus acted in self-defence, but the Council placed them on a similar footing. The Council is perhaps not obliged to make determinations of illegality on each and every occasion and is generally empowered to demand a cease-fire by both parties to the conflict. But in this case the Council demanded from a state that it not resort to its inherent right to self-defence, which is clearly beyond its mandate, and its decision was very unlikely to override operation of the right to self-defence. The assessment of the Council's action requires consideration of the elementary distinction between the failure to condemn the aggressor and the positive demand that the victim of an aggression stops defending itself.

Finally, there are situations where the Security Council has perhaps not intended to act in a way that offends jus cogens, but the events subsequent to adoption of a given measure cause such inconsistency. Resolution 713 (1991) imposed an arms embargo on Yugoslavia before its disintegration. After its disintegration, a situation arose in which, if the resolution were complied with, Bosnia would be hindered from exercising its right to self-defence and from preventing genocidal practices.

## 2 *The Council's Inaction in Face of the Breach of jus cogens*

In *East Timor*, Australia defended its decision to conclude with Indonesia the controversial 1989 Timor Gap Treaty, despite Indonesia's occupation of East Timor as a grave breach of the principle of self-determination, by submitting that the right to self-determination is dependent on the decisions of the UN;<sup>65</sup> it also depends on the decision of UN organs whether third states are prevented from dealing with the power in control of a territory, even if that control is illegal.<sup>66</sup> Australia submitted that the Council's Resolutions 384 and 389 condemning Indonesian occupation 'contained no guidance as to the behaviour expected – even less imposed – on third States.'<sup>67</sup>

<sup>65</sup> Counter-Memorial of Australia, *East Timor*, 145, para. 322.

<sup>66</sup> *Ibid.*, at 147, para. 327.

<sup>67</sup> *Ibid.*, at 148, para. 330. Australia distinguished the Council's response to the East Timor issue from the situations of Rhodesia, the 'Turkish Republic of Northern Cyprus', Namibia, and Israel's claim on East Jerusalem: *ibid.*, at 155–156, paras. 347–348.

Australia emphasized that several states – Canada, Australia, France, Sweden, Japan – recognized the integration of East Timor into Indonesia as a reality and an accomplished and irreversible fact, and refused to support further UN resolutions on East Timor.<sup>68</sup> This emphasis on irreversibility in fact supported the validity of a forcible territorial acquisition.

If a territorial acquisition is wrongful, then no rights such as the treaty-making power and the right to stay in the territory may arise from it. The International Court's affirmation of East Timor's right to self-determination<sup>69</sup> meant that Indonesia had no right to stay in East Timor, and consequently no right to make treaties for it. The Court was of course aware of such logical and consequential link, and it was not deterred by the above-mentioned contrary practice to affirm East Timor's right to self-determination.

In 1964, the Republic of Cyprus argued before the Security Council that the Cyprus Guarantee Treaty between Greece, Turkey, Cyprus and UK was *contra jure cogentis* and void, as it authorized forcible intervention into the country. The Council has not expressed any view on this. The mere fact of the failure to reject the Treaty explicitly does not suffice to assume that it upheld it implicitly. The Council did not follow the proposal of Turkey to affirm the Guarantee Treaty, but simply noted the views of the parties and also referred to Article 2(4) of the Charter which could also be interpreted as negating the validity of claims of the forcible intervention.<sup>70</sup>

The most recent situation to illustrate the inaction of the Security Council in the face of violations of jus cogens arose in 1999 with regard to the conflict in Kosovo, where the Council did not support the draft resolution submitted by Russia, China and India condemning the armed attack against the Federal Republic of Yugoslavia. The Council had not itself authorized such armed attack, nor found circumstances under Chapter VII that would justify it.

The failed adoption of the draft resolution calling for the immediate cessation of the NATO air strikes cannot be seen as an implied authorization or legitimation.<sup>71</sup> The political nature of the motives of non-condemnation combined with the criticism of the essential number of states both within and outside the Security Council demonstrates that no implicit acceptance or authorization took place.<sup>72</sup> This approach is supported in *Namibia*, where the International Court clearly stressed that: 'The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed.'<sup>73</sup>

<sup>68</sup> *Ibid.*, at 152–153, paras. 339–341; at 153–154, paras. 344–345.

<sup>69</sup> [1995] ICJ Rep 90 at para. 36.

<sup>70</sup> A. Jacovides, *Treaties Conflicting with Peremptory Norms of International Law and the Zurich-London 'Agreements'* (1966), at 25.

<sup>71</sup> Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis', 12 *EJIL* (2001) 431.

<sup>72</sup> Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *EJIL* (2001) 460.

<sup>73</sup> *Namibia* [1971] ICJ Rep 36, para. 69.

### 3 *The Claims of Subsequent Validation of the Breaches of jus cogens*

It is interesting to ascertain whether the adoption of a resolution by the Security Council, as opposed to its non-adoption, can subsequently validate a breach of peremptory norms, especially if the Council deals with the factual or legal consequences of a breach of jus cogens.

In October 1998, the Federal Republic of Yugoslavia signed agreements providing for the return of refugees in Kosovo and a verification role for the OSCE. These agreements were obtained through deliberate military threat, which was openly admitted by the US and NATO.<sup>74</sup> These agreements were unconditionally and absolutely void under Article 52 VCLT as coercively imposed treaties<sup>75</sup> and the outcome is identical under conventional law embodied in VCLT 1969 and VCLT 1986 and customary law.<sup>76</sup> The Security Council manifestly lacks the competence to validate agreements imposed through coercion,<sup>77</sup> not least because the peremptory prohibition of the use of force is a limitation on the Council's powers and the voidness of coercively imposed treaties is the clear consequence of jus cogens.<sup>78</sup>

Resolution 1203 (1998), which approved the terms of the settlement reached with the FRY, is interpreted as a validation of coercively imposed agreements.<sup>79</sup> It is also suggested that far from affecting the legal value of the 1998 agreements, Resolution 1203 imposed on FRY entirely new obligations having an identical content to those included in the agreements and that the Council chose to replace those agreements of doubtful validity by a binding Chapter VII resolution rather than retrospectively validate the agreements.<sup>80</sup> But facts unsettle this assumption as Resolution 1203 welcomed and explicitly endorsed the conclusion of the agreements of 15–16 October 1998 and demanded the 'full and prompt implementation of these agreements by the Federal Republic of Yugoslavia', upon which they were forcibly imposed. All this took place despite the fact that the Council lacked the competence to validate the forcibly imposed agreements. Therefore, such validation is void *ab initio* for its conflict with the peremptory prohibition of force embodied both in the Charter and general international law.

