A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council Arms Embargo on Bosnia and Herzegovina

Craig M. Scott  
Osgoode Hall Law School of York University

Francis Chang

Peter Copeland

Jasminka Kalajdzic

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

Part of the International Law Commons

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Repository Citation
https://digitalcommons.osgoode.yorku.ca/scholarly_works/2248

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
A MEMORIAL FOR BOSNIA: FRAMEWORK OF LEGAL ARGUMENTS CONCERNING THE LAWFULNESS OF THE MAINTENANCE OF THE UNITED NATIONS SECURITY COUNCIL’S ARMS EMBARGO ON BOSNIA AND HERZEGOVINA

Craig Scott*
Abid Qureshi
Jasminka Kalajdzic
Francis Chang**
Paul Michell
Peter Copeland

INTRODUCTION: LEGAL QUESTIONS AT STAKE AND PREMISES ON WHICH A MEMORIAL FOR BOSNIA IS BASED .................................. 6
A. Overview of the Legal Questions at Stake ............................... 6
B. Situating A Memorial for Bosnia in the Context of the Ongoing Case in the International Court of

* Associate Professor of Law, University of Toronto. Dalhousie University, LL.B. (1988); University of London/London School of Economics, LL.M. (1987); University of Oxford, B.A. (1986); McGill University, B.A. (1984).


This Memorial was written while all six authors were associated with the Faculty of Law, University of Toronto, the first as Associate Professor of Law and the last five as students.

The authors would like to thank the Government of Bosnia and Herzegovina for the opportunity to study and present these arguments regarding the arms embargo. More specifically, the authors are grateful to Ambassador Muhamed Sacirbey and Mr. Phon van den Biesen, Agent and Deputy-Agent, respectively, for Bosnia in the case before the International Court of Justice, for permitting us to publish a revised version of the Framework of Legal Arguments presented to Bosnia in early summer 1994. While the research on the topic was initiated at Bosnia’s request, the arguments, their accuracy, and their priority inter se are the authors’ own and do not necessarily represent the views of the current legal team or of the Government of Bosnia. Thanks are also due to Dr. Marc Weller of the University of Cambridge (a current member of the legal team for Bosnia). Finally, the authors thank Messrs. René Provost (Bolton Fellow, McGill University Faculty of Law and Doctoral Candidate, University of Oxford) and Mark Gendron (Doctoral Candidate at the University of Toronto) for their perceptive comments in response to presentations by coauthors Copeland and Qureshi at the Annual Conference of the Canadian Council on International Law in October 1994 as part of a panel discussion on the arms embargo.

Prof. Scott and Jasminka Kalajdzic also extend their appreciation to Prof. Francis Boyle for inviting their contributions during the two Provisional Measures stages of the case. Prof. Boyle was Counsel for Bosnia at these stages.

Prof. Scott would like to acknowledge the financial assistance of the Social Sciences and Humanities Research Council of Canada.
Justice Brought by Bosnia Against Serbia Under the Genocide Convention ........................................ 8

1. The Case Brought by Bosnia Against Serbia and the Alleged Facts with Respect to Serbia’s Responsibility for Conduct in Breach of the Genocide Convention ........................................ 8

2. The Attempt to Raise the Arms Embargo Issue in the Current Case ........................................ 9

3. ICJ Cases Contemplated by Bosnia in Late 1993 .... 11

C. A Contentious Case Brought Under Article IX of the Genocide Convention Against a State Engaged in Maintaining the Arms Embargo Would Create, According to a Structure Similar to Lockerbie, the Possibility for the ICJ to Address the Legal Status of Resolution 713 and Its Effect on States’ Obligations ...................................... 14

D. The Premises upon Which A Memorial for Bosnia Is Structured ........................................ 17

1. The Presumed Jurisdictional Context ....................... 17

2. The Presumed Facts ........................................ 18

E. The Plan and Format of the Memorial ....................... 20

1. Plan of Memorial ............................................ 20

2. Symbolic Format of the Memorial ......................... 21

I. STATE CONDUCT IN ENFORCEMENT OF SECURITY COUNCIL RESOLUTIONS’ OBLIGATIONS TO MAINTAIN AN ARMS EMBARGO PLACES STATE PARTIES TO THE GENOCIDE CONVENTION IN CONFLICT WITH THEIR JUS COGENS OBLIGATION TO PREVENT GENOCIDE ........................................... 22

A. Genocide, Jus Cogens, and the Genocide Convention ........................................... 22

1. The Principle of Jus Cogens Is Established in International Law as the Highest Form of Law ........ 22

2. The Genocide Convention Codifies the Jus Cogens Prohibition Against Genocide, as well as the Corollary Obligations Which Flow from This Prohibition ........................................... 26

B. States Have a Duty to Prevent the Genocide Occurring in Bosnia ................................. 36

1. States Have a Positive Obligation to Intervene or Offer Assistance to Prevent the Genocide in Bosnia ........................................... 37
2. In the Alternative, States Have a Duty to Refrain from Interfering with Cooperative Efforts to Prevent the Genocide in Bosnia

II. SECURITY COUNCIL RESOLUTIONS THAT MAINTAIN THE ARMS EMBARGO FETTER THE RIGHT OF SELF-DEFENSE IN A MANNER Ultra Vires the Security Council

A. Aggression and the Content of the Right of Self-Defense
   1. Serbia Has Committed an Illegal Use of Force, Which Constitutes Aggression and an “Armed Attack” Against Bosnia
   2. Bosnia Has an Inherent Right of Individual and Collective Self-Defense to Respond to Serbian Aggression and Genocide

B. Article 51 Requires that a State’s Inherent Right to Self-Defense May Be Suspended Only if the Security Council Undertakes Effective Measures to Maintain International Peace and Security
   1. The Right to Self-Defense Is “Inherent” or “Naturel”
   2. The Inherent Right of Self-Defense Is a Jus Cogens Norm
   3. The Security Council Was Under an Obligation to Take Objectively Effective Measures to Ensure that Its Maintenance of the Arms Embargo Against Bosnia Did Not Fetter Bosnia’s Inherent Right to Self-Defense under Article 51 of the U.N. Charter that Bosnia Enjoyed from the Moment of Admission into the U.N.
   5. The Legitimacy of the U.N. System of Collective Security Demands an Interpretation of the Inherent Right of Self-Defense Consistent with the Principles Underlying the System
III. PERMISSIBILITY OF AN ICJ JUDGMENT ON THE STATUS OF SECURITY COUNCIL RESOLUTIONS AND THEIR EFFECTS ON THE LEGAL OBLIGATIONS OF STATES .......................... 75

A. The Provisions and Structure of the U.N. Charter and the ICJ Statute Permit, and in Matters of Jus Cogens Require, the ICJ to Pass Judgment on the Lawfulness of Security Council Resolutions ............ 75

1. The ICJ Is Not Precluded from Addressing a Dispute or Situation Which Is Simultaneously Before the Security Council ............................................ 75

2. The ICJ Has the Authority Under the Charter to Consider the Validity of Security Council Resolutions if This Is Required in Order to Fulfill Its Judicial Mandate ................................... 82

3. The Contention that the ICJ Has No Authority Within the "Constitutional" Framework of the U.N. to Pass Any Judgment on the Legal Vires or Effects of Security Council Resolutions Cannot Be Sustained ........................................... 90

B. The ICJ Has Special Authority to Pass Judgment on the Actions of All International Actors, Including Organs of International Organizations, that Are Related to the Genocide Taking Place in Bosnia ........................................... 97


2. Proper Interpretation of the Genocide Convention Suggests a Broad Power for the ICJ to Judge the Legality of Acts of the Security Council in This Situation ........................................... 98

3. The 1969 and 1986 Vienna Conventions on the Law of Treaties Represent the International Community's Recognition of the ICJ as the Principal Judicial Authority for Passing Judgment on Disputes Involving Jus Cogens Norms ........................................... 100

C. Appropriate Treatment of the Arms Embargo Resolutions and Obligations Generated by Them Within the Court's
Juridical Order in Light of a Presumption of Validity of the Resolutions of the U.N. Political Organs 106

IV. Legal Status of Security Council Resolutions and Legal Consequences for the Obligation of State Parties to the Genocide Convention to Prevent Genocide and for the Right of Bosnia to Engage in Self-Defense Assisted by Other States 110

A. Resolution 713 and Resolutions Reaffirming It May Be Conceptualized as Ultra Vires Juridical Acts of the Security Council to the Extent that They Are Not in Accordance with the Jus Cogens

Right of Self-Defense 110

1. The Principle of Jus Cogens Renders Unlawful All Purportedly Juridical Acts, Including Acts of Organs of International Organizations, such as the U.N., and Does Not Merely Invalidate Treaties or Treaty Provisions Which Derogate from It 110

2. For the Resolutions of the Security Council to be Treated as Having Legal Force and Effect, the Council Must Act in Accordance With the U.N. Charter Which Incorporates by Reference Principles of Justice and International Law Which, in Turn, Are at Minimum Comprised of Jus Cogens Norms 118

3. Resolutions 713 and 727 as Maintained Against Bosnia Contravene Article 51 and Are Not “in Accordance with the Charter” Under Article 25 130

B. Legal Effects of Resolution 713 and Resolutions that Reaffirm It and Thus Maintain the Embargo Against Bosnia 131

1. Should Resolution 713 Be Treated as Void? 131

2. Should Resolution 713 Be Treated as Inoperative? 134

3. Should Resolution 713 Be Treated as Inapplicable Under a Doctrine of Reading Down? 135

Submissions 139
INTRODUCTION: LEGAL QUESTIONS AT STAKE AND PREMISES ON WHICH A MEMORIAL FOR BOSNIA IS BASED

A. Overview of the Legal Questions at Stake

This Memorial seeks to present a framework of legal arguments with respect to the validity and legal effects of an arms embargo imposed by United Nations Security Council Resolution 713 in September 1991 on the Socialist Federal Republic of Yugoslavia (Yugoslavia), before its dissolution, and since treated as being in force with respect to the new states that have succeeded Yugoslavia. More particularly, the Memorial addresses the legality of maintaining (or, at least, having maintained during the crucial time period) the arms embargo in force, either de jure or de facto, against the Republic of Bosnia and Herzegovina (Bosnia) in light of evidence that the arms embargo’s maintenance vis-à-vis Bosnia has contributed to the inability of the Government of Bosnia to prevent the perpetration on Bosnia’s territory of acts of genocide by Bosnian Serb forces as well as combined acts of genocide and aggression by the neighboring state of Serbia and Montenegro (Serbia).¹

The operative clause of Resolution 713 provides that the Security Council:

