
The Security Council, Democratic Legitimacy and Regime Change in Iraq

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Abstract

This article examines the political transition in Iraq from the perspective of international law, which regards forcible democratic regime change as unlawful. The concern is to establish the extent to which the relevant Security Council Resolutions, 1483 (2003), 1511 (2003) and 1546 (2004), necessary to give legal effect to the fact of regime change, may be regarded as a legitimate exercise of the political authority provided to the Security Council under the Charter of the United Nations, and consequently a lawful exercise of that authority. The article will argue that Security Council resolutions enjoy 'democratic' political legitimacy to the extent that they are consistent with the constitutional framework provided by the UN Charter and wider international law, and that they accord with the practice of the Security Council in 'like' cases, or the Council is able to demonstrate sufficient justification for the exercise of political authority in the particular case. The article first reviews the process of political transition in Iraq, examining the role of Security Council resolutions. It concludes that the process involved a violation of the right of the Iraqi people to political self-determination, creating a conflict between the Security Council resolutions adopted under chapter VII and an international norm of jus cogens standing. Rejecting arguments that the resolutions should be regarded as void, or that they should command absolute deference, the work outlines a model of constitutional adjudication in cases of conflict between these 'higher' forms of obligations in accordance with a deliberative understanding of the nature of the system of international law.

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1 Introduction

While the US-led military intervention divided the international community,¹ the introduction of democracy in Iraq following the establishment of the military occupation was neither contested nor apparently controversial: a remarkable fact given that regime change was the stated political objective of *Operation Iraqi Freedom*,² reflecting the determination of the Bush Administration both to target ‘rogue’ states and to spread democracy, with a particular focus on the Middle East and the wider Muslim world.³ This article examines the political transition in Iraq from the perspective of international law, which regards forcible democratic regime change as unlawful.⁴ The concern is to establish the extent to which the relevant Security Council resolutions, 1483 (2003), 1511 (2003), and 1546 (2004), necessary to give legal effect to the fact of regime change, may be regarded as a legitimate exercise of the political authority provided to the Security Council under the Charter of the United Nations, and consequently a lawful exercise of that authority.

The article will argue that Security Council resolutions enjoy ‘democratic’ political legitimacy (and legality) to the extent that they are consistent with the constitutional framework provided by the UN Charter and wider international law, and that they accord with the practice of the Security Council in ‘like’ cases, or the Council is able to demonstrate sufficient justification for the exercise of political authority in the particular case. Given that the nature of the system of international law is deliberation, reason, and consensus, the question whether sufficient justification exists will be dependent on the extent to which the relevant measure can be justified in accordance with the principle of public reason. In the case of Iraq, there is no doubt that that situation fell within the scope of authority of the Security Council, and that the decisions enjoyed a high degree of procedural legitimacy, in the form of participatory deliberations in the Security Council. Moreover, the Security Council has consistently expressed its support for the introduction of democracy as a necessary element in the re-establishment of international peace and security following military intervention in a ‘failed’ or ‘rogue’ state. The endorsement by the Security Council of a particular system of government, involving the sharing of power between the main ethno-cultural groups and expression of support for the establishment of a ‘federal, democratic, [and] pluralist’ Iraq, is consistent with neither standards recognized in international law, nor the practice of the Security Council. Given that no reasons were provided for the endorsement of the system of government introduced under the authority of the occupying powers, this must raise serious questions concerning the political

¹ See the debates in the Security Council: S/PV.4726, 26 Mar. 2003, and S/ PV.4726 (Resumption 1), 27 Mar. 2003.

² See Agence France Presse, ‘The leaders’ two declarations: “We uphold a vision of international security”’, *New York Times*, 17 Mar. 2003.

³ See, e.g., President Bush’s address to the General Assembly of the United Nations, 12 Sept. 2002; and the US *National Security Strategy* (2002).

⁴ *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States) Merits* [1986] ICJ Rep. 14, at para. 263.

legitimacy and legal effect of the relevant resolutions, which have contributed to the emergence of a democratic system in Iraq in which religious and ethnic identity are central to political debate.⁵

The article first reviews the process of political transition in Iraq, examining the role of Security Council resolutions. It concludes that the process constituted a violation of the right of the Iraqi people to political self-determination, creating a conflict between the Security Council resolutions adopted under chapter VII and an international norm of *jus cogens* standing. Rejecting arguments that the resolutions should be regarded as void, or that they should command absolute deference, the article outlines a model of constitutional adjudication in cases of conflict between these 'higher' forms of obligation in accordance with a deliberative understanding of the nature of the system of international law.

2 Regime Change and Occupation Law

Democratic regime change did not provide the legal basis for the military intervention in Iraq, and the issue did not feature in Security Council debates leading up to the intervention. The legal basis for *Operation Iraqi Freedom* depended on a particular reading of Security Council resolutions 678 (1991), 687 (1991), and 1441 (2002): the 'material breach' of the disarmament obligations in resolution 687 revived the right to use military force provided in resolution 678.⁶ The legal basis for the intervention is unrelated to the position concerning forcible democratic regime change in states subject to foreign military occupation. Article 43 of the regulations annexed to the 1907 Hague Convention (IV) with respect to the Laws and Customs of War on Land obliges an occupying power to respect 'unless absolutely prevented, the laws in force in the country'.⁷ The regulations represent the position under customary international law.⁸ Article 43 cannot be regarded as a norm of *jus cogens*, given that exceptions to the proscription are recognized in the second paragraph of article 64 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The exceptions concern threats to the security of the occupying power, obstacles to the application of the Fourth Geneva Convention, including the protection of the civilian population, and/or the need to maintain the orderly government of the territory. The introduction of democracy in a state subject to military occupation cannot be reconciled with the language of article 43, or justified by the exceptions recognized in the Fourth Geneva Convention. In short, international law precludes the possibility of the forced democratization of occupied territories.

⁵ See S/PV.5386, 15 Mar. 2006.

⁶ Taft IV and Buchwald, 'Preemption, Iraq, and International Law', 97 *AJIL* (2003) 557.

⁷ Reprinted at 1(2) *AJIL* (1907), Supplement: Official Documents, 129.

⁸ *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, advisory opinion 9 July 2004, available at www.icj-cij.org, at para. 89.

A *The Resolutions*

The legal basis for the military occupation and political transition in Iraq was provided by the rules of international humanitarian law, as amended by Security Council resolutions 1483 (2003), 1511 (2003), and 1546 (2004).⁹ The power of the Security Council to amend international law in this way is implicit in the principle of the supremacy of the UN Charter, reflected in article 103. Security Council resolution 1483 (2003), adopted under chapter VII on 22 May 2003 by fourteen votes to nil, with Syria not participating in the voting,¹⁰ established the legal basis for the occupation.¹¹ It is clear on the need for regime change, calling on UN member states to deny safe haven to members of the Baathist regime,¹² thus preventing the formation of a 'government-in-exile',¹³ and appealing to states and international organizations 'to assist the people of Iraq in their efforts to reform their institutions'.¹⁴ In the words of Adam Roberts, the resolution both insisted on the application of occupation law and 'proclaimed certain transformative objectives for the occupation'.¹⁵

Resolution 1483 (2003) affirmed the right of the Iraqi people to political self-determination,¹⁶ and referred to the need to establish a 'representative government' that affords equal rights to all Iraqi citizens 'without regard to ethnicity, religion, or gender'.¹⁷ The establishment of a representative government requires the recognition of equal rights of political participation for all citizens;¹⁸ it does not require the introduction of democratic government, and resolution 1483 (2003) makes no reference to the need to introduce democracy in Iraq.¹⁹ The Security Council did express its support for the formation of an Iraqi interim administration,²⁰ and on 13 July 2003 the occupying powers constituted a Governing Council of Iraq, which was given a role advising the Coalition Provisional Authority (CPA).²¹ The Governing Council was

⁹ See Coalition Provisional Authority Order 100, 'Transition of Laws, Regulations, Orders, and Directives issued by the Coalition Provisional Authority', CPA/ORD/28 JUNE 2004/100, preamble.