<sup>74</sup> Gazzini, *supra* note 71, at 430; Hilpold, *supra* note 72, at 440.

<sup>75</sup> In codifying the law of treaties applicable to international organizations, the ILC decided to use the formulation used in VCLT 1969, II *UNCLT Official Records* (1986), 37–39. The formulation was so adopted in VCLT 1986.

<sup>76</sup> A. Cassese, *International Law* (2001), at 132–133; *YbILC* (II-1966), 246–247.

<sup>77</sup> Gazzini, *supra* note 71, at 430.

<sup>78</sup> Judge Schwebel in *Nicaragua* referred to Art. 52 VCLT in the context of the peremptory nature of the prohibition of the use of force: Dissenting Opinion [1984] ICJ Rep 392, at 615. According to Virally, there is a parallelism between jus cogens and invalidity of forcibly imposed treaties: Virally, 'Reflexions sur le "jus cogens"', 12 *Annuaire Francais de Droit International* (1966) 13. As the International Court stressed in *Fisheries Jurisdiction* (UK v Iceland) [1973] ICJ Rep 3, at para. 24, the nullity of coercively imposed treaties is implied in the UN Charter, and this is a clear limitation on the Council's powers.

<sup>79</sup> France considered resolution 1203 as necessary to legitimate agreements signed by FRY: Gazzini, *supra* note 71, at 406.

<sup>80</sup> Cf. *ibid.*, at 430.



With Resolution 1244 (1999), the Council approved the international security presence in Kosovo and defined the mandate of KFOR. This has been interpreted by some as a retrospective approval of the armed attack on Yugoslavia, although nothing in the text of the resolution confirms this and a resolution approving the war against the FRY would not have been supported by the majority. Besides, the Council had not found that the situation in relation to Kosovo mandated authorization of force, and it would be absurd to assume that it later validated such use of force; such judgment would justify the Council in offending against the clear terms of the Charter which outlaws the use of force in absolute and unconditional terms. The use of force was not authorized when it was employed and hence remained illegal both under the Charter and general international law. When the Council initially authorizes the use of force under Chapter VII, such use of force is *legal*; but when the force is used without that authorization, it becomes *illegal*, both under the Charter and under general international law. Therefore, it cannot be argued that once the Council can initially authorize the use of force it can also retrospectively validate the use of unauthorized force. The two situations are radically different. In the first situation the Council would act in accordance with the clear mandate delegated to it by states under the Charter; in the second case it would validate an action which is absolutely illegal, and this is beyond the Council's mandate.

Nevertheless, Alain Pellet considers that Resolution 1244 dramatically changed the picture and retrospectively legitimated the NATO action against the FRY, which he characterizes as an international crime.<sup>81</sup> But it is far from established that the Council was willing to provide such retrospective validation. The Council decided to act in light of a new reality: the vacated territory of the Yugoslavian province of Kosovo was to be placed under an authority able to maintain law and order before the solution of the conflict, ensure the safe return of refugees and prevent further instances of inter-ethnic conflict. Therefore, 'the fact that [in Resolution 1244] the Security Council does not refer to the NATO military action can hardly be seen as evidence for an acquiescence to the intervention'.<sup>82</sup> Pellet himself recognizes that such subsequent validation, if it happened, was deeply repugnant to the function of law in any society.<sup>83</sup> Similarly, Christine Gray convincingly characterizes the idea of retrospective authorization of illegal armed actions as a dangerous idea with no adequate support in state practice.<sup>84</sup>

The implausibility of claims of subsequent validation of illegalities in the case of Kosovo has become so clear that when, after the Second Gulf War, the Council adopted Resolution 1483 (2003) governing the status of occupying powers in Iraq, it was not seriously contended that this resolution validated the use of force against Iraq.

<sup>81</sup> Pellet, 'Brief Remarks on the Unilateral Use of Force', 11 *EJIL* (2000) 387–389. See also Wedgwood, 'Unilateral Action in the UN System', 11 *EJIL* (2000) 358–359.

<sup>82</sup> Hilpold, *supra* note 72, at 441.

<sup>83</sup> Pellet, *supra* note 81, at 389.

<sup>84</sup> C. Gray, *International Law and the Use of Force* (2000), at 195.

#### 4 Resolutions Explicitly Approving Breaches of *jus cogens*

An action of the Security Council can result in the direct approval of a violation of *jus cogens*, when such intention is inferable from the relevant resolution. This is the case of the Council's approval of enhanced powers of the High Representative in Bosnia.

The position of the High Representative was initially introduced by the Dayton Agreement. Its Annex 4 confirmed the political independence and sovereignty of Bosnia; its Article I(4) affirms that Bosnia should have such symbols as are decided by its Parliamentary Assembly and are approved by the Presidency. Article II of Annex 10, which lists the powers of the High Representative, does not empower it to make binding decisions on any matter belonging to the competence of Bosnian institutions, and states that he has only monitoring, consultative, coordinative and conciliatory powers. He is not vested with public authority in Bosnia. Article V of Annex 10 makes the High Representative 'the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement'. As there is a difference between interpretation and revision of treaties, the High Representative is the final instance in interpreting the powers it has been granted under the Treaty, not in arrogating new powers to himself.

However, the Bonn Decision of the Peace Implementation Council (PIC), adopted on 10 December 1997, welcomed the High Representative's intention to use its authority of final interpretation and exercise some functions not conferred to it under the Dayton Treaty: organization of meetings of common institutions, interim measures with regard to governmental decisions, and dismissal of public officials 'who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms of its interpretation'. Such very broad powers are not foreseen under the Peace Agreement and the PIC Decision empowers the High Representative to exercise these powers 'as he judges necessary'.