*Decides,* under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.²

The purpose of the resolution was to prevent external interference in Yugoslav affairs (as well as the regional escalation that such interference
could potentially cause) and to prevent the dissolution of Yugoslavia.\textsuperscript{3} The resolution came at the request of the then-Yugoslav Government.\textsuperscript{4} Indeed, the decision to impose the arms embargo upon Yugoslavia was influenced by the view that such a measure was requested by Yugoslavia itself.\textsuperscript{5} Without the express request and consent of Yugoslavia, it is unlikely that the arms embargo would have been imposed by the Security Council.\textsuperscript{6} While the resolution has been "reaffirmed" in subsequent resolutions,\textsuperscript{7} Resolution 713 itself clearly states that the arms embargo applies to "Yugoslavia," an entity no longer existing\textsuperscript{8} and which is entirely distinct from the successor states, including Bosnia.\textsuperscript{9} Resolution 713 was adopted only a month before the collapse of Yugoslavia. Despite the fact that this collapse drew into question the international legal status and capacity of "Yugoslavia," to which Resolution 713 applies, most Security Council Members have treated the embargo as continuing to apply to post-Yugoslavia Bosnia.\textsuperscript{10}

\begin{itemize}
\item[3.]
See id.
\item[4.]
\item[5.]
\item[6.]
This may be gleaned by reference to the statements of the representatives of Zimbabwe, Yemen, Cuba, China, the U.S.S.R., the United Kingdom, Zaire, and France. See id. at 28, 36, 38, 49, 52, 55, 64, 66.
\item[7.]
\item[8.]
\item[9.]
Bosnia has continuously protested that the arms embargo does not apply against it. The argument that the arms embargo is formally inapplicable to Bosnia will be considered infra part IV, wherein the legal significance of S.C. Res. 727, supra note 7, will be discussed.
\item[10.]
See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 325,
B. Situating A Memorial for Bosnia in the Context of the Ongoing Case in the International Court of Justice Brought by Bosnia Against Serbia Under the Genocide Convention

1. The Case Brought by Bosnia Against Serbia and the Alleged Facts with Respect to Serbia’s Responsibility for Conduct in Breach of the Genocide Convention

It is necessary to situate this Memorial in relation to the ongoing contentious case before the International Court of Justice (ICJ or Court) brought by Bosnia against Serbia, Application of the Convention on the Prevention and Punishment of Genocide (Bosnia v. Serbia). This case was initiated on the basis of the contentious jurisdiction of the Court by virtue of Article IX’s compromissory clause in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Bosnia has sued Serbia both for acts of Serbian forces in Bosnia and for Serbian support of genocide carried out by Bosnian Serb forces, support which Bosnia argues to be sufficient to engage Serbia’s state responsibility under the Genocide Convention. Given the urgency
of the situation, Bosnia sought an indication of provisional measures from the ICJ twice in 1993. At the first Provisional Measures stage in April, the Court ruled in Bosnia’s favor, ordering that Serbia cease and desist from all genocidal actions. Bosnia filed its second request in late summer of 1993, claiming that Serbia was not complying with the first order; again, the Court ruled in Bosnia’s favor.

2. The Attempt to Raise the Arms Embargo Issue in the Current Case

While Bosnia’s central claim at each stage of the case was that Serbia was legally responsible for acts of genocide, Bosnia also sought to persuade the Court to consider the legal status and effects of the arms embargo in the context of Serbian responsibility. Bosnia, notably at the Bosnia v. Serbia II stage, recognized that the case was not ideally suited as a springboard to raising the issue of the arms embargo. The respondent state, Serbia, arguably was not engaging in positive acts to maintain the embargo; rather, Serbia was breaching the embargo by providing arms to Bosnian Serbs. Serbia therefore was in violation of the Genocide Convention, and Serbia would not (and did not) raise obliga-

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Genocide Convention, supra note 11, art. II.

Art. III of the Genocide Convention then lists the modes of committing genocide for which individuals can be punished under international law:

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Id. art. III.

While the primary focus of the Genocide Convention is the facilitation of the prosecution of individuals, it is clear that states can incur state responsibility not only for failure to meet their obligations with respect to the punishment of individuals, see id. arts. IV-VII, but also for states’ conduct causally connected to the perpetration of genocide, see id. art. IX, supra, and art. I (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”).

tions flowing from Resolution 713 as a defense against Bosnia's claim. Thus, the legal force of obligations stemming from Resolution 713 was not a necessary issue in deciding whether or not Serbia had breached the Genocide Convention in the manner alleged by Bosnia. Despite the awkward fit between the substantive claims being made against Serbia and the logical necessity (or lack thereof) of addressing the arms embargo, Bosnia attempted nonetheless to convince the Court to use the occasion of the provisional measures request to "clarify the legal situation for the entire international community." Specifically, Bosnia wished to know whether it had rights of access to the means (including arms) to prevent genocide and whether these rights prevailed over Security Council obligations to uphold an arms embargo. Bosnia was clearly not seeking a binding order on nonparties, whether states or the Security Council itself, but rather was seeking something resembling an expression of judicial opinion on the matter. Bosnia hoped in part to justify the Court's stepping out of the pure bilateral jurisdictional context of the case (Bosnia versus Serbia) by pointing to the existence of latitude for judicial courage within Article VIII of the Genocide Convention.

However, in both Bosnia v. Serbia I and Bosnia v. Serbia II, the Court declined to adhere to this line of argument based on its interpretation of the interaction between the wording of Article 41(1) of the Statute of the International Court of Justice (ICJ Statute) and the jurisdictional nexus (or lis) of the case. Article 41(1) states that "[t]he Court shall have the power to indicate, if it considers that circumstances so

14. The reader may recognize the structure of the case Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Lib. v. U.S.), 1992 I.C.J. 114 (Apr. 14) [hereinafter Lockerbie]. State X sues State Y for breach of a treaty obligation, and Y raises as a defense obligations to obey a Security Council resolution, which in effect "trump" the obligation to abide by the treaty to the extent the resolution and treaty conflict. The Lockerbie structure and the potential for replicating it in the context of a contentious case under the Genocide Convention will be discussed infra Introduction, part C.

15. See Bosnia v. Serbia II, 1993 I.C.J. at 344-45, for the Court's discussion of the way Counsel for Bosnia, Prof. Francis Boyle, framed the issue for the Court.

16. Id.

17. Of course, the Security Council is never directly bound by an ICJ judgment, as will be discussed infra part III.A.2.

18. Genocide Convention, supra note 11, art. VIII. Art. VIII states that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." Id. Art. VIII possibly should not be interpreted as a jurisdictional clause in the same sense as art. IX, supra note 11, although it clearly does serve to acknowledge an erga omnes "jurisdiction" (in the sense of standing) in all State Parties to raise issues of genocide in international fora. See infra part I.A.2.b.
require, any provisional measures which ought to be taken to preserve
the respective rights of either party." The Court clearly saw its power
to issue provisional measures as limited to preservation of rights which
could be the subject of binding legal judgment at the eventual Merits
stage of a case. Since the Court’s eventual judgment at the Merits stage
is only binding on the states before it, it was not free to issue provision-
al measures with respect to the “rights of either party” if the Court did
not have jurisdiction over a state with the correlative obligation to
respect those same rights. Greater willingness to relate the arms embarg
o to Serbia’s alleged responsibility for genocide in Bosnia under the
Genocide Convention is evident in Judge Lauterpacht’s opinion in
Bosnia v. Serbia II. However, Judge Lauterpacht also voiced concern
that the particular bilateral relationship of the case made it difficult for
the Court directly to assess the legal status of the arms embargo im-
posed by Resolution 713 in terms of legal effects on obligations directly
at stake in the litigation. Thus, while there was still the possibility that
the Court might view the matter differently at the Merits stage, it was
tolerably clear that the ideal respondent was not before the Court if the
arms embargo was to come up for any judicial consideration by the
Court as a whole.

3. ICJ Cases Contemplated by Bosnia in Late 1993

Bosnia, while not abandoning the arms embargo argument at the
Merits stage of the case, hoped to present the issue of the arms embargo
to the ICJ in a jurisdictional setting more conducive to addressing the
question. Two avenues, apart from the ongoing case, were contemplated.

19. Statute of the International Court of Justice art. 41(1) [hereinafter ICJ
Statute].

20. See Bosnia v. Serbia II, 1993 I.C.J. at 344-45. As early as the first request for
provisional measures, the Court declined to read art. VIII of the Genocide Convention as
having any jurisdiction-conferring character and also seemed unwilling to use art. VIII
interpretively, stating that “the Court considers [that] Article VIII... appears not to confer on
it any functions or competence additional to those provided in its Statute” and that “accord-
ingly the Court... is not required to do more than consider what provisional measures may

21. Judge Lauterpacht’s suggestion is relatively soft:

I would be prepared to say that the Applicant may have an indication of a provi-
sional measure in the following terms: that as between the Applicant and the
Respondent the continuing validity of the embargo in its bearing on the Applicant
has become a matter of doubt requiring further consideration by the Security
Council.


22. Id. at 441-42.
a. Contentious Case Against
the United Kingdom

On November 15, 1993, Bosnia’s Ambassador to the U.N. issued a public statement which was circulated to all Members:

[Bosnia] hereby states our solemn intention to institute legal proceedings against the United Kingdom before the International Court of Justice for violating the terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide . . . . We have already issued formal instructions to that effect to our Attorneys-of-Record before the World Court. They are currently drafting an Application and a Request for Provisional Measures against the United Kingdom. We have instructed our lawyers to file these papers with the World Court as soon as physically possible.\[23\]

The Statement of Intention indicates that the United Kingdom, as a party without reservation to the Genocide Convention, could be sued under Article IX. The two most clearly articulated grounds invoked by Bosnia under the Genocide Convention were an alleged breach by the United Kingdom of its “duty to prevent” genocide, found in Article I of the treaty, and its duty under Article III(e) not to engage in “complicity with genocide.”\[24\]

On December 23, 1993, before proceedings could be initiated before the ICJ, a joint statement was released at the U.N. by the Ambassador of Bosnia and the Ambassador of the United Kingdom. The joint statement referred to an “agreement” between Bosnia and the United Kingdom that Bosnia would not pursue its stated intention to implead the United Kingdom.\[25\] It is not unlikely that the Government of Bosnia had been faced with a Hobson’s choice of proceeding with the case or compromising Bosnia’s already precarious political position at the peace negotiations, the success of which depended in significant measure on the role played by the United Kingdom.

\[23\] Mission of Bosnia, Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom Before the International Court of Justice 1, November 15, 1993 (on file with the Michigan Journal of International Law) [hereinafter Statement of Intention]. The Statement of Intention also mentions art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination as another basis for jurisdiction. Id. at 2–3.

\[24\] Id. at 1–2.

b. Advisory Opinion Sought Through a Request to the ICJ from the General Assembly

Diplomatic and media sources report that while a contentious case was being considered against the United Kingdom, Bosnia succeeded in having one of the three drafts of General Assembly resolutions, which were being negotiated in December 1993, include a request for an advisory opinion on the issue of the legal status and effects of the arms embargo resolution(s). At a very late stage, Bosnia asked that the clause requesting the advisory opinion be dropped; observers noted that the clause had more than enough support to be adopted.

c. The Ongoing Case and the Arms Embargo Argument

In late 1993, the authors of this Memorial were asked to explore the arguments relating to the arms embargo under the Genocide Convention. In early 1994, however, the Bosnian Government decided not to include any arguments pertaining to the arms embargo in its Memorial on the merits. Especially in light of the cool reception that the majority of the Court gave the arms embargo arguments at the two Provisional Measures stages, it seems that Bosnia has quite sensibly decided that the best course of action is to secure a Court judgment that Serbia has violated the Genocide Convention and not to cloud the Court’s inquiry with the controversial and jurisdictionally uncertain issue of the arms embargo.


