A Compelling Idea: Jus Cogens and the Power of the United Nations Security Council

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Introduction

"The United Nations, whose membership comprises almost all the States in the world... is the nearest thing we have to a representative institution that can address the interests of all states, and all peoples. Through this universal, indispensable instrument of human progress, States can serve the interests of their citizens by recognizing common interests and pursuing them in unity."[1]

The United Nations was created as an institution to protect mankind. In the aftermath of two world wars, a shared interest of states emerged in creating and maintaining a peaceful world for all states and individuals to enjoy.[2] This interest was underscored by the principle of respecting the sovereignty and equality of all nations.

Recognition of the common interests of states is at the very core of *jus cogens*, a principle of international law which protects the most important values and interests of the community.[3] Otherwise known as 'compelling law', *jus cogens* is binding on all states and is a supreme quality which attaches to a norm making it absolute.[4] This means that no derogations from the norms will be accepted, even on grounds of reciprocity. In this dissertation, I seek to demonstrate the true value of *jus cogens* by outlining how it can operate as a limitation on one of the most powerful institutions in the world; the United Nations Security Council.

The Vienna Convention on the Law of Treaties (VCLT) included *jus cogens* in its provisions, which clarified the scope and operation of the customary principle somewhat. Under the VCLT, any action or norm which comes into conflict with a norm of *jus cogens* is legally void *ab initio*.[5] This gives *jus cogens* some practical force in that no international actor may take any action which could be said to have violated *jus cogens*. A common criticism of the principle however is that its imprecision hinders its practical application. Any international actor defending a claim that they had violated a norm of *jus cogens* could challenge siad accusation, on the basis that the norm they breached was not *jus cogens*. To mitigate this, I propose a clear

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[1] Kofi Annan, Secretary-General of the UN "Nobel Lecture" (Oslo, 2001)

[2] Ian Hurd "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World" (2011) 25 Ethics. Int. Aff. 293 at 295

[3] Robert Kolb, *Peremptory International Law - Jus Cogens: A General Inventory* (Hart Publishing, Oxford, 2015) at 4

[4] Kolb, above n 3, at 4

[5] Vienna Convention on the Law of Treaties 1155 UNTS 331 (Opened for signature 23 May 1969, entered into force 27 January 1980), art 53

criterion that norms can be determined against to assess whether or not they are *jus cogens* norms. This criteria focuses on the acceptance of the norm in the international community, whether or not it is non-derogable and whether it is in the interests of the wider community. This last factor requires a substantive analysis, assessing whether the interests of the norm reflects the values important to the community of states.[6]

Although an exhaustive list of *jus cogens* norms can not exist, there are several norms which have been clearly established in the community as holding this supreme status. The prohibition of the use of aggressive force, and the right to self-determination of people are both important principles protected by the UN Charter, clearly accepted as *jus cogens.* Human Rights norms are more complex given there is no consensus between states as to what human rights are. The derogability of each right thus offers strong insight into their 'supreme' status. Humanitarian norms are generally accepted as having *jus cogens* character given the substance of what they protect. Lastly, while international environmental norms have enjoyed sufficient acceptance to be *jus cogens*, it is likely some environment norms will reach this status soon, reflecting the increasing importance being placed on environmental protection in the international community.

Exploring the concept of *jus cogens* and its criteria is an interesting theoretical exercise but potentially lacks utility until the principle is applied in practice. Since its inception, there have been a number of instances where the Security Council has made a decision which has led to an outcome inconsistent with *jus cogens*. In theory, this would invalidate the action but that has not always been enforced. In this dissertation, I argue that the International Court of Justice has jurisdiction to assess the Security Council's actions in light of these fundamental norms of international law, and can provide direction for states as to their resulting obligations under the Charter. Importantly, it should be noted the power *jus cogens* has, compared with existing limitations within the UN Charter which overlap substantively with *jus cogens*. Reliance upon the purposes and principles of the Charter to restrain the actions of the Council has been relatively ineffective so far.[7] Even if an action of the Council was found to be *ultra vires* by the ICJ, it would not necessarily be invalidated. The power of *jus cogens* is stronger and could

[6] Kolb, above n 3, 8

[7] Inger Österdahl, *Threat to the Peace: the Interpretation by the Security Council of Article 39 of the UN Charter* (Swedish Institute of International Law, Uppsala, 1998), at 9

offer a more effective limitation on the Council given any conflicting act is void *ab initio.* This shifts more power to the Courts and Member States in circumstances of misguided decisions.

No institution which derives its power from the law can be above the law.[8] While this principle has not always been applied in practice, laying out the legal groundwork for a check on the Security Council's power is a starting point towards consistent observation of the rule of law.

[8] *Lockerbie (Separate Opinion Rezek)* [1998] ICJ Reports 152, at 154

Chapter I – the Application of 'Jus Cogens' to the United Nations Security Council

A. An Overview of the Security Council and Jus Cogens

The United Nations (UN) was established on 24 October 1945 with the intention of centralising the actions of the global powers and pacifying relations between states.[9] The Security Council was established as the political organ of the UN and given primary responsibility for the "maintenance of international peace and security".[10] Institutionalising the response to international crimes and conflicts has played a major role in the development of international relations in the seventy-three years since the Council's establishment.[11]

1. The Security Council and international law

The Security Council has broad, discretionary powers, constrained only by a few provisions within the United Nations Charter ('the Charter'). Under Article 39, once the existence of a 'threat to peace' has been determined, the Council is empowered to take almost any action, including the authorisation of the use of force (under Article 42).[12] The 'Permanent Five' ('P5') states have the right to veto any proposal brought before the Council.[13] Any decisions by the Council may translate into a mandatory order on Member States under Article 25.[14] The binding nature of Security Council decisions is conditional on decisions according with the purposes and principles of the UN Charter, listed under Articles 1 and 2. This limitation is outlined in Article 24(2) and is recognised as the strongest limitation on the Council that is contained in the Charter.[15]

The primary purpose of the UN is the maintenance of peace and security.[16] Developing friendly relations among states based on respect for the equal status and right to self-determination is

[9] Hurd, above n 2, at 295
[10] Charter of the United Nations, art 24
[11] Pierre Klein "Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law" (2002) 13 EJIL 1241 at 1243
[12] Charter of the United Nations, art 39
[13] Charter of the United Nations, art 27
[14] Devon Whittle "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action" (2015) 26 EJIL 671 at 672
[15] Whittle, above n 14, 673
[16] Charter of the United Nations, art 1(1)

also an objective of the organisation.[17] These objectives are to be achieved in accordance with principles of the equality of all members, the requirement to settle disputes peacefully and obligation to respect sovereignty of states.[18]

The Security Council is a political organ. However, it is not above the law.[19] As discussed by the International Court of Justice (ICJ) in the *Admission* case, the political character of an organ does not exempt it from observing the legal provisions which constitute limitations on its power.[20] The ICJ reaffirmed this in the *Lockerbie* case, holding that any legal decision derives its power from the law, and is thus constrained by the law.[21] The powers of international organisations come from the constitutions upon which they are founded; constitutions agreed upon by their Member States.[22] This means international organisations are constitutionally bound to act within the laws of their organisation and as bodies which exist within the international sphere, they are also bound by international law.[23] An important aspect of this limitation is the concept of *jus cogens* and the role it plays in binding the actions of the Security Council.

2. An introduction to jus cogens

Jus Cogens is a concept of international law which refers to norms and values that are superior to all other law, and cannot be derogated from.[24] It is a legal quality, described as 'compelling law' which may attach to a norm if it is found to protect the interests of the international community of states as a whole.[25] The concept comes from the need to protect the most important ideas held by the international community.[26] Should a law or action be found to offend against a norm of *jus cogens*, that law or action will be void *ab initio*.[27] It should be

[17] Charter of the United Nations, art 1(2)-(4)
[18] Charter of the United Nations, art 2(1)-(7)
[19] Alexander Orakhelashvili "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" (2005) 16 EJIL 59 at 60
[20] *Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion)* [1948] ICJ Rep 57 at 64
[21] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)(Preliminary Objections) (Dissenting Opinion of Judge Jennings)* [1998] ICJ Rep 99, at 110
[22] Orakhelashvili, above n 19, at 59
[23] Orakhelashvili, above n 19, at 59
[24] Kolb, above n 3, at 3
[25] Kolb, above n 3, at 4
[26] Orakhelashvili, above n 19, at 62
[27] Kolb, above n 3, at 4

noted that under Black's Law Dictionary, the term '*jus cogens* norm' can be used interchangeably with 'peremptory norm'; I will refer to both terms throughout this dissertation.[28]

The primary guidance on *jus cogens* comes from the Vienna Convention on the Law of Treaties 1969 (VCLT) which provides under Article 53 that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.[29] Article 64 of this convention further clarifies that only a new peremptory norm may modify or revoke an existing peremptory norm.[30] It is generally accepted that *jus cogens* is not confined to the scope of treaty law.[31] This much was made clear by the International Law Commission (ILC) in their report to the General Assembly on the draft articles of the VCLT, where they stated that "a rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it of legality".[32] Judge Lauterpacht affirmed this in in his separate opinion in the ICJ's *Bosnia* case (1993).[33]

As both a principle of customary law and provision of positive law, *jus cogens* applies to the United Nations Security Council.[34] This is through the purposes and principles of the UN, the VCLT's application to the United Nations Charter as a constituent treaty and through direct application of the concept as a supreme form of customary law.[35] Under Article 103 of the Charter, if a Member State of the UN has a conflict with a Security Council order and an existing obligation outside of the UN, the Council order will prevail.[36] This principle does not apply however to a conflict with a *jus cogens* norm.

3. Preliminary critiques of jus cogens

[28] *Jus Cogens* definition, Black's Law Dictionary (11th ed. 2019), *available at* Westlaw
[29] Vienna Convention on the Law of Treaties 1155 UNTS 331 (Opened for signature 23 May 1969, entered into force 27 January 1980), art 53
[30] Vienna Convention on the Law of Treaties, above n 5, art 64
[31] NG Onuf and Richard K Birney "Peremptory Norms of International Law: Their Source, Function and Future" (1974) 4 Denv.J.Int'l L.&Pol'y 187 at 195
[32] *Report of the International Law Commission on the work of its eighteenth session* [1966] vol 2, pt 2 YILC 261
[33] Alexander Orakhelashvili *Perempotry Norms in International Law* (Oxford University Press, New York, 2006) at 436
[34] John Dugard "Judicial Review of Sanctions" in Vera Gowlland-Debbas (ed) *United Nations Sanctions and International Law* (Kluwer Law International, The Hague, 2007) at 86
[35] Orakhelashvili, above n 33, at 429
[36] Charter of the United Nations, art 103

The existence of *jus cogens* does not depend on an exhaustive list of norms.[37] This was a decision in the drafting of the VCLT, despite objections from a few states. In the ILC's report to the Conference in 1968, they determined that the full content of *jus cogens* must be worked out through state practice and the jurisprudence of international tribunals.[38] The vagueness of the principle does not deprive *jus cogens* of its legal character; each norm must be examined substantively on a case-by-case basis.[39] The absence of this criteria has however become a strong criticism of *jus cogens* in its practical application.[40] While theoretically the principle of *jus cogens* exists, many have argued that it lacks any 'flesh and blood' because there is too much disagreement over the scope and criteria of the norms.[41] Some argue this supreme status attaches to only the most fundamental norms of the international order, whereas others argue in favour of *jus cogens* applying to any norm which is in the interests of the community of states as a whole and is considered non-derogable.[42] Without a stronger consensus on what a norm requires in order to be *jus cogens*, and which norms have been generally accepted in the international community, *jus cogens* will remain nothing more than an interesting theoretical concept.[43]

B. Determining the Scope and Criteria of Jus Cogens

1. *The source of jus cogens*

There is a lot of support for the notion that *jus cogens* is a product of natural law, given traces of the concept can be found in legal and political philosophy throughout history.[44] The concept of 'immutable' principles of the law of nations played a role in the Nuremberg Trials where convictions were not based upon norms which were consensually binding on states, but on norms whose nature meant they were binding on all of mankind regardless of state consent.[45] While there are certainly strong connections between the concept of *jus cogens* and the features

[37] Orakhelashvili, above n 33, at 43
[38] *Report of the International Law Commission on the work of its eighteenth session*, above n 32, 248
[39] Orakhelashvili, above n 33, at 43
[40] NG Onuf and Birney, above n 31, at 196
[41] NG Onuf and Birney, above n 31, at 196
[42] Eva M Kornicker Uhlmann "State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms" (1998) 11 Geo. Int'l Envtl. L Rev. 101 at 101
[43] Uhlmann, above n 42, at 101
[44] Kolb, above n 3, 8; *for more information, see Online Library of Liberty (ed) Hugo Grotius, The Enhanced Edition of The Rights of War and Peace (1625) (eBook, Liberty Fund, Indianapolis, 2014);* Richard Whatmore (ed) *Emer de Vattel, the Law of Nations (1797)*(eBook, Liberty Fund, Indianapolis, 2008)
[45] Orakhelashvili, above n 33, at 37

of natural law, it is more likely that *jus cogens* is actually an expression of the common legal order within the community of states.[46] Natural law refers to the creation of foundational laws and ideas, whereas *jus cogens* is a legal quality which attaches to already existing laws.[47] *Jus cogens* is more flexible as a legal quality because the norms with this quality can change to reflect the values of the contemporary international order.[48] This allows for the emergence of new peremptory norms reaching this peremptory status, compared with an approach under natural law which would restrict *jus cogens* to only those traditionally recognised as 'foundational' to international law. Using the example of international environmental law, a field which continues to grow, under natural law there would be no grounds to accept the development of environmental norms as peremptory.

2. The scope of jus cogens

Jus cogens as an expression of the interests of the international community of states as a whole means that identifying a norm as *jus cogens* requires a substantive assessment.[49] *Jus cogens* status can be determined from any norm of international law which reflects the wider interests of the community of states.[50] This approach aligns with the ILC's report to the Vienna Conference in 1968 which determined that it is the substantive nature of the norm which determines its peremptory status.[51]

It must be qualified that more than a mere alignment with the interests of the community of states is required to recognise peremptory status.[52] Given *jus cogens* limits international actors' actions with or without their consent, only the most important norms reflecting the community's interests can be given this supreme status.[53] Looking back to Article 53 of the VCLT, a clear requirement of *jus cogens* status is that a norm must be non-derogable.[54] The prohibition of derogation provides the strongest evidence of peremptoriness given non-derogability is reserved for only the most important norms existing in the current international

[46] Orakhelashvili, above n 33, at 38
[47] Orakhelashvili, above n 33, at 38
[48] Orakhelashvili, above n 33, at 46
[49] Kolb, above n 3, 8
[50] Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyer's Publishing Co., Helsinki, 1988) at 207
[51] *Report of the International Law Commission on the work of its eighteenth session,* above n 32, 248
[52] Orakhelashvili, above n 33, at 47
[53] Orakhelashvili, above n 33, at 47
[54] Orakhelashvili, above n 33, at 43

order.[55] In terms of developing a criteria for *jus cogens*, the prohibition of derogation is both a feature and a consequence of a norm being supreme.[56] It is the substance of a norm which gives it the character so important (in a moral sense) that it must not be derogated against. This consequence (of non-derogation) then provides strong evidence of the moral character of the norm.[57] In this way, the substance (nature) and form (non-derogability requirements) work together to provide a criteria for determining which norms are peremptory and which are not.

3. The criteria of jus cogens

In light of the source and scope of *jus cogens* discussed, I propose the following criterion for determining whether a norm has peremptory character. This criterion comes primarily from the guidance of Article 53 of the VCLT but also from the recognition of *jus cogens* requiring a substantive assessment. The aim of this criteria is to allow the application of *jus cogens* to a variety of norms across international law, without expanding the concept too far so that it loses its supreme character.

A norm is peremptory if the norm is (1) of general international law; and (2) accepted and recognised as peremptory by the international community of states as a whole; and (3) one from which no derogation is permitted; except for (4) modification by another conflicting peremptory norm; and (5) must protect the overriding interests of the international community of states. Each of these elements require further consideration.

(a) A norm of general international law

The first requirement of *jus cogens* is that the norm must be about general international law, instead of regional or domestic laws.[58] This means a norm whose substance has 'general applicability', creating obligations or rights for the great majority of states in the international system.[59] The term 'general' as opposed to 'universal' implies it must be applicable to the majority of states, but not all.[60] Customary law is the primary source of norms of *jus cogens*

[55] Orakhelashvili, above n 33, at 46
[56] NG Onuf and Birney, above n 31, at 189
[57] Orakhelashvili, above n 33, at 44
[58] Hannikainen, above n 50, at 208
[59] Hannikainen, above n 50, at 208
[60] Hannikainen, above n 50, at 209

because of the general nature inherent in this form of law.[61] There are very few peremptory norms which contain specific provisions because such specificity often does not work when applying a rule to the whole community.[62]

(b) Accepted and recognised as peremptory by the international community of states as a whole

Although *jus cogens* is an exception to the general principle that no law binds a state without its consent, the acceptance of the majority of states is still required to hold a norm as peremptory.[63] At the Vienna Convention, the Chairman of the Drafting Committee Mr Yaseen stated that the words "as a whole" (in Article 53) were included to clarify that a peremptory norm does not require every state to have accepted its status, provided that the dissenting states only constitute a small minority.[64] To hold otherwise would allow an individual or small group of states to veto a norm accepted by a large number of states to be in the interests of the global community.[65] It is thus in the interests of the international community of states to impose the will of the overwhelming majority on the small minority who do not respect the protection of the common good.[66]

To determine whether a norm has been accepted as peremptory, there must be a high level of consistency between states in the application and observance of a norm.[67] Furthermore, this must have been due to a belief in the relevant norm being peremptory.[68] Acceptance can be inferred from the silence of a state if it can be demonstrated that the state was aware of the norm and the peremptory status being awarded to it by other states.[69] Where acceptance of a norm is not overwhelmingly clear, the existence of the norm in international instruments and bilateral treaties as non-derogable can provide useful evidence. This finding links back to the ILC's comment at the Vienna Convention that the full content of *jus cogens* must be discerned from state practice and jurisprudence.[70]

[61] NG Onuf and Birney, above n 31, at 191
[62] NG Onuf and Birney, above n 31, at 191
[63] Hannikainen, above n 50, at 211
[64] Hannikainen, above n 50, at 210
[65] Hannikainen, above n 50, at 211
[66] Hannikainen, above n 50, at 213
[67] Hannikainen, above n 50, at 237
[68] Hannikainen, above n 50, at 237
[69] Hannikainen, above n 50, at 239
[70] Kolb, above n 3, 8

(c) A norm from which no derogation is permitted

For ordinary principles of international law, *jus dispositivum* allows parties to contract out or modify their obligations in bilateral agreements.[71] When a principle is peremptory, the stronger interests of the international community outweigh the individual interests of states to alter their obligations.[72] A principle restricting derogation is thus strong evidence of peremptory status.[73]

Evidence of non-derogability can be found in treaties and statements from both international organisations and states regarding the operation of the norm.[74] Treaties may refer to an inability to suspend a norm in emergency circumstances, or prohibit reprisals.[75] As a general rule, if derogation of the norm can be justified, then any prohibition on derogation is not absolute. Any norm which permits reprisals will not be a *jus cogens* norm because *jus cogens* only extends to the most important norms whose violation amounts to an offence against the international community. The concept of reprisal focuses on an offence committed in a bilateral relationship between states, whereas *jus cogens* norms have an *erga omnes* character.[76] A reprisal against a violation of a peremptory norm would thus amount to a second offence against the wider community, going against the function of *jus cogens*.[77]

A heavily debated question is whether the partial derogation of a norm can occur without affecting the non-derogable integrity of the entire norm. This depends on whether the violation of the norm can be considered to be within the ambit of the norm or not. If a norm provides for exceptions, then carrying out this exception when the circumstances arise does not constitute a derogation (because one is acting within the ambit of the principle). If no such exceptions are provided for, then derogation disrupts the continuing operation of the norm in the international community. Testing whether a norm is non-derogable thus depends on the ambit of exceptions provided for within the principle, and whether or not the norm permits reprisals. The clearest guidance on this will come from international instruments and state practices.

[71] Kolb, above n 3, 2
[72] Kolb, above n 3, 2
[73] Hannikainen, above n 50, at 263
[74] Hannikainen, above n 50, at 263
[75] Uhlmann, above n 42, at 111
[76] Orakhelashvili, above n 33, at 64
[77] Hannikainen, above n 50, at 255

(e) Norm only modifiable by conflicting peremptory norm

Peremptory norms may only be modified by those of equal character; a requirement which stems from the general requirement of non-derogability.[78] Modification may range from specification to a substantial alteration, and must be accepted and recognised by the international community of states as a whole.[79] Where a substantial alteration to a peremptory norm is proposed, it must be done through a collective expression of the will of the international community. This is a reasonably high threshold only likely satisfied by a resolution of the General Assembly of the UN or Global Conference representative of all member states, expressly declaring the normative terms of the modification.[80]

An issue with this rule is raised by Onuf and Birney in '*Peremptory Norms Of International Law',* who argue modification would be impossible as any conflicting norm would be void *ab initio* before it could obtain *jus cogens* status.[81] This is on the basis that norms have ordinary status first, until sufficient recognition by all states warrants qualification of *jus cogens.*[82] To resolve this, modification would have to come from a norm contained in a general, multilateral treaty or from norms promulgated by the UN General Assembly which were introduced as peremptory.[83] This could happen with the introduction of a new peremptory norm in relation to the protection of the international environment. With increasing numbers of global conferences being convened to tackle climate change, such a move could happen if states were to agree.

(f) Norm protects the overriding interests of the international community of states

> "An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State…by their nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes."*[84]

[78] Hannikainen, above n 50, at 266
[79] Hannikainen, above n 50, at 266
[80] Hannikainen, above n 50, at 266
[81] NG Onuf and Birney, above n 31, at 192
[82] NG Onuf and Birney, above n 31, at 192
[83] NG Onuf and Birney, above n 31, at 193
[84] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)* [1962] ICJ Reports 3 at 32

Globalisation meant that the international order shifted from co-existence to community. This shift has been necessary to accommodate for the increasing number of transnational threats such as terrorism and climate change.[85] Acknowledging shared community interests also means acknowledging shared obligations.[86] This idea was discussed in *Barcelona Traction* where the court determined states have common interests, and rights to protect those interests.[87] This principle of obligations *erga omnes* was also affirmed in the *Nuclear Tests* case wherein the ICJ acknowledged states' common rights to the environment.[88] These rights translate into an ability of individual states to vindicate a breach committed by another actor against the community's interest.[89]

Two types of community interests exist in international law: a narrow interest aimed at the direct benefit of the entire community, and a broader interest aimed at the protection of individuals. The former includes the common interests of international peace, preservation of the natural environment and the use of the 'global commons', among others.[90] The latter takes a humanitarian approach, with a common interest in protecting the values important to mankind. This broader interest shows itself in norms which prohibit atrocities like genocide, slavery or torture.[91] Declarations and global actions plans of the UN world conferences, resolutions of the General Assembly and multilateral treaties are all sources of evidence of what the interests of the international community are.[92]

Jus cogens plays an important role in protecting the interests of the international community of states, recognising their superior status over ordinary laws and principles. A substantive assessment must be made to determine whether a norm is in the interests of the wider community.

[85] Uhlmann, above n 42, at 105
[86] Uhlmann, above n 42, at 105
[87] Uhlmann, above n 42, at 104
[88] Hannikainen, above n 50, at 274
[89] Navia, above n 36, at 53
[90] Uhlmann, above n 42, at 108
[91] Uhlmann, above n 42, at 108
[92] Uhlmann, above n 42, at 108

Chapter II – Norms of Jus Cogens

> "In order to qualify as peremptory, a norm… must safeguard interests transcending those of individual States, have a moral or humanitarian connotation, because its breach would involve a result so morally deplorable as to be considered absolutely unacceptable by the international community as a whole, and consequently not [permit] division of those interests into bilateral legal relations."[93]

There is no definitive list of peremptory norms. Critics argue that this takes away from the practical force of the concept while proponents argue it makes *jus cogens* flexible. In this chapter, I argue that while there is no definitive list, there are a number of norms of international law which can clearly be identified as *jus cogens.* The rest of this Chapter will focus on which norms these are.

A. The Prohibition of the Use of Aggressive Force

1. General prohibition

The prohibition of the use of aggressive force, outlined under Article 2(4) of the Charter is undoubtedly a peremptory norm.[94] Aggressive force is force which has not been authorised by the Security Council nor utilised in self-defence under Article 51 of the Charter.[95] Almost every state is a member of the UN, meaning this prohibition applies to the majority of states and has been accepted by the entire community of states.

The ILC determined this prohibition to be the most credible example of *jus cogens* in international law because it forms the very cornerstone of the contemporary legal order and the effort to promote international peace.[96] As a fundamental norm of the international legal order, it is non-derogable. The prohibition of aggressive force is of fundamental importance to the community of states as it ensures the survival and independent existence of states. As a norm

[93] Orakhelashvili, above n 33, at 50
[94] Charter of the United Nations, art 2(4)
[95] Charter of the United Nations, art 51
[96] Orakhelashvili, above n 33, at 50

of general international law, universally accepted and in the interests of the wider community, this prohibition can be conclusively considered peremptory.[97]

2. Prohibition of the acquisition of territory by means of force

States may not acquire territory through the unlawful exercise of force; a principle implicit in the broader prohibition of aggressive force. It would be unacceptable to gain from the violation of a peremptory norm.[98] This prohibition is peremptory given it stems from another principle which is peremptory.[99] The UN condemnation and non-recognition of the Israeli-Occupied Territories of Palestine, taken during the Six-Day War (1967) is evidence of the wider acceptance of this principle as peremptory.[100] The General Assembly, representing the entire community of states, has stated that no territorial acquisition resulting from the use of force shall be recognised as legal.[101]

B. The Right to Self-Determination

The right to self-determination is one of the purposes of the UN, under Article 1(2).[102] This right became important in the era of decolonisation, and was initially recognised as applying only to non-self-governing territories.[103] This focus was clear in '*The Declaration of the Granting of Independence to Colonial Countries and Peoples*' from the General Assembly, which affirmed the UN obligation to assist non-self-governing territories in their fight for independence.[104]

The right to self-determination has since broadened beyond the colonial context to have general applicability on all states, as is demonstrated in the International Covenant on Civil and Political Rights 1976 ('ICCPR') which entrenched the principle that all peoples have the right

[97] Orakhelashvili, above n 33, at 50
[98] John Dugard *Recognition and the United Nations* (Cambridge University Press, Cambridge, 1987) at 55
[99] Dugard, above n 98, at 55
[100] See SC Res 2334 (2016) for most recent Resolution passed regarding the conflict
[101] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* GA Res 2625 (1970)
[102] Charter of the United Nations, art 1(2)
[103] Navia, above n 36, at 57
[104] *The Declaration of the Granting of Independence to Colonial Countries and Peoples* GA Res 1514(1960)

to self-determination.[105] The violation of this right was at issue in Resolutions 418 and 554 which condemned South Africa's Apartheid regime.[106] The Council ordered an arms embargo as a response to the violation of the right to self-determination against the non-white majority of South Africa. This demonstrated the applicability of the right in self-governing territories. The right of self-determination has clearly been accepted by the community of states given its position in the UN Charter, resolutions of both the General Assembly and Security Council, and recognition in international legal instruments. Given its general applicability, this right is clearly in the community interests (above individual states').

Some have argued that the ability of states to conclude agreements, relinquish control of natural resources and other national decisions constitutes a derogation from the principle thus excluding the right of self-determination from peremptory status.[107] Orakhelashvili in *'Peremptory Norms of International Law'* disagrees with this point however, arguing that the essence of sovereignty is the ability of a state to freely dispose of their natural resources in contracts with other states.[108] Provided agreements are exercised out of the free will of sovereign representatives, such activities do not constitute a violation of this right, rather they are within the ambit of the right to exercise such decision-making.[109]

As a norm with general applicability to all states, accepted by the international community as one from which no derogation is permitted, the right of self-determination can be considered as a norm of *jus cogens*.

C. Human Rights

Human Rights are rooted in morality and are fundamentally important to the interests of mankind. Determining which human rights are peremptory is a matter of contention in international law. In general terms, respect for human rights is an obligation under Articles

[105] *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 1(1)
[106] SC Res 554 (1984)
[107] Orakhelashvili, above n 33, at 52; *For further details, see* Jerzy Sztucki *Jus Cogens and the Viena Convention on the Law of Treaties: a critical appraisal* (Springer-Verlag, New York, 1974); Nico Schrijer, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, Amsterdam, 1997)
[108] Orakhelashvili, above n 33, at 53
[109] Orakhelashvili, above n 33, at 53

1(3) and 55 of the Charter, thus binding on all states.[110] These articles in conjunction with Article 103 make the obligation of acting in accordance the principle of 'respect for human rights' an obligation which trumps any other conflicting obligations existing outside of the Charter.[111] The establishment of the UN Human Rights Council (UNHRC) (formerly known as the UN Commission of Human Rights) demonstrates the importance human rights has been given by the community of states.[112]

1. Non-derogable human rights

States have different conceptions of human rights meaning not every right recognised in the Universal Declaration on Human Rights (UDHR) will be recognised as *jus cogens*.[113] It can be assumed that every human right is in the interests of the international community in a broad sense, thus the 'supreme' status of a norm will be indicated by its derogability. Article 4(2) of the ICCPR offers guidance on the derogability of human rights, stating that even under emergency circumstances, the prohibition of torture, genocide and slavery, recognition of people before the law and right to life and freedom of thought and consciousness remain non-derogable.[114] Similar provisions are found in the American Convention on Human Rights (ACHR) and European Convention of Human Rights (ECHR) in relation to most of these rights.[115]

(a) Prohibition of torture, genocide and systematic racial discrimination

The International Criminal Tribunal for the Former Yugoslavia (ICTY) determined the prohibition of torture, genocide, slavery, racial discrimination, aggression, and forcible suppression of peoples' right to self-determination have all acquired high status in the international normative system.[116]

[110] Navia, above n 36, at 59
[111] Hidayat Ur Rehman, Syed Raza Shah Gilani and Mumammad Haroon Khan "A Critical Assessment of Jus Cogens Nature of International Human Rights Law" (2014) Dialogue 404 at 406
[112] Navia, above n 36, at 59
[113] Orakhelashvili, above n 33, at 56
[114] *International Covenant on Civil and Political Rights,* above n 101, art 4(2)
[115] Navia, above n 36, at 60
[116] *Prosecutor v Furundžija (Judgement)* ICTY Trial Chamber IT-95-17/I-T, 10 December 1998 at [147]

The prohibitions against torture, genocide and systematic racial discrimination have all been firmly accepted by the community of states as norms which are binding states regardless of consent.[117] The prohibition of torture is affirmed under Article 7 of the ICCPR, Article 5 of the American Convention on Human Rights (ACHR), and Article 3 of the European Convention on Human Rights (ECHR).[118] The crime of genocide was introduced with General Assembly Resolution 96 (1946), the Convention on the Prevention and Punishment of the Crime of Genocide 1951 and prohibited in Article 6 of the ICCPR .[119] The prohibition of systematic racial discrimination can be read in to the Articles 2, 4(1) and 26 of the ICCPR which prohibit discrimination on the basis of race. This prohibition was also the foundation of the Convention on the Elimination of All Forms of Racial Discrimination and the reason for the embargo imposed on South Africa when the Apartheid regime was still in place[120] It is clear that each norm has been firmly accepted by the international community of states.

Under Article 4 of the ICCPR, no derogation from any of these norms may be made under any circumstances, including in the event of an emergency. This is because no circumstances could ever justify the violation of such important norms. The ICJ made a point in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* that the purpose of the genocide convention was to safeguard the existence of human groups and endorse elementary principles of morality.[121] The ICTY also linked the absolute prohibition of derogation of a norm to its nature, explaining how this acts as strong evidence for the fundamental value of the norms and their supreme importance to mankind.[122] As norms applicable to all states, which are absolutely non-derogable and of fundamental importance to humankind, it is clear these prohibitions are peremptory.

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[117] Navia, above n 36, at 64

[118] *International Covenant on Civil and Political Rights,* above n 101, art 7; *American Convention on Human Rights "Pact of San José, Costa Rica"* 1144 UNTS 123 (signed 22 November 1969, entered into force 18 July 1978), art 5; *European Convention on Human Rights* 213 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953), art 3

[119] *Convention on the Prevention and Punishment of the Crime of Genocide* 78 UNTS 277 (open for signature 9 December 1948, entered into force 12 January 1951)

[120] Dugard, above n 98, at 57; SC Res 418 (1977)

[121] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Reports 15, 23

[122] *Prosecutor v Furundžija (Judgement)* ICTY Trial Chamber IT-95-17/I-T, 10 December 1998 at [144]

2. 'Formally' derogable human rights

An important point is raised in *Peremptory Norms in International Law* that some 'formally derogable' rights can still be peremptory if non-derogable in a bilateral context.[123] It has been established that determining peremptoriness involves a substantive assessment given the substance of a norm is what makes it 'compelling law'. Non-derogability is a consequence of the substance. While non-derogability is strong evidence of a norm being peremptory, there is room to argue that in a few instances, a norm may be considered peremptory without the consequence of 'absolute' non-derogability.[124]

A distinction must be drawn between the right to derogate from a norm under the VCLT and the right to derogate from it under human right instruments, as they have different consequences. Derogation under the VCLT means attempting to nullify a norm *inter se.,* disrupting the continued operation of the norm internationally. If the norm is *erga omnes*, then the derogation would offend against the entire community.[125] This is different to derogation under a human rights instrument which is limited to national emergencies.[126] This is because in these emergency circumstances, derogation is made within the system and the operation of the right in the community of states is unaffected. The fact that a right is formally derogable in a human rights instrument does not exclude the same right from being non-derogable on states in a bilateral context, a point confirmed by the UN Human Rights Committee (UNHRC) in their General Comment No. 29.[127] The applicable criteria for determining peremptory status would thus be whether the substance of the norm protects the interests of the community of states, and whether the norm is non-derogable in a bilateral context. Such a determination can only be made through an individual examination of rights.[128]

(a) Rights of due process

This argument can be applied in an assessment of due process rights. The term 'due process' covers a range of civic rights, including the right to access a court, the right to a fair,

[123] Orakhelashvili, above n 33, at 58
[124] Orakhelashvili, above n 33, at 58
[125] Orakhelashvili, above n 33, at 59
[126] Orakhelashvili, above n 33, at 59
[127] UNHCR *International Covenant on Civil and Political Rights: General Comment No. 29: Article 4: Derogations during a State of Emergency* (31 August 2001), at 11
[128] Orakhelashvili, above n 33, at 59

independent and impartial hearing, the right to a public hearing, the right to hearing within a reasonable time and the right to a reasoned judgement.[129] Article 8 UDHR provides for the right to an effective remedy after the violation of ones rights, and Articles 10 and 11 provide for the right to a fair trial, the latter outlining the minimum standards of justice.[130] Elements of the right to a fair trial include the presumption of innocence, the right to be tried exclusively by a court of law in relation to a criminal offence, and the right to take proceedings before a court to address the violation of a non-derogable right.[131] The European Convention for the Protection of Human Rights (1953), the ICCPR, ACHR, African Charter on Human and People's Rights and the Arab Charter on Human Rights all set out these rights out in similar detail.[132] There is clearly a strong body of international law affirming due process rights.

Whether or not due process rights are peremptory comes down to their bilateral derogability. While due process rights are formally derogable under Article 4(1) ICCPR, there are grounds to argue the rights are absolute in relations between states and international organisations.[133] In *Tadíc*, the ICTY considered that the right to fair trial was an unconditional limitation on the powers of the Security Council, whose observance was *sine qua non* for the validity of Security Council resolutions.[134] Further, the UNHRC found the right to fair trial was non-derogable even in emergency circumstances, despite the ICCPR.[135] Firstly, the Committee determined the Article 4(2) list was not intended to conclusively determine which rights were peremptory (on the basis of 'absolute derogability') as some rights were only included in it on the basis that derogation would be unnecessary in an emergency situation, here referring to Articles 11 and 18. Secondly, certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflicts, thus there is no justification for a derogation during other emergency situations.[136] Thirdly, the right to a fair trial underlies the enforcement of other peremptory norms. Without the protection of such a right, the rule of law as the foundation of every legal system, is weakened.[137]

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[129] Grant L Willis "Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson" (2011) 42 Geo Int'l LJ 673 at 735
[130] Willis, above n 129, at 733
[131] UNHRC, above n 123, at 16
[132] Willis, above n 129, at 733
[133] Orakhelashvili, above n 33, at 427
[134] *Prosecutor v Dusko Tadíc (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* ICTY Appeals Chamber IT-94-1, 2 October 1995, at [41]-[42]
[135] UNHRC, above n 123, at 11
[136] UNHRC, above n 123, at 16
[137] UNHRC, above n 123, at 16

Reconciling the position of the HRC with Article 4(1) ICCPR, the right to a fair trial may be derogable in some rare instances, but is clearly non-derogable in a bilateral context, a prohibition which the HRC persuasively argues extends to the actions of the Security Council. The character of the right to a fair trial as binding upon the Security Council and Member States leads to the conclusion that it is above the treaty-making capacity of states, which supports a finding of peremptoriness.[138]

D. Humanitarian Laws

Humanitarian law is an important area of international law which serves to protect the interests of mankind. Humanitarian norms have been broadly accepted because they speak to the essential components of humanity.[139] The norms originate from The Hague Conventions (1899 and 1907) and the Geneva Conventions (1949)[140] These conventions established war crimes, crimes against humanity, and the rights of civilians and combatants in warfare. Not all norms within these conventions can be considered peremptory given some can be derogated from by states in a bilateral context.[141]

Some humanitarian norms are clearly peremptory, such as the principle of distinction, the prohibition on weapons causing disproportionate suffering, and the humane treatment of sick or captured enemy combatants.[142] These norms have general applicability to all states, regardless of whether that state has ratified the relevant conventions.[143] This applicability extends to both internal and external conflicts given the violation of these norms offends the moral character of the international community.[144] As a distinctive feature of *jus cogens*', the binding nature indicates that these norms are peremptory.

Peremptory humanitarian norms have come into conflict with the Security Council's use of economic sanction regimes. It is well established that the making and implementation of any

[138] Orakhelashvili, above n 33, at 427
[139] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*[1996] ICJ Reports 226, at 257
[140] Navia, above n 36, at 65
[141] Navia, above n 36, at 68
[142] Navia, above n 36, at 68
[143] Navia, above n 36, at 69
[144] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America (Merits)*[1986] ICJ Rep 14, 114

decisions by the Council must observe basic human right obligations and applicable norms of international law.[145] A general peremptory principle can be ascertained from humanitarian law that the starvation of a population cannot be used as a weapon of warfare.[146] With reference to economic sanctions, this means considering the impact of any decision on the civilian population and their rights to access food, water, shelter and medical care.[147]

The peremptory status of humanitarian norms is supported by their non-reciprocal nature as discussed in Chapter I. Agreements which violate humanitarian norms will be outlawed under Common Articles 66/6/6/7 and 7/7/7/8 and Article 47 Fourth Geneva Convention. Each of these articles works to renounce individual state's rights in favour of obligations to the international community, obligations which are 'higher norms' of international law.[148] The Geneva Conventions are theoretically non-derogable in their entirety, due to their substance.[149] No derogation could thus be justified in any circumstances, even in an emergency, because the humanitarian conventions are framed for situations of international conflict; the gravest of situations a state could face.[150]

There is a common interest in having absolute norms which safeguard the fairness, orderliness, civilisation and humanity of warfare.[151] When it comes to the violation of norms prohibiting international aggression or war crimes, the offence is not directed at particular states or governments, but rather at the very foundations on which the international community rests, "endangering the peaceful coexistence of nations".[152]

E. Protection of the Natural Environment

International Environmental Law is a relatively new field of law, largely emerging over the last forty years following the UN Conference on the Human Environment (Stockholm Conference) in 1972.[153] For this reason, it remains unclear whether any norms of environmental

[145] Orakhelashvili, above n 33, at 428
[146] Anna Segall "Economic sanctions: legal and policy constraints" (1999) 836 Int' R. Red Cross. 763
[147] Orakhelashvili, above n 33, at 429
[148] Orakhelashvili, above n 33, at62
[149] Orakhelashvili, above n 33, at 63
[150] Orakhelashvili, above n 33, at 64
[151] Navia, above n 36, at 65
[152] Marjorie M Whiteman "*Jus Cogens* in International Law, with a Projected List" (1977) 7 GA. J. INT'L & COMP. L. 609 at 610
[153] Uhlmann, above n 42, at 116

law have been generally accepted as peremptory by the community of states. There is clearly a growing relationship between international environmental law and *jus cogens,* given the protection and restoration of the environment is in the direct interests of international community. Climate Change has emerged as one of the most important issues for the current global community, the recent UN Climate Action Summit on 21 September 2019 affirming this. As environmental law grows in importance, more norms may be considered peremptory on the basis that *jus cogens* is an expression of the interests of the international community.[154]

Some jurists argue the prohibition against wilful serious damage to the environment during armed conflict may have reached the *jus cogens* status.

1. Prohibition against wilful damage to the environment during armed conflict

This norm refers to the prohibition against severe damage to the environment when it is a foreseeable consequence of military action. The substance of the interest this prohibition protects provides a strong argument in favour of peremptory status. This prohibition is geared towards the protection of the earth, something all states are universally reliant upon. The norm is therefore clearly in the interests of the entire community.[155] The source of this prohibition comes from the laws of armed conflict which also forbid the attack of the natural environment by way of reprisal. This absolute prohibition of derogation offers strong evidence of the 'supreme' status of the prohibition, however it is not enough persuasively demonstrate absolute character of the prohibition. There is a major hurdle to a finding of peremptoriness of this norm.

The requirement of general acceptance by the international community has not been satisfied. Under Articles 35 and 55 of the Additional Protocol I to the Geneva Convention, the infliction of widespread, long-term and severe damage to the natural environment during armed conflict is prohibited.[156] This is considered an international crime under Article 8(2)9b)(iv) of the ICC Statute.[157] The International Committee of the Red Cross (ICRC) published a lengthy guide on Customary International Humanitarian Laws, which included this prohibition.[158] This

[154] *Report of the International Law Commission on the work of its eighteenth session*, above n 32, 248
[155] Uhlmann, above n 42, at 117
[156] Elizabeth Mrema, Carl Bruch and Jordan Diamond *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (United Nations Environment Programme, Nairobi, 2009) at 4
[157] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, New York, 2005) at 153
[158] Henckaerts and Doswald-Beck, above n 157, at 153

prohibition is not settled customary law however, with the ICRC noting in their report that both France, the United States (US), and the Court itself in the *Nuclear Weapons* case determined that this prohibition was not customary, and not binding on those who did not ratify the Additional Protocol I. These states had issue with this prohibition because it would effectively make the use of nuclear weapons a crime under the Geneva Conventions. While there has generally been widespread, representative and virtually uniform acceptance of the prohibitions in state practice, these statements from two Permanent Members of the Security Council about its derogability mean there has not been universal acceptance of peremptory status. As a result, this prohibition can not yet be considered peremptory.

2. Prohibition of the use of destruction of the natural environment as a weapon

This norm refers to the prohibition of environmental damage as a military objective, a norm which is broadly accepted by states.[159] During a debate in the UN General Assembly, Sweden held that the destruction of oil wells in Kuwait by Iraq forces was an unacceptable form of warfare in the future. Canada supported this, arguing the environment should never form the object of an attack. Article 1 of the Environmental Modification Convention (ENMOD) prohibits this form of warfare. There are however a number of national military manuals which imply that compliance with ENMOD is down to the will of states.[160] While there has been widespread, representative and uniform practice to support the existence of this prohibition in customary law, there is insufficient evidence of its non-derogable nature in bilateral contexts. While this prohibition can thus be considered an important norm of international law, until a violation of it is considered inconceivable, it will fall short of acquiring *jus cogens* status.

The norms discussed in this chapter are the most commonly cited in discussions around *jus cogens* however they are not the only ones. Notable mentions not included in this dissertation are the prohibition against piracy, the hijacking of an aircraft, and the dispersion of germs with the intent to cause harm to human life. Given *jus cogens* acts as an expression of the interests of the community of states, there can never be a definitive list of norms as they are ever evolving. Having a clear criterion and a history of state and judicial recognition of peremptory norms will make the future identification of *jus cogens* norms clearer and stronger.

[159] Henckaerts and Doswald-Beck, above n 157, at 155
[160] Henckaerts and Doswald-Beck, above n 157, at 155

Chapter III – The Security Council's History of Offences Against Jus Cogens Norms

A. Determining a Normative Conflict

A normative conflict between a peremptory norm and a norm underpinning an action will result in a violation of *jus cogens.*[161] A normative conflict requires a deeper substantive assessment of what interests the relevant norms protect, and what the goals and outcomes of Council action are.[162] A determination must be made, looking to the wording, stated intention and necessary results of Council actions to ascertain whether the outcomes of a resolution are likely to lead to some form of *jus cogens* violation.[163] This assessment is objective. While the intentions of the Council will be a relevant factor, the attitudes of the Council regarding the lawfulness of their actions within *jus cogens* will be irrelevant.[164] This means a violation of *jus cogens* can be well-intentioned and simply err in its execution.

For the Security Council, this conflict may arise through the validation of an action of another which violated *jus* cogens or through the Council's own offending actions.[165]

1. Ascertaining the intentions of the Security Council

Ascertaining the intentions of the Council regarding the implementation and outcome of a resolution is crucial to understanding a resolution's substance, and whether this substance violates *jus cogens*.[166] Evidence of intention comes from the text of a resolution and circumstances of its drafting.[167] The intention behind Security Council Resolution 1260, welcoming the Sierra Leone Peace Agreement signing, can be informed by the UN Secretary-General's statement that the Council would not provide amnesty for perpetrators of international crimes. Although not explicit in the Resolution, the Council's absence of

[161] Orakhelashvili, above n 33, at 439
[162] Orakhelashvili, above n 33, at 439
[163] Orakhelashvili, above n 33, at 440
[164] Orakhelashvili, above n 14, 77
[165] Orakhelashvili, above n 33, at 439
[166] Orakhelashvili, above n 33, at 459
[167] Orakhelashvili, above n 33, at 465

statements to the contrary means it can be assumed that such a position was accepted by the Council, thus forming part of the Council's intentions. [168]

If it is difficult to ascertain the intention of the Council, resolutions should be interpreted in accordance with the purposes and principles of the Charter, given they are binding on the Council.[169] As established, these purposes and principles are *jus cogens* norms. Under the normative hierarchy, the task of interpretation must mean ensuring an interpretation in accordance with *jus cogens*. This is supported by the Judge Lauterpacht (ICJ) in his separate reasoning in *Bosnia* where he held the Council would not intend to adopt a norm which conflicts with *jus cogens*, and if they did, the contradiction must have been unforeseen.[170] If the Council demonstrates a very clear intention to violate *jus cogens* without room for interpreting in accordance with *jus cogens*, the issue of invalidity must be raised.

2. Interpretation in practice

The issue of interpretation has been raised in a few instances.

(a) Resolution 242 (1967)

Resolution 242, passed in response to the Six-Day War, provided for the 'just settlement' of the refugee problem in Palestine without further explanation.[171] Given the vague nature of this provision, an interpretation must be taken which accords with norms of *jus cogens*. The Security Council must therefore be insisting upon the right of Palestinians to return to the Occupied Territories. Any other interpretation of 'just settlement' would constitute a violation of *jus cogens* as it would be validating the deportation and mass displacement of a civilisation, a war crime under Article 8(2)(e)(vii) Rome Statute.[172]

[168] SC Res 242 (1967); Orakhelashvili, above n 33, at 465
[169] Orakhelashvili, above n 33, at 462
[170] *Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina V. Yugoslavia (Serbia And Montenegro) (Separate Opinion Lauterpacht)*[1993] ICJ Reports 407, at 440
[171] Orakhelashvili, above n 33, at 462
[172] Orakhelashvili, above n 33, at 462

(b) Resolution 1483 (2003)

Resolution 1483 provided for the settlement of post-invasion Iraq, establishing the obligations of the occupying powers, the rights of the Iraqi people, and the need for the UN to play a humanitarian role in the rebuilding of the state.[173] An important provision referred to the establishment of a 'properly constituted, internationally recognised, representative government of Iraq', without further clarification.[174] 'Proper' is subjective and likely to differ between states with different styles of government.[175] The requirement of 'internationally recognised' does not specify who this recognition must come from and how broad it must be. Finally, the term 'representative', while likely indicating a requirement for a democratic government, could include an elected body whose members each represent one sector of the community.[176] It is unclear how these factors were intended to operate together, raising the question of whether a narrow interpretation of one may justify a more liberal interpretation of another.[177] Considering the normative hierarchy, the requirements had to be recognised in accordance with *jus cogens* norms, especially the right to self-determination.[178] Given this government would have control over Iraqi natural resources, the principle of self-determination dictated the requirement for a democratic government so as to give power to will of the people over their resources.[179]

3. Functional non-compliance

Circumstances surrounding a resolution can change to make a lawful decision of the Council have an outcome which violates *jus cogens*.[180] In these instances, the concept of 'functional non-compliance' and the need for an evolving interpretation arise.

States cannot be bound by a resolution which violates *jus cogens* on the basis any violation makes that resolution void *ab initio*. It can thus be presumed that had the Council foreseen the change of circumstances, and had knowledge that their actions would constitute a violation of

[173] SC Res 1483 (2003)
[174] Alexander Orakhelashvili "The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law" (2003) 8 J.C.&S.L. 307 at 312
[175] Orakhelashvili, above n 174, at 312
[176] Orakhelashvili, above n 174, at 312
[177] Orakhelashvili, above n 174, at 312
[178] Orakhelashvili, above n 174, at 308
[179] Orakhelashvili, above n 33, at 464
[180] Orakhelashvili, above n 33, at 464

jus cogens, they would not have authorised them.[181] In these instances, Member States should refuse to comply with any offending obligation knowing it was not the Council's intention for them to do so.[182] This refusal to comply is legally justified on this 'functional non-compliance' basis.

Another option, where the text of a resolution allows for it, is for Member States to reinterpret a resolution in a way that accords with *jus cogens*. This would be an 'evolving interpretation' allowing for the continuance of Council ordered action, but within the confines of the most important norms of international law.[183] This was the approach adopted by some Member States at the crux of the Bosnian War with Resolution 713 (1991) which had placed an arms embargo over all of the Former Yugoslavia. Developments in the conflict meant the arms embargo would work to deprive Bosnia of the right to self-defence.[184] Several states argued for a new interpretation which excluded Bosnia from the embargo in order to sustain lawfulness of Council actions.[185]If there is no room for an alternative interpretation which is consistent with all relevant norms of *jus cogens,* then a resolution of the Security Council which violates *jus cogens* will be void *ab initio*.

B. Assessing the 1267 Counter-Terrorism Sanctions Regime in Light of Jus Cogens

1. What is the 1267 Counter-Terrorism Sanctions Regime

The Security Council has been the principal architect of the global response to terrorism. A significant part of this response has been through the use of sanctions. In Resolution 1267 (1999), the Security Council determined that the Taliban in Afghanistan constituted a threat to peace (under Article 39 of the Charter) due to their affiliation with Al-Qaeda.[186] The Security Council authorised Member States to take coercive measures against the Taliban and associated networks. One of these measures was the establishment of the UN Sanctions Committee. This committee has since branched into sub-committees, each made up with the members of the Security Council and each given the authority to implement and make decisions within the

[181] Orakhelashvili, above n 33, at 464
[182] Orakhelashvili, above n 33, at 464
[183] Orakhelashvili, above n 33, at 464
[184] Orakhelashvili, above n 33, at 464; *see* SC Res 713 (1991)
[185] Orakhelashvili, above n 33, at 464
[186] Andrew Hudson "Not a Great Asset: the UN Security Council's Counter-Terrorism Regime: Violating Human Rights" (2007) 25 Berkeley J. Int'l Law 203 at 205

bounds of their empowering resolutions.[187] Committees are now established to manage operations in relation to the Taliban, Al-Qaeda, and ISIL. When I refer to the use of sanctions, I will refer to the '1267 Sanctions Regime' with the intention that this reference includes all related resolutions passed since the Sanction Committees establishment in 1999.

(a) Targeted sanctions

The use of targeted sanctions represented a shift away from state-wide sanctions regimes which had caused high levels of suffering in the civilian populations of the states. This new focus also reflected a shift in international relations from the focus on states to the growing focus on transnational actors and threats.[188] Social media, trade and international mobility of populations has meant the challenge of fighting terrorism has gone beyond the capacity of individual states.[189] It is thus no longer feasible to single out one state to sanction, nor would it be effective, given states may not have the means to deliver on the demands of the Council.

Targeted sanctions operate so that any individual recognised as an affiliate of a listed terrorist organisation will be added to the 1267 Sanctions Regime List, and immediately lose financial rights, privacy rights and the right to seek or maintain employment.[190] The financial sanction means all of an individual's assets are frozen, with the goal of preventing the laundering of any money to terrorist organisations.[191] This freeze includes funds, personal assets, and economic resources owned or controlled by the individual. The freezing of assets is usually limited to one year, but it may be extended by the Council.[192] Since the establishment of the 1267 regime, an embargo on the right to travel and right to carry a weapon has also been included.[193]

b. Listing and De-Listing Process

The manner in which individuals are listed and de-listed should be examined.[194] States may nominate an individual to the Committee who they have reason to suspect has terrorist

[187] Hudson, above n 186, at 206
[188] Annalisa Ciampi "Security Council Targeted Sanctions and Human Rights" in Bardo Fassbender (ed) *Securing Human Rights: Achievements and Challenges of the UN Security Council* (eBook ed, Oxford Scholarship Online, 2011) at 101
[189] Ciampi, above n 188, at 101
[190] Ciampi, above n 188, at 103
[191] Ciampi, above n 188, at 101
[192] Ciampi, above n 188, at 103
[193] Hudson, above n 186, at 206
[194] Hudson, above n 186, at 206

affiliations.[195] Prior to 2002, these proposals required only minimal levels of personal information about the individual and their connection to a terrorist network.[196] Now, states must provide some evidence of a connection but there is no burden of proof to overcome so the persuasiveness of this evidence is not crucial. Listing is done on a 'no-objection' basis; an individual will be listed unless a committee member makes an objection within the five days allotted.[197]

Where there are few obstacles towards the 'listing' of an individual, there are a number of near-insurmountable obstacles for individuals who proclaim their innocence and apply for a review. The review of any listing is subject to the individual's national government agreeing to support their case.[198] If the listing proposal was made by another state, and the individual's government agrees to support their request for review, this government must approach the other government which made the proposal about the individual and convince them to propose de-listing to the Committee.[199] The government representing the individual is able to propose de-listing themselves but they will face tougher procedural hurdles this way, including the ability of any committee member to veto the review proposal without providing a reason.[200]

2. Does the 1267 Counter-Terrorism Sanctions Regime violate norms of jus cogens?

A number of states have raised concerns around the listing procedures within the 1267 Sanctions Regime, with regard to potential violations of individuals' due process rights.[201] The right to a fair trial before an independent and impartial tribunal has been established as peremptory, meaning that such a finding could invalidate the listing of individuals.[202]

(a) The case of 'Yusuf' (ECFI)

The violation of due process rights was considered by the European Court of First Instance (ECFI) in *Ahmed Ali Yusuf and Al Bakaraat International Foundation v. Council of the*

[195] Hudson, above n 186, at 207
[196] Hudson, above n 186, at 207
[197] Hudson, above n 186, at 207
[198] Hudson, above n 186, at 208
[199] Hudson, above n 186, at 208
[200] Hudson, above n 186, at 208
[201] Hudson, above n 186, at 218
[202] Hudson, above n 186, at 217

European Union and Commission of European Communities (‘*Yusuf*’). The court found they had jurisdiction to review the implementation of mandatory Security Council orders within their own regional jurisdiction.[203] Ahmed Yusuf, made an appeal to the European Court after being listed, along with two associates, to the 1267 Sanctions Regime. Yusuf contested the implementation of the sanctions on the basis of a human rights violation. The ECFI accepted *jus cogens* as a limitation on the power of the council, and acknowledged the right to a fair hearing as peremptory.[204] They found no violation however, on the basis that a de-listing procedure existed, despite being onerous.[205]

(b) Lack of opportunity to dispute listing

In his article ‘*Not a Great Asset: the UN Security Council’s Counter-Terrorism Regime’*, Hudson argues the ECFI erred in this conclusion.[206] Although the de-listing mechanism does exist, Hudson argues it is so onerous and insurmountable that it does not amount to a ‘fair’ hearing.[207]

(i) Reliance upon government support

Firstly, Hudson argues that an individual having to rely on their state to support the review puts them at the mercy of their state’s political interests. A state may be hesitant to support the review if it would be perceived as supporting terrorism.[208] Further, if a government is corrupt or incompetent, an individual’s legal right to a hearing may be ignored. Most individuals on the list are from Afghanistan, which is generally recognised in the international community as a failed state.[209] The other nations which feature heavily are Yemen, Egypt, Algeria, Syria and Saudi Arabia; none of which are renowned for having an open, accountable government.[210]

[203] Hudson, above n 186, at 214
[204] Hudson, above n 186, at 214
[205] Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II- 03533, [312]
[206] Hudson, above n 186, at 217
[207] Hudson, above n 186, at 219
[208] Hudson, above n 186, at 219
[209] John F Sopko *Quarterly Report to the United States Congress* (Special Inspector General for Afghanistan Reconstruction, Jan 2017) at 58
[210] Hudson, above n 186, at 219

Most likely, it would be extremely difficult for an individual within these states to successfully petition their government for de-listing.[211]

(ii) Consensus of the Committee

Secondly, Hudson notes that even if a state accepts an individual's request for review, they must still convince all the 1267 Committee members, and the government which proposed their listing.[212]The political nature of the de-listing process indicates that cases will not be determined exclusively on the merits of the evidence.[213]

(iii) Mistaken perception that de-listing procedure sees fair results

Thirdly, Hudson contends the court misunderstood some of the material facts. Yusuf's associates had been cleared of any incriminating association before the official listing but the Court mistook this as the Yusuf's associates going through the de-listing process outlined. The Court relied upon this mistaken fact as evidence that the de-listing procedure did work.[214] In essence, Hudson argues the procedure for review exists in theory, but not in substance. [215]

(c) Breach of core elements of the right to a fair hearing

Even if the de-listing process does constitute an opportunity for a hearing, the process violates some of the core elements of the right to a fair hearing. At minimum, grounds must be proven to find someone guilty of an offence.[216] The 1267 Sanctions Regime sets no burden of proof, nor specific evidentiary requirements, apart from a description of the alleged incriminating activities. Further, almost any activity can be captured by the guidelines making evidence easy to manipulate.[217] At no stage is the individual given the chance to be heard from, violating individuals' rights to self-defence. Finally, the same body responsible for listing the individual conducts the review. This breaches the fundamental right to an independent, impartial

[211] Hudson, above n 186, at 219
[212] Hudson, above n 186, at 219
[213] Ciampi, above n 188, at 108
[214] Hudson, above n 186, at 220
[215] Hudson, above n 186, at 220
[216] Ciampi, above n 188, at 107
[217]Ciampi, above n 188, at 107

tribunal.[218] Given the severity of the embargo imposed on the individuals, this de-listing procedure constitutes a gross violation on individuals' rights to have a fair hearing.

(d) Maintenance of International Peace

The strongest justification for these violations of due process is the goal of the regime, to fight terrorism. Arguably, this goal could be undermined if there was a fair trial, acknowledging that 'innocent before proven guilty' does allow guilty people to be acquitted.[219] This argument attempts to legitimise violations of human rights with an appeal to the basic foundational purpose of the UN; maintaining peace and security. Such an argument may have been entertained if the question was whether the Regime was *ultra vires*, having breached Article 25 of the Charter as voidability is discretionary. It can not be entertained however in the face of a *jus cogens* breach where a violation is void *ab initio*. If a breach of *jus cogens* were accepted on a purposive argument, then the principle of respecting human rights would be devoid of all normative and practical value.[220] Such an argument could be utilised to justify any breach against the interests of the international community as a whole. *Jus cogens* status is reserved for only to the most important norms in the international legal order meaning no reason could ever justify a violation (bilaterally).[221]

C. Other Actions of the Security Council Which Have Violated Jus Cogens

1. Implicit validation of violations of jus cogens

There have been instances where the Security Council has adopted a decision which supports a Member State's action, knowing that action is a violation of a peremptory norm.

[218] Hudson, above n 186, at 221
[219] Ciampi, above n 188, at 104
[220] Ciampi, above n 188, at 104
[221] Ciampi, above n 188, at 104

(a) Resolution 1203

In October 1998, the Socialist Federal Republic of Yugoslavia (SFY) signed a peace agreement providing for the return of refugees to Kosovo.[222] This agreement had been induced by NATO through an unauthorised military threat; a clear violation of the prohibition on the use of aggressive force.[223] Following the conclusion of these agreements, the Security Council passed Resolution 1203 which approved the terms of the peace settlement. The Resolution went so far as to endorse the agreement, demanding the "full and prompt implementation of [the] agreement" which, in effect, amounts to an endorsement of the violation of *jus cogens* which induced the agreement.[224] The only conclusion can be that the validation of a violation of *jus cogens* is void *ab initio*.[225]

(b) Resolution 731 and 748

In December 1998, an American aircraft was destroyed mid-flight by a suspected Libyan terrorist group, killing 270 people total. The US and United Kingdom (UK) made threats to Libya to coerce them into extraditing the suspects who had returned home after the attack.[226] These threats were made despite being unauthorised by the Council.[227] The Security Council passed two resolutions in the aftermath, endorsing the demands of the US and the UK.[228] The second resolution ordered coercive action against Libya for failing to comply with demands to extradite.[229] The resolutions were intrinsically tied to the unlawful threats made by the US and the UK, endorsing the violation of the peremptory prohibition on threatening the use of aggressive force.[230]

[222] Orakhelashvili, above n 33, at 449
[223] Orakhelashvili, above n 33, at 450
[224] Orakhelashvili, above n 33, at 451
[225] Orakhelashvili, above n 33, at 451
[226] Orakhelashvili, above n 33, at 450
[227] Orakhelashvili, above n 19, 71
[228] Vera Gowland-Debbas "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" (1994) 88 AJIL 643 at 644; see SC Res 731 (1992); SC Res 748 (1992)
[229] Gowland-Debbas, above n 228, at 645; *see* SC Res 731 (1992)
[230] Orakhelashvili, above n 19, 71

2. Explicit validation of violations of jus cogens

A Security Council resolution may also directly approve the violation of *jus cogens*. Such a violation occurred in relation to the High Representative of Bosnia and Herzegovina, who had been established to manage and supervise the civilian implementation of the Dayton Agreement in 1995. Under Article 2 of Annex 10 of the agreement, the power to 'manage and supervise' meant the power to monitor, consult, coordinate and be conciliatory.[231] This did not include making binding decisions as a public authority. Despite this, the High Representative began to use his powers to dismiss a lot of high-level officials including presidents, and adopt laws affecting the ombudsman, state border protection, and criminal procedures.[232] The use of power beyond the scope of the Dayton Agreement had the effect of depriving the people of Boznia and Herzegovina of their right to self-determination.[233] Despite this violation, the Council expressly declared their support for the High Representative, and his ability to make binding decisions in Resolution 1305, adopting an expansionist view of his limitations.[234] This amounted to explicit support for a breach of the *jus cogens* right to self-determination.

3. Resolutions which violated jus cogens norms directly

On top of validating the breach of *jus cogens* norms by other actors, the Security Council has also made orders for certain actions themselves which have amounted to breaches of *jus cogens.*[235]

(a) Sanctioning regime breaching peremptory humanitarian norms

The most prominent example of a Security Council order amounting to a violation of *jus cogens* was the economic sanction regime in Resolution 661 implemented against Iraq following its invasion of Kuwait in the 1990s.[236] The sanctions amounted to a near total-ban on trade and finance and are widely believed to have caused a humanitarian crisis for the civilian population.[237] During the sanction years, Iraq's infant and child mortality rates increased,

[231] Orakhelashvili, above n 33, at 453
[232] Orakhelashvili, above n 33, at 453
[233] Orakhelashvili, above n 33, at 454
[234] Orakhelashvili, above n 33, at 454
[235] Orakhelashvili, above n 33, at 455
[236] Orakhelashvili, above n 33, at 455
[237] Orakhelashvili, above n 33, at 455

while corresponding rates of those with access to food and medicine decreased.[238] Children were taken out of school in order to get jobs, resulting in a decline in primary and secondary educated people.[239] Even after the implementation of humanitarian exceptions which allowed the flow of certain goods into the country, the sanctions still had a devastating effect on the community.[240]

Sanction regimes operate on the basis that the government will concede to demands in order to protect their civilian population.[241] The Iraqi leadership, however made very few concessions, meaning the hardship inflicted had no positive outcome.[242] Depriving civilians of their basic needs (leading to high malnutrition rates) was clearly a violation of humanitarian peremptory norms.

Notably, the Council also implemented these sanctions to similar effect against Haiti (1993) and Former Yugoslavia (1990s and early 2000s), thus there was a pattern of violations.[243] There is no force or context which can justify the breaching of humanitarian law, thus in hindsight the resolutions imposing economic sanctions would have been void *ab initio* had the outcomes been foreseeable.

(b) Arms embargo on Former Yugoslavia breaching peremptory right to self-defence

As previously discussed, the arms embargo implemented over the entire Former Yugoslavian state, established in Resolution 713 (1991) was another example of a violation given its outcome. The resolution deprived Bosnians of their right to organise troops and solicit arms in their self-defence.[244] This had the devastating consequence of making Bosnian communities vulnerable, a factor which contributed to the commission of genocide by the Serbian forces in 1995.[245]

[238] Denis J Halliday "The Impact of the UN Sanctions on the People of Iraq" (1999) 28 J. Palest. Stud. 29 at 30
[239] Halliday, above n 238, at 32
[240] Orakhelashvili, above n 19, 77
[241] Orakhelashvili, above n 33, at 455
[242] Orakhelashvili, above n 33, at 455
[243] Orakhelashvili, above n 33, at 455
[244]Orakhelashvili, above n 19, 72
[245] Orakhelashvili, above n 19, 72

These examples demonstrate the need for an independent tribunal to be able to exercise some check on the Council's power. Even with good intentions, it is always dangerous to give any body or institution such high levels of broad, unfettered power.

Chapter IV – The Ability to Review the Actions of the Security Council Under Jus Cogens

"No community anywhere suffers from too much rule of law; many do suffer from too little – and the international community is among them. This we must change."[246]

- Kofi Annan

One of biggest obstacles in relation to the application of *jus cogens* to the Security Council is the matter of enforcement. This was discussed in *Certain Expenses* where Judge Morelli determined the Council enjoyed *de facto* 'absolute validity' on the basis there was no judicial body established to hold them accountable.[247] The majority found the existence and application of *jus cogens* to the Security Council was not dependent on the existence of a judicial organ. Accepting this, I argue it must still be conceded that in practice, the only way to enforce the rule of law upon the Security Council is to establish some form of accountability outside of the Council itself. Relying upon certain political features of the Security Council itself to be legitimate checks and balances is not reasonable, nor has such a position of reliance been proven successful. This raises important questions regarding the jurisdiction of the ICJ and the competency of states to make a unilateral determination of lawfulness.

A. The Problem of Enforcement

It is not surprising that the question of enforcement against the Security Council has not been explored in much detail, given the Council only became truly active after the Cold War.[248] At its drafting, the UN Charter was framed to include a number of provisions which, when combined, would impose certain limitations on the Council's exercise of their power.[249] Articles 24, 25, and 39 limit when and how the Council makes decisions, however the vague nature of these provisions has enabled very broad interpretations, especially under Article 39 which renders them ineffective.[250] The Security Council has become a tool that members use

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[246] Kofi Annan, Secretary-General of the UN "Address at the Truman Presidential Museum and Library" (Independence, Missouri, USA, 11 December 2006)
[247] *Certain Expenses of The United Nations (Advisory Opinion)* Dissenting Opinion [1962]
[248] Dugard, above n 34, at 83
[249] Mohamed Sameh M Amr *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (Kluwer Law International, The Hague, 2003) at 281
[250] Österdahl, above n 7, at 9

to pursue their own national interests, as opposed to states being used by the Security Council in the pursuit of international interest of peace and security.[251] It is a fair assumption that the drafters of the UN would not have expected the Security Council to exercise power in the way that is has.

The Security Council is still clearly bound by *jus cogens*. This is important as no liberal interpretation of purposes and principles of the UN will validate the violation of a fundamental norm to the international community. Further, a determination of an offence against *jus cogens* is objective thus the intentions of the Council to operate within the (broad) confines of the Charter will not justify a breach; if an action violates *jus cogens*, the justification becomes irrelevant. *Jus cogens* can only remain a theory unless it is actively utilised as a check on the powers of the Council. Given it would be against the interests of the Council to impose such a limitation on their own power, it follows that the enforcement of *jus cogens* must happen by someone else.

The binding nature of Security Council resolutions (under Articles 25 and 103) means enforcing compliance with *jus cogens* has elevated importance.[252] If there is no way to enforce legality, then states may be bound to implement Council orders which are unlawful.[253] This is clearly an unacceptable conclusion.[254]

B. The Jurisdiction of the International Court of Justice

1. Reasons in favour judicial review by the ICJ

The rule of law requires enforcement, which traditionally comes from the operation of the judicial branch of government.[255] In the international sphere, the ICJ is the primary judicial organ of the international community; the 'guardian of the legality of the UN'.[256]

[251] Österdahl, above n 7, at 12
[252] Karl Doehring "Unlawful Resolutions of the Security Council and their Legal Consequences" (1997) 1 MaxPlanckUNYB 91 at 98
[253] Doehring, above n 252, at 98
[254] Salvatore Zappalà "Reviewing Security Council Measures in the Light of International Human Rights Principles" in Bardo Fassbender (ed) *Securing Human Rights: Achievements and Challenges of the UN Security Council* (eBook ed, Oxford Scholarship Online, 2011) at 176
[255] Sameh, above n 249, at 305
[256] Sameh, above n 249, at 305

Ideally, there should be a centralised approach to review as the ICJ could provide clearer guidance on Member States' obligations and promote uniformity of state compliance.[257] The reasons which support the ICJ as the primary check on the Security Council are likely to gather more momentum as the Security Council adopts more resolutions which raise legality concerns.[258] This is because 'questionable' resolutions will highlight the increasing need for enforcement of international law.[259]

2. Legal basis upon which the ICJ has jurisdiction to review

(a) Judicial review within the scope of the ICJ Statute

Under Article 36(3)(b) of the ICJ's statue, the court has authority to decide any questions of international law.[260] If a state argues an action is unlawful under international law, the ICJ should have jurisdiction to make a judicial determination of its legality.[261] It is the role of the ICJ to determine the constitutional and legal boundaries of the Security Council's autonomy.[262] The ICJ touched on these reasons in *Lockerbie* when they referred to the 'procedural and substantive limitations' of the Council requiring some mechanism of review.[263] In his separate opinion, Judge Rezek recognised the emergence of *jus cogens* as an indisputable limitation on the Council's powers and concluded that the Court has full jurisdiction to interpret and apply the law in contentious cases, even where this would require scrutiny of a Security Council action. Rezek stated:

> "it would be surprising indeed if the Security Council of the United Nations were to enjoy absolute and unchallengeable power in respect of the rule of law."[264]

There is no provision contained within the ICJ statute, nor the UN Charter which prohibits the ICJ from judicially reviewing the actions of the Security Council.[265] This is notable given that Article 12 of the UN Charter precludes any similar determination of the Council's actions by

[257] Orakhelashvili, above n 33, at 480
[258] Dugard, above n 34, at 85
[259] Dugard, above n 34, at 85
[260] Statute of the International Court of Justice, Art 36(3)(b)
[261] Sameh, above n 249, at 324
[262] Orakhelashvili, above n 33, at 483
[263] Gowlland-Debbas, above n 228, at 656
[264] *Lockerbie,* above n 8, at 154
[265] Sameh, above n 249, at 304

the General Assembly.[266] Jurisdiction to review the Council would be a natural extension of their power to interpret the UN Charter within which scope the Council operates.[267]

This argument comes down to a consideration of the overarching function of the Security Council. The fact that the ICJ statute does not prohibit Security Council review is not enough to establish legal grounds for this jurisdiction.[268] However, in adopting a purposive approach to the interpretation of the ICJ Statute, this absence of a prohibition becomes more meaningful. The exercise of power by the Security Council has not always been consistent with the goals of the UN drafters; a fact exacerbated by the lack of accountability. The absence of a body to review the Council is likely a result of the drafters not foreseeing how the Council would go on to interpret the Charter and exercise their power. The interest in having this body to prevent the gravest violations of the very norms which the UN was established to protect, may justify a liberal reading of Article 36(3)(b) of the ICJ statute. The fact it is not banned by the Charter thus makes the proposition more tenable.

(b) Methods of referral to the ICJ

(i) Direct recourse

States are barred from making a direct complaint to the ICJ regarding Security Council actions because under Article 34 ICJ Statute, only states may be party to contentious proceedings. [269]

(ii) Advisory Jurisdiction

Under Article 96 of the UN Charter, the Court may give an advisory opinion if a direct request is made by a political organ of the UN.[270] This opinion will constitute an assessment of the constitutionality of an act, either arising out of a direct request about the act's legality, or as an incidental assessment of an act's legality when determining another question.[271] In the *Lockerbie* case, Judge Bedjaoui emphasised the potential that advisory opinions have as a

[266] Dugard, above n 34, at 85
[267] Sameh, above n 249, at 323
[268] President Schwebel firmly rejected this argument in *Lockerbie (Dissenting Opinion. Schwebel)* [1998] ICJ Reports 155, at 166
[269] Sameh, above n 249, at 328
[270] Charter of the United Nations, art 96
[271] Sameh, above n 249, at 329

method of judicial review of the Security Council by the ICJ.[272] Bedjaoui was of the opinion that an advisory opinion should be requested by the General Assembly every time the legality of a decision (that is about to be implemented) is in question. The jurisdiction of the court to provide an advisory opinion on request provides an "irrefutable basis of jurisdiction" for the ICJ.[273] Advisory opinions are only authorised by a majority vote from a UN political organ meaning reviews would be limited to when the community of states wanted one. Advisory opinions are not binding, thus avoiding any confrontation between branches.

However, the problem with advisory opinions as a check on the Council is that they rely upon this majority vote and no veto being exercised by the Council.[274] The Security Council is only likely to allow a referral where they expect that confirmation of a Resolution's legality will strengthen state support.

That is not to say this avenue is impossible; the Court has made these advisory assessments of UN action in the *Reparation* case, *Second Admission* case and *Certain Expenses* case.[275] In *Certain Expenses*, the ICJ was requested to provide an opinion on whether or not expenses of the General Assembly had been decided on in conformity with the United Nations Charter.[276] The Court held that the legality of the finances of each operation are intrinsically linked to the legality of the operation they come from[277]. This meant that the legality of the operation was incidental to the determination of the legality of the expenses. In the case of *Namibia*, the Court was called upon by the Security Council to advise on the consequences and implications of Resolution 267. While this did not amount to a review of the substantive content of this resolution, as would occur with a question of *jus cogens* conflict, the Court did consider itself competent to assess the procedural validity of actions taken by the Security Council.[278]

[272] Sameh, above n 249, at 330
[273] Sameh, above n 249, at 330
[274] Sameh, above n 249, at 330
[275] Sameh, above n 249, at 330
[276] Sameh, above n 249, at 310
[277] *Certain Expenses of The United Nations (Advisory Opinion)* [1962] ICJ Reports 151, at 167
[278] *Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1970] ICJ Reports 16, at [19]–[22]

(iii) Contentious Jurisdiction

States may not bring a direct claim against the Security Council to the ICJ as they are barred from making advisory requests, and only states may be parties to contentious proceedings. Actions taken by the Security Council may, however, become relevant to the dispute between states before the court, meaning an incidental review of the action may take place.[279] This review would be limited to reviewing actions of the Council after they had been implemented, (or else they could not be incidental to the legal dispute). An example of what is meant by 'incidental' review can be found in *Tadíc* where the ICTY was challenged on its own jurisdiction to prosecute an individual on the basis that their establishment was invalid.[280] The tribunal had to assess the legality of the Security Council resolution which had established the ICTY. The tribunal confirmed their jurisdiction to conduct this review arguing that as long as the case turned on a legal question which could not be answered without an assessment of the Council's actions, they had the jurisdiction to make this judicial determination.[281]

The competency of the Court to judicially review actions of the Council (incidentally) was discussed in *Lockerbie.* Several of the judges determined that the Court might be competent to pass judgement on the legality and validity of Security Council resolutions, given the Court's position as the 'guardian of legality'.[282] This competency goes back to the Court's jurisdiction to make judicial determinations on any questions of international law; assessing the legality of the Security Council's actions when it is relevant to the judicial question before the court is within the ambit of Article 36(2)(b) ICJ Statute.

Key to this approach is that the Security Council is not a party in the proceedings before the Court. This however creates an issue of enforcement because only the parties to a case are bound by the Court's findings, meaning no effect is had on the continuing operation of the relevant resolution.[283] This is also an issue for determinations made within an advisory opinion which are, of course, only advisory. This does not necessarily mean the opinion of the ICJ will not have an effect. A finding of invalidity by the Court will cast doubt upon the relevant

[279] Sameh, above n 249, at 331
[280] *Prosecutor v Dusko Tadíc,* above n 134, at [20]
[281] *Prosecutor v Dusko Tadíc,* above n 134, at [24]
[282] Sameh, above n 249at 331
[283] Sameh, above n 249, at 332

resolution. This may have a prospective effect as any determination would provide guidance for Member States about their obligations under Articles 25 and 103 of the Charter.[284]

3. Objections to judicial review by the ICJ

The strongest objection to the ICJ taking on this function of review is the concern that it will hamper the effectiveness of the Council in its effort to maintain international peace and security.[285] I argue that the relatively limited instances in which it would have jurisdiction to review mitigates this concern. Review by the Court will only be in circumstances where it is incidental to the main legal issue, or where the General Assembly or Security Council refer the case to the Court. While the former would be outside the control of the Council, it is only possible after an action has been implemented. This means the effectiveness and strength of the Council is less likely to be impeded upon because the results of that action will show clearly whether the action should be lawful or not. It is important to remember that for the purposes of this dissertation, the jurisdiction in question relates to a review of violations of *jus cogens*. As supreme law, the Council has never had any power to act against *jus cogens* norms. The strength of the Council's power does not equate to the right to act unlawfully. If it should not be lawful, then declaring the action void does not take away from the power of the Council because the Council never had that power in the first place. Judicial review is thus merely ensuring that the Council is not acting in excess.

The existing limitations contained within the Charter are also utilised as another reason against the ICJ having this jurisdiction. The limitations concerned, however, are all internal to the Council.[286] Under basic principles of the rule of law and separation of powers, the constraints on the powers of the Council should not be exclusively internal; a political organ should not be the body to determine the legality of its own actions.[287]

[284] Sameh, above n 249, at 333
[285] Orakhelashvili, above n 33, at 481
[286] Sameh, above n 249, at 306
[287] Sameh, above n 249, at 321

4. Consequences of enforcement

(a) Invalidity and non-binding determinations

It is generally assumed that judicial review of the Security Council's actions by the ICJ would constitute an assessment of the legality of a resolution.[288] With a focus on judicial review of potential violations of *jus cogens* norms, the review would constitute an objective, substantive assessment of the validity of a resolution.[289] This raises the question of the interaction between violations of *jus cogens* norms being void *ab initio* and the inability of the ICJ to decide anything binding on the Security Council.[290] With regard to actions which are *ultra vires* (beyond the scope of the Security Council's constitutive instrument), the Court has no power to declare a resolution null and void because they cannot make any binding legal determinations on the actions of the Council directly. A violation of a norm of *jus cogens* has a different outcome, however. As established in *Certain Expenses*, the 'void' nature of violations of *jus cogens* is not dependent on the existence of a judicial determination. Not needing a judicial determination for invalidity means any declaration of the Court on this matter will only be necessary in so far as it offers guidance to Member States, and helps to coordinate a uniform response to a finding of invalidity. The fact that any determination by the Court is not binding is irrelevant when a binding judicial determination is not required for invalidity.

(b) Severability of impugned provisions

There is no clear guidance as to whether an impugned provision of a resolution can be 'severed' from the rest of the resolution.[291] Looking to the positivist origins of *jus cogens* under Articles 44, 52 and 53 VCLT, the entire treaty would be void. There is some practice however suggesting severability is an option where the impugned provision is not integral to the operation of the resolution as a whole.[292] Such a determination will be performed on a case-by-case basis. This approach aligns with the desire to avoid undermining the purposes of the Security Council's actions. While it will never be in the interests of the international community to legitimise the violation of a *jus cogens* norm, it may go against community

[288] Orakhelashvili, above n 33, at 482
[289] Orakhelashvili, above n 33, at 481
[290] Doehring, above n 252, at 91
[291] Orakhelashvili, above n 33, at 470
[292] Orakhelashvili, above n 33, at 470

interests to invalidate provisions of a resolution which are legal and are aimed at securing international peace and security.[293] The Court would need to balance both of these considerations in making their determination.

C. Unilateral Determinations of Illegality by Member States

The alternative to a finding of invalidity by the ICJ is the unilateral determination of invalidity by Member States, remembering that the ICJ's jurisdiction is limited to advisory opinions authorised by the Security Council, or incidental reviews which require another cause of action first. The ICJ discussed the need for unilateral determinations of lawfulness in *Certain Expenses*, implicitly recognising the right of states to make them.[294] This right comes from the acknowledgement that states cannot be under a lawful obligation to comply with an unlawful order.[295] States are obligated to comply with every Council order made within the accords of the Charter (under Articles 25 and 103), thus they can be individually judged for their failure to comply.[296] A state choosing to refuse compliance must have strong grounds to argue that a resolution is invalid.[297] This imputes a requirement for states to clearly declare their intention to protest and lay out the grounds upon which their protest is based.[298]

1. The right to make unilateral determinations

As a general rule, states do not have the right to *terminate* the operation of a resolution of the Security Council.[299] This rule applies where states consider the goals of the relevant resolution to have been achieved, or where circumstances have changed so as to make the continued operation of the resolution problematic. The exception to this rule is in instances where Council actions are illegal under *jus cogens*.[300] An example of this occurring was in *Lockerbie* when the League of Arab States adopted decisions which expressed solidarity with Libya and condemned Resolution 748 which had reiterated the unlawful demands being made by the

[293] Orakhelashvili, above n 33, at 470
[294] Orakhelashvili, above n 33, at 471
[295] Doehring, above n 252, at 106
[296] Orakhelashvili, above n 33, at 471
[297] Orakhelashvili, above n 33, at 471
[298] Nicolas Angelet "Protest Against Security Council Decisions" in Eric Suy and Karel Wellens (ed) *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Kluwer Law International, the Netherlands, 1998) 277 at 279
[299] Orakhelashvili, above n 33, at 472
[300] Orakhelashvili, above n 33, at 475

West, and authorised coercive measures against Libya for failure to comply.[301] The Organisation of the Arab Union called upon the Council to suspend Resolution 748 on the basis it was causing unjustifiable suffering on the civilian population; a violation of *jus cogens*.[302]

To be clear, there is no explicit right contained within the Charter empowering states to make this determination, but the condition of legality included in Article 25 (which also applies to Article 103) is evidence of this right. States are not obligated to comply where a resolution is illegal; this equates to a right to refuse to comply with unlawful orders.

To legitimise this non-compliance, the question of the lawfulness of the order could be dealt with through the domestic or regional courts of the relevant state. This national or regional review is to be distinguished from a review which applies to the entire international community, as the domestic jurisdiction review would focus only on the legality of the implementation of orders within the domestic jurisdiction. The case of *Yusuf,* discussed in Chapter III in relation to the legality of the 1267 Sanctions Regime, was determined by the European Court of First Instance. A similar cause of action was brought to the European Court of Justice in *Kadi*, which found it did have jurisdiction to review on the basis it was not a member of the UN and had jurisdiction to determine matters of law relevant within the European Union.[303] Again, such a review was focused on the implementation of the 1267 Sanctioning Regime within the EU, not the legality of the regime itself in international law.[304] A review from a judicial body, as opposed to political organ of a state, would legitimise any justification of non-compliance that was given to the Security Council.

2. Objection to unilateral action

The most important argument against the right of states to make a unilateral determination of validity is the fact that this power could be abused by states for their own national interests. There is of great concern in states making unilateral determinations of the validity of Council

[301] Orakhelashvili, above n 33, at 475
[302] Orakhelashvili, above n 33, at 475
[303] Ciampi, above n 188, at 119
[304] Ciampi, above n 188, at 119

actions, as it may take away from the Council's power to achieve the primary goals of the organ.[305] This would destroy the 'peace-making' capacity of the Security Council.[306]

It could be argued however that on equal terms, forcing states to implement unlawful orders is also against the peace-making purposes of the Council. The power of the Council is only weakened where states refuse to implement lawful orders of the Council.[307] Unfortunately, in recognising the political reality of the United Nations and Security Council, states refusing to implement lawful orders on the basis of an unreasonable claim of invalidity is a real potentiality. As must be recognised in any discussion of international law, states are primarily motivated by self-interest, and will not always operate within the scope of the law to achieve their goals. Recognising this both bolsters the need for an independent body to enforce any violations of the law (especially when that law is *jus cogens*), and also acknowledges how this enforcement has the potential to be abused. A possible solution would be to refer any instance where a state voices protest to the General Assembly for a determination. As an organ representing all states, this would centralise a decision and ensure uniformity without being restricted by jurisdictional issues (like the ICJ). The key issue with this approach is Article 12 of the UN Charter which prohibits the General Assembly from making recommendations regarding any dispute before the Council (unless requested).[308] Adopting the same purposive argument as utilised under section B(2)(a), it could be said that the General Assembly here would not be making recommendations on the policy or substance of an issue, rather, constitutional legality of the exercise of power in the UN. If this distinction could be made, the General Assembly may be found to have this capacity.

[305] Doehring, above n 252, at 99
[306] Doehring, above n 252, at 99
[307] Angelet, above n 308, at 278
[308] Charter of the United Nations, art 12

Conclusion

Jus cogens is a very powerful principle of international law which, when utilised effectively, ensures the protection of the most important values in the international community of states. Developing a criterion upon which to assess norms is crucial to giving this principle real weight. Accepting *jus cogens* as a device used to protect the important values and ideas of the international community allows for a criterion which can find any norm across international law peremptory, as long as it has all the required qualities. This avoids the principle being too restrictive in scope, or stuck in positive law.

While the vague nature of *jus cogens* has been a hallmark of the principle, there has been sufficient jurisprudence to confidently assess several norms of international law as being peremptory. The prohibition on the use of force, and the right to self-determination, are norms which make up of the purposes and principles of the UN Charter, making a finding of *jus cogens* easy. The same ease extends to the fundamental norms of humanitarian law, which exist in the interests of mankind. Human rights norms are more difficult to determine given the inconsistent recognition of rights across states, and across international law. There are however a number of human rights generally recognised as so important across both indices mentioned that they can be awarded *jus cogens* status, subject to any declaration from the community of states which says otherwise.

Jus cogens norms have played a subtle role in the history of the Security Council, with certain resolutions intentionally interpreted in a way to ensure compliance with these fundamental principles. Where violations of *jus cogens* have become apparent, the Security Council has responded inconsistently; sometimes taking active steps to avoid future violations (an example being the humanitarian exemptions to economic sanctions implemented), and other times ignoring protests from states and other international organisations alike.

The limitations provided for within the UN Charter, under Articles 24, 25, and 39 have been interpreted liberally by the Security Council, with the consequence that the Council has become a tool for certain states to advance their national interests within. This is clearly contrary to the intentions of the drafters of the UN, giving rise to the need for an external body of review. The ICJ, being the principal judicial organ of the UN is the natural suggestion. International

Jurisprudence suggests the ICJ does have jurisdiction to review the legality of the Security Council, but only in circumstances where the general assembly has requested an advisory opinion, or in contentious proceedings between states where the question of legality is incidental to another question before the court. Given these limited circumstances, there is an interest in a right being recognised for all Member States to make their own determinations of legality, given they can be bound to implement an action themselves. Whether or not this right can and will be recognised by Member States however is matter yet to be determined.

It is clear that *jus cogens* has real force. It is powerful in theory, and has great potential to also be powerful in practise. It is of course the nature of international law that what is discussed in theory may not be what results in practise. States, despite globalisation, still operate in their own national interest and do not always accord with established principles of law. This is not to say however that there can be no value in international jurisprudence and theory. Without such groundwork, there can be no progress in practise. The rule of law must be established before it can be followed. From this, I conclude that the concept of *jus cogens*, which calls to the conscience of states and international organisations, is a compelling idea, not be ignored.

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