In practice, the High Representative used these powers to effect dismissal of a great number of officials of various levels, including popularly elected high-level officials such as presidents,<sup>85</sup> and to adopt laws (on the ombudsman, state border protection, criminal procedure),<sup>86</sup> state symbols, and a procedure for the adoption of laws.<sup>87</sup> These powers and the manner of their exercise went to the core of state sovereignty and the right of peoples to self-determination, which consists in the entitlement of peoples to decide freely on their political organization and future.

This factor is continuously neglected by the Security Council, which, in Resolutions 1305 (2000) and 1491 (2003), expresses full support for the High Representative to make binding decisions as specified in the PIC Bonn Decisions. These provisions clearly offend against the principle of self-determination and hence their legal effect is questionable.

<sup>85</sup> Numerous decisions of this kind are available at [www.ohr.int](http://www.ohr.int).

<sup>86</sup> Decision imposing the Law on the Human Rights Ombudsman of Bosnia and Herzegovina, 14 Dec. 2000; Decision on the Law on State Border Service, 13 Jan. 2000; Decision Amending the Law on Special Witness Protection in Criminal Proceedings in the Federation of BiH, 2 Mar. 2001.

<sup>87</sup> Decision on Law-signing Procedures in the Republika Srpska During a Presidential Vacancy, 25 June 1999.

### 5 Resolutions Generating Breaches of jus cogens

The action of the Security Council can itself generate a breach of jus cogens, possibly through coercive measures under Chapter VII. There are several examples of sanctions affecting the innocent civilian population. The economic sanctions against Iraq reached their exhaustion point in causing suffering to the Iraqi civilian population, including the Kurdish minority.<sup>88</sup> Sanctions against the FRY have also inevitably placed a heavy burden upon the civilian population.<sup>89</sup> Sanctions against Haiti, the FRY and Iraq contributed to an increase in infant mortality and impaired access to food and medicines.<sup>90</sup> In Iraq, child mortality doubled after the imposition of sanctions.<sup>91</sup> Besides, such sanctions have not proved effective in producing behavioural change in the target leadership.<sup>92</sup>

As this problem is so evident, the Security Council has approved humanitarian exceptions to sanctions it has imposed on certain states,<sup>93</sup> but such exceptions are limited in scope and do not address such human rights issues as primary education, access to health care or drinkable water.<sup>94</sup> As Gasser submits, humanitarian exceptions under Resolutions 661, 666 and 757 on Iraq and Yugoslavia comply with humanitarian law embodied in the Geneva Conventions. But the Iraqi and Yugoslav civilian population have unquestionably suffered hardship under the embargoes, despite the humanitarian exceptions.<sup>95</sup> The Council has to undertake assessment in terms of foreseeability of adverse humanitarian consequences so that, as Gasser submits, the 'unintended' or 'unavoidable' effects on the civilian population are limited to a strict minimum.<sup>96</sup>

### C Some General Observations

It is clear that the Council can violate jus cogens in various ways. The analysis of practice confirms the approach to normative conflict in terms of practical and operative interaction of the terms of a resolution with jus cogens.

The illegality emanating from the breach of jus cogens is objective, which means that the basis of the illegality is the breach of a rule as such, regardless of the attitude of specific actors. This is so because, as Jennings suggests, objective wrongs are breaches of jus cogens offending against the community interest, and the consequent nullity is not qualified by subsequent attitudes.<sup>97</sup> This means that the applicability of peremptory norms to a given situation or the legality of a given fact or action is not

<sup>88</sup> N. White, *The Law of International Organisations* (1996), at 188; Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *RdC* (1997) 117, at 121.

<sup>89</sup> *Ibid.*, at 127.

<sup>90</sup> *Ibid.*, at 139, 147–148.

<sup>91</sup> de Wet, *supra* note 33, at 289.

<sup>92</sup> Damrosch, *supra* note 88, at 129.

<sup>93</sup> For an overview see de Wet, *supra* note 33, at 281–284.

<sup>94</sup> ICESCR Committee, General Comment No.8, para. 5; Reinisch, *supra* note 1, at 863.

<sup>95</sup> Gasser, *supra* note 46, at 892–894.

<sup>96</sup> *Ibid.*, at 902.

<sup>97</sup> R. Jennings, *Nullity and Effectiveness in International Law* (1965), at 74. On objective illegality see also C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976), at 24ff.

prejudiced by how the Security Council treats that act or situation. To hold otherwise would mean that the rules of international law do not independently generate legal consequences in the case of their violation but that such consequences arise only in the event of a subsequent determination of illegality by one or another institution. Such outcome would cause fragmentation of legal relations, and defeat the primary purpose of jus cogens, which is to avoid such fragmentation.

Some specific issues arise from claims of subsequent approval or validation of certain conduct by the Security Council or its acquiescence in certain acts. But the concept of acquiescence is not unqualified. Tribunals always apply a very high standard of proof in terms of acquiescence and in most cases decline to find it.<sup>98</sup> Acquiescence can never be presumed: it must be inferred from convincing evidence, including the clarity of attitude and the time factor. To find these in the Security Council's practice outlined above is an impossible task. The non-condemnation of an act does not mean its approval, as confirmed by the *Namibia* Opinion. In addition, acquiescence cannot operate in the face of overriding jus cogens. There is no valid precedent of the acquiescence into acts or situations *contra juris cogentis* and the legal doctrine rejects the relevance of acquiescence in such situations.<sup>99</sup> No act contrary to jus cogens 'can be legitimated by means of consent, acquiescence or recognition; nor protest is necessary to preserve rights affected by such acts'.<sup>100</sup>

There are more practical problems when some states consider that the action 'approved' by the Council remains illegal as, for instance, the FRY and many other states consider with regard to the NATO action against the FRY. The opposite conclusion would suggest that the Council is master of the Charter and of jus cogens rather than an organ subjected to the Charter. Such fragmentation of jus cogens has no lawful foundation.