27. See G.A. Res. 48/88, supra note 26; G.A. Res. 48/143, supra note 26; G.A. Res. 48/153, supra note 26. All three resolutions were adopted on December 20, 1993, which was virtually the same date as the decision by Bosnia to withdraw its intention to sue the United Kingdom — three days after the Bosnian Ambassador’s letter to the Security Council President and three days before the December 23 joint statement by Bosnia and the United Kingdom.

28. On April 15, 1994, Bosnia submitted its Memorial to the Court; Serbia has one year in which to submit its reply. Bosnia has, however, reserved its right to reinvoke various elements of its initial requests, which include those related to the status of the arms embargo, in response to the course of argument.
C. A Contentious Case Brought Under Article IX of the Genocide Convention Against a State Engaged in Maintaining the Arms Embargo Would Create, According to a Structure Similar to Lockerbie, the Possibility for the ICJ to Address the Legal Status of Resolution 713 and Its Effect on States’ Obligations

It is clear that an application against the United Kingdom or other similarly situated party to the Genocide Convention would have squarely raised the issue of the validity and legal effects of the embargo. The United Kingdom could be sued for breach of the Article I duty to prevent genocide and perhaps the Article III(e) obligation not to be complicit in genocide. The basis for the Article I claim was clearly articulated in the separate opinion of Judge Lauterpacht in Bosnia v. Serbia II:

The duty to “prevent” genocide is a duty that rests upon all parties and is a duty owed by each party to every other . . . . First, there is the duty of the Respondent [and thus of any state party] both to prevent genocide and to refrain from conduct that inhibits the ability of the Applicant itself to prevent genocide or to resist it . . . . Third, there is the question of access by the Applicant to the means to prevent the commission of acts of genocide. The Applicant obviously has here in mind . . . the embargo placed by Security Council resolution 713 (1991) . . . . [I]t is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens29 or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded . . . . On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina’s access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in

29. For a more elaborate discussion of the concept of jus cogens, see infra part I. For the moment, it is sufficient to note that jus cogens refers to a norm from which no derogation is permitted and, to that extent, is analogous to high constitutional norms in domestic legal systems.
some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.

If a suit were initiated based on a claimed violation of Article I (and possibly Article III(e)) of the Genocide Convention, the Applicant would not be seeking to establish that the Genocide Convention itself creates jurisdiction for some form of direct or binding review of the actions of the Security Council. However, the Article IX compromissory clause, if purposively and generously interpreted in accordance with the generally accepted principles of interpretation for human rights treaties, would seem to create considerable scope for a State Party unilaterally to seize the Court in a way that would permit the Court to render an opinion on how a Security Council resolution may or may not affect the obligations and rights of a State Party to the Genocide Convention.

Article IX’s reference to “responsibility of states” makes clear that questions of the responsibility of states actively enforcing (or maintain-

---

30. *Bosnia v. Serbia II*, 1993 I.C.J. at 436–41 (separate opinion of Judge Lauterpacht). It will be recalled that the Statement of Intention, *supra* note 23, specifically characterizes the U.K.’s role as a Security Council member in maintaining the arms embargo (including “actively opposing all of the efforts by other States to 'lift' the arms embargo”) as complicity in genocide and associates the art. I “duty to prevent” only with an affirmative obligation. The Statement of Intention refers for support to the reasoning of Judge Lauterpacht in *Bosnia v. Serbia II*. However, it should be noted that Judge Lauterpacht based his above-quoted argument on the premise that the art. I “duty to prevent” genocide (at least) embodies negative obligations; Judge Lauterpacht felt there was no strict need, for his purposes, to consider more positive duties to prevent genocide. The “complicity” argument as a basis for responsibility of an embargo-maintaining state like the United Kingdom will be discussed briefly *infra* note 119, as feeding into the interpretation of the art. I duty to prevent genocide.

The last sentence of Lauterpacht’s argument is also particularly worth noting. In virtually the same breath, it touches both on the Security Council resolution as a juridical act (the status of which, in terms of validity, is clearly implied) and on the conflict obligations of states that cannot both obey the resolution and meet their duty to prevent genocide under art. I of the Genocide Convention. This coming together of the legal status of the resolution as a juridical act and its legal consequences for states’ obligations (and thus for state responsibility) is discussed *infra* part IV.B. There, the argument is made that the most appropriate way to conceptualize Resolution 713’s legal status is in terms of a doctrine analogous to what in some constitutional law systems is called “paramountcy doctrine.” Under this doctrine, when one *prima facie* valid statute produces an obligation that conflicts with an obligation flowing from another *prima facie* valid statute, the result is inoperativeness, not voidness.

31. The Security Council as a nonstate actor cannot be a party before the Court and, as such, cannot be subject to the Court’s binding judgment. ICJ *Statute* arts. 34(1), 59. In addition, there are very few treaties which have compromissory clauses which provide for advisory opinions with binding effect. *See Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, in Report of the International Law Commission on the Work of its Thirty-Second Session, [1980] 2(2) Y.B. Int’l Comm’n 64, 87 n.251, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (listing conventions that have made provisions for advisory opinions with binding effect) [hereinafter 1980 Draft Vienna Convention]; *see also infra* part III.B.3 (discussing the near-binding effect of ICJ judgments on international organizations envisaged by art. 66 of the 1986 Vienna Convention).
ing through other forms of support) the arms embargo would be raised by asking the Court to determine whether this kind of enforcement constitutes involvement in genocide sufficient to amount to a breach of Article I or Article III(e) of the Genocide Convention. If this interpretation of the substantive scope of one or both of these provisions is valid, the question would then become whether the state in question could raise as a defense (or, phrased in the language of the International Law Commission (ILC), as a “circumstance precluding wrongfulness”) the Security Council resolution in tandem with Articles 25 and 103 of the U.N. Charter. If the Court were to find initially that assisting in maintaining an unbalanced situation of arms in a context of genocide infringes Article I, a necessary element of the Court’s reasoning would then have to include the legal effects of the resolution and of the obligations it places on states who are also parties to the Genocide Convention. The Court would not be reviewing the Security Council in any direct and binding sense, but it would be determining in a binding fashion the scope of states’ rights and duties under the Genocide Convention.

The above kind of contentious case replicates the basic structure of Lockerbie, in which Libya sued both the United States and the United Kingdom for breach of obligations owed to Libya under the 1971 Montreal Convention. The two respondents raised as defenses two Security Council resolutions, the earlier one being a nonbinding recommendation and the later one being a binding decision taken under Chapter VII of the U.N. Charter. At the Provisional Measures stage, the ICJ ruled that the later resolution prevented the Court from indicating provisional measures because of the trumping effect of Article 103. However, it is

32. Art. 25 provides that Security Council resolutions containing decisions of the Council create binding obligations for all parties to the U.N. Charter. U.N. CHARTER art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”). Art. 103 indicates that an obligation binding under art. 25 is to be treated as superior to any non-Charter treaty obligation a party might have that conflicts with its obligation to obey a Security Council resolution under art. 25. Id. art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter should prevail”).


clear that at this stage of the litigation, the Court felt that it only had to accept that the resolution was *prima facie* valid in order to establish its binding effect under Article 25 and its resulting effect under Article 103. For reasons to be discussed in Part III, *Lockerbie* leaves open a role for the ICJ, at least at the Merits stage of a case, in assessing whether a presumptively valid Security Council resolution is actually valid in terms of creating obligations for states with respect to which Article 103 can then be called in aid. It will be argued that the implication of *jus cogens* norms (related simultaneously to prevention of genocide and to the right of self-defense) in the context of a possible contentious case under the Genocide Convention dealing with the arms embargo creates the possibility, indeed responsibility, of the ICJ to find that Resolution 713 is not able, if certain facts obtain, to create obligations which enjoy the protection of Article 103.

D. The Premises upon Which A Memorial for Bosnia Is Structured

1. The Presumed Jurisdictional Context

It is crucial that the reader be clear on the context within which this Memorial is framed. The arguments set out in this Memorial presuppose that the respondent is not Serbia but rather an embargo-maintaining state that is also party to the Genocide Convention. As the foregoing narrative suggested, the respondent could be the United Kingdom, as a party without reservation to that treaty, but the Memorial does not depend on the specific identity of the respondent. Alternatively, it is conceivable that the issues could be raised in the structure of this Memorial by way of an appropriately phrased advisory opinion. In either possible jurisdictional context (contentious case or advisory opinion), the normative arguments found in Parts I to III and the institutional arguments found in Part IV (relating not to formal ICJ jurisdiction but to scope of review) are equally applicable, at least presumptively. Moreover, the normative arguments involving *jus cogens*, genocide, and interpretation of the U.N. Charter found in Parts I, II, and III may be viewed as self-

---

34. "[P]resumptively" because this Memorial does not purport to be primarily about jurisdiction, and thus to that extent it is also not primarily about the differences that different jurisdictional contexts might make for the Court's scope of review once jurisdiction is established. Thus, arguments exist for bolder pronouncements by the Court on questions that arise from a request for an advisory opinion than on the same questions arising from a contentious case. For some comments of a schematic nature about the potential differences between the Provisional Measures stage and the Merits stage of a contentious case brought under art. IX of the Genocide Convention, see infra note 336.
standing in that they do not depend for their validity upon the ICJ's institutional competence to address them.35

Thus, the Memorial is not grounded in the current case before the ICJ. It is also appropriate to clarify that it is not being argued that the ICJ has an implicit inherent jurisdiction, derivable from the U.N. Charter and ICJ Statute in combination, to review the actions of the Security Council, although such an argument is not new and may indeed be considered seriously some years hence.

