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Abstract

The modern-day international law is chiefly regulated by International Organisations (hereinafter also referred to as 'IO'). One such organisation that has emerged at the forefront is the United Nations (hereinafter also referred to as 'UN'). The advent of UN saw the rise of the Security Council, which is one of the six primary organs of the UN. Post-1990s, the Security Council started establishing its footprint through its resolutions, thereby imposing its own will in specific instances of violations of human rights of individuals. This paper attempt to finds answers to questions like, firstly, is there a restriction on the Security Council resolutions? If affirmative, does the solution lie in a higher norm called jus cogens (hereinafter also referred to as 'peremptory norm'); secondly, is there any mechanism for security council impact assessment in the Security Council to place a tap on the Security Council's actions; thirdly, the emergence of fragmentation and its repercussion in the domain of jus cogens and Security Council; and finally the consequences and implication of the Security Council resolutions contradicting jus cogens. The paper is divided into four sections; the first portion tracks the concept of jus cogens in international law. The second part analyses the interaction of jus cogens and Security Council resolutions. The third section covers the consequences of the violation of peremptory norm through the Security Council resolutions. And, the final segment highlights the impact of fragmentation of international law on peremptory norm and Security Council resolution.

Key Words: *Peremptory Norm, Security Council, United Nations, fragmentation, International Organisation.*

1. INTRODUCTION

The United Nations Security Council (hereinafter referred to as 'UNSC') is widely regarded as the most powerful organ in the globe.[1] The distinctive character of UNSC is reflected in Article 24 of the UN Charter[2]; notwithstanding this, the Security Council has continuously been wielding its power to violate international law, flagrantly. To place a check on the unbridled power of the UNSC, there need to be robust checks and balance mechanisms; one such norm to put a lid on the unchecked regime of UNSC is 'peremptory norms of general international law.'[3] The UNSC operates through a more extensive system of International Organisations and is based on the constitution of limited powers; therefore, bound by standards set by international law.[4] The principle of sovereign equality is inapplicable to International Organisation.[5] The regulation on the organs in an institution is usually carried out through a review process.

However, the constituent instrument which regulates the functioning of the organisation cannot breach the peremptory norm of International Law. Having said this, in modern international law, the role of the Security Council is indispensable in the maintenance of peace and security; the extent and scope, however, remain vague and unclear. The question about the nature of the UNSC is shrouded in mystery, as is the nature of the organ as legal or political.[6] The enormous power does not guarantee the UNSC to do anything under the sun, and the check and balances in the system are very evident, as was understood through a UNSC resolution 1483.[7] In this resolution, the President of the

1 Erik Voeten, 'The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force.'

2 United Nations, 'UN Charter (Full Text) | United Nations' [1945] 1945.

3 Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter' [2005] Santa Clara Journal of International Law.

4 Julie Bishop, 'United Nations General Assembly High Level Debate - Building Global Security and Prosperity' (2013).

5 ibid.

6 Voeten (n 1).

7 Mahmoud Hmoud, 'The Use of Force against Iraq: Occupation and Security Council Resolution 1483.'

Security Council stressed on the inherent limitations to UNSC resolution in Article 1 of the United Nations Charter.[8] However, the concern of this paper is limited to the peremptory norm of general international law. The UNSC, as a legislative organ, needs to be analysed. Exempting a few resolutions post 9/11, the UNSC has not legislated laws. The Security Council could only adopt measures in the restoration of peace and security. The decisions from the International Court of Justice (hereinafter also referred to as 'ICJ') and tribunals confirm the fact that specific international legal standards bind the UNSC.[9] The scope of the present article is to confine the study to the implication of the UNSC in breach of peremptory norm obligations.

2. MYSTERY AND CONCEPT OF PEREMPTORY NORMS

International Law operates in a highly decentralised manner, predominantly dominated by States; hence, to indict a State for a wrongful act becomes impossible.[10] In order to break this vogue in international law, a different term is floated around, i.e., jus cogens, a phrase that challenges the entire notion of the Statist approach to international law. The term or, rather, the concept of jus cogens is highly controversial and ambiguous. Academicians across the board have debated extensively on its content.[11] Some scholars even point out the fact that jus cogens is the sole remedy to the present-day international law, which is State Centric and Voluntaristic.[12]

The term jus cogens developed mainly because of the contribution made by International Legal Scholarship (hereinafter referred to as 'ILS'). It's a movement towards the revival of natural law in the domain of international law, which

8 United Nations (n 2).

9 Gordon A Christenson, 'The World Court and Jus Cogens' [1987] The American Journal of International Law.

10 Abram Chayes and Antonia Handler Chayes, 'On Compliance,' *International Law and International Relations* (2007).

11 Matthew Saul, 'Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges.'

12 A. Hameed, 'Unravelling the Mystery of Jus Cogens in International Law' [2014] British Yearbook of International Law.

had lost its glory post-world war II due to Nuremberg fallout and positivism taking center stage. The resurfacing of the concept of jus cogens has brought forth a moral dimension in international law which, hitherto, was lacking. Thus, in short, jus cogens, as scholars depict, is the only possible quick-fix to the already declining international law. The term gets its root in Natural Law; which is based on morality and values.[13]

Hence, it is evident that in the background of all the debate on treaty framework, jus cogens could act as a buffer to regulate the giant sovereign called 'State'. The concept of jus cogens got a universal footprint after the codification of the Vienna Convention on Law of Treaties, 1969 (hereinafter referred to as 'VCLT'). Article 53 of VCLT clarifies on what constitutes jus cogens: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[14] Although peremptory norm was mentioned in the VCLT, the drafters failed to clarify its precise scope and content; this, in turn, resulted in the host of debates surrounding the expression today.[15] The growth of international law is mainly through subsequent practice as elucidated in the VCLT. The two nodal institutions which are conferred with this task, i.e., ICJ and International Law Commission (hereinafter also referred to as the 'ILC'), have failed to explain its content and scope, albeit in certain instances the contribution of the separate and the dissenting opinions in the ICJ have to some degree shed light on its evolving nature.[16] The major work on the topic is undertaken by scholars who need acknowledgement and praise.

13 Mary Ellen O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms,' *The Role of Ethics in International Law* (2011).

14 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008).

15 Hameed (n 12).

16 Christenson (n 9).

The ILC in its fourth report on peremptory norms of general international law identified eight norms that could be categorised as peremptory norms. As pointed out by the ILC in the draft conclusion 24, the list enumerated is non-exhaustive; hence open to progressive development. As ILC is widely regarded as the legislative institution in international law, the list can reflect consensus amongst the States.[17]

Article 53 of 64 of VCLT deals with the invalidation of treaties in conflict with the peremptory norm. One of the inherent deficits in this is that it's confined to treaties and not other sources of international law.[18] Therefore, the question arises as to whether peremptory norms apply to UNSC resolutions. In one of the leading Judgments in the ICJ, i.e., *Bosnia v Serbia,*[19] Judge Lauterpacht[20] observed that the UNSC binds jus dispositivum; for more clarity, an in-depth of Article 103 of the UN Charter is required, which will be discussed in the subsequent section. The substantive contents of jus cogens as enumerated by the ILC are a matter of least concern, as it is open-ended.[21]

3. INTERACTION BETWEEN JUS COGENS WITH SECURITY COUNCIL

A bare reading of Article 24 and 25 of the UN Charter would suggest that the Security Council shall act in compliance with the purpose and principle of the UN Charter. It is quite evident by the literal interpretation of the UN

17 Draft Conclusion 24 of Fourth Report on peremptory norms of general international law identifies eight peremptory norms, viz., (a) the prohibition of aggression or aggressive force; (b) the prohibition of genocide; (c) the prohibition of slavery; (d) the prohibition of apartheid and racial discrimination; (e) the prohibition of crimes against humanity; (f) the prohibition of torture; (g) the right to self-determination; and (h) the basic rules of international humanitarian law.

18 Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions.'

19 Richard J Goldstone and Rebecca J Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' [2008] Leiden Journal of International Law.

20 ibid.

21 Villiger (n 14).

Charter that[22] one of the principles embedded in Article 2(4) of the charter on the non-use of force[23] has been elevated to the jus cogens; this implies any resolution in contradiction to Article 2(4) is ultra vires; this analogy could be stretched to other principles in the UN Charter, i.e., self-determination, fundamental human rights. Another relevant treaty that forms the soul of interpreting international law is the VCLT; as an International Organisation, the VCLT applies to the UN.[24] The UN Charter is bound by Article 53 and 54 of VCLT, as it is a treaty framework. An idealist might argue that the UN is beyond a treaty,[25] something like a super-treaty. Since treaties are primarily based on consent, could it be presumed that a State in the garb of autonomy could insert a provision subsuming and contradicting jus cogens? Can a State escape the moral authority called jus cogens through the establishment of an International Organisation?[26]

It could be safe to say that jus cogens have percolated into other regimes of international law, like the World Trade Organisation (hereinafter also referred to as 'WTO') through the WTO agreement which has been challenged on the ground of breaching jus cogens norm.[27] The writers defending the charter obligation over jus cogens argue that by Article 103, the charter obligation prevails over any other obligations, but its rivalry with a jus cogens norm is blurred, but international practice suggests otherwise. In certain times, jus cogens hit directly at the acts of the Security Council; for instance, the 1986 convention on International Organisation hits directly in terms of coercive treaties.[28] To decipher the philosophy of norm clash between the Security

22 United Nations (n 2).

23 Hossain (n 3).

24 Villiger (n 14).

25 Nico Schrijver, 'The Future of the Charter of the United Nations' [2006] Max Planck Yearbook of United Nations Law Online.

26 O'Connell (n 13).

27 Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' (2013).

28 Orakhelashvili (n 17).

Council and jus cogens is a challenging proposition. The term 'conflict' requires to be clarified to understand the debate in the proper sense. The analysis of the term conflict should be tested in the background of rights and duties of States; the paradox of the Security Council and jus cogens needs to be looked into. The intention of the drafters needs to be deciphered to reveal the real theme of the resolution and absolve any contradiction with jus cogens.[29]

Practice in the UN has indicated that a resolution is in contradiction with jus cogens; the UNSC has brazenly toed the line and gone ahead with the resolution.[30] For instance, the notorious resolutions 731 (1992) and 748 (1992) contradicted prohibition on the use of force, i.e., Article 2(4). UNSC resolutions 731 and 748 demanded that Libya extradite two suspects allegedly involved in the bombing of an aircraft over the airspace of the Scottish town of Lockerbie to either United Kingdom (UK) or United States (US). When requesting extradition, both UK and US undertook a policy of threat to use force against Libya to force it to comply with its demand[31] In the East Timor case,[32] the counter-memorial of Australia was more on the lines of a literal interpretation of the UNSC resolution, as it did not refer to the rights of the third State; however, the ICJ acknowledges the 'Right of Self-determination' of the people of East Timor. The action of the Security Council itself could violate jus cogens; this can be because of the composite measure under chapter VII imposing economic sanctions affecting the lives of innocent civilians.[33] This has occurred in many instances in international relations. The sanctions in FRY, Haiti or Iran contributed to the increased causality and impaired access to food and medicine. Although, the Security Council has approved humanitarian exception to sanction through the General Comments of International

29 Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' [2019] Max Planck Yearbook of United Nations Law Online.

30 Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (2014).

31 Orakhelashvili (n 17).

32 Case Concerning East Timor (Portugal v. Australia), Judgement of 30th June 1995, International Court of Justice (ICJ).

33 Droubi (n 29).

Covenant on Economic, Social and Cultural Rights (hereinafter referred to as 'ICESCR'),[34] those exceptions are very limited in their scope and application, despite the humanitarian exception, and the sufferings are perpetual. What could be done to stem this kind of alarming situation is that the Security Council can seriously contemplate carrying out an impact assessment before passing a resolution concerning human rights issues of the individuals or the victims.[35] The illegality stemming from the breach of the peremptory norm is objective, which would mean that the rules of international law do not independently generate legal consequences in case of their violation, but that such consequences arise only in the event of a subsequent determination of illegality by one or another institution.[36] Such an outcome would cause fragmentation of legal relations and defeat the primary purpose of jus cogens, which is to avoid such fragmentation in the first place. The International tribunals are to determine the legality of the resolution; but the courts and tribunals have applied high standards, and in most cases involving peremptory norm, have declined to delve deeper.[37] In short, the acts of the Security Council, because of the lack and reluctance of the courts, go untested in terms of their legality.

4. CONSEQUENCES OF THE VIOLATION OF PEREMPTORY NORM BY SECURITY COUNCIL RESOLUTION

A careful analysis of the text of the UNSC resolution is required to evaluate the legality of the Security Council resolution. Conducts prohibited under peremptory norm are outside the scope of the Security Council resolution. This is the position concerning the States. Now, an organisation like the UN which is established by the States cannot be conferred with powers and functions to act as a supra-state.[38] The interpretation of the UN Charter is

34 Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (2007).

35 ibid.

36 Orakhelashvili (n 17).

37 Jure Vidmar, 'Rethinking Jus Cogens after Germany V. Italy: Back to Article 53?' [2013] Netherlands International Law Review.

38 Voeten (n 1).

done in consonance with the purpose and principles of the UN as well as to give effect to the will of the States, and the intention is looked upon by taking into consideration the previous practices reflected in the resolutions.[39] Having said this, the outright interpretation of the UNSC resolution could be perfectly justifiable in a flat system, whereas in international law which is governed by a system based on hierarchy, the clash becomes inevitable. The charter law is subject to the charter obligation and is, in its entirety, subject to the peremptory norms, the interpretative tool to ascertain that the UNSC resolution is absent.[40] Certain resolutions contain a specific paragraph that places a priority on human rights. In case of resolutions being vague and marred, the resolution requires to be interpreted in a way that is consistent with the peremptory norm.[41] The clauses in Resolution 1483 (2003) on Iraq referring to 'a properly constituted, internationally recognised representative government of Iraq' (paragraphs 16, 20 and 21),[42] without defining any further requirements such government would have to satisfy, must be construed as referring to a democratically elected government as far as the disposal of Iraqi oil resources is concerned.[43] Whether the subsequent events could lead to the resolution ending up violating peremptory norm, in the ICJ case of 'Certain Expenses of the United Nations',[44] it was reiterated that when the organisation takes action to fulfill its object and purpose, it is not ultravires of the organisation. The law of invalidity is applied when the said resolution is not in fulfilment of the object and purpose of the UN. Now, the issue is which body oversees the actions of the charter.[45] Therefore, the onus is upon the individual member States in the absence of any process of judicial review. Other recourse is that

39 Wood (n 28).

40 ibid.

41 Orakhelashvili (n 17).

42 Hmoud (n 7).

43 Jeremy M Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits' [2014] Journal of Conflict and Security Law.

44 Certain Expenses of The United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion of 20th July 1962.

45 Orakhelashvili (n 17).

individual State could challenge the validity of a specific act. The institutional determination of the validity of the peremptory norm is problematic, as no institution is competent. There cannot be a separate regime established to determine a particular act to be in contradiction of peremptory norm, as the act per se is void in the first place.[46]

Another controversial issue is concerning the severability of the resolution. In case of a paragraph in a resolution contradicting peremptory norm, is the entire resolution ultra-vires or can the particular provision from the resolution be severed and subsequently interpreted.[47] The VCLT supports the proposition that the entire treaty stands invalid. Some scholars argue that to give life to the treaty, the so-called 'innocent' clause requires preservation. Having discussed the legality and the various interpretative nuances involved in the process of placing UNSC resolution in harmony with the peremptory norm, it is essential to examine the recourse available to States to challenge the resolutions in contravention with peremptory norms. The legal restraint on the conduct of the Security Council, i.e., whether lawful or not, is determined by three institutions: a) The ICJ, b) The national courts, c) Internal mechanism under the Security Council working as a full-fledged review mechanism; further, the Security Council is bound by Article 24(2) of UN Charter and is also bound by peremptory norm of international law under Article 53 of VCLT.[48] The present paper is confined merely to the authority of ICJ to review the Security Council resolution. At the San Francisco conference, the issue of judicial review of the Security Council resolution was proposed by Belgium, but did not get through, because it was felt by the States that this could be detrimental to the essential rights and could be a hindrance to the exercise of the functions of the Security Council.[49] However, the issue was brought as an advisory opinion in the

46 *Regime Interaction in International Law* (2011).

47 Wood (n 28).

48 B. Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' [1999] European Journal of International Law.

49 Yoram Dinstein and others, 'The Charter of the United Nations: A Commentary' [2004] The American Journal of International Law.

certain expenses case.[50] Notwithstanding this, the court rejected the possibility of judicial review by the ICJ. The dissenting opinion of Judge Christopher Gregory Weeramantry in the same judgment is noteworthy. The late Judge observed that the court is not debarred from the matter which comes under Chapter VII.[51] Despite the jurisprudence in the certain expenses case, the ICJ has remained passive in judicial activism, seldom interfering in the functioning of other organs of the UN.

5. FRAGMENTATION OF INTERNATIONAL LAW VIS-À-VIS JUS COGENS AND SECURITY COUNCIL RESOLUTION

The era of globalisation led to the increasing universalisation of social life around the world. It has led to fragmentation and, subsequently, the emergence of autonomous regimes in International Law. The phenomenon of fragmentation has impacted significantly, especially in the realm of diplomatic law, wherein the interaction of immunity with jus cogens is ubiquitous.[52] The impact of fragmentation on jus cogens vis-à-vis Security Council requires detailed analysis. Some of the questions that pop up are whether fragmentation leading to specialisation has diluted jus cogens or the Security Council resolution. If affirmative, to what extent, or has the interaction of jus cogens and Security Council resolution been impacted by the interplay. The fact compounds the problem that there is no general order or hierarchy in international law.[53] The application of the lex specialis or lex posterior rule depends on the prior assessment of a particular criterion, which is value-oriented; the prior assessment is weighing it with jus cogens norm, a norm which is inherently superior to catapult the constitutionalism in international law, although the

50 Certain Expenses of The United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20th July 1962.

51 Christopher Gregory Weeramantry, 'Dissenting Opinion of Judge Weeramantry' [1992] The American Journal of International Law; Martenczuk (n 47).

52 Koskenniemi (n 26).

53 M. Koskenniemi, 'Hierarchy in International Law: A Sketch' [1997] European Journal of International Law; Dinah Shelton, 'Normative Hierarchy in International Law' [2006] American Journal of International Law.

formal hierarchy in international law is absent. The vocabulary of jus cogens gives rise to an informal hierarchy. A similar kind of norm is outlined in Article 103 of UN Charter.[54] The formulation of this provision had a precursor in the Covenant of the League of Nations in Article 20.[55] A bare reading of these two provisions would indicate that the language of Article 103 is broader in its scope, as its application extends to the future agreements and agreements with non-UN members. The question arises as to whether council resolutions adopted ultra vires prevail by virtue of Article 103. Scholars, like Susan Lamb, Niels Blokker, and Robert Kolb,[56] argue that in the first place there is no question of conflict, as it is per se ultra vires. The extent of the application of Article 103 has given priority to the charter obligation, rather than invalidating the whole treaty in contradiction to Article 103. In the case of *Hilal Abdul-Razzaq Ali Al-Jeddah v Secretary of State for Defence*,[57] the court granted priority to Security Council resolution over human rights breach; however, the court was silent on the violation of human rights in the context of detention in the said case.

In case of a conflict between jus cogens and charter obligations, the charter obligation is invalidated.[58] The UNSC resolution in stricto sensu is an international agreement, which is often accused of contradicting jus cogens norm. The clash was apparent in the court of the first instance of the EC; the court decided that the obligation under the UN Charter prevailed over any other obligation. On the other side, it also made it clear that the Security Council resolution must comply with a peremptory norm of jus cogens.[59] Many of the

54 United Nations (n 2).

55 Maxwell Garnett and others, 'The Covenant of the League of Nations,' *A Lasting Peace* (2019).

56 Koskenniemi (n 26).

57 Hilal Abdul-Razzaq Ali Al-Jedda v. Secretary of State for the Home Department [2012] EWCA Civ 358.

58 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' [2002] Leiden Journal of International Law; *Regime Interaction in International Law* (n 45).

59 Türküler T. Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' [2010] European Law Journal.

1990s Security Council resolutions have outlawed any other obligation.[60] Before the 1990s, the world court has mentioned Article 103 once in the Namibia advisory opinion. The ICJ had an opportunity to discuss in detail about the relation between Security Council resolutions and other treaties in the Lockerbie case.[61] In the provisional measure requested by Libya, the world court, although not going into the legality of the resolution, underscored the fact that according to Article 103, the charter prevails over any other international agreement. Several separate and dissenting opinions confirm this fact.[62] However, the comprehensive understanding of the nexus between Article 103 and jus cogens was provided through the separate opinion of Judge Lauterpacht in the *Bosnia v. Serbia* case,[63] accordingly: The concept of jus cogens operates as a concept superior to both customary international law and treaty.[64]

6. CONCLUSION

The paper was an attempt to answer a central question in international law, i.e., whether the notion of the peremptory norm or jus cogens has checked the incessant violation of the Security Council. The answer remains vague, as there is very limited jurisprudence on the said question; however, the study has revealed the fact that, through the separate and dissenting opinion and judgments of the regional court in Europe, the Security Council is bound by certain minimum standards, which are jus cogens. However, it is not precisely evident as to which institutions determine the legality of the Security Council resolution, as the regimes in international law are fragmented. Secondly, through this paper, the researcher argues that there has to be a mechanism called Security Council impact assessment to offer an internal mechanism to check the proliferating legal implications of the Security Council resolution. Thirdly, unlike domestic law, in international law, there is lack of checks and

60 Farrall (n 33); Droubi (n 29).

61 Martenczuk (n 47); Koskenniemi (n 26).

62 Koskenniemi (n 26).

63 Goldstone and Hamilton (n 18).

64 Koskenniemi (n 26).

balances; the author opines that jus cogens can act as a buffer to pre-empt the Security Council's actions to legislate on unchartered areas; thus, offering an alternative solution to State-Centric approach to international law. However, the researcher is cautious in stating that the content and scope of jus cogens remains the subject matter of progressive development and codification of international law. Finally, the researcher reckons that Article 53 of VCLT requires broad interpretation to extend its scope to International Organisations - in particular, to avenues like resolutions and customary laws - thereby, ensuring sovereign equality of International Organisations.