## 5 Legal Consequences

### *A Peremptory Norms and the Intention of the Security Council*

To clarify whether a decision of the Council offends against jus cogens requires ascertaining the intention of the Council behind a given decision. This can only occur through the careful analysis of the text of a resolution to verify whether the Council intends to derogate from a peremptory norm or its effects, or legitimate non-compliance with it, and this established intention should be judged in terms of relevant peremptory norms. This is the task of discovering whether there is a normative conflict and whether the consequences of such normative conflict, such as the law of invalidity, apply.

<sup>98</sup> Acquiescence was found in *Temple* in a situation unchallenged for decades: [1962] ICJ Rep 6. It was not found in *Gulf of Maine* [1982] ICJ Rep 246, at 303–312; and *Libya-Malta* [1985] ICJ Rep 13, at 29.

<sup>99</sup> Lauterpacht, 'Sovereignty over Submarine Areas' [1950] *BYIL* at 397–398, considered that acquiescence cannot cure acts which are void *ab initio*. Mann, 'Reflection on the Prosecution of Persons Abducted in Breach of International Law', in Y. Dinstein and M. Tabori (eds.), *Festschrift Rosemne* (1989), at 410, also asserted that no acquiescence could heal serious violations of state sovereignty, even if the affected state did not complain.

<sup>100</sup> R.Y. Jennings and A. Watts, *Oppenheim's International Law* (1996), i, at 8.

The encroachment on *jus cogens* is clearly outside the Council's competence. It is established in national and international jurisprudence (although on a different matter than considered here) that conduct outlawed under *jus cogens* is outside the functions of states.<sup>101</sup> Organizations established by states cannot be endowed with functions and powers which states themselves are not entitled to exercise. This raises the issue of excess of competence (*ultra vires*) and ensuing legal consequences. But in the first place the Council is aware of such limitations of its competence, and must be presumed to respect it,<sup>102</sup> unless the opposite appears true from the wording of a resolution.

This raises the issue of interpretive methods. The interpretation of the Council's resolution should give effect to the will of Member States, but also be in accordance with the UN Charter.<sup>103</sup> As far as general international law is concerned, it is contended that:

The extent to which Security Council Resolutions should be interpreted taking into account applicable rules of international law, whether general international law or particular treaties, depends on the analysis of the intentions of the Security Council (as evidenced by the text of the resolution and the surrounding circumstances). If it appears that the Council was intending to lay down a rule irrespective of the prior obligations of States, in general or in particular, then that intention would prevail; if, conversely, it appears that the Council was intending to base itself on existing legal rules or an existing legal situation, then its decisions ought to certainly be interpreted taking those rules into account.<sup>104</sup>

This statement could be perfectly true if international law were a flat system where none of its norms possess the distinctive characteristics of public order. But there is a hierarchy in international law with direct impact on the scope of the Council's powers. Not only are the Council's resolutions part of secondary law subjected to the Charter, but also part of a system which in its entirety is subordinated to *jus cogens*. The task of interpretation is to ensure compliance with the standards which govern the powers of the Council and thus the meaning of its resolutions.

Apart from the cases of economic sanctions under Article 41, which can prevail over inter-state agreements, such as trade agreements, the Security Council hardly

<sup>101</sup> The House of Lords in *Pinchoet* considered that acts such as torture, hostage-taking, and crimes against humanity, disavowed as abhorrent by all states and outlawed as international crimes under specific conventions, cannot be official functions of any public official: [1998] 4 All ER 97, *per* Lord Nicholls at 939–940; *per* Lord Steyn at 945–946; [1999] 2 All ER 000, *per* Lord Hutton at 165–166; *per* Lord Browne-Wilkinson at 113–114; *per* Lord Millett at 179. A US Court of Appeals (Ninth Circuit) refused to immunize acts of torture, killing, and disappearance performed by, under the direction, or with the connivance of, a head of state, and implicating systematic use of state machinery, because no public official, even a head of state, can claim these as his functions: *Hilao v. Marcos*, 104 ILR 119, at 122–125. In *Arrest Warrant*, the Joint Separate Opinion made it clear that international crimes are outside state functions and 'State-related motives are not the proper test for determining what constitutes public State acts': at para. 85.

<sup>102</sup> Judge Lauterpacht suggested that the Security Council would not deliberately adopt a resolution violating a peremptory norm such as that prohibiting genocide, but suggested that such contradiction might be involved in an unforeseen manner: [1993] ICJ Rep 407, at 440–441.

<sup>103</sup> Wood, 'The Interpretation of Security Council Resolutions', 2 *Max-Planck YBUNL* (1998) 95.

<sup>104</sup> *Ibid.*, at 92.

ever expresses any intention of disregarding existing rules of international law. As the ICTY observed in *Tadić*,

It is open to the Security Council – subject to peremptory norms of international law (jus cogens) – to adopt definitions of crimes in the Statute which deviate from customary international law. Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the Statute, or from other authoritative sources.<sup>105</sup>

This approach is shared in *Akayesu*, which suggests that, through establishment of the *ad hoc* criminal tribunals, the Council did not derogate from customary law, and the fact that the concept of crimes against humanity was linked to an armed conflict in *Tadić* and to a discriminatory intent in *Akayesu* was due not to the intention of the Council to change or otherwise affect the composition of these crimes as recognized under general international law, but just to provide the ICTY and ICTR with the jurisdiction limited accordingly.<sup>106</sup> This must be the key criterion presuming that the Council does not deviate from general international law unless the contrary intent is clear. Interpretive methods can be used to establish that such intention is not present.

Certain resolutions contain explicit clauses requiring respect for human rights and humanitarian law in terms of the fight against terrorism, such as Resolution 1456 (2003), or for respect of territorial integrity and sovereignty of a state, such as Resolution 1244 (1999), and this demonstrates that the Council does not intend to offend jus cogens in these specific ways. In other cases more certainty may be desired.

The terms of a resolution, if vague, must be construed as requiring an outcome that is consistent with jus cogens. According to Gasser, ‘doubtful’ wording of the Council’s resolutions must always be construed in such a way as to avoid conflict with fundamental international obligations.<sup>107</sup> Resolution 242 called for ‘a just settlement of the refugee problem’ in Palestine. ‘Just settlement’ can only refer to a settlement guaranteeing the return of displaced Palestinians, and other interpretations of this notion may be hazardous.<sup>108</sup> The Council must be presumed not to have adopted decisions validating mass deportation or displacement. More so, as such expulsion or deportation is a crime against humanity or an exceptionally serious war crime (Articles 7.1(d) and 8.2(e) ICC Statute).<sup>109</sup>

In similar spirit, the clauses in Resolution 1483 (2003) on Iraq referring to ‘a properly constituted, internationally recognised, representative government of Iraq’ (paragraphs 16, 20 and 21), without defining any further requirements such government would have to satisfy, must be construed as referring to a democratically elected government as far as the disposal of Iraqi oil resources is concerned. The

<sup>105</sup> *Tadić*, *supra* note 15, para. 296.

<sup>106</sup> *Akayesu*, ICTR Appeals Chamber, 1 June 2001, paras. 465–466.

<sup>107</sup> Gasser, *supra* note 46, at 883.

<sup>108</sup> Quigley, ‘Displaced Palestinians and a Right to Return’, 39 *Harvard JIL* (1998) 192.

<sup>109</sup> As Special Rapporteur Waldock suggested, one of the criteria for determining a norm’s peremptory status is the criminality of the conduct it outlaws: see [1963-II] *Yearbook of the International Law Commission* 52–53.

requirements listed in the resolution and the Council's intention cannot be understood as trumping basic rights of Iraqi people, including the right to govern themselves and decide on their natural resources in accordance with the principle of self-determination. In order to validly commit the Iraqi people through the allocation of oil contracts, the government in question must be elected by the people, as required by the right to self-determination and the attendant permanent sovereignty over natural resources.

Another tool is the evolutionary interpretation of resolutions. One could ask, using the example of Resolution 713 (1991), whether the subsequent changes in the situation made this resolution incompatible with *jus cogens*, and whether Bosnia, despite the terms of the resolution, would be entitled to receive military support to exercise its right to self-defence and to prevent alleged genocidal practices. One could perhaps advance the concept of functional non-compliance with the resolution for the part which offends against *jus cogens*, or with regard to a state which is the victim of the breach of *jus cogens*. Had the Council foreseen the outcome, it would not have ordered the arms embargo as it did, and even if it had, this would have triggered the issue of validity of its action as an arms embargo depriving a victim of armed attack of the practical possibility of exercising the right to self-defence. A similar functional non-compliance could be justified in the case of economic sanctions against Iraq and Yugoslavia, if it were presumed that the Council would not intentionally inflict such severe hardship on populations in violation of human rights and humanitarian law.

In certain cases, circumstances surrounding the adoption of a resolution can confirm that the Council did not intend to offend against *jus cogens*. For instance, Resolution 1260 (1999) welcomed the signing of the Peace Agreement in Sierra-Leone, and called upon all parties to implement it fully. At its signing, the UN Secretary-General stated that the amnesty provided for in the agreement would not extend to perpetrators of international crimes. Therefore, the Council cannot be presumed to have endorsed immunity for perpetrators of international crimes. Although the Secretary-General cannot speak for the Council, it must be assumed that the latter was aware that the former committed the UN with that qualification.

There would be no need to assert invalidity of a resolution which can be construed as consistent with *jus cogens*. The duty to comply with a resolution can be understood as qualified by the need to ensure observance of peremptory norms with regard to a state or a non-state actor whose rights under peremptory norms would be affected were the resolution strictly and indiscriminately implemented.

But once the intention to offend against *jus cogens* is clear from a resolution as a whole or its specific clause, the only option is to raise the issue of invalidity. The sanctions imposed on Libya under Resolution 748 (1992) were parallel to unlawful threats of force, and perhaps to a potential violation of the right to fair trial. This resolution is so closely linked to the context of those illegalities that it is difficult to conceive it as not having the rationale of support of and participation in those illegalities. Also, the terms of Resolution 1203 (1998) on the FRY are clear in supporting and affirming the coercively imposed agreements and it is beyond doubt that the Council had intended that.

## B *Invalidity of Resolutions Offending against Peremptory Norms*

Invalidity can apply to all international acts, including the acts of international organs and even so-called legislative acts.<sup>110</sup> Any analysis must consider the normative hierarchy and different types of invalidity of acts conflicting with different kinds of norms.<sup>111</sup>

The Council's actions not covered by express powers may be based on implied powers in order not to be considered *ultra vires*. The relevance of *ultra vires* doctrine is broader than the issue of implied powers: an institutional act may be in excess of both implied and explicitly conferred powers. The doctrines of implied powers and of *ultra vires* are sometimes considered as two sides of one coin,<sup>112</sup> and this was so in the *Certain Expenses* case, suggesting that 'when the Organisation takes action which warrants assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* of the Organisation.'<sup>113</sup> The same approach was adopted in *Lockerbie*,<sup>114</sup> where the Court did not consider the Council's Chapter VII resolution as absolutely valid but only *prima facie* binding upon Libya, and thus confirmed that its validity could be considered at the merits phase.

In *Certain Expenses*, the Court did not pronounce on the type of invalidity, but only on the primary issue of legality such as the excess of competence. If there is no excess of power, no issue of validity arises, as was the situation in *Certain Expenses*. This justifies assuming that if the relevant measure were not in accordance with the purposes and principles of the Charter, then the presumption of its *prima facie* validity and bindingness can be rebutted and the law of invalidity applies.

Judge Morelli, while agreeing with the Court's final findings, asserted that the UN acts enjoyed absolute validity as there was no competent body empowered to decide on the validity of those acts.<sup>115</sup> The same factor led President Winiarski to consider that in the absence of judicial review of acts of the Organization it was only the individual Member States who could decide on the validity of those acts and, consequently, refuse to comply with it if they were *ultra vires*.<sup>116</sup> The Court's approach seems to be a balancing of opinions of Judges Morelli and Winiarski. For the Court, the validity of an act of an organization is primarily connected not with any institutional prerequisites, such as existence of the body competent to review, but with the purposes of the Organization as part of the substantive law. The Court does not assert absolute validity of acts but it speaks about presumption of validity. Therefore, the Court's approach is more easily reconciled with the approach of Judge Winiarski than with that of Judge Morelli.

<sup>110</sup> Verzijl, 'Actes juridiques internationaux', 15 *Revue de droit international* (1935) 306–307; Guggenheim, 'La validité et la nullité des actes juridiques internationaux', I *RdC* (1949) 197–198.

<sup>111</sup> Much of the existing material on the subject was written at a time when the relevance of *jus cogens* was not seriously contemplated in the literature in the context of Security Council actions. See, for instance, E. Lauterpacht, *supra* note 1, at 88–121.

<sup>112</sup> White, *supra* note 88, at 128.

<sup>113</sup> [1962] ICJ Rep 168; for a similar view see Fitzmaurice, Separate Opinion [1962] ICJ Rep 204.

<sup>114</sup> *Lockerbie (Provisional Measures), Libya v. US* [1992] ICJ Rep 126; *Libya v. UK* [1992] ICJ Rep 15.

<sup>115</sup> Separate Opinion [1962] ICJ Rep 222–223.

<sup>116</sup> Dissenting Opinion [1962] ICJ Rep 232; Separate Opinion of Judge Gros in *WHO/Egypt* [1980] ICJ Rep 104.



Both the Court and Judge Winiarski seem to hold that the *ultra vires* acts of an organization may be invalidated despite the non-existence of a designated judicial organ. In fact, Judge Morelli's view means that UN organs are *legibus solutus*, which was so vigorously rejected by the ICTY in *Tadić*, and earlier by the ICJ in *Namibia*.

That said, we need to clarify what kind of invalidity applies if a resolution of the Security Council is *ultra vires* because of a conflict with *jus cogens*. Excess of competence by an organ can encroach on interests of individual states only or involve a breach of *jus cogens*, thereby infringing the community interest and giving rise to objective illegality which causes nullity.

In some contexts, such as the EC or international administrative tribunals, institutional regimes specify the process for determining the invalidity of *ultra vires* acts.<sup>117</sup> Such institutional voidability can be a different concept from voidability in general international law. The latter voidability means that an interested party must challenge a given act, in order to trigger its invalidity, as in the case of voidability of treaties concluded through error, corruption, fraud or excess of powers (Articles 47–50 VCLT). Such bilateralist framework is unsuitable in the case of *jus cogens*. Institutional voidability is linked to a determination by a competent organ. But there is no ordinary way to challenge Security Council resolutions and the seising of the International Court can only result in an incidental review, subject to the usual jurisdictional requirements under the Court's Statute. The absence of a regular mechanism of review may either mean that Council resolutions are not in practice subject to challenge and hence enjoy *de facto* absolute validity, or that their validity has to be judged by states by reference to the criteria provided for in international law. The governing legal framework, including both the overriding nature of *jus cogens* and the analogy with the law of treaties, supports the latter option. Both VCLT and the conclusions of the Vienna Conference reject the notion that *jus cogens* invalidity is dependent on institutional determination.<sup>118</sup>

An act offending against *jus cogens* cannot be voidable or relatively invalid but only void. All acts and transactions, such as treaties, unilateral acts and actions of states that offend against *jus cogens* are void and not voidable. Bernhardt distinguishes between different kinds of invalidity of institutional acts: where special procedures exist, such as in the case of dismissal of officials, the acts are voidable but not void, but acts obviously *ultra vires* are void *ab initio*.<sup>119</sup>

In the case of ordinary norms the validity of illegal acts can possibly be linked to the existence and operation of institutional machineries. Such acts are subject to the regime of relative invalidity, which is part of *jus dispositivum*, thereby enabling states to derogate from that regime by establishing special institutional regimes of invalidity. But acts contrary to *jus cogens* are void *ab initio*. Such voidness is itself part of *jus cogens* and cannot be replaced by specific institutional regimes, because *jus cogens* invalidity admits of no derogation. States are not entitled to establish a treaty-based

<sup>117</sup> Overviewed in E. Lauterpacht, *supra* note 1, at 94–99.

<sup>118</sup> Simma, 'From Bilateralism to Community Interest', 250 *RdC* (VI-1994) 289; Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), at 351.

<sup>119</sup> Bernhardt, *supra* note 4, at 608.

institutional regime in which the voidness of institutional acts *contra juris cogentis* would be derogated from through making such voidness dependent upon institutional determination. There is no precedent of an attempt to do so. Therefore, the general international law regime of jus cogens invalidity fully applies to institutional acts whatever the specific regulation, if any, applicable to invalidity of institutional acts.

### **C Severability of Impugned Clauses**

Is an illegal resolution void in its entirety, or are the void clauses severable from the rest of a resolution? In practice, severability of illegal institutional acts is possible.<sup>120</sup> The law of treaties supports entire invalidity of a treaty whose content or conclusion involves a violation of jus cogens (Articles 44, 52 and 53 VCLT).

Arguably, non-severability in the case of transactions offending against jus cogens is not part of customary law.<sup>121</sup> If so, then a resolution of the Security Council offending against jus cogens would not be entirely void and the ‘innocent’ clauses could be preserved.

But the severability approach does not produce ready-made consequences; it requires demonstration in each specific case that the impugned clause of a resolution is not integrally connected with the rest of the document. If, for example, there is an impunity clause in a resolution imposing a comprehensive peace settlement, it is possible that only that impunity clause is void. In some cases, severability would be excluded if the resolution as such were based on, or were conducive to, a breach of jus cogens. This approach applies to Resolution 748 (1992) as it followed up on the unlawful threat of the use of force addressed to Libya, demanded that it follow the course of conduct required under such threats and backed them up with coercive Chapter VII measures. This demonstrates that Resolution 748, in its total rationale, offended against the peremptory prohibition of the threat or use of force. The same is true of Resolution 1203 (1998), whose rationale was clearly linked to the approval of the agreements forcibly imposed on the FRY.

### **D The Means of Challenging Resolutions Offending against Peremptory Norms**

#### *1 Protest*

Security Council decisions are presumed to be legal and the failure to comply is permissible only if a decision is challengeable on legal grounds.<sup>122</sup> This extends even to Chapter VII decisions.<sup>123</sup> A natural outcome is the right of states to protest against an illegal decision.

<sup>120</sup> E. Lauterpacht, *supra* note 1, at 120–121.

<sup>121</sup> Cassese, *supra* note 76, at 144–145; Marceau, *supra* note 54, at 753.

<sup>122</sup> Angelet, ‘Protest against Security Council Decisions’, in Wellens (ed.), *supra* note 10, at 278; Bowett, *supra* note 10, at 93–94.

<sup>123</sup> Angelet, *supra* note 122, at 278–279.

*Certain Expenses* implicitly recognizes the right of Member States to pass judgment on Security Council resolutions.<sup>124</sup> Under Article 25 of the Charter, Member States are obliged to justify refusal to comply in legal terms.<sup>125</sup> In terms of decisions *contra juris cogentis*, protest is not a necessary requirement, as the jus cogens regime of voidness applies anyway. But protest by many states may induce the Council to reconsider its decision.

## 2 Refusal to Carry Out

The conceptual basis of the principle that states shall not enforce institutional decisions offending against jus cogens is that even after an organ such as the Security Council enacts a wrongful decision, states continue to be bound by jus cogens, because the latter is non-derogable and a conflicting decision is *ultra vires*. As the European Court of Human Rights clearly emphasized in *Matthews*, states parties remain bound by the obligations enshrined in the ECHR, even if they are contradicted by the powers delegated to the European Communities. In such cases, the ECHR obligations assume priority.<sup>126</sup> Despite institutional decisions, states are still bound by alternative superior sets of norms to which the powers of respective institutions are subordinated.

It is a starting-point question whether the Charter can be interpreted in a way that even decisions that are unlawful under the Charter or general international law are binding.<sup>127</sup> The meaning of Article 25 of the Charter is that Security Council decisions are binding on a state even without an *ad hoc* agreement, but not that they are so binding even if they are incompatible with the Charter. In such cases, Article 25 admits that states may refuse compliance,<sup>128</sup> especially if a resolution offends against jus cogens.<sup>129</sup>

An organ cannot be the final judge of the legality of its acts.<sup>130</sup> A residual power to determine the legality of the Council's action rests with individual states,<sup>131</sup> and this applies even to Chapter VII measures.<sup>132</sup> The obvious *ultra vires* acts may be challenged.<sup>133</sup> Doehring criticizes the argument that the whole collective security system would be destroyed if states had the right to judge legality independently and considers that such a view is neither coherent nor convincing. "This position would result in an obligation to do wrong."<sup>134</sup> Gasser observes that states must not comply with sanctions imposed by the Security Council if they violate the absolutely binding obligations of humanitarian law.<sup>135</sup> Even if extreme examples are invoked, such as

<sup>124</sup> *Ibid.*, at 279. France explicitly took such view.

<sup>125</sup> *Ibid.*, at 280–281.

<sup>126</sup> Application No. 24833/94, *Matthews v. UK*, EctHR, para. 32.

<sup>127</sup> Doehring, *supra* note 26, at 98.

<sup>128</sup> Angelet, *supra* note 122, at 278; Bernhardt, *supra* note 4, at 607.

<sup>129</sup> Doehring, *supra* note 26, at 98.

<sup>130</sup> Bernhardt, *supra* note 4, at 604.

<sup>131</sup> Nolte, *supra* note 12, at 318.

<sup>132</sup> de Wet, *supra* note 33, at 279–280.

<sup>133</sup> Bernhardt, *supra* note 4, at 604.

<sup>134</sup> Doehring, *supra* note 26, at 98.

<sup>135</sup> Gasser, *supra* note 46, at 883.

starvation leading to genocide in the case of embargo, this still illustrates the grave consequences that may be provoked by Council decisions if they are in conflict with a preemptory norm.<sup>136</sup> It can be added that such ‘extreme’ examples are not very rare in the Council’s practice.

Arguably, a state can be estopped from challenging a resolution to which it consents.<sup>137</sup> In practice, states consent to resolutions which would not *per se* bind them, including *ultra vires* decisions, and are hence considered to be bound by them.<sup>138</sup> A profound example is Israel’s acceptance of the Partition Resolution in 1948. But this standard cannot apply to decisions contradicting preemptory norms, the acceptance of which would be a derogation from *jus cogens* through concordance of wills between the Council’s action and a state’s acceptance. In addition, the concept of estoppel has no place in the context of *jus cogens*.<sup>139</sup>

Doehring submits that the Council is under a duty to consult a state that is unwilling to carry out the resolution conflicting with *jus cogens*. If no consensus is reached, no state can be bound by a resolution contrary to preemptory norms.<sup>140</sup> But the limit on such consultation is that any resolution conflicting with *jus cogens* is void, and this cannot be remedied through consultations whose outcome amounts to derogation from *jus cogens*.

### 3 Judicial Review

If, in certain cases, individual states are entitled to refuse compliance with a Security Council resolution due to its conflict with *jus cogens*, it may be asked whether the International Court of Justice, the principal judicial organ of the UN, is entitled to proclaim that the individual states are legally justified in their non-compliance, that is to exercise the judicial review of a resolution. This issue is not crucial in terms of the effects of *jus cogens*, as it would have only a declaratory and not a constitutive effect in this context. This is because *jus cogens* invalidity, like absolute invalidity, does not depend on institutional determinations. But some observations are nevertheless necessary, simply because if, in certain situations, Member States are legally justified in refusing compliance with a resolution, it is important to know what the Court’s powers are to state the law in that regard.

There are only two arguments against judicial review: one is a policy argument regarding the need to preserve the Council as a powerful organ and questioning whether considerations of justice can prevail over those of peace in the narrow sense; another argument derives from a specific reading of *travaux*, which are in fact just secondary means of Charter interpretation. These two arguments may be weighty for

<sup>136</sup> Doehring, *supra* note 26, at 98–99.

<sup>137</sup> Bernhardt, *supra* note 4, at 607.