2. The Presumed Facts

It is not the purpose, or the place, of this Memorial to establish the facts with respect to either Serbia's role in the underlying genocide or the causal connection, past or present, between the arms embargo and genocide. Rather, the Memorial is premised on the factual constellation essentially as pleaded by Bosnia at the two Provisional Measures stages.36

In addition, the presumed facts for purposes of the arguments in this Memorial are limited to a specific chronological period, namely the period from the formation of Bosnia as a state in the first half of 1992 to the time of the two missed opportunities to place the arms embargo before the ICJ in a suitable jurisdictional context, that is late December 1993.

By way of summary, during this period, the Memorial takes as given that genocide was taking place on Bosnian territory against the predominantly Muslim population.37 It was also widely, though not universally, accepted that the imbalance of arms greatly contributed to this genocide in the way described by Judge Lauterpacht, quoted in Part C of the Introduction. For example, in Resolution 47/121 of December 18, 1992, the General Assembly cited with approval the findings of

35. For example, the normative issues could be debated within the Security Council, within the General Assembly, between states, or in international society at large.
36. See James Gow, One Year of War in Bosnia and Herzegovina, RFE/RL RES. REP., June 4, 1993, 1, 1–13. The reader should also note two collections to be published in the near future, the purpose of which is to reproduce all the primary documentation relevant to the fragmentation of Yugoslavia, especially as it relates to Bosnia. See Francis Boyle, The Bosnian People Charge Genocide (forthcoming 1995); Marc Weller, The Yugoslav Crisis in International Law: Part I, General Issues (forthcoming 1995). Francis Boyle was counsel before the ICJ at the two Provisional Measures stages. The case at the Merits stage has since been taken over by a new legal team of which Marc Weller is a member.
37. The facts are by now well known to the general public. There are approximately 200,000 dead, many more wounded, 2.6 million refugees, 20,000 women raped, scores of towns and villages in ruins, and major cities under constant siege and sniper fire. The victims are predominantly civilians, with rudimentary weapons if any.
U.N. Commission on Human Rights Special Rapporteur Tadeusz Mazowiecki, stating that "another factor which had contributed to the intensity of 'ethnic cleansing' in areas under Serbian control was the marked imbalance between the weaponry in the hands of the Serbian and the Muslim population of Bosnia and Herzegovina." Resolution 47/121 also equated so-called "ethnic cleansing" to a campaign of genocide for which the Yugoslav Army and the political leadership of the Republic of Serbia bore primary responsibility. In this same resolution, the General Assembly, by a vote of 102 in favor, none against, and 57 abstentions, "urged the Security Council . . . [t]o exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under Security Council resolution 713 (1991)."

One year later, almost to the day, the General Assembly repeated its request for an arms embargo exemption in Resolution 48/88.

Despite the fact that the Security Council has, in the summer of 1993, itself voted against the lifting of the embargo, there are signs that its Members are aware of the causal relationship between the embargo and genocide. In a letter from the President of the Security Council to the Secretary-General, the Members implicitly acknowledged the disastrous effects of the imbalance of arms by requesting that international observers be deployed on the borders of Bosnia, "with priority being given to the border between the Republic of Bosnia and the Federal Republic of Yugoslavia" in order to facilitate the implementation of the "relevant" Security Council resolutions. Given that the border between Bosnia and Serbia has been the site of significant flows


39. See id. G.A. Res 47/121 was re-affirmed in G.A. Res. 48/143, supra note 26, in which the General Assembly also drew specific attention to rape as genocide. Rape was referred to as a "systemic practice" and "an instrument of 'ethnic cleansing'" against the women and children in the areas of armed conflict in the former Yugoslavia. Id. at 3. Rape was termed "a deliberate weapon of war in fulfilling the policy of 'ethnic cleansing' carried out by Serbian forces in Bosnia and Herzegovina." Id. at 2.

40. G.A. Res. 47/121, supra note 38, at 3-4.

41. G.A. Res. 48/88, supra note 26, states that the Assembly "urges the Security Council to give all due consideration, on an urgent basis, to exempt the Republic of Bosnia and Herzegovina from the arms embargo." Id. at 5. The resolution further urges Member States, "as well as other members of the international community, from all regions, to extend their cooperation to the Republic of Bosnia and Herzegovina in exercise of its inherent right of individual and collective self-defence in accordance with Article 51 of Chapter VII of the Charter." Id.


of troops and arms to the Bosnian Serbs, one can conclude that the Council was seeking to enforce an embargo that had been effective against only one party — the victim of genocidal aggression. Not only the sanctions applied by the Security Council against Serbia but also the belated agreement of Serbian President Milosevic in early summer 1994 to seal the border with Bosnia must be taken as a recognition by the U.N. and by Serbia that material support for the Bosnian Serb military had been reaching the Bosnian Serbs from Serbia despite the arms embargo.

To the extent that an arms imbalance continues to exist and the effects of the imbalance are to perpetuate genocide, the normative arguments in this Memorial retain their force. Therefore, if the current situation is judged to be sufficiently similar to the pre-December 1993 facts, then this Memorial’s arguments would be as applicable now as they were when Bosnia first raised the issue of the validity of the embargo before the ICJ in April 1993. The authors, however, do not purport to make any statement about the existence of genocide as a result of the embargo today. The relative balance of military capacity in Bosnia as an ongoing matter and its relationship to genocide are factual and legal issues for the Security Council, the ICJ, and Member States of the U.N. to consider as the occasion may permit. This Memorial is thus limited temporally to the period before the Government of Bosnia considered including arms embargo arguments in its official written submissions to the Court and to the period shortly thereafter, when it was considering alternative cases that could be placed before the ICJ which might raise the issue more directly. The normative and institutional features of the Memorial assume specific factual and jurisdictional contexts, described above, that are beyond the scope of the current litigation between Bosnia and Serbia at the ICJ.

E. The Plan and Format of the Memorial

1. Plan of Memorial

The foregoing introduction has set out the factual background to the Memorial and the premises upon which it rests. Part I of the Memorial

---

44. Interestingly, another Security Council member, the United States, even considered the embargo in its domestic affairs. In June 1994, the majority of the House of Representatives voted to lift the embargo against Bosnia unilaterally, while the minority approved this action only in consultation with other Security Council members. In late November 1994, the United States announced that it would not enforce the embargo against the Bosnian Government forces.
will seek to demonstrate that the maintenance of an arms embargo on Bosnia, whether or not justified as being in conformity with obligations that Resolution 713 and subsequent resolutions purport to create for Member States of the U.N., conflicts with *jus cogens* obligations of states related to genocide, notably the duty to prevent genocide. Part II will then seek to establish that the maintenance of the arms embargo by and under the authority of the Security Council is *ultra vires* the Security Council’s powers under the U.N. Charter because this maintenance overly fetters Bosnia’s Charter-protected right to self-defense. Parts I and II, therefore, are primarily concerned with the normative state of affairs, putting aside, for the most part, questions of institutional authority. Thus, it is Part III that will canvass the institutional powers and responsibilities of the ICJ to pass judgment on the status of the implicated Security Council resolutions and their effects on the obligations of states. The institutional question having been addressed, Part IV then will address the legal effects, within the jurisdictional realm of the ICJ, of the unlawfulness established in Parts I and II. Brief submissions will conclude the Memorial.

2. Symbolic Format of the Memorial

Finally, a word should be said about the title and format of the Memorial. The arguments are presented in the format of a memorial for symbolic reasons. Research and formulation of the arguments were initially undertaken with a view to integrating them in the official Bosnian Memorial in the current *Bosnia v. Serbia* case. When the Bosnian Government decided that it was counterproductive to pursue the arms embargo issue in its current case before the ICJ, the authors continued to utilize the argumentative (and explicitly advocatory) format as they wished to present the arguments concerning this most critical issue in the form in which they could have been (and still could be) presented in a judicial context to the international community.

With the foregoing setting the context for the reader, the authors’ arguments thus take the form of *A Memorial for Bosnia* — a memorial to Bosnians.
I. STATE CONDUCT IN ENFORCEMENT OF SECURITY COUNCIL RESOLUTIONS' OBLIGATIONS TO MAINTAIN AN ARMS EMBARGO PLACES STATE PARTIES TO THE GENOCIDE CONVENTION IN CONFLICT WITH THEIR JUS COGENS OBLIGATION TO PREVENT GENOCIDE

A. Genocide, Jus Cogens, and the Genocide Convention

1. The Principle of Jus Cogens Is Established in International Law as the Highest Form of Law

a. International Law Recognizes the Existence of Jus Cogens

According to Article 53 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention), jus cogens are "peremptory norm[s] of general international law . . . accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." Leading publicists have more specifically defined jus cogens as "an inherent part of every legal system . . . [which] include those rules whose nonobservance would affect the very essence of the system," as rules which "involve . . . considerations of morals and of international good order," and as "overriding principles of morality or of paramount international interest."

The concept of jus cogens has been virtually universally accepted by states, courts, and publicists alike. The Members of the Sixth Committee of the U.N. General Assembly that discussed the inclusion of jus cogens in the 1969 Vienna Convention welcomed the introduction of the jus

---


46. Id. art. 53; see also id. arts. 64, 66, and 71 (dealing with the legal implications of jus cogens norms).


cogens articles into the ILC's draft without exception.\textsuperscript{50} Article 53 was considered "a very constructive contribution to the progressive development of international law."\textsuperscript{51} After the formulation at the ILC's 1963 session of what is now Article 53, fifty-one Member States commented on the draft in writing or in statements to the General Assembly. Of these, forty-three went on record as favoring the concept of jus cogens as part of the draft, the majority of them without reservations.\textsuperscript{52} Two years later at the Lagonissi International Law Conference on jus cogens, more than thirty participants, representing all parts of the world, were in agreement on the concept, at times even on the content, of jus cogens.\textsuperscript{53} Although some ambiguity remains as to which rules of international law qualify as jus cogens,\textsuperscript{54} "the concept has penetrated the consciousness of public international law discourse."\textsuperscript{55} Moreover, "the concept of jus cogens . . . finds reception and recognition in all the principal legal systems of the world."\textsuperscript{56}

Over the past fifty years, various courts have also acknowledged the existence of peremptory norms of international law. As early as the Nuremberg Trials, discussion of absolute rules of morality or public order was prevalent. In the Krupp case, for instance, the Tribunal determined that an agreement between Germany and the Vichy Governments for the use of French prisoners of war in the armaments industry was void under the law of nations as being manifestly contra bonos mores.\textsuperscript{57} Although never directly dealt with by the ICJ,\textsuperscript{58} dicta in the opinions of

\begin{itemize}
\item \textsuperscript{50} "The most striking feature of the record of the Commission's debates is the unanimity with which the members of the Commission accepted the idea of jus cogens." Erik Suy, \textit{The Concept of Jus Cogens in Public International Law, in CONCEPT OF JUS COGENS, supra note 47, at 17, 54.}
\item \textsuperscript{51} \textit{Id.} (quoting Jacovides of Cyprus).
\item \textsuperscript{52} \textit{See} Schwelb, \textit{supra} note 49, at 960.
\item \textsuperscript{53} \textit{See} Suy, \textit{supra} note 50, at 111. Professor Lissitzyn went so far as to remark that all the participants agreed on the \textit{jus cogens} character of arts. 1 and 2 of the U.N. Charter, \textit{see id.}, a position which seems, with the passage of time, to overstate the scope of \textit{jus cogens} norms.
\item \textsuperscript{54} \textit{See} Georg Schwarzenberger, \textit{International Jus Cogens?}, 43 TEX. L. REV. 455 (1964).
\item \textsuperscript{55} Christenson, \textit{supra} note 49, at 586.
\item \textsuperscript{57} \textit{United States v. Krupp, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS} 1, 1395-96 (1950).
\item \textsuperscript{58} The ICJ has shown caution in defining certain norms as peremptory. In its judgment in \textit{North Sea Continental Shelf}, however, the Court gives implicit recognition to the existence of the concept itself by referring to it, even while it chooses to refrain from pronouncing on it. \textit{North Sea Continental Shelf} (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20); \textit{see also} Diplomatic and Consular Staff (U.S. v. Iran), 1980 I.C.J. 1, 42 (May 24) (referring to the "imperative character" of Iran's human rights obligations that cannot be altered by the
the Court have shaped what some consider a particular ideological vision of *jus cogens*.\(^9\) In *Barcelona Traction*,\(^6\) for example, Judge Ammoun associates self-determination with imperative norms of *jus cogens* he believes were sanctioned by representatives of most states at the Vienna Conference on the Law of Treaties.\(^6\) Similarly, in *Reservations to the Convention on Genocide*, the Court stated that conventions like the one before it have both civilizing and purely humanitarian "high purposes."\(^6\) In this case, despite the absence of an explicit reference to *jus cogens*, the Court leaves no doubt as to the limitation on the contractual liberty of states when "high purposes" are at stake.\(^6\) Such a position distinctly parallels the provisions of Article 53 of the 1969 Vienna Convention, which also delimits the ability of states to contract by rendering void any treaty that conflicts with a peremptory norm.

b. *Jus Cogens* Norms Entail Obligations of a Special Nature

In keeping with their universal and general import, rules which derive from principles of *jus cogens* bind the international community as a whole; that is, even countries not signatories to the 1969 Vienna Convention are nonetheless bound by the content of its *jus cogens* provisions, most notably Articles 53, 64, and 71.\(^6\) In light of the fact that nonobservance of the body of *jus cogens* rules may affect the very essence of the legal system to which they belong, universal applicability

---


60. *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) [hereinafter *Barcelona Traction*].

61. See id. at 304 (separate opinion of Judge Ammoun) (implying that the U.N. Charter contains principles of *jus cogens* in its preamble).


63. Suy, supra note 50, at 60.

64. Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings Int'l & Comp. L. Rev. 411, 436 (1989). It is not clear whether nonparties to the 1969 Vienna Convention would be bound to a customary law equivalent of art. 66 because that provision is of a procedural nature and thus, as part of the supervisory machinery of the treaty, may be less apt to reflect or generate custom. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27) [hereinafter *Nicaragua*] (commenting that the reporting procedure in art. 51 of the U.N. Charter is specific to the treaty regime and has no customary analogue). That being said, the normative signal sent by art. 66 in permitting unilateral submission of *jus cogens* disputes to the ICJ would appear to be of significant corroborative relevance in assessing the special role that the ICJ should play in cases involving genocide when those cases get to the Court by a jurisdictional route other than art. 66 (for example, by way of the Genocide Convention).
is inherently necessary. Professor (now Judge) Ago further stipulates that peremptory norms are those "rules which, while embodied in a treaty, [are] still valid as customary rules for States not bound by the treaty, and hence for States in general."65

Existing as they do "in the higher interest of the whole international community" as opposed to "satisfying the needs of individual states,"66 jus cogens norms dictate that states and other international actors depart from the absolute sovereign-state paradigm. Just as pure voluntarism is curbed by the limits imposed by Articles 53 and 64 of the 1969 Vienna Convention, so too are states obliged to act without self-interest and with regard to the welfare of the international community when jus cogens obligations are at issue. Hence, when principles of jus cogens have been or are in the process of being violated, a universal international reaction is justified.

Jus cogens rules, "by reason of the importance of their subject-matter for the international community as a whole, are — unlike the others — obligations in whose fulfillment all States have a legal interest."67 Indeed, it has been generally posited that jus cogens norms in the area of human rights must by their very nature be owed erga omnes,68 due to their fundamental importance to the international community as a whole.69 In the spirit of this movement towards a global consciousness where primary legal and moral values are simultaneously at stake, it follows that the observance of jus cogens principles can be demanded and enforced by all members of the international community.70

65. Suy, supra note 50, at 53.
68. MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 163 (1992); 1976 Draft Articles on State Responsibility, supra note 67, at 95 (art. 19(3)(c)).
69. While jus cogens norms comprise a narrower category than erga omnes norms, it is clear that all jus cogens norms are also erga omnes norms even if not all erga omnes norms are jus cogens norms. See MERON, supra note 58, at 194.
70. The quality of such norms of jus cogens may be attributed to only those legal provisions which are firmly rooted in the legal conviction of the community of states, which are indispensable for the existence of international law as an international legal order and the observance of which can be demanded by all members of the community of states.

Schwelb, supra note 49, at 951 (quoting an unidentified German Federal Constitutional Court decision in 1965) (emphasis added).
Ultimately, *jus cogens* principles represent the most powerful, compelling, and fundamental of expectations in a humane internal order. As such, they must necessarily involve duties among states to respect and protect these principles. Rules which truly express foundational norms are essential for the evolution and progress of world public order and must therefore be guarded by members of this order. In the end, giving effect to *jus cogens* norms would be "a step further in strengthening international law, by underlining the great importance of these principles and by recognizing that derogation from them constitute[s] a great danger to the international community as a whole and to the effectiveness of international law in international relations."\(^7\)

2. The Genocide Convention Codifies the *Jus Cogens* Prohibition Against Genocide, as well as the Corollary Obligations Which Flow from This Prohibition

   a. The Prohibition Against Genocide Is the Quintessential Example of a *Jus Cogens* Norm

   There is overwhelming evidence to support the fact that genocide is an act in violation of *jus cogens* principles. Both the preparatory work behind the Genocide Convention and subsequent judicial and scholarly opinion substantiate genocide's position among the most universally condemned acts in international law. Its prohibition represents the quintessential *jus cogens* norm, in conformity with the latter's function as guardian of the most fundamental moral and legally essential principles in the international system.

   Article 1 of the Genocide Convention confirms that genocide is a crime under international law (that is to say, a crime for individuals) and therefore clearly expresses the consensus of the U.N. General Assembly concerning the codificatory nature of the document. Genocide has always been prohibited by international law, according to the Preamble.\(^7\) This interpretation is authoritatively supported by the U.S. Restate-
ment, which declares that the Genocide Convention "is generally accepted for purposes of customary law."\textsuperscript{73}

That the Convention embodies a universally compelling principle is further evidenced by its unanimous adoption and wide ratification. Work on the Draft Convention was completed in only two years and was adopted by the General Assembly without a dissenting vote as the U.N.'s first major human rights instrument.\textsuperscript{74} Although there is some differences of opinion, all were in favor of adopting the Convention.\textsuperscript{75} The collective resolve to formulate and adopt the Convention is representative of the unequivocal abhorrence of genocide common to all cultures and legal systems.

The ICJ itself made this universal condemnation and prohibition of genocide concrete in its advisory opinion in \textit{Reservations to the Genocide Convention}:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" . . . [T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention).\textsuperscript{76}

This language invites the interpretation that the provisions of the Genocide Convention move beyond customary law and acquire the character of peremptory norms in light of the Convention's dual "universal character."

Following the adoption of the Genocide Convention, eminent jurists considered the \textit{jus cogens} character of the prohibition contained within the treaty. Members of the ILC, in their discussion on the Vienna Convention, stated that there are "obvious and best settled rules of \textit{jus

\textsuperscript{73} \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 702, cmt. d (1986); \textit{see also id.} n.3.

\textsuperscript{74} \textit{Nehemiah Robinson, The Genocide Convention} 27 (1960).

\textsuperscript{75} Id. It is also interesting to note that, as recently as 1988, there have been some voices of dissent coming from the U.S. Senate, where ratification of the Genocide Convention was hotly debated for several years. Even those in the minority who voted against ratification in 1988 acknowledge that the prohibition of genocide "was a moral imperative and symbolically important." \textit{Lawrence T. Leblanc, The United States and the Genocide Convention} 8 (1991).

\textsuperscript{76} \textit{Reservations to the Genocide Convention}, 1951 I.C.J. at 23.
cogens," among them the prohibition against genocide. In 1976, the ILC put forward its view that genocide is not only a crime under international law for individuals (per Article I of the Genocide Convention) but also is an "international crime," that is, a crime for a state. The ILC adopted on first reading Article 19(3)(c) of the Draft Articles on State Responsibility, reiterating its view that "international law now in force includes obligations of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid." Similarly, the U.S. Restatement lists the prohibition against genocide as an example of jus cogens. Finally, there is substantial consensus among individual scholars that the prohibition against genocide constitutes one of the few uncontested peremptory norms.

b. The Prevention and Punishment of Genocide Are Central to the Genocide Convention, as Evidenced by the Travaux Préparatoires and Opinio Juris

It is perhaps axiomatic at this point to state that the rules of jus cogens are those rules which derive from principles that the legal conscience of humankind deems essential to coexistence in the international community. The prohibition against genocide, as one of the most established of peremptory norms, represents the wish of the collective legal and moral conscience to condemn and suppress an act which is the antithesis of coexistence. As its aim is to exterminate whole populations, including whole peoples, the act of genocide not only violates the sanctity of life, but also undermines the international system itself by systematically destroying its constituent parts. It was in recognition of this reality that the Member States of the newly formed U.N. sought, as the organization's first major achievement, to draft a convention that would consolidate international action against this "odious scourge."


78. 1976 Draft Articles on State Responsibility, supra note 67, at 95 (art. 19(3)(c)) (emphasis omitted).

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, cmt. d and n.3.

That the Genocide Convention’s objective was to initiate action against genocide rather than simply to codify symbolic international condemnation of it is demonstrated in the Preamble and in Article I:

*Being convinced* that, in order to liberate mankind from such an odious scourge, international co-operation is required, [the State Parties]

*Hereby agree as hereinafter provided:*

**Article I**

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.\(^8^1\)

In the words of Raphael Lemkin, the lawyer who coined the term “genocide” and who was the prime mover behind the development of the Genocide Convention, by declaring genocide a crime under international law and by ensconcing it in the sphere of international concern, “the right of intervention on behalf of minorities slated for destruction has been established . . . . The usefulness of a future international treaty on genocide lies in facilitating the prevention and punishment of the crime and apprehension of criminals.”\(^8^2\) While it is clear that suppression of genocide is an integral component of the Genocide Convention, the content of that obligation remains to be elucidated. For this purpose, it is necessary to examine the *travaux* as well as scholarly opinion and judicial statements on the matter.

The ICJ and the U.S. war crimes tribunal confirmed the status of Resolution 96(I) of the General Assembly, the Convention’s point of conception, as the authoritative pronouncement on the status of genocide as a component of customary international law.\(^8^3\) The resolution, adopted unanimously, stressed that “international co-operation be organized between States with a view to facilitating the speedy prevention and

---


83. See Reservations to the Genocide Convention, 1951 I.C.J. at 23; United States v. Alstoetler, in *Trials of War Criminals Before the Nuremberg Military Tribunals* 954, 979 (1951) (stating that the General Assembly is “the most authoritative organ in existence for the interpretation of world opinion. The General Assembly’s recognition of genocide as an international crime [in Resolution 96(I)] is persuasive evidence of the fact”).
punishment of the crime of genocide . . . " The use of U.N. mechanisms to this end was introduced later in Article XII of the Secretary-General’s Draft Convention: “The State Parties are to do everything in their power to give full effect to the intervention of the United Nations.” The commentary to the Secretariat’s draft explains that Article XII was intended to facilitate preventive action by the U.N. “before the harm is done or before it has assumed wide proportions.” However, it is also clear from the draft, according to Professor Matthew Lippman, that Article XII was “intended to supplement, rather than to preempt, the application of other mechanisms of prevention, suppression and redress. The draft text specified that Article XII was applicable ‘irrespective of any provision in the foregoing articles.’” It is necessary, then, to take note of the “other mechanisms” that exist in the Convention.

During the General Assembly’s consideration of the Genocide Convention, Gerald Fitzmaurice of the United Kingdom stressed that the Convention involved not only rights for peoples but also obligations on governments — not only toward their own peoples, but also toward other states. It is obvious that the implementation and enforcement of domestic legislation criminalizing acts of genocide (Article V) fulfills the internal obligation of a government to its people. It is equally obvious, therefore that individual state governments have the affirmative obligation to prevent genocide within their own borders. Fitzmaurice’s comment, however, displays an acknowledgment of the existence of “international” acts of genocide, that is, genocidal acts of one state against the people of another. Consistent with the nature of the prohibition against genocide as jus cogens, the affirmative obligation to prevent it extends beyond a state’s territorial boundaries. The awareness of the necessarily nonterritorial quality to the suppression of genocide was also recognized in the General Assembly’s discussion; for example, Mr. Perez Perozo of Venezuela stressed that the “signatory States would pledge themselves to prevent and punish genocide whenever it was committed and in whatever conditions.” The question of the nonterritorial applicability of the Genocide Convention was raised in connection with the draft: “[I]t was the opinion of the Secretary-General

86. Id. at 45.
and the experts involved that universality of repression seemed to have been the intention of the General Assembly's Resolution 96(l)."  

Universality of application was eventually abandoned in the final text of the Convention (Articles VI and VII), but only with respect to punishment. This was due to the fear that the sovereign rights of a state would be abused by permitting a foreign state’s court to punish acts committed outside its territory or by foreigners. This fear further resulted in the formation of the international Nuremberg tribunal and continues to reappear in the call for an international criminal court. The abandonment of universal application with respect to punishment, however, does not affect the universal preventative aspect of the Genocide Convention, preserved in the adopted wording of Article I, as evidenced by the statements of Fitzmaurice and Perez.

Statements by the ICJ in Reservations to the Genocide Convention and in Barcelona Traction strengthen this position of universal application with regard to prevention. In the former case, the ICJ noted "the clearly universal character of the United Nations under whose auspices the Convention was concluded and the very wide degree of participation" envisaged by the Convention. It further specified that, in this Convention, "the States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention." As the Convention contains no restriction on universal application of the prevention of genocide, as it does for punishment in Articles VI and VII, the ICJ lends credence to the position that the preventative "high purpose" is to be universally accomplished, irrespective of any self-interest. Furthermore, the Court has clearly given further support to this interpretation by ascribing to genocide erga omnes obligations in Barcelona Traction.

Despite the overriding purpose of the Genocide Convention to prevent the recurrence of genocide, the only explicit provision to this

---

90. ROBINSON, supra note 74, at 31. See also Draft Convention on the Crime of Genocide, supra note 85, at 18.
91. ROBINSON, supra note 74, at 31.
93. Id. at 23.
94. Barcelona Traction, 1970 I.C.J. at 32. While, as already noted, erga omnes is not equivalent to jus cogens, Meron has noted that the ICJ perhaps intended its particular examples of erga omnes norms to be jus cogens examples as well: "[t]he examples of basic human rights mentioned by the Court, protection from slavery and racial discrimination, may well reflect the Court's conception of jus cogens norms which it did not explicitly articulate." MERON, supra note 58, at 194. The examples of "basic rights" in the judgment included genocide and aggression which, a fortiori, must be caught by Meron's comment.
effect apart from Article I is contained in Article VIII, which allows a state to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."\(^{95}\) However, prevention is also implicit in the deterrent effect of the provisions relating to punishment. Given, *inter alia*, the clear reference in Article I to the duty of states to prevent genocide, given the commentary by and intentions of State Parties, given the negotiating history of Article VIII's precursor (draft Article XII), and given dicta by the ICJ, Article VIII cannot be construed as elucidating the only means by which genocide is to be prevented.\(^{96}\) That is to say, states are not entitled to take the view that their duties to prevent genocide are met simply by virtue of calling upon U.N. organs to act in accordance with Article VIII; the generality of Article I and its positioning as the lead clause for the entire treaty preclude such a restrictive position.

Yet while it could clearly be contended that prevention generally is nonterritorial, the question of what specific measures are to be taken by individual states remains to be answered. The alarming failure of U.N. institutions to prevent genocide gives particular currency to this issue. This ineptness was envisioned, ironically enough, by the Yugoslav representative at the Sixth Committee discussion of the Draft Convention. The former Yugoslavia was one of the few states to abstain from voting on the Draft Convention, based on the belief that "the draft was not sufficiently strong and that, as a result, it would prove ineffective in combatting genocide."\(^{97}\)

Given the lack of specific, substantive provisions dealing with preventative action, therefore, the answer to the question of individual states' obligations to prevent genocide perhaps cannot be found within the black letter of the Convention and must be sought in the realm of purposive treaty interpretation, including the interpretive effect of *jus cogens* norms which exist parallel to the treaty.

---

95. Genocide Convention, *supra* note 11, art. VIII.

96. This does not mean that art. VIII is devoid of all relevance for this case. Rather, it will be argued *infra* part III.B.2 that it should be taken as an important interpretive baseline for the ICJ in determining both its jurisdiction in cases brought before it under art. IX and its scope of "review" once jurisdiction has been established.

97. Lippman, *supra* note 87, at 53. The Yugoslav representative, Mr. Kacijan, regretted that his delegation had to refuse to vote for a text which fell short of achieving the "real aim of the convention, namely, the prevention of genocide." U.N. GAOR 6th Comm., 3d Sess., 133d mtg. at 707 (1948). That the Convention fell short in the view of one of the delegates does not mean that the text, purposively interpreted in light of evolving customary norms, is not conducive to an interpretation that includes significant preventative elements.
c. Properly Interpreted, the Genocide Convention Must Necessarily Codify the Universal Obligation Under General International Law to Prevent Genocide.

As has been shown, the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation. The universal character of both the condemnation of genocide and the cooperation required "to liberate mankind from such an odious scourge" gives rise to a distinctly universal obligation to prevent it — an obligation towards the international community as a whole rather than simply vis-à-vis another state, as in the field of diplomatic protection. At this highest level of dédoublement fonctionnel, states must consolidate their efforts and take preventative action on behalf of the community as a whole before genocide occurs, or at the very least, before it takes its final, annihiliistic toll. As Shabtai Rosenne affirms, "the ICJ has established the jus cogens duty of all States to cooperate in the suppression of genocide." It would seem, therefore, that in addition to the duty of a state to prevent genocide within its own borders, there is the duty of all states to take action against perpetrators of genocide in other states, in fulfillment of their "duty owed to the international community as a whole."

In order to reach this conclusion, it is necessary to make use of tools of treaty interpretation and developing doctrine on humanitarian, notably human rights, treaties in particular. The humanitarian object and purpose of the Genocide Convention and the international community’s desire to ensure universal protection from genocide dictate that the Convention should be accorded a broad and purposive interpretation. The principle of effectiveness as well as the integrity of the treaty must be considered in the process of interpretation. A rigid or textualist approach to the treaty would be inconsistent with the 1969 Vienna Convention, which requires that the terms of the treaty be assessed “in their context and in the light of its object and purpose.” This is especially so in the case of a treaty with a purely humanitarian purpose, where a noncontextual approach may fail to “contribute to the fulfillment of an inclusive or common interest in the maintenance of minimum

100. 1969 Vienna Convention, supra note 45, art. 31.
world order." The Inter-American Human Rights Court endorsed this approach to interpretation of human rights documents in Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, wherein it stated that "the 'ordinary' meaning of terms cannot of itself become the sole rule, for it must always be considered in light of the object and purpose of the treaty." As a result, courts must interpret such documents in order "to give effect to the objectives of the [human rights treaty], for it does not advance the protection of the individual's basic human rights and freedoms" to do otherwise.

Several members of the ICJ also have emphasized the necessity of according a broad, purposive interpretation to human rights treaties. In Reservations to the Genocide Convention, the majority of the Court observed that the Genocide Convention embodied principles of natural law that transcend particularistic state interests. Such principles guide any interpretation of the Convention:

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention . . . . The high ideals which inspired the Convention provide,

101. W. Michael Reisman, Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions and Prospects, in LAW AND FORCE IN THE NEW WORLD ORDER 26, 45 (Lori F. Damrosch and David J. Scheffer eds., 1991). Note that this favorable citation of Prof. Reisman on the normative issue must be read with the understanding that Prof. Reisman has different views from those expressed in this Memorial on the institutional question of the role of the Court. See infra part III.A.3 (discussing Reisman's work).


by virtue of the common will of the parties, the foundation and measure for all its provisions.\textsuperscript{104}

Indeed, this Convention may be \textit{the} example of a purely humanitarian treaty as well as the quintessential case of a \textit{jus cogens} norm; in their joint dissenting opinion in \textit{Reservations to the Genocide Convention}, Justices Guerrero, McNair, Read, and Mo noted that "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."\textsuperscript{105} Beyond the necessary focus on the interpretive implications of the \textit{humanitarian} content of a multilateral treaty like the Genocide Convention, these implications are reinforced when a treaty is categorized as dealing with the \textit{public interest of the world community as a whole}. In general, multilateral conventions created in recognition of world-communitarian interests in international law are markedly different from ordinary multilateral conventions. As Judge Alvarez has stated in a now classic passage:

To begin with, they have a universal character; they are, in a sense, the \textit{Constitution} of international society, the \textit{new international constitutional law}. They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.\textsuperscript{106}

It is thus clear from \textit{Reservations to the Genocide Convention} that considerations of sovereignty and the reciprocity of sovereign wills in the usual course of international relations must cede to more pressing, imperative obligations in the human rights context. The case of genocide, then, as the most egregious of such human rights violations, dictates particularly strong considerations of effectiveness and purposiveness as interpretive principles.

\textsuperscript{104} \textit{Reservations to the Genocide Convention}, 1951 I.C.J. at 23 (emphasis added).
\textsuperscript{105} \textit{Id.} at 47 (dissenting opinion of Judges Guerrero, McNair, Read, and Mo).
\textsuperscript{106} \textit{Id.} at 51 (separate opinion of Judge Alvarez) (emphasis added). There is a remarkable similarity between Alvarez's approach to this species of universal treaties and the approach of the Inter-American Human Rights Court to human rights treaty interpretation. Interstate reciprocity of rights and obligations cannot serve as the baseline for interpretive principles or application of those principles.

Note also that Judge Tanaka has similarly pointed to the need for effectiveness in dealing with humanitarian treaties, stating in \textit{South West Africa} that "[t]here must be no legal vacuum in the protection of human rights." \textit{South West Africa} (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6, 298 (July 18) (dissenting opinion of Judge Tanaka).
B. States Have a Duty to Prevent the Genocide Occurring in Bosnia

Article I of the Genocide Convention confirms "that genocide, whether committed in time of peace or in time of war, is a crime under international law which [parties] undertake to prevent and to punish." Thus, it is not simply the prohibition of genocide which is affirmed in the Convention; rather, states have undertaken positive obligations to prevent and punish genocide. It is, at a minimum, a delict in international law for states to fail to prevent and punish genocide. Furthermore, the failure to prevent and punish genocide would be an international crime if the omission amounted to either conspiracy or complicity in the genocide itself.

The extent of the duty to prevent genocide contained in Article I of the Genocide Convention requires a broad interpretation, given the Convention's object and purpose as an effective instrument in the elimination of the "odious scourge" of genocide. The minimum content of the duty to prevent genocide must be that a state has an obligation to take positive action to stop genocide which is imminent or ongoing within its territory or within territory subject to its control. Moreover, the undertaking to prevent genocide arguably includes within it an extraterritorial component even without the need to show general control over territory other than that of the state.

Under a broad and purposive interpretation, the meaning of "prevention" in the Genocide Convention must include a universal, collec-

107. Genocide Convention, supra note 11, art. 1 (emphasis added).
108. General principles of state responsibility would of course apply, including circumstances precluding wrongfulness. In particular, art. 23 of the Draft Articles on State Responsibility is applicable:

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

1979 Draft Articles on State Responsibility, supra note 32, at 93.

This Memorial suggests that in order to breach a duty of prevention, a state's own actions and omissions must be culpable (either through intention or negligence, presumably). Duties of result, contrary to the opinion of some, are not to be equated with absolute responsibility; the specific standard of care associated with a given duty of result must always be determined on a norm-by-norm basis. Thus, Bosnia would not be responsible for failing to prevent Serbian genocidal practices, since the failure has not been caused "by the conduct adopted" by Bosnia. Duly diligent efforts to prevent an event would not result in the breach of an obligation under art. 23.
tive obligation to suppress acts of genocide. As a *jus cogens* norm, the prohibition against genocide cannot be perceived as applicable to only the individual state within which genocide is being perpetrated. This is particularly compelling in a world where genocidal acts often occur at the hands of a government against its own citizens. If the "duty to prevent" is restricted to the containment of genocide domestically, then systematic extermination of a people would go normatively unchecked. Such an absurd result would be contrary to both the spirit of the Convention and to its characterization as a (perhaps the) fundamental human rights instrument, as well as antithetical to basic rules of human rights treaty interpretation, as discussed above. It follows, therefore, that there must exist some element of collective action within the definition of prevention.

As the object of the Genocide Convention is ultimately to protect people against extermination, the treaty must be interpreted with a view to individuals as subjects of international law. The doctrinal field of human rights has forced the international system to query the notion of the state as the supreme actor in international law. Consequently, territorial boundaries lose rigidity, and the human family becomes a focus of international attention. Assumptions about treaty interpretation, the role of states, and the function of judicial institutions require conceptual rethinking and doctrinal adjustments in the context of human rights. Treaty interpretation must therefore achieve effectiveness relative to its subject; an obligation owed to the "international community as a whole," such as the *jus cogens* duty to prevent genocide, requires that states protect individual communities against genocide, regardless of territorial boundaries.

### 1. States Have a Positive Obligation to Intervene or Offer Assistance to Prevent the Genocide in Bosnia

While a state clearly has an obligation to prevent genocide within its territory, this is not the sole purpose of Article I of the Genocide Convention. Nowhere in the Genocide Convention is a state's duty to prevent genocide expressly limited to its territory or to persons within its jurisdiction. This fact distinguishes the Genocide Convention from other international human rights instruments. For example, the Interna-

---


111. *See supra* part 1.
tional Covenant on Civil and Political Rights explicitly limits the scope of the undertaking "to respect and to ensure" the rights therein recognized "to all individuals within its territory and subject to its jurisdiction."\textsuperscript{112} The absence of such a potentially restrictive aspect to the undertaking clause reflects the importance of the prevention of genocide to the international community and the understanding, stated in the third preambular paragraph of the Convention, that international cooperation is required in order to prevent genocide effectively.

In particular, the third preambular paragraph of the Secretary-General's Draft Convention is illuminating on this point.\textsuperscript{113} In the draft, the parties "pledge themselves to prevent and to repress such acts wherever they may occur."\textsuperscript{114} That the duty to prevent genocide was moved from the Preamble to a justiciable obligation in Article I strengthens this interpretation.

With respect to an affirmative duty to prevent genocide, however, it is not necessary on the facts at hand to decide whether an independent right of unilateral "humanitarian intervention" exists under the Genocide Convention or customary international law. Indeed, a lesser affirmative duty of a conventional nature can be argued for in accordance with a vigorously purposive interpretation of Article I of the Genocide Convention. If the representative government of a state in which the population is the victim of genocide requests assistance necessary to prevent genocide within its territory, it is submitted that states, under the Genocide Convention, would be obligated to respond to this request if they are, materially, in a position to do so.

An interpretation of the duty to prevent as the duty to respond to the victim of a breach of a \textit{jus cogens} norm can be derived from a progressive interpretation of the law of nonrecognition as it has developed in recent decades.\textsuperscript{115} Such an interpretation would involve viewing states' "duty not to recognize" as, at least in some contexts of utmost necessity, an affirmative "duty to deny recognition" to circumstances furthered by violations of the norm. In the terms in which current ILC Special Rapporteur Arangio-Ruiz has touched on this issue, there is a hint that the

\textsuperscript{112} International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), 999 U.N.T.S. 171, 6 I.L.M. 368.
\textsuperscript{113} Draft Convention on the Crime of Genocide, \textit{supra} note 85, at 5.
\textsuperscript{114} \textit{Id.} (emphasis added).
duty of nonrecognition can entail positive duties: "The Special Rapporteur drew attention to the problem of obligations to react on the part of injured states. Foremost among them was . . . the duty of non-recognition."

It is clear from the 1992, 1993, and 1994 Annual Reports of the ILC to the General Assembly that the draft articles proposed by the former Special Rapporteur Riphagen on Part II of the Draft Articles on State Responsibility have relatively little presumptive weight in the mind of the new Rapporteur and perhaps the ILC as a whole. Nevertheless, the form in which former Special Rapporteur Riphagen phrased the duties of all states in response to an international crime like genocide in his proposed article 14(2) is suggestive:

An international crime committed by a State entails an obligation for every other State: (a) not to recognize as legal the situation created by such a crime; and (b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such a crime; and (c) to join other states in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

If the duty of nonrecognition amounts to a duty to deny recognition, and if some states are denying recognition, inter alia, by lawfully assisting the victim state (or state seeking to protect the victims) through the provision of arms, then it could be said that other states have a positive duty within the logic of subparagraph (c) affirmatively to join that effort of mutual assistance.

2. In the Alternative, States Have a Duty to Refrain from Interfering with Cooperative Efforts to Prevent the Genocide in Bosnia

In the alternative, the norm suggested by Article 14(2)(b) of the Draft Articles on State Responsibility, as well as the crisp reasoning of Judge Lauterpacht in Bosnia v. Serbia II, quoted in the Introduction, makes clear that even if the duty to prevent does not require every state, individually, to take positive steps to prevent genocide within the territory of another state, it must at a minimum require states not to impede


discretionary efforts by third party states to assist a state which is the victim of genocide. This principle is the necessary corollary of the sovereign right of a state whose population is the victim of genocide to seek and receive assistance to prevent this crime and the corresponding right of the requested state to provide such assistance. Such an interpretation of “prevent” is consistent with a state’s inherent right of self-defense of its territorial integrity, political independence, and population.\textsuperscript{118} The duty not to interfere with another state’s consent-based intervention to prevent genocide is concomitant with the duty to refrain from complicity in genocide.\textsuperscript{119} Furthermore, this approach to noninter-

\textsuperscript{118} See infra part II.A.


Article 27 reads:

\begin{quote}
Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constituted an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.
\end{quote}

Id. at 99. The commentary by the ILC on art. 27 extensively relies on the example of the provision of weapons to other states engaged in international crimes such as genocide or aggression, including a reference to a note written by Elihu Lauterpacht (later Judge Lauterpacht) that argued that the key element in State X’s complicity in State Y’s illegal use of arms was knowledge of the use to which the arms would be put. See id. at 99–104; Elihu Lauterpacht, The Contemporary Practice of the United Kingdom in the Field of International Law: Survey and Comment, 7 Int’l & Comp. L.Q. 514 (1958). The ILC distills its discussion of doctrine and practice into the following statement of two key elements in complicity through aid or assistance: “(a) the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act; [and] (b) the aid or assistance must have been rendered with intent to facilitate the commission of that internationally wrongful act by another . . . .” 1978 Draft Articles on State Responsibility, supra, at 104 (emphasis in the original). The ILC commentary contains some tensions in terms of how it understands these material and mental elements of complicity. However, two passages suggest art. 27 complicity is triggered in a situation such as that of the case at bar, where blocking arms to a victim of genocide can be viewed as an indirect provision of arms to the perpetrator of the genocide if the party blocking the arms has knowledge of the use to which the blocked arms would be put by the victim and of the use to which the military advantage is being put by the perpetrator. The first of these two passages speaks to the material element: “The aid or assistance provided may consist in the provision of material means, but there can also be aid or assistance of a legal or political nature such as the conclusion of a treaty that may facilitate the commission by the other party of an internationally wrongful act.” Id. at 102. The words “aid or assistance of a legal or political nature” are clearly capable of covering an embargo on another state as a form of assistance to a state acting unlawfully. Nowhere does the ILC require that direct material aid is necessary to trigger complicity, only that the assistance make it, per element (b), “materially easier” for the perpetrator to commit the unlawful act. The second of the two passages makes clear that the mental element of “intent to facilitate” includes “knowledge of the specific purpose for which the State receiving certain supplies intends to use them.” Id. at 103. States that blocked arms to Bosnia knew, at a certain point, that Serbia and the Bosnian Serbs intended to use the military advantage that they were assisted in achieving for the purpose of committing aggressive and genocidal acts.
ference is consistent with the *jus cogens* status of genocide and the incumbent obligation of nonrecognition and the obligation not to further violations of *jus cogens* norms. Finally, to return to principles of treaty interpretation, interpretation of a treaty with a human rights character must actively seek to make the treaty protections effective and nonillusory.\(^2\) This is limited only by the principle that the interpretation in question does not produce a distortion in the possible meanings which the text can bear. The interpretation of the "duty to prevent" as the duty not to obstruct (or impede, frustrate, or preclude) others from preventing or others from assisting in the prevention is not such a distortion of Article I's ordinary language. Indeed, it is arguably a minimalist interpretation when compared to more wide-ranging interpretations that could be advanced, such as a duty to prevent through humanitarian intervention (an interpretation which itself would not necessarily distort the text of Article I).

II. SECURITY COUNCIL RESOLUTIONS THAT MAINTAIN THE ARMS EMBARGO FETTER THE RIGHT OF SELF-DEFENSE IN A MANNER *Ultra Vires* THE SECURITY COUNCIL

A. Aggression and the Content of the Right of Self-Defense

It is the position of Bosnia that, at least up to the point that the Government of Serbia purported to seal the border between Serbia and Bosnia, Serbia has been responsible for acts of aggression against the territory and population of Bosnia. Both by transferring units of the Yugoslav People's Army (JNA) to Bosnian Serb forces and by continuously providing material and logistical support to such forces, Serbia has

Lastly, it should be noted that in drawing on the doctrine of complicity to interpret art. I's "duty to prevent" genocide, the argument has avoided taking the position that complicity in genocide equates to genocide itself. The ILC states in this regard:

The conduct of a State which supplies, for example, weapons or other means to another State in order to facilitate the commission of an act of aggression or genocide by that other State does not necessarily, and in every case, constitute conduct that can also be classified as aggression or genocide . . . . [T]he determination of such equivalence can only be a question of degree, since in the final analysis it depends on a variety of factors and above all, on the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act.

*Id.* at 103–04. While it need not be contended that states maintaining the arms embargo themselves committed genocide, the assistance provided to Serbia and the Bosnian Serbs has been of such a degree that at minimum it amounts to a failure to prevent genocide.

maintained the international character of the Bosnian conflict, thereby engaging the right to individual and collective self-defense as recognized by Article 51 of the U.N. Charter, which provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations ...."\(^\text{121}\)

The facts of Serbia's involvement in the Bosnian conflict demonstrate such a degree of forceful intervention that it is impossible not to conclude that an "armed attack" has occurred against Bosnian territory for which Serbia is internationally responsible. Nonetheless, it may be of assistance to address two issues related to the application of the right of self-defense to this case. First is the question of whether Serbia's intervention constitutes an armed attack, that is, whether Serbia's involvement in support of Bosnian Serb forces is substantial enough or otherwise of sufficient gravity to meet the threshold of aggression, thereby justifying the disregard by the victim state of the general prohibition on the international use of force contained in Article 2(4) of the Charter. Second, the content and boundaries of the right of self-defense must be considered in light of the circumstances of the conflict. It is the position of Bosnia that the support provided by Serbia to Bosnian Serb forces is sufficient to engage Bosnia's right of self-defense, even in light of the decision of the ICJ in *Nicaragua*,\(^\text{122}\) and that Bosnia was justified in taking all measures, on an individual or collective basis, which are necessary and proportionate to counter Serbia's intervention.

1. Serbia Has Committed an Illegal Use of Force, Which Constitutes Aggression and an "Armed Attack" Against Bosnia

Article 2(4) of the U.N. Charter prohibits states from using force against the political independence or territorial integrity of other states. Although the boundaries of the categorization are controversial, serious violations of the principle of nonuse of force amount to "aggression" or "armed attack."\(^\text{123}\) After extensive negotiation, the General Assembly

---

121. U.N. Charter art. 51.

122. In *Nicaragua*, the Court concluded that, although Salvadoran rebel forces may have received some support from the Nicaraguan Government and may have made use of Nicaraguan territory in their conflict with the Government of El Salvador, the involvement of Nicaragua was not sufficient to give rise to a right to take collective self-defense action against the territory and government of Nicaragua. *See Nicaragua*, 1986 I.C.J. at 4.

123. A distinction between "aggression" and "armed attack" is of questionable cogency. In particular, the equally authoritative French text of art. 51 of the U.N. Charter substitutes the phrase "agression armée" for "armed attack." *See Hilaire McCoubrey & Nigel D. White, International Law and Armed Conflict* 51-52 (1992).
adopted Resolution 3314 (Definition of Aggression), which is generally regarded as declaratory of the meaning of aggression in customary international law. Since it was intended to serve as a guide to the Security Council in the exercise of its functions regarding the maintenance and restoration of international peace and security, the Definition of Aggression does not purport to be exhaustive. In particular, the discretion of the Security Council to determine other acts which constitute aggression is recognized. Aggression is also an international crime under Article 12 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind.

a. By Transferring Units of the JNA to the Bosnian Serb Forces, Serbia Committed an Act of Aggression Against Bosnia

On May 4, 1992, Serbia purported to renounce authority over units of the JNA which remained in Bosnia, without the consent of the Bosnian Government. Yet the Security Council recognized the ongoing interference by JNA units, leading it to adopt certain provisions in Resolution 752 on May 15, 1992, demanding that Bosnia’s neighbors immediately cease all forms of interference in Bosnia, including by JNA units, and that those units of the JNA within Bosnia be withdrawn, placed under the control of the Bosnian Government, or disbanded and disarmed. Serbia failed to comply with these demands, leading the Security Council to return to this matter on May 30, 1992, in Resolution 757. Noting that Serbia had not complied with the demands of Resolution 752, the Security Council adopted a comprehensive embargo against Serbia under its Chapter VII powers.
By placing these units of the JNA at the disposal of Bosnian Serb forces, Serbia committed an act of aggression against Bosnia, an act which continues to the present, due to the noncompliance of Serbia with Security Council Resolution 752. Article 3(e) of the Definition of Aggression confirms that "[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement," constitutes an act of aggression. Bosnia did not consent to the continued presence of these units in Bosnia, much less to their transfer to the Bosnian Serbs. This prohibited action also constitutes an international crime against peace, as recognized in the ILC Draft Code of Crimes Against the Peace and Security of Mankind. Serbia is internationally responsible for this act of aggression and for the subsequent conduct of these JNA units in Bosnia, in particular with respect to the commission of genocide.

b. Serbia Has Committed Further Acts of Aggression Against Bosnia Through Its Proxy Forces, the Bosnian Serbs

Article 3(g) of the Definition of Aggression prohibits, as an act of aggression, "[t]he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." The ICJ has recognized

until the Security Council decides that the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro), including the Yugoslav People's Army (JNA), have taken effective measures to fulfil the requirements of resolution 752(1992).

Id. at 3.

129. The extent of foreign involvement in this situation goes well beyond the more limited training, funding, and arming that was determined by the ICJ in Nicaragua to fall short of aggression (although it still constituted a prohibited use of force). Nicaragua, 1986 I.C.J. at 103.

130. Definition of Aggression, supra note 124, at 3 (art. 3(c)).


132. See 1979 Draft Articles on State Responsibility, supra note 32, at 91 (art. 9) ("The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed").

133. Definition of Aggression, supra note 124, at 3 (art. 3(g)).
that Article 3(g) reflects customary international law. Article 8 of the ILC Draft Articles on State Responsibility, regarding actions taken “on behalf of” a state, confirms the general applicability of this type of “agency” responsibility in international law.

Bosnian Serb forces have been armed and supported by the Government of Serbia; they have made use of Serbian territory to coordinate their strategic movements; and the Government of Serbia has tolerated and actively participated in the recruitment of irregular forces from the Serbian population, as well as returned Bosnian Serbs from Belgrade to the front to fight for “the Fatherland.” These acts amount to the direct sending of armed bands, groups, and irregulars. At minimum, they must be taken to amount to “substantial involvement therein.” Serbia has thereby continued to commit aggression against Bosnia.

c. In the Alternative to (b), the Continued Material, Logistical, and Other Support Provided by Serbia to the Bosnian Serb Forces Constitutes an Act of Aggression Against Bosnia

In the alternative, if the facts of Serbia’s “substantial involvement” in the sending of armed bands cannot be proved, or if Serbia’s involvement is found not to meet the particular wording of Article 3(g) of the Definition of Aggression, it is submitted that the provision of arms and other support to the Bosnian Serb forces nonetheless constitutes an act of aggression against Bosnia. