Examining Jus Cogens Norms: Limiting the power of the UNSC

Nishan V Gopal[1] Amrutha Rose J Valavi[2]

Abstract

The United Nations Security Council is one of the most powerful and important organs of the United Nations in the world and is charged with ensuring international peace and security. It is also the only organ of the United Nations whose decisions are legally binding on the member states and cannot be challenged in any manner. This study explains the history of the United Nations, and the Security Council in particular in order to show why it has such a unique structure and the motivations behind the wide variety of powers that are bestowed to the council. It then goes on to explain the history of jus cogens norms and explains how they evolved throughout the course of human history. Then, a correlation is drawn between jus cogens norms and how they can act as a limitation to the powers that are wielded by the United Nations Security Council, mainly regarding how jus cogens can function as the basis for a judicial review of the resolutions taken by the Security Council.

Keywords: Jus Cogens, United Nations, United Nations Security Council, Collective Responsibility, International Law

[1] Final Year Student, School of Law, Christ University, Pune Lavasa; ORCID - 0009-0000-0620-3704
[2] Assistant Professor, School of Law, Christ University, Pune Lavasa; ORCID - 0000-0002-2315-741X

INTRODUCTION

Throughout known history, humans have come together either voluntarily or by force in order to form states which were sovereign entities with defined territorial boundaries which were entitled to the full allegiance of its citizens. These were often ruled by rulers who established peace inside their boundaries but there was no other authority apart from them and no oversight on them to establish inter-state peace or to uphold the rights of the citizens. There was no authority that could keep a check on the rulers. Each state was in constant competition with each other for territory and resources, resulting in an ultra hostile environment where armed conflicts were constant. This led to the common man, who was most affected by this constant cycle of conflicts and all the problems that came along with it, such as conscription, famine etc; to dream about a world government which will rule all states and enforce peace. References to such a world government can be found throughout history: the Florentine poet and philosopher Dante Alighieri, Spanish philosopher Francisco de Vitoria and the man considered to be the father of international law himself, Hugo Grotius. All of their works contain references to a world government to varying degrees. Grotius was not necessarily an advocate for a world government, rather he believed that in order to enforce the "law of nations", a world government will eventually be formed.

The first concrete step that formed an International Organization which shared a lot of characteristics with the concept of a World Government came during the aftermath of World War I, when the League of Nations was formed as a result of the Treaty of Versailles on 10th January 1920. The League at its essence was an intergovernmental organization committed to upholding Human rights, settling disputes between countries through negotiation, diplomacy, improving global quality of life and most importantly, disarmament and preventing war through collective security. Collective security in this context refers to n international system or structure in which all members would be committed to act, if called on to do so, against any one of their number who offended against the rules of the system. This was necessary for the League since it did not have its own armed forces and depended upon the armies of the major powers when it was needed. But, the major powers were not always willing to act in such situations and this led to the downfall of the League and the beginning of World War II in earnest when it failed to take action against Benito Mussolini's Italy when it invaded Abyssinia.

The concept of collective security gained new life after the end of World War II because the allied powers had a strong feeling that earlier action in response to Hitler's aggression could have reduced the damage done by the War or maybe even stop the war before it started. Because of this sentiment, the United Nations was formed on the 24th of October 1945. But, during the war time through multiple conferences between the allied powers, the leaders of the three major powers, i.e. The USA (Roosevelt), Soviet Union (Stalin) and England (Roosevelt) had already agreed on the basic structure of the new organization, including a strong new instrument of collective security : The Security Council. The Researcher analyzed Charters, Statues, Regulations, Juristic writings, Case laws to correlate different perspectives and application in defining the scope of Jus Cogens.

MEANING AND SCOPE

A. The United Nations Security Council

As earlier stated, the United Nations Security Council is one of the Six Principal organs of the United Nations, the others being The General Assembly, Economic and Social Council, Trusteeship Council, International Court of Justice and the UN Secretariat. The main function of the UNSC is to ensure international peace and security, recommend new members to the UN General Assembly and to approve any changes to the UN Charter. Amongst this, the maintenance of international peace and security is considered to be the prime function of the Council, and is in turn given the most importance. The UNSC is composed of 15 members; 5 of these, i.e. The USA, The UK, China, France and Russia are considered to be permanent members, and hold the power to veto any substantive security council resolution. The remaining 10 members are chosen for a two-year term at the regional level. Every month, a member of the body takes turns serving as president.

The main difference between the UNSC and the other organs of the United Nations can be found in article 25 of the UN Charter; which states that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" This means that the resolutions that are taken by the UNSC are legally binding on all the member

states of the United Nations, and this is something that is exclusive to the Security Council; the decisions of the other organs of the United Nations are not legally binding. But, a structural problem that exists within the UN regarding these resolutions is there is no review or appeal process for a UNSC decision; once the decision is taken, it cannot be questioned. There are no existing limitations on the powers of the UNSC, except for the fact that the resolutions' binding nature is contingent upon choices made in accordance with the UN Charter's purposes and principles, which are outlined in Articles 1 and 2 of the charter. This is widely recognised as the strongest limitation of the UNSC and this in the author's opinion is a huge structural flaw in the integrity of the United Nations, especially considering how the UNSC is not a democratic structure as explained above. Taken along with the fact that there are no limitations on the power of the decisions taken by the security council, the structure shows a clear lack of accountability. The gravity of the problem worsens when you consider the scope of the (considerable) powers of the council (amongst others) under article VII of the UN Charter which empowers the it to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken".[1] However, realistically, it is evident that even though there has been attempts to improve the veto system, most notably by the text (document A/77/L.52), which was adopted without a vote, the Assembly decided that its President shall convene a formal meeting of the 193-member organ within 10 working days of the casting of a veto by one or more permanent members of the Council and hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation. Further, the Assembly invited the Council, in accordance with Article 24 (3) of the Charter of the United Nations, to submit a special report on the use of the veto in question, to the Assembly at least 72 hours before the relevant discussion is to take place. But, these measures still do not solve the problem, which is that the 5 permanent members have a standing that is above the rest of the members, and this is something that is not likely to change. Therefore, the only realistic change that can be proposed with regards to the functioning of the security council is some sort of international judicial review specifically in certain cases where the affected states feels like there has been a miscarriage of justice. In order to do that, a standard must exist which serves as a barometer to test whether the resolutions that are passed by the UNSC have in fact, lead to a miscarriage of justice.

B. Jus Cogens

Jus cogens refers to peremptory norms of general international law that are accepted and recognized by the international community of states as norms from which no derogation is permitted and which can only be modified by a subsequent norm of the same character. They were developed in the 1900s through judicial decisions and international legal scholarship, while drawing upon elements of natural law. The similarities of both can be seen in how they are both ostensibly moral doctrines that wield a huge amount of power. The specifications of Jus Cogens remain murky to date; nobody exactly knows when a norm reaches jus cogens status; in fact, the view that jus cogens exists is not universal, but rather is 'overwhelming' and is a doctrine which not all, but 'most international lawyers recognize',[2]

According to article 53 of the Vienna Convention,fied only by a subsequent norm of general international law having the same character." *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized 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."* But, it is generally accepted that Jus Cogens is not confined to the scope of just treaties; but to the entirety of International Law as a whole, as seen in the report made by the International Law Commission to the General Assembly on the draft articles of the vienna convention, where its stated that "a rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it of legality"[3]

Jus cogens have been referred to in multiple judgements since, such as the Pablo Nájera Case and the Oscar Chinn Case, further solidifying its recognition in the landscape of International Law.

A comprehensive set of norms is not necessary for jus cogens to exist.[4] This was decided upon during the VCLT's drafting, despite several states' reservations. The ILC concluded in its 1968 report to the Conference that state practice and international tribunal jurisprudence must be used to define the entire scope of jus cogens[5]. Jus cogens retains its legal status despite the principle's ambiguity; each rule needs to be thoroughly considered on an individual basis. However, in actual implementation, the lack of this criterion has come to be seen as a serious

criticism of jus cogens. Although theoretically the principle of jus cogens exists, many have contended that because there is too much debate regarding the parameters and standards of the norms, it lacks any real substance[6]. While some contend that jus cogens only applies to the most fundamental international norms, others maintain that it applies to any standard that serves the interests of the community of states as a whole and is deemed non-derogable. Jus cogens will remain little more than an intriguing theoretical concept unless there is a greater consensus on what constitutes a standard that qualifies as jus cogens and which norms have gained widespread acceptance in the international community.[7]

It is generally accepted that for a norm to be considered peremptory it needs to satisfy the following criteria: it must be

1. general international law;
2. acknowledged and accepted as such by the international community of states in its entirety;
3. from which no deviation is allowed, with the exception of
4. modification by another conflicting peremptory norm; and
5. must safeguard the international community of states' overriding interests.

Because there is no definitive list of jus cogens norms, which hurts the practical effect of these norms according to some critics, there are only very few norms that are considered to be jus cogens. However, there are certain norms which are quite clearly recognised as being jus cogens norms which also fulfill the criteria laid out before, such as

1. The Prohibition of the Use of Aggressive Force
2. The right to self determination
3. Human Rights
4. Humanitarian Laws
5. Protection of the Natural environment etc.[8]

These norms, throughout history due to several judgements and treaties are considered to be Jus Cogens norms and have been quite clearly accepted to be so, even by the United Nations Security Council.

INTERFERENCE OF JUS COGENS NORMS IN LIMITING THE POWERS OF UNSC

By nature of a jus cogens norm, which is first and foremost accepted to be binding on all states and possess a unique supreme overriding quality that makes them solute and non derogable, cannot be ignored by any entity that operates within the realm of International Law, and the UN is not exempt from this. The UNSC, being a constituent organ of the UN, is also most certainly bound by the Jus Cogens norms. Particular jus cogens rules, such the bans on crimes against humanity, aggression, genocide, and torture, restrict the authority of the UNSC by making it illegal for the Council to approve or condone breaches of these essential standards.[9] The UNSC is required to operate in accordance with jus cogens norms, as established by the goals and tenets of the UN Charter and the Vienna Convention on the Law of Treaties. A jus cogens norm would render any UNSC action unconstitutional.[10] While the UNSC was designed to have wide and far reaching powers, especially under Chapter VII of the United Nations Charter, which empowers the UNSC to take several actions with respect to Threats to the peace, breaches of the peace and acts of aggression, [11] it is not *legibus solutus* **(**unbound by law). It is subject to legal limitations, and it can be quite easily concluded that Jus cogens norms should be one of them. But, even though theoretically it is a very cut and dry situation and easy to conclude that the UNSC must be bound by Jus Cogens Norms, there have been multiple situations where a UNSC resolution can be observed to be in violation of the very same highest principle of International Law, either directly or by resolutions that explicitly or implicitly validates the violations of Jus Cogens norms, such as Resolution 1203. This was a tacit approval of a member states actions that quite clearly violated Jus cogens norms.

The Socialist Federal Republic of Yugoslavia (SFY) signed a peace treaty that allowed refugees to return to Kosovo in October 1998. NATO had used an unauthorized military threat to compel this agreement, which was obviously against the ban on the use of aggressive force. The Security Council adopted Resolution 1203, endorsing the conditions of the peace accord, after these agreements were reached. The Resolution even went so far as to support the agreement, requiring its "full and prompt implementation." This effectively means that the resolution supports the jus cogens infringement that led to the accord. The only possible conclusion is that a jus cogens breach is null and void from the beginning.[12]

The breach of jus cogens may also be explicitly approved by a Security Council decision. A similar transgression concerned the High Representative of Bosnia and Herzegovina, who was appointed in 1995 to oversee and coordinate the civilian application of the Dayton Agreement. The

authority to "manage and supervise" was defined in Article 2 of Annex 10 of the agreement as the monitor, consult, coordinate and be conciliatory.As a public authority, this did not entail rendering legally enforceable decisions. In spite of this, the High Representative started abusing his authority to oust numerous powerful people, including presidents, and to pass legislation pertaining to criminal procedures, state border security, and the ombudsman. The people of Bosnia and Herzegovina were deprived of their right to self-determination as a result of the use of power that went beyond the parameters of the Dayton Agreement. In spite of this transgression, the Council clearly stated in Resolution 1305 that they supported the High Representative and his authority to make legally binding judgments, taking an expansive stance on his bounds. This was tantamount to overt endorsement of a violation of the jus cogens right to self-determination.[13]

Additionally, to confirm other actors' violations of the jus cogens principles, the Security Council has issued directives for specific acts that themselves constitute jus cogens violations. The most well-known instance of a Security Council directive that violated jus cogens was the resolution 661 economic sanctions program against Iraq after its invasion of Kuwait in the 1990s. It is generally accepted that the sanctions—which amounted to an almost complete prohibition on commerce and finance—caused a humanitarian disaster for the general populace. While rates of those with access to food and medication declined throughout the sanction years, baby and child death rates in Iraq rose[14]. Children were pulled out of school to pursue employment, which led to a decrease in the number of adults with only a primary or secondary education. The people continued to suffer greatly from the sanctions even after humanitarian exceptions were put in place, allowing some products to enter the nation.[15] There was no doubt that depriving civilians of their basic necessities and raising the rate of starvation was against humanitarian premptive norms. Given its results, Resolution 713 (1991)'s arms embargo, which covered the entire former Yugoslavian state, was another example of such a violation. The resolution denied Bosnians the ability to raise militias and obtain weapons for self-defense. This had the terrible effect of increasing the vulnerability of Bosnian communities, which in turn led to the genocide committed by Serbian forces in 1995.

Jus cogens obviously binds the Security Council. This is crucial because breaking a basic international norm would never be justified by a liberal reading of the UN's Purposes and principles. Furthermore, the Council's intentions to function within the (wide) bounds of the

Charter will not justify a breach; if an action violates jus cogens, the reason becomes irrelevant. An infraction against jus cogens is determined objectively. Only in the absence of actual application as a restraint on the Council's authority can Jus cogens remain a theoretical concept. Because it would be against the Council's interests to place such a restriction on their own authority, someone else must enforce jus cogens. It is very important to remember that only the resolutions passed by the UNSC has a legally binding nature. States might be forced to carry out illegal Council orders if there is no method to enforce legality. This result is obviously unacceptable.

In such a situation, the International Court of Justice seems to be the best suited to enforce some sort of Judicial Review upon the resolutions of the Security Council, as the rule of law requires enforcement and traditionally, it has always been the judicial branch of the government that provides it. In the international sphere, the ICJ is the primary judicial entity. Moreover, Article 36(3)(b) of the ICJ statute gives it the power to decide any questions of international law. [16] In a situation where a state argues that some resolutions of the UNSC violates principles of international law, The ICJ should be a viable recourse to challenge said decision. However, this would also mean hampering the power and effectiveness of the Security Council to act in situations where quick action is a necessity.

CONCLUSION

When applied skillfully, the great international legal principle of Jus cogens guarantees the defense of the most significant ideals upheld by the member nations of the international community. To give this idea actual weight, a standard for judging norms must be developed. By acknowledging jus cogens as a tool for safeguarding the fundamental principles and ideals of international law, any standard can be deemed peremptory under international law, provided it satisfies all necessary requirements. Even though the concept of jus cogens has always been ambiguous, there has been enough case law developed to affirmatively identify a number of international legal principles as superseding others. The UN Charter's goals and principles, which forbid the use of force and guarantee the right to self-determination, make jus cogens a straightforward concept to determine. The essential principles of humanitarian law, which exist for the benefit of all people, are equally easy to follow. Determining human rights norms is more challenging because rights are not

consistently recognized by governments or by international law. Nonetheless, a handful of human rights are universally acknowledged as being so crucial in both of the aforementioned indices that they can be granted jus cogens status, barring any proclamation from the community of states to the contrary.

Jus cogens norms have been subtly present throughout the Security Council's history, with certain decisions purposefully construed to guarantee adherence to these core values. When jus cogens has been violated, the Security Council has reacted inconsistently; at times, it has taken proactive measures to prevent such violations (such as enacting humanitarian exemptions to economic sanctions) and at other times, it has disregarded complaints from both states and other international organizations. The Security Council has interpreted the restrictions outlined in Articles 24, 25, and 39 of the UN Charter loosely, which has led to the Council being a tool for some members to further their national interests within. This is obviously against the intentions of the drafters of the UN, which is why an outside review committee is required. The ICJ is the obvious choice, being the principal judicial organ of the UN and jurisprudence suggests that the ICJ may have the power to do so. But, whether doing so might limit the effectiveness of the UNSC is a very real question on which debate rages on and is not at a settled position yet. The actual force of jus cogens is evident. It is strong in theory and has a lot of room to grow in practical use. Naturally, the nature of international law means that theoretical discussions may not always translate into practical outcomes. Despite globalization, states continue to act in their own best interests and occasionally deviate from accepted legal doctrines. This is not to argue that international theory and jurisprudence cannot have importance. Practice cannot advance without laying such a foundation. Before the rule of law can be obeyed, it must first be established.

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