<sup>138</sup> E. Lauterpacht describes such cases as the instances of ‘relative nullity’: *supra* note 1, at 121.

<sup>139</sup> A. Martin, *L’Estoppel en droit international public* (1979), at 329; the same holds true for acquiescence. There is some practice arguably evidencing acquiescence by states to illegal decisions of international organizations: see the overview in E. Lauterpacht, *supra* note 1, at 117–119. However, no precedent of valid acquiescence has been identified which would legitimise an institutional act offending against more than the interests of individual member states and contrary to *jus cogens*.

<sup>140</sup> Doehring, *supra* note 26, at 108–109.

those inclined to believe them, but they are not sufficient, by themselves, to exclude the possibility of judicial review within the United Nations system.

It is suggested that the strengthening of the Council after the Cold War is a positive sign, and that judicial review would thus decrease the Council's effectiveness.<sup>141</sup> It is also noted that when the Charter was drafted, the Belgian proposal on endowing the International Court with respective powers was not adopted. This fact of the non-adoption of the Belgian proposal is interpreted differently, and the outcome of this is perhaps not to exclude judicial review.<sup>142</sup> The ICJ clearly stated in *Certain Expenses* that the fact of rejection of the Belgian proposal does not mean the rejection of judicial review by the Court of other principal organs' actions.<sup>143</sup> Besides, the Charter and the Court's Statute, which entitles the Court to decide any question of international law, do not expressly exclude judicial review, nor can such outcome be inferred by necessary implication; especially as the Council is not *legibus solutus*. Even if each principal organ remains *prima facie* a judge of its competence, the exercise of such competence undoubtedly involves legal questions on which the ICJ is empowered to adjudicate, subject to usual jurisdictional requirements.

Different people would understand the concept of judicial review differently and the actual type of judicial action would be more important than the formal terms used in specific cases. A common meaning would be a verification of acts in terms of their compliance with the law. The 1992 Order in *Lockerbie* does not reject the concept of judicial review; it merely signifies – rightly or wrongly – that judicial review could not be performed at that stage of the proceedings. This is especially inferable from the Court's reference to the *prima facie* force of Resolution 748. The 1998 Judgment in *Lockerbie* (Preliminary Objections) does not directly deal with judicial review, but the very fact that the Court has not declined jurisdiction in the case involving a Chapter VII resolution was considered by Dissenting Judge Schwebel (who then served as the President and ended up in the minority) as an exercise in judicial review.<sup>144</sup>

The Court has come very close to judicial review, for instance in *Certain Expenses* or *Namibia*. Judge Jennings in *Lockerbie* opposed judicial review, requiring that the Court should support the Council's action in maintaining peace.<sup>145</sup> However, the Court is obliged to support only such action of the Council as is compatible with the Charter and relevant general international law. Judge Lauterpacht in *Bosnia* considered that the Court is entitled, and indeed bound, to ensure respect for the rule of law within the United Nations system, and therefore to insist, in cases properly brought before it, on compliance by UN principal organs with the rules governing their operation.<sup>146</sup> Judge Skubiszewski noted in *East Timor* that the Court is entitled to examine the Security

<sup>141</sup> Dissenting Opinion, *Lockerbie* [1998] ICJ Rep 73–81.

<sup>142</sup> Watson, 'Constitutionalism, Judicial Review, and the World Court', 34 *Harvard ILJ* (1993) 8–14.

<sup>143</sup> [1962] ICJ Rep 168.

<sup>144</sup> [1998] ICJ Rep 71, at 73, complaining that the Court's judgment obstructs the Council in fulfilling its primary responsibility under the Charter.

<sup>145</sup> Dissenting Opinion [1998] ICJ Rep 110.

<sup>146</sup> Separate Opinion [1993] ICJ Rep 439.

Council's resolutions and draw appropriate conclusions if they are *ultra vires*.<sup>147</sup> The ICTY in *Tadic* affirmed its power to review the Chapter VII measures of the Security Council.<sup>148</sup>

The powers of the Security Council under Chapter VII are not unlimited, but are bound by legal norms to be determined finally by the International Court, either in contentious or advisory proceedings.<sup>149</sup> The Council possesses autonomy in the relevant field, but the Court determines the legal and constitutional boundaries of that autonomy.<sup>150</sup>

If the Court is faced with two sets of legal obligations, one of which offends against peremptory norms, and another is *jus cogens* itself, it would have to resolve this normative conflict. The refusal to exercise judicial review would merely be a refusal to express a view, and not affirmation of validity of the Council's measures whatever their substantive legality. If a court is competent to affirm validity of a resolution, then it is also entitled to reach an opposite conclusion, and both conclusions would amount to an exercise of judicial review.

## 6 Conclusions

If *jus cogens* provides a full-fledged limitation on actions of the Security Council, this shall have necessary consequences for validity and interpretation of relevant instruments: if the principle is accepted, its consequences must also be accepted. On the other hand, *jus cogens* does not by itself generate the institutional powers of determination of voidness or judicial review and the effects of *jus cogens* are also independent from such institutional factors.

This article has examined this argument by referring to relevant standards and practice. An argument which may well be advanced against this logical chain by those unwilling to see the Security Council as limited by legal standards may be that this logical reasoning is not always accepted in the real world. But, along with reference to reality, one should also bear in mind the special role of peremptory norms in the contemporary international legal system, and consider that the continuance in force of a Council resolution which is in conflict with *jus cogens* is nothing but the maintenance of a situation that is morally and ethically repugnant in the eyes of the international community. This last factor is a reality in itself. Another incontrovertible reality is that the Council is not *legibus solutus*, and this, with all its ensuing consequences, must be accepted.

<sup>147</sup> Dissenting Opinion [1995] ICJ Rep 90, paras. 70, 85–86.

<sup>148</sup> *Prosecutor v. Tadic*, *supra* note 15, at 44–45.

<sup>149</sup> Bernhardt, *supra* note 4, at 606; for an overview of the options for review see *ibid.* and Bowett, *supra* note 10, at 98–101.

<sup>150</sup> Bernhardt, *supra* note 4, at 607.