¹⁰ Syria subsequently stated that it would have voted in favour of the resolution had it been granted more time for deliberation before voting: Mr. Mekdad (Syrian Arab Republic), S/PV.4762 (Resumption 1), 22 May 2003, at 20.

¹¹ See Scheffer, 'Beyond Occupation Law', 97 *AJIL* (2003) 842, at 844.

¹² At para. 3.

¹³ Grant, 'The Security Council and Iraq: an Incremental Approach', 97 *AJIL* (2003) 823, at 828.

¹⁴ At para. 1 (emphasis added).

¹⁵ Roberts, 'The End of Occupation: Iraq 2004', 54 *ICLQ* (2005) 27, at 36.

¹⁶ SC Res. 1483 (2003), at para. 4. See also para. 8 (c).

¹⁷ *Ibid.*, preamble. The resolution refers to Security Council Res. 1325 (2000), which concerns the political participation of women.

¹⁸ See GA Res. 2625 (XXV), adopted 24 Oct. 1970, 'Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations'. See also Vienna Declaration and Programme of Action (1993), 32 *ILM* (1993) 1661, at para. 1(2).

¹⁹ The preamble to SC Res. 1483 (2003) does refer to the 'Nasiriyah statement' (CENCOM Press Release No. 03-04-133, 15 Apr. 2003), which concluded that Iraq must become a democratic state.

²⁰ SC Res. 1483 (2003), at para. 9.

²¹ Coalition Provisional Authority Regulation Number 6, 'Governing Council of Iraq', CPA/REG/13 July 2003/06, s. 2(1).

'broadly representative' of the religious and ethnic differences in Iraq, comprising a Shia majority, with equal representation of Kurds and Sunnis,²² although not of other senses of identity or political interest and perspective. The Security Council welcomed its establishment,²³ and subsequently recognized the Council and its ministers as the 'principal bodies of the Iraqi interim administration'.²⁴

Security Council resolution 1511 (2003), adopted unanimously under chapter VII on 16 October 2003, invited the Governing Council to provide 'a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution'.²⁵ A 'common objective' had been agreed within the United Nations for the establishment of a 'sovereign, democratic and independent Iraq' as quickly as possible.²⁶ Under a process announced on 15 November 2003, indirect elections would be held to a transitional national assembly, which would elect a government and act as a legislative body. The 15 November proposals did not survive the opposition of the majority Shia population, notably Grand Ayatollah Ali al-Sistani, who demanded early direct elections.²⁷ A compromise emerged in the form of a new interim and transitional constitutional order, the Transitional Administrative Law (TAL).²⁸ The TAL was drafted by the Governing Council of Iraq, under the authority of the Coalition Provisional Authority, with CPA Administrator Paul Bremer playing a key role in the process.²⁹

The Transitional Administrative Law provided for the establishment of an Iraqi Interim Government from the end of the occupation until the establishment of an Iraqi Transitional Government, following elections in January 2005.³⁰ It put in place a system of government that provided for the sharing of power between the representatives of the majority Shia population and minority Sunni and Kurdish groups,³¹ and recognized a right of self-government for the Kurdish population in northern Iraq.³² The Transitional Administrative Law also introduced a political process, involving elections to a Transitional National Assembly, which had responsibility for drafting the permanent constitution. The constitution would be approved in a general referendum, with elections for a permanent government

²² D. McGoldrick, *From '9-11' to the Iraq war 2003* (2004), at 135.

²³ SC Res. 1500 (2003), at para. 1.

²⁴ SC Res. 1511 (2003), at para. 4.

²⁵ *Ibid.*, at para. 7.

²⁶ UN Secretary-General, S/PV.4844, 16 Oct. 2003, at 2.

²⁷ Dodge, 'A Sovereign Iraq?', 46 *Survival* (2004) 39, at 43.

²⁸ Art 3(a) of the Law of Administration for the State of Iraq for the Transitional Period ('Transitional Administrative Law'), adopted 8 Mar. 2004, available at <http://www.iraqcoalition.org/government/TAL.html> (last visited 29 Mar. 2006).

²⁹ Chandrasekaran, 'Iraqi Council agrees on terms of interim constitution', *Washington Post*, 1 Mar. 2004.

³⁰ Arts 2(b)(1) and (2) of the Transitional Administrative Law.

³¹ See, e.g., the establishment of a three-member 'joint Presidency': Art. 36 of the Transitional Administrative Law.

³² Art. 53(a) of *ibid.* See, also, art. 54. This represented a continuation of the self-government regime enjoyed by the Kurds since 1991 under the protection of US and UK forces.

being held no later than 15 December 2005, and the new government taking office no later than 31 December 2005.³³

In resolution 1546 (2004), adopted unanimously under chapter VII on 8 June 2004, the Security Council ‘endorsed’ the interim and transitional constitutional arrangements introduced in the Transitional Administrative Law,³⁴ and called on ‘all Iraqis to implement these arrangements peaceably’.³⁵ Notwithstanding the use of the term ‘endorse’, i.e. to ‘confirm’, ‘sanction’, or ‘declare one’s approval of’,³⁶ the resolution and the discussions leading to its adoption make clear the determination of the Security Council to give legal effect to the fact of democratic regime change in Iraq.³⁷ The Security Council further welcomed the commitment of the Interim Government of Iraq to work towards a ‘federal, democratic, pluralist, and unified Iraq’.³⁸ In debates in the Council all participants, including states that are notably not democracies,³⁹ expressed their support for the establishment of democracy in Iraq.⁴⁰

On 28 June 2004, the occupying powers formally transferred power to the Iraqi interim administration, led by Prime Minister Ayad Allawi. Elections to the Transitional National Assembly were held on 30 January 2005, with a high degree of participation in Shia and Kurdish areas. Members of the Sunni minority were unable or unwilling to participate, leading to their under-representation in the Transitional National Assembly, a significant fact given its responsibility for drafting the new constitution.⁴¹ The solution was to appoint Sunni Arab members to the committee responsible for drafting the constitution,⁴² which was finally approved on 13 September 2005, but without the support of Sunni politicians.⁴³ On 15 October 2005, the people of Iraq voted by a majority of 79 per cent to 21 per cent to approve the new constitution, again with significant opposition from the Sunni minority. The new constitution describes Iraq as a ‘democratic, federal, representative

³³ Arts 60–61 of *ibid.*

³⁴ SC Res. 1546 (2004), at paras 1 and 4. See, also, SC Res. 1637 (2005).

³⁵ *Ibid.*, para. 6. In a letter to the Security Council, Dr. Ayad Allawi, Prime Minister of the Interim Government of Iraq, expressed ‘the commitment of the people of Iraq to complete the political transition process to establish a free, and democratic Iraq’: SC Res. 1546 (2004), Annex.

³⁶ *Oxford English Dictionary*.

³⁷ See, on this point, *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* [1971] ICJ Rep 16, at para. 114.

³⁸ SC Res. 1546 (2004), preamble.

³⁹ See, e.g., Mr Baali (Algeria), S/PV.4987, 8 June 2004, at 4; and Mr Wang Guangya (China), *ibid.*, at 6.

⁴⁰ S/PV.4987, 8 June 2004.

⁴¹ See S/PRST/2005/5.

⁴² Mosher and Feki, ‘Sunnis added to Iraq constitution panel’, *Washington Post*, 17 June 2005.

⁴³ Worth, ‘80 killed in Baghdad blast; amended Charter approved’, *New York Times*, 14 Sept. 2005. The Transitional Administrative Law recognized a *de facto* right of veto over the adoption of the new Constitution for the minority Kurdish population (art. 61(c)), providing that group, in addition to the representatives of the majority Shia population, with significant influence during the drafting process.

(parliamentary) republic'.⁴⁴ It recognizes a continued right of self-government for the Kurdish population in northern Iraq,⁴⁵ and also introduces the possibility of other self-governing regions emerging.⁴⁶ Central government enjoys exclusive powers in defined and limited areas, in relation for example to foreign, defence, finance, and customs policy.⁴⁷ In all other areas, powers will be devolved to the regions, although they may be shared with the federal government.⁴⁸ Many Sunnis consider that the 'US-backed [Constitution is] a device to divide Iraq and deprive [them] of its oil wealth'.⁴⁹

Elections under the new Constitution were held on 15 December 2005, bringing to an end the political transition process outlined in resolution 1546 (2004).⁵⁰ The United Iraqi Alliance, a coalition of Shia Islamist parties, won 47 per cent of the seats in the national assembly, the Kurdistan Coalition 19 per cent, and the Iraqi Consensus Front and Iraqi Front for National Dialogue, both coalitions of Sunni Arab parties, 16 per cent and 4 per cent respectively. The main secular coalition, the National Iraqi List, won only 9 per cent of the seats.⁵¹ Iraq is (now) a deeply divided state: the political system is dominated by political parties organized along religious and ethnic lines.⁵² Following months of negotiations, on 20 May 2006, Iraqi political parties (under pressure from the international community) agreed to form a 'national unity government', with the cabinet comprising 19 Shiites, 8 Sunni Arabs, 8 Kurds, and 1 Christian (who was given the human rights portfolio).⁵³

3 The Legal Status of the Resolutions

Security Council resolution 1546 (2004) purported to give legal effect to the fact of democratic regime change in Iraq. In doing so, it granted a degree of legitimacy to the fact of the regime change and the form of government introduced.⁵⁴ There is no doubt that the issue fell within the scope of authority of the Security Council, i.e. that the situation in Iraq following the military intervention constituted a threat to or breach of international peace and security. The relevant question is whether the endorsement by the Security Council of democratic regime change

⁴⁴ Draft Iraqi Constitution, art. 1 (translated from the Arabic by the Associated Press); available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_08_05_constit.pdf (last visited 29 Mar. 2006).

⁴⁵ *Ibid.*, arts 150 and 152.

⁴⁶ *Ibid.*, art. 114.

⁴⁷ *Ibid.*, art. 108.

⁴⁸ *Ibid.*, art. 111.

⁴⁹ Poole, 'Sunnis cry foul as charter is approved', *Daily Telegraph*, 26 Oct. 2005, at 16.

⁵⁰ Mr Gambari (Under-Secretary-General for Political Affairs), S/PV.5325, 14 Dec. 2005, at 2.

⁵¹ 'Iraq election result confirmed', available at http://news.bbc.co.uk/1/hi/world/middle_east/4700870.stm (last visited 26 May 2006).

⁵² See D. Horowitz, *Ethnic Groups in Conflict* (1985), at 8.

⁵³ Stack and Daragahi, 'A new Iraqi government takes office', *Los Angeles Times*, 21 May 2006.

⁵⁴ See Claude, 'Collective Legitimization as a Political Function of the United Nations', 20 *Int Org* (1966) 367.

was a legitimate exercise of the political authority accorded to the Security Council under chapter VII of the Charter of the United Nations,⁵⁵ and consequently effective in purporting to give legal effect at the level of the international community to the fact of regime change.

The International Criminal Tribunal for the Former Yugoslavia (a body established by the Security Council) has observed that neither the text nor the spirit of the Charter of the United Nations conceives of the Security Council as '*legibus solutus* (unbound by law)'. The Council was established by a treaty which provides a 'constitutional framework' within which it operates. It is 'thus subjected to certain constitutional limitations'.⁵⁶ Specifically for these purposes, the Charter requires that the Security Council, in discharging its duties, act in accordance with the 'Purposes and Principles' of the organization.⁵⁷ The purposes include the development of friendly relations among nations based on 'the principle of equal rights and self-determination of peoples'.⁵⁸ The expression is not defined in the Charter, although the principle underpins chapters XI and XII, concerning non-self-governing and international trust territories. Additionally, the preamble begins 'We the peoples of the United Nations', and concludes with 'our respective Governments'. The term 'peoples' may be applied to 'peoples organised as States'.⁵⁹

In *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the International Court of Justice reaffirmed its position that the principle of self-determination of peoples is now clearly recognized as a 'right' of peoples: 'a right *erga omnes*'.⁶⁰ The right of peoples to self-determination is also recognized as a norm of *jus cogens*.⁶¹ In *Case concerning armed activities on the territory of the Congo*, the

⁵⁵ See arts 39 and 41 of the UN Charter. See also *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* [1971] ICJ Rep 16, at para. 110; and Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1994) 1, at 45.

⁵⁶ *Prosecutor v Dusko Tadic*, Case No. IT-94-1-AR72, 35 ILM (1996) 32, at para. 28.

⁵⁷ Art. 24(2) of the UN Charter.

⁵⁸ Art. 1(2) of *ibid.*

⁵⁹ Quane, 'The United Nations and the Evolving Right to Self-determination', 47 *ICLQ* (1998) 537, at 540. See also Principle VIII, GA Res. 1541 (XV), adopted 15 Dec. 1960, 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter'; and Human Rights Committee, General comment No. 12, 'Article 1 (Right to self-determination)', adopted 13 Mar. 1984, at paras 3 and 4.

⁶⁰ *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, advisory opinion 9 July 2004, available at www.icj-cij.org, at para. 88.

⁶¹ Commentary on Art. 26(5) of the International Law Commission's Draft Articles on State Responsibility, with Commentaries, Report of the International Law Commission, 53rd session, UN Doc. A/56/10 (2001), at 59; reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002). See also UN Commission on Human Rights, Resolution E/CN.4/RES/2000/4, 7 Apr. 2000, preamble; *Case concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, Dissenting Opinion of Judge *ad hoc* Skubiszewski, at para. 135; and Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM (1992) 1488, Opinion No. 1, at para. 1(e). See also Doehring, 'Self-determination', in B. Simma *et al.* (eds), *The Charter of the United Nations: a Commentary* (2nd edn., 2002), at 47, 62.

International Court confirmed the existence of the notion of *jus cogens*.⁶² In his separate opinion, Judge *ad hoc* Dugard observed that the recognition by the Court of *jus cogens*, along with the notion of obligations *erga omnes*, 'affirms the normative hierarchy of international law'.⁶³

According to the Vienna Convention on the Law of Treaties, a treaty is void if it conflicts with a norm of *jus cogens*,⁶⁴ defined as a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.⁶⁵ The notion of *jus cogens* is not only concerned with the law of treaties, however, or the non-derogable rights of states, for example the proscription on the permanent subjugation of the High Seas areas to the sovereignty of individual states.⁶⁶ Those peremptory norms that are 'clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.⁶⁷ In his separate opinion, Judge *ad hoc* Dugard observed that norms of *jus cogens* 'give legal form to the most fundamental policies or goals of the international community'.⁶⁸ Norms of *jus cogens* represent the established interests of the international legal community,⁶⁹ distinct from those of the 'sovereign' collective interests of the members of that community.⁷⁰ Those 'clearly accepted and recognized' norms of *jus cogens* reflect both the fundamental value to the system of international law of international peace and security,⁷¹ and a constructed idea of international justice within the international legal community, seen, for example, in the adoption of the resolutions of the General Assembly which first de-legitimized and then declared unlawful the practice of colonialism as a violation of the right of peoples to self-determination.⁷²

⁶² *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Rwanda)*, judgment 3 Feb. 2006 available at www.icj-cij.org/, at para. 64.

⁶³ *Ibid.*, Separate Opinion of Judge *ad hoc* Dugard, at para. 4. According to Judge *ad hoc* Dugard, the right of peoples to self-determination is a norm of *jus cogens* standing. The judgment of the Court refers only to the prohibition on genocide as a norm having *jus cogens* character: *ibid.*, at para. 64.

⁶⁴ Arts 53 and 64 of the Vienna Convention on the Law of Treaties.

⁶⁵ Art. 53 of *ibid.*

⁶⁶ Cf. L. Hannikainen, *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at 66.

⁶⁷ Commentary on art. 26, at para. 5, International Law Commission's Draft Articles on State Responsibility, above note 61. According to the International Court of Justice, obligations *erga omnes* derive 'from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination': *Case concerning the Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, at para. 34.

⁶⁸ *Supra* note 63, at para. 10.

⁶⁹ Formal rights of political participation, i.e. those concerning the ability to 'constitute' the system of international law, are reserved for states, and, to a limited extent, international organizations, which together comprise the 'international legal community'.

⁷⁰ See Commentary on art. 48(7) of the International Law Commission's Draft Articles on State Responsibility with Commentaries, *supra* note 61.

⁷¹ See International Military Tribunal (Nuremberg), judgment and sentences, 1 Oct. 1946, reprinted in 41 *AJIL* (1947) 172, at 216–220.

⁷² See, in particular, GA Res. 1514 (XV), adopted 14 Dec. 1960, 'Declaration on the granting of independence to colonial countries and peoples'.

A *Democratic Self-determination*

The contemporary position in international law on the right of peoples to self-determination is expressed in article 1, common to the International Covenants: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'⁷³ The populations of sovereign and independent states enjoy (as 'peoples') the right to determine the system of government and administration, and the substantive nature of their political regime.⁷⁴ It is increasingly accepted that this 'internal' aspect of the right of peoples to self-determination⁷⁵ requires the introduction of some form of democratic government,⁷⁶ albeit recognizing '[that] there is no single model of democracy', and 'the necessity of due respect for sovereignty and the right of self-determination'.⁷⁷ Democracy in international law is not defined by a particular institutional arrangement.⁷⁸ A regime is democratic if it embodies within its institutions and mechanisms, including its electoral system, the twin principles of political equality and popular sovereignty.⁷⁹ Political equality requires that the votes and preferences of one citizen be accorded the same respect as those of all others. Popular sovereignty 'is the view that individual citizens bestow legitimacy upon a government through their implied or actual consent to its rule'.⁸⁰ The will of the people is the basis of legitimate government authority in a democratic state.⁸¹

In cases of foreign military occupation of a sovereign and independent state, irrespective of the legality or legitimacy (however defined) of the intervention, there is a violation of the right of peoples to self-determination.⁸² The self-determination remedy requires the restoration of the previous constitutional order, or, where this is not possible or in accordance with the will of the people, the establishment of a government elected in accordance with the expressed wishes of the population

⁷³ Art. 1(1), common to the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. See also GA Res. 2625 (XXV); Vienna Declaration and Programme of Action (1993), at para. I (2); art. 20(1), African Charter on Human and Peoples' Rights; and GA Res. 59/180, adopted 3 Mar. 2005, 'Universal realization of the right of peoples to self-determination'.

⁷⁴ See Principle VIII, Conference on Security and Co-operation in Europe: (Helsinki) Final Act (1975), 14 ILM (1975) 1292.

⁷⁵ See Committee on the Elimination of Racial Discrimination, 'General Recommendation XXI on the right to self-determination', adopted 15 Mar. 1996, at para. 4.

⁷⁶ Wheatley, 'Democracy and International Law: A European Perspective', 51 *ICLQ*, (2002) 225, at 231–233.

⁷⁷ GA Res. 60/1, adopted 16 Sept. 2005, 'World Summit Outcome', at para. 135.

⁷⁸ *Ibid.*

⁷⁹ See J. Crawford, *Democracy in International Law* (1994), at 4; and Vienna Declaration and Programme of Action (1993), at para. I (8).

⁸⁰ Fox, 'The Right to Political Participation in International Law', 17 *Yale J Int'l Law* (1992) 539, at 550.

⁸¹ See art. 21(3), GA Res. 217(III)A, adopted 10 Dec. 1948, 'Universal Declaration of Human Rights'.

⁸² See GA Res. 2625 (XXV) and Vienna Declaration and Programme of Action (1993), at para. I (2). See also GA Res. 58/161, adopted 22 Dec. 2003, 'Universal realization of the right of peoples to self-determination', at para. 2.

concerned.⁸³ Security Council resolutions authorizing the administration of territories on behalf of the international community are clear on the need to introduce democratic government.⁸⁴ A determination by the Security Council that a representative government should be established in an occupied territory following free and fair elections is consistent with the right of peoples to self-determination.⁸⁵ The endorsement of a particular form of democratic government, without the express consent of the people of the territory concerned, is not.⁸⁶ There is no paradigmatic model of democracy that may be imposed on territories subject to military occupation. This is particularly the case in territories where political differences between ethno-cultural groups extend beyond questions of culture to encompass all political issues, and political debate is limited to bargaining between political parties claiming to represent the different ethno-cultural groups over the distribution of public goods.

There is no consensus in the theory or practice of democracy as to the appropriate form of government in deeply-divided polities, although it is generally recognized that the application of simply majoritarian conceptions of democracy is problematic.⁸⁷ A number of writers propose power-sharing between the main ethno-cultural groups;⁸⁸ others suggest more integrative approaches to the practice of democracy which encourage political parties to seek support from members of different ethno-cultural groups.⁸⁹ In resolution 1546 (2004), the Security Council endorsed the imposition of a form of ethnic power-sharing government in an Iraq under the authority of the occupying powers, in the absence of any active participation by the Iraqi people, or their freely elected representatives, in contravention of their right to political self-determination.⁹⁰

⁸³ See GA Res. 34/22, adopted 14 Nov. 1979, 'The situation in Kampuchea', para. 10; GA Res. 38/7, adopted 2 Nov. 1983, 'The situation in Grenada', para. 5.

⁸⁴ See SC Res. 814 (1993) (Somalia); SC Res. 1521 (2003) (Liberia); and SC Res. 1244 (1999) (Kosovo/Serbia and Montenegro). See also SC Res. 1272 (1999) (East Timor). In the case of Kosovo, SC Res. 1244 (1999) recognized a right of democratic self-government for the 'people of Kosovo'.

⁸⁵ See White, 'The United Nations and Democracy Assistance: Developing Practice within a Constitutional Framework', in P. Burnell (ed.), *Democracy Assistance: International Co-operation for Democratization* (2000), at 67.

⁸⁶ The Security Council has itself affirmed 'the primary responsibility of national and transitional Governments and authorities of countries emerging from conflict ... in identifying their priorities and strategies for post-conflict peacebuilding, with a view to ensuring national ownership': SC Res. 1645 (2005), preamble.

⁸⁷ See, generally, S. Wheatley, *Democracy, Minorities and International Law* (2005), ch 3.

⁸⁸ Lijphart, 'Consociational Democracy', 21 *World Politics* (1969) 207.

⁸⁹ Horowitz, *supra* note 52.

⁹⁰ See also SC Res. 1031 (1995) (Bosnia-Herzegovina); and UNMIK Regulation 2001/9, 'on a Constitutional Framework for Provisional Self-Government in Kosovo', adopted 15 May 2001 (under the authority provided by SC Res. 1244 (1999)); cf. SC Res. 1545 (2004) (Burundi).

4 The Conflict between ‘Higher’ Norms within the International Legal Order

In cases of conflict between resolutions of the Security Council adopted under chapter VII of the Charter of the United Nations and rights and obligations under other sources of international law, it is the position of the Security Council that its resolutions should prevail.⁹¹ Security Council resolutions are binding in respect of UN member states by virtue of articles 25 and 48(1),⁹² and by article 2(6) in relation to ‘all States’.⁹³ Resolutions adopted under chapter VII constitute, by virtue of article 103 of the UN Charter,⁹⁴ a ‘higher’ form of legal obligation within the system of international law.

In relation to the resolutions endorsing democratic regime change in Iraq, the conflict was between the relevant Security Council resolutions and a ‘higher’ norm of *jus cogens*. This conflict may be resolved in one of three ways:⁹⁵ the norm of *jus cogens* may ‘trump’ the offending provisions of the Security Council resolution;⁹⁶ Security Council resolutions, properly adopted,⁹⁷ may demand respect even in cases of conflict with norms of *jus cogens*; or the conflict may be resolved in accordance with principles of constitutional adjudication, ‘balancing’ the interests of international public order against the right of the Iraqi people to political self-determination.⁹⁸

⁹¹ See, e.g., SC Res. 864 (1993), at para. 20.

⁹² *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* [1971] ICJ Rep 16, at para. 116.

⁹³ See SC Res. 917 (1994), 918 (1994), and 1054 (1996). At the time of the adoption of SC Res. 1244 (1999), the Federal Republic of Yugoslavia was not a member of the United Nations. See Tomuschat, ‘Yugoslavia’s Damaged Sovereignty over the Province of Kosovo’, in G. Kreijen *et al.* (eds), *State, Sovereignty and International Governance* (2002), at 323, 336.

⁹⁴ See *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libya v United States)* [1992] ICJ Rep 114, at para. 42. On the primacy of art. 103 of the UN Charter, see art. 30 of the Vienna Convention on the Law of Treaties; and art. 30 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations; also *Case Concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States)* [1984] ICJ Rep 392, at para. 107.

⁹⁵ An alternative argument might recognize only the ‘colonial’ aspect of the right of peoples to self-determination as a norm of *jus cogens*: see Gros Espiell, ‘Self-determination and *jus cogens*’, in A. Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (1979), at 167, 169. The relevant legal instruments concerning the right of peoples to self-determination do not support such an ‘unbundling’ of the right: see, e.g., GA Res. 59/180, adopted 3 Mar. 2005, ‘Universal realization of the right of peoples to self-determination’.

⁹⁶ ‘[The] relief which Article 103 of the Charter may give the Security Council . . . cannot as a matter of simply hierarchy of norms extend to a conflict between a Security Council resolution and *jus cogens*’: Separate Opinion of Judge Lauterpacht, *Case concerning application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, further requests for the indication of provisional measures [1993] ICJ Rep. 407, at para. 100. Either the relevant paras. of the offending resolution should cease to be valid (*ibid.*, para. 103), or the Security Council should revisit the issue and revise the impugned measure accordingly (*ibid.*, para. 104). See, also, Commentary on article 26, para. 3, International Law Commission’s Draft Articles on State Responsibility with Commentaries, *supra* note 61.

⁹⁷ Art. 27 of the UN Charter.

⁹⁸ In relation to the use of the ‘balance’ metaphor in constitutional adjudication, see, generally, R. Alexy, *A Theory of Constitutional Rights* (trans. J. Rivers, 2002), and J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, 1996).

Consideration of the appropriate response to situations of conflict between resolutions adopted under chapter VII and norms of *jus cogens* is complicated by the fact that there is little scope for 'balancing' the interests of international peace and security against the humanitarian values recognized in the clearly accepted norms of *jus cogens*: the prohibitions on genocide, slavery, racial discrimination, crimes against humanity and torture. The exception, beyond that of the peremptory norm concerning the prohibition on the use of force,⁹⁹ is the right of peoples to self-determination, beyond colonialism.¹⁰⁰ As Michael Matheson has observed, there may be circumstances where the Security Council is justified in requiring a change in some aspect of the political structure of a state, where it determines that 'doing so is necessary to restore and maintain international peace and security'.¹⁰¹ The question is whether the right of peoples to political self-determination should be overridden by the 'public interest in the maintenance of international peace and security',¹⁰² the pursuit of which is considered more compelling in the particular circumstances of the case.

Under the Charter, the Members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.¹⁰³ To adopt a resolution which has the effect of negating the right of peoples to self-determination, the Council must overcome the double veto provided by the Charter scheme:¹⁰⁴ the formal veto accorded to each of the five permanent members of the Security Council, and the 'functional veto' accorded to the non-permanent members, who may prevent the adoption of a resolution, which will fail without the requisite nine positive votes.¹⁰⁵ The practice of the Security Council is to act where possible by consensus.¹⁰⁶ Kathleen Cronin-Furman refers to the pronouncements of the Security Council as having 'the quality of having been fairly arrived at through a consensus among nations varying greatly along geographical and political lines'.¹⁰⁷ It is noteworthy that China observed that resolution 1546 (2004) was adopted as a result of 'joint efforts by all Council members, who actively participated in the consultations and searched for consensus in a constructive spirit

⁹⁹ See Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *EJIL* (2005) 59, at 63–64.

¹⁰⁰ The Charter excludes the application of a formal trusteeship arrangement to 'Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality': art. 78 of the UN Charter.

¹⁰¹ Matheson, 'United Nations Governance of Postconflict Societies', 95 *AJIL* (2001) 76, at 85. See SC Res. 554 (1984), at para. 1, where the Security Council declared the 'new constitution' of *Apartheid* South Africa to be 'contrary to the principles of the Charter of the United Nations'.

¹⁰² Case T 315/01, *Kadi v Council of the European Union and Commission of the European Communities*, judgment of the CFI, 21 Sept. 2005, available at www.curia.eu.int, at para. 289.

¹⁰³ Art. 24(1) of the UN Charter.

¹⁰⁴ Art. 27(2) of *ibid.*

¹⁰⁵ Reisman, 'The Constitutional Crisis in the United Nations', 87 *AJIL* (1993) 83, at 98.

¹⁰⁶ See UN Secretary-General, S/PV.4761, 22 May 2003, at 12.

¹⁰⁷ Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship', 106 *Colombia L Rev* (2006) 435, at 459–460.

and with a pragmatic and cooperative approach'.¹⁰⁸ There may then be an argument for absolute deference to the judgement of the Security Council on matters concerning international peace and security.¹⁰⁹ In other words, a resolution properly adopted under chapter VII should be regarded in all instances as a lawful exercise of the political authority vested in the Council under the UN Charter.

The adoption of a resolution by the Security Council in accordance with proper procedure provides presumptive evidence that sufficient justification exists for the introduction of the relevant measures, but this is not conclusive: it does not, *ipso facto*, create political legitimacy for the resolution or shield it from legal challenge. The subjective judgement of the Security Council cannot avoid the objective fact that it operates within a constitutional system of law provided by the UN Charter. The consent of the Members of the United Nations to submit themselves to the authority of the Security Council on matters of international peace and security through membership of the organization does not absolve the Council from an obligation to provide sufficient justification for the actual exercise of political authority in a particular case.¹¹⁰ The fact that an issue falls within the scope of its authority does not, in all circumstances, entitle the Security Council to act, or to act in a particular way. The exercise of political authority within any system of law must be justified in the circumstances of the particular case in order to avoid the arbitrary exercise of power: the doctrine of the rule of law.

There is at present no formal process for the direct review of Security Council resolutions within the system of international law.¹¹¹ A right of indirect judicial review, in which the position of one or more parties to a dispute is dependent upon the legal status of a Security Council resolution, has been recognized by international Courts¹¹² and tribunals.¹¹³ Questions concerning the legal status of Security Council resolutions will also impact on the effectiveness of their implementation, pulling against voluntary compliance, in particular in circumstances where national courts pass adverse judgment on resolutions adopted under chapter VII. The following section outlines an approach to the judicial review of Security Council resolutions that avoids in large part the possibility of subjective judgment by courts, tribunals, or officials concerned when evaluating their legal status, and the consequential dangers to the uniform application of the system of international peace and security introduced by the UN Charter.

¹⁰⁸ Mr Wang Guangya (China), S/PV.4987, 8 June 2004, at 6.

¹⁰⁹ See *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie* [1998] ICJ Rep 115, Dissenting Opinion of President Schwebel.

¹¹⁰ See Bodansky, 'The Legitimacy of International Governance: a Coming Challenge for International Environmental Law', 93 *AJIL* (1999) 596, at 601.

¹¹¹ See Watson, 'Constitutionalism, Judicial Review, and the World Court', 34 *Harvard Int'l LJ* (1993) 1.

¹¹² In *Kadi v Council of the European Union and Commission of the European Communities*, *supra* note 102, at para. 230, the ECJ confirmed that it had the right to engage in a form of 'indirect judicial review' of resolutions adopted by the Security Council under chapter VII, and that this might include the question of the binding effect of a resolution, in particular the issue whether an impugned resolution conflicts with 'provisions of jus cogens'.

¹¹³ ICTY, *Prosecutor v Dusko Tadic*, Case No. IT-94-1-AR72, 35 *ILM* (1996) 32, at para. 22.

5 Democratic Legitimacy and Security Council Resolutions

In *An agenda for peace*, UN Secretary-General Boutros Boutros-Ghali argued that '[d]emocracy within the family of nations . . . requires the fullest consultation, participation and engagement of all States, large and small, in the work of the Organization'. Moreover, the principles of the Charter 'must be applied consistently, not selectively'.¹¹⁴ The international system of law approximates, in its ideal form, to deliberative conceptions of the practice of democracy,¹¹⁵ in which equal members of a legal community engage in a process of reasoned deliberation with a view to reaching a consensus on the political questions of the day.¹¹⁶ In diplomatic conversations, states will have their own interests and preferred outcomes. Self-interested or self-regarding arguments will not, however, prevail.¹¹⁷ States cannot simply impose their views on others.¹¹⁸ They must seek a 'reasoned consensus',¹¹⁹ through a process of 'discourse, reasoning and renegotiation'.¹²⁰ As Ian Johnstone explains, states must offer 'reasonable arguments . . . those that fit within a wider context of shared understandings about the rules of international life'.¹²¹

According to the Westphalian orthodoxy, the system of public international law is constituted by a complex web of voluntary legal relationships between sovereign and independent states.¹²² Ian Brownlie has referred to the sovereignty and equality of states¹²³ as 'the basic constitutional doctrine of the law of nations'. One corollary of the principle is the 'dependence of obligations arising under customary law and treaties on the consent of the obligor'.¹²⁴ Political legitimacy in the international legal order is guaranteed by 'the rational exchange of arguments, which

¹¹⁴ Boutros Boutros-Ghali, *An Agenda for Peace*, Security Council Doc. S/24111, 17 June 1992, at para. 82.

¹¹⁵ According to Ian Johnstone, it is 'an open question whether the ideal of democratic deliberation is possible at the transnational level, but there is certainly evidence of legal discourse and argumentation within international regimes': 'The plea of "necessity" in international legal discourse: humanitarian intervention and counter-terrorism', 43 *Columbia J Transnat'l L* (2005) 337, at 381.

¹¹⁶ Habermas, *supra* note 98, at 158.

¹¹⁷ A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1998), at 120.

¹¹⁸ See Habermas, 'Interpreting the Fall of a Monument', 4 *German LJ* (2003) 701, at 708.

¹¹⁹ Slaughter, 'Sovereignty and Power in a Networked World Order', 40 *Stanford J Int'l L* (2004) 283, at 318.

¹²⁰ T.M. Franck, *Fairness in International Law and Institutions* (1995), at 14.

¹²¹ Johnstone, 'US UN Relations after Iraq: the End of the World (Order) as We Know It?', 15 *EJIL* (2004) 813, at 819.

¹²² See *Case of the SS 'Wimbledon'*, PCIJ, Ser. A, No. 1, 1923, at 25; and *Case of the SS 'Lotus'*, PCIJ, Ser. A, No. 10, 1927, at 18.

¹²³ GA Res. 2625 (XXV): '[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community'.

¹²⁴ I. Brownlie, *Principles of Public International Law* (6th edn., 2003), at 287. The International Court of Justice has referred to the 'the fundamental principle of State sovereignty, on which the whole of international law rests': *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States) Merits* [1986] ICJ Rep 14, at para. 263.

eventually arrives at a conclusion in the form of agreement'.¹²⁵ The adoption of the Charter of the United Nations represented a move away from this Westphalian orthodoxy: the Charter not only proclaimed that the rules of the organization were a 'higher' form of law,¹²⁶ but also recognized the political authority of a subsidiary body to take enforcement measures on vague and indeterminate grounds, irrespective of the view of the (member) states against which the measures were applied. The authority granted to the Security Council under chapter VII reflected a move away from an essentially contractual understanding of the system of international law¹²⁷ to a constitutional one that embraces a form of international regulation,¹²⁸ in which the legitimate, and therefore lawful, exercise of political authority is conditioned not by the will of the parties to the international agreement, but by the practice of the institution of government which gives concrete meaning to the open-textured provisions of its constitutive instrument.

Consent is not a necessary condition for the application of laws and regulations in the practice of deliberative democracy. Where, following reasoned democratic deliberation, a majority of participants agree that policy proposal *A* should be adopted, there is a presumption that the policy is legitimate.¹²⁹ The fact of majority support does not *ipso facto* provide democratic legitimacy for an impugned measure (the fact that the measure is impugned creates problems of democratic legitimacy, requiring justification for its introduction). Laws and regulations are legitimate to the extent that the processes of deliberation and substantive outcomes are consistent with the principles of deliberative democracy. There must be an inclusive process of democratic decision-making, with those who will be subject to the laws and regulations able to participate effectively in the process. In those deliberations, participants must put forward reasons that others may reasonably accept and reject proposals 'on the basis that insufficiently good reasons have been offered for them': the requirement of public reason.¹³⁰ There must be a reasoned basis for the introduction of laws and regulations. This is particularly important when the impugned measure will have the effect of interfering with, or negating, the rights of subjects recognized within the

¹²⁵ Steffek, 'The Legitimation of International Governance: a Discourse Approach', 9 *European J Int'l Relations* (2003) 249, at 263.

¹²⁶ Art. 103 of the UN Charter.

¹²⁷ Any system of law requires 'constitutional' rules, concerning, e.g., the criteria for the capacity to enter into 'contractual' type agreements, the binding nature of legal agreements, and the consequences of any failure to comply with legal obligations.

¹²⁸ The Charter of the United Nations is the most important component of the international constitutional order, but it is not 'the' constitution for the system of international law, which embraces pre- and extra-Charter principles such as *pacta sunt servanda* and *jus cogens*. Cf. Bernhardt, 'Article 103', in B. Simma *et al.* (eds), *The Charter of the United Nations: a Commentary* (2nd edn., 2002), at 1292, 1298; and Fassbender, 'The UN Charter as Constitution of the International Community', 36 *Colombia J Transnat'l L* (1998) 529, at 532.

¹²⁹ Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (1996), at 67, 72.

¹³⁰ Black, 'Procuralizing Regulation: Part I', 20 *Oxford J Legal Stud* (2000) 597, at 609.

legal order. The requirement of substantive legitimacy further demands that like cases be treated alike: the principle of equal treatment.¹³¹

The role of constitutional courts in a deliberative system of government is not to supplant the judgement of the members of the democratic polity with their own subjective positions. Their role is to be the 'custodian of deliberative democracy'.¹³² Relevant questions for constitutional courts concern the source of authority for an impugned measure; the question of participation by those affected by the measure in the decision-making process; and the justification for the introduction of the measure. Constitutional courts may also evaluate an impugned measure against the constructed conceptions of justice recognized in the political community.¹³³ The constitutional court must evaluate the reasoned argument for the introduction of an impugned measure on its own terms in the context of the wider system of law. The court must determine whether sufficient justification exists for the negation of the rights of the subjects of the legal system in the interests of the general good in the particular circumstances of the case. Where a political body fails to adduce reasons for a particular decision or regulation, then, to the extent that it does not 'fit' with existing legal norms, principles, and practices, the decision must be regarded as arbitrary and, consequently, not deserving of democratic political legitimacy or legal status.

According to a deliberative understanding of the nature of the system of international law, the democratic legitimacy of Security Council resolutions is dependent upon the extent to which they are consistent with the constitutional framework provided by the Charter of the United Nations and wider international law;¹³⁴ that they conform to the requirements of procedural legitimacy; and comply with the requirements of substantive legitimacy, which requires that adopted measures can be justified in accordance with the principles of public reason and equal treatment. External 'moral' positions on international justice, which might, for example, argue for extending the democratic entitlement to the persons and people(s) of Iraq, are not relevant when considering the 'democratic' legitimacy of Security Council resolutions or their legal status. The only relevant standards of justice are those recognized by the international legal community,¹³⁵ including the fundamental norm of general international law concerning the right of peoples to self-determination, which provides both a constitutional limit on the exercise of political authority by the Security Council under the Charter, and a consideration of international justice as a norm of *jus cogens*.

¹³¹ Habermas, *supra* note 98, at 414.

¹³² *Ibid.*, at 275.

¹³³ *Ibid.*, at 282.

¹³⁴ Johnstone, 'Security Council Deliberations: the Power of the Better Argument', 14 *EJIL* (2003) 437, at 457.

¹³⁵ Likewise, Thomas Franck does not posit an 'objective' concept of fairness: the position of the international community on the questions of distributive justice should result from a 'discursive enterprise' in which participants 'advance claims and [test] them against rival claims'. Deliberations about fairness exclude claims 'which proceed not from reason but by automatic trumping': Franck, *supra* note 120, at 478.

There is no doubt that the situation in Iraq fell squarely within the scope of authority of the Security Council, and that the decisions enjoyed a high degree of procedural legitimacy in the form of participatory deliberations in the Security Council.¹³⁶ Moreover, the resolutions endorsing democratic regime change are consistent with the practice of the Security Council,¹³⁷ which has expressed support for democratically elected governments against insurgent forces,¹³⁸ and authorized, in the ‘unique’ and ‘exceptional’ case of Haiti,¹³⁹ and accepted, in the case of Sierra Leone,¹⁴⁰ military intervention to reinstall an elected government removed from power by unconstitutional means. The Security Council has also accepted that the introduction of democratic government forms one part of the solution to the problem of ‘failed’ states¹⁴¹ following acts of ‘humanitarian’ intervention in Somalia,¹⁴² Liberia,¹⁴³ Bosnia-Herzegovina,¹⁴⁴ Kosovo,¹⁴⁵ and East Timor.¹⁴⁶ In the case of the (other) ‘rogue’ state of Afghanistan,¹⁴⁷ following the US-led military intervention, the Security Council expressed its support for ‘a new and transitional administration leading to the formation of a government which should be broad-based, multi-ethnic and fully representative of all the Afghan people’.¹⁴⁸ The Council subsequently ‘endorse[d]’ the ‘Bonn’ Agreement establishing an Interim Government for Afghanistan,¹⁴⁹ and the new Constitution adopted in 2004,¹⁵⁰ welcoming ‘the determination of the Afghan people to ensure the transition of their country towards a stable and democratic State’.¹⁵¹

In resolution 1546 (2004), the Security Council endorsed the establishment of a system of government involving the sharing of power between the three main ethno-cultural groups, and expressed its support for the establishment of a ‘federal, democratic, pluralist, and unified Iraq’. None of the terms are defined, or the subject of elaboration in the debates in the Council. Reference to ‘federalism’, for example, is made

¹³⁶ The representative of Iraq, Mr al-Estrabadi, sat, but did not speak, in the Security Council meeting which followed the adoption of Security Council resolution 1546 (2004): S/PV.4987, 8 June 2004.

¹³⁷ See SC Res. 1625 (2005).

¹³⁸ See SC Res. 864 (1993) (Angola), SC Res. 880 (1993) (Cambodia), and SC Res. 1216 (1998) and SC Res. 1580 (2004) (Guinea-Bissau).

¹³⁹ SC Res. 940 (1994).

¹⁴⁰ See SC Res. 1156 (1998) and SC Res. 1181 (1998).

¹⁴¹ See, generally, von Einsiedel, ‘Policy Responses to State Failure’, in S. Chesterman *et al.*, *Making States Work: State Failure and the Crisis of Governance* (2005), at 13.

¹⁴² SC Res. 814 (1993).

¹⁴³ SC Res. 1521 (2003), and SC Res. 1626 (2005).

¹⁴⁴ SC Res. 1031 (1995), SC Res. 1088 (1996), and SC Res. 1639 (2005).

¹⁴⁵ SC Res. 1244 (1999).

¹⁴⁶ SC Res. 1272 (1999).

¹⁴⁷ See, generally, F. Fukuyama, *State Building: Governance and World Order in the 21st Century* (2004), at 93.

¹⁴⁸ SC Res. 1378 (2001), at para. 1. In debates in the Security Council a number of states made reference to the need to establish a democratic government in Afghanistan: S/PV.4414, 13 Nov. 2001 and S/PV.4414 (Resumption 1), 13 Nov. 2001.

¹⁴⁹ SC Res. 1383 (2001), para. 1.

¹⁵⁰ Available at <http://www.unama-afg.org/docs/Docs.htm> (last visited 26 May 2006).

¹⁵¹ SC Res. 1536 (2004), preamble. See also SC Res. 1659 (2006), and SC Res. 1662 (2006).

by only the United States,¹⁵² and United Kingdom,¹⁵³ and only then in the context of a 'federal, democratic, pluralist, and unified Iraq'. Nor does any of the terms enjoy a fixed and uncontested meaning in international law; nor were the resolutions irrelevant to the process of political transition, with the Iraqi representative to the Security Council referring to the mandate provided by resolution 1546 (2004) to draft a new permanent constitution which would 'enshrine the ideas of . . . pluralism, democratic rights, [and] federalism'.¹⁵⁴

There was no articulation in the relevant resolutions or the debates in the Security Council of the rationale for introducing democracy in Iraq, for the process of democratization, or the system of government 'endorsed', reflecting perhaps differences between the occupying powers and other states on the process of political transformation.¹⁵⁵ Security Council resolution 1546 (2004) endorsed a system of 'ethnic power-sharing' and moves towards a highly devolved federal system with limited evidence of support from the Iraqi people, in contravention of their right to political self-determination. According to deliberative concepts of democratic decision-making, regulations enjoy political legitimacy (and putative legality) to the extent that they comply with the requirement of public reason. Resolution 1546 (2004) cannot be defended in accordance with the principle of public reason, as no reasons were provided, creating significant problems for accepting the legitimacy of the resolution, and its claim to give legal recognition, at the level of the international community, to the fact of regime change.

In *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the International Court of Justice concluded that all states were under an obligation not to recognize the illegal situation resulting from the construction of the wall, which involved a violation of the right of peoples to self-determination.¹⁵⁶ Similarly, article 41(2) of the International Law Commission's Draft Articles on State Responsibility provides that no state 'shall recognize as lawful a situation created by a serious breach' of an obligation arising under a peremptory norm of general international law, including the right of peoples to self-determination.¹⁵⁷ The endorsement by the Security Council of the introduction of a form of 'democratic' government that provided for the sharing of power between the three main ethno-cultural groups in Iraq without reasoned justification cannot be regarded as a legitimate exercise of the political authority provided to the Security Council under the Charter, and consequently a lawful exercise of that authority: the resolutions did not remove the proscription on regime change provided by the regulations annexed to the 1907 Hague Convention (IV) with respect to the Laws and Customs of War on Land. However, just as the Hague regulations must be read in the light of the 1949 Fourth Geneva Convention,¹⁵⁸ they must also be

¹⁵² S/PV.4987, 8 June 2004, at 2.

¹⁵³ *Ibid.*, at 3.

¹⁵⁴ Mr Zebari (Iraq), S/PV. 5189, 31 May 2005, at 5.

¹⁵⁵ See Mr Akram (Pakistan), S/PV.4844, 16 Oct. 2003, at 7; Mr Negroponte (USA), S/PV.4761, 22 May 2003, at 23; and Mr Lavrov (Russian Federation), S/PV.4761, 22 May 2003, at 7.

¹⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, available at www.icj-cij.org, at paras 156 and 159.

¹⁵⁷ See International Law Commission's Draft Articles on State Responsibility, Commentary on article 41, para. 8.

¹⁵⁸ E. Benvenisti, *The International Law of Occupation* (1993), at 105.

read in the light of the emergence of the right of peoples to self-determination. As Eyal Benvenisti has observed, the ‘ultimate test for the legality of the regime installed by an occupant is its approval in internally monitored general elections, carried out without undue delay’.¹⁵⁹ The endorsement by the Iraqi people of the new constitution, drafted by elected representatives in the Transitional National Assembly, in the referendum of 15 October 2005 and their participation in elections on 15 December 2005 constituted a legitimate expression of democratic self-determination, giving legal effect to the fact of democratic regime change. This is the case notwithstanding the fact that they were not accorded a free choice in determining the form and functioning of democracy in Iraq, given the existence of a political system imposed by the occupying powers, and endorsed by the Security Council, in the form of the Transitional Administrative Law.¹⁶⁰

6 Conclusion

This article has shown that the endorsement of the particular form of government introduced under the authority of the occupying powers in Iraq constituted a violation of the right of peoples to self-determination. One consequence of the introduction of power-sharing between the representatives of the main ethno-cultural groups has been the establishment of a political system in Iraq in which religious and ethnic identity are central to political debate.¹⁶¹ The principal concern of this work is not, however, the possibilities or modalities of forcible democratic regime change, but the resolution of the conflict between the measures adopted by the Security Council and the right of peoples to political self-determination, a norm of *jus cogens* standing. Given that the nature of the system of international law is deliberation, reason, and consensus, the work has argued that the democratic legitimacy of Security Council resolutions is dependent on the extent to which they are consistent with the constitutional framework provided by the UN Charter and wider international law, and that the relevant measures can be justified in accordance with the principle of public reason. The relevant question is whether the negation of the right of the Iraqi people to political self-determination was necessary to restore international peace and security: this is a question of subjective, political judgment.

In a related context, Judge Kooijmans, in his separate opinion in *Case concerning oil platforms*, argued that the evaluation of issues concerning ‘essential security interests . . . is first and foremost a political question and can hardly be replaced by a judicial assessment. *Only when the political evaluation is patently unreasonable . . . is a judicial ban*

¹⁵⁹ *Ibid.*, at 173. Cf. Foreign Affairs Select Committee, Tenth Report, ‘Foreign Policy Aspects of the War against Terrorism’, HC 405, 31 July 2003, written evidence submitted to the Committee in a memorandum from the Foreign and Commonwealth Office in response to questions from the Committee, 13 and 22 May 2003, at para. 27.

¹⁶⁰ The US viewed the Transitional Administrative Law as ‘the foundation stone’ of the final constitution: Dinmore, ‘US “losing its grip” on political process in Baghdad’, *Financial Times*, 1 June 2005, at 10.

¹⁶¹ See, generally, Wimmer, ‘Democracy and Ethno-religious Conflict in Iraq’, 45 *Survival* (2003/04) 111; and Y. Ghai *et al.* (eds.), *Building Democracy in Iraq* (2003).

appropriate'.¹⁶² A political judgement is patently unreasonable where no reasons are provided, or no reasoned justification exists for the introduction of an impugned measure. A regulation introduced without any reasoned justification cannot have the effect of negating the existing rights of the subjects of the legal system: arbitrary regulations (and resolutions) have no legal effect. It follows that the Security Council is obliged to provide a clear, reasoned argument for any resolution that purports to effect a change in the legal rights or obligations of any state or other subject of international law. This is particularly the case where the norm in question is one of *jus cogens* standing. A requirement that the Council articulate a clear basis for the exercise of the political authority vested in it under the Charter is not only a practical necessity; it is also required if states are not to avoid their obligation to comply with resolutions adopted under chapter VII by engaging in subjective acts of judicial review. Given that the Security Council is increasingly exercising its political authority away from areas clearly accepted and recognized as being concerned with international peace and security,¹⁶³ the articulation of public reason is necessary if the Council is not to find its authority increasingly challenged within the international legal community.

¹⁶² *Case concerning oil platforms (Islamic Republic of Iran v United States of America)*, judgment of 6 Nov. 2003, available at www.icj-cij.org, Separate Opinion of Judge Kooijmans, at para. 44 (emphasis added).

¹⁶³ See, e.g., SC Res. 1373 (2001) and SC Res. 1624 (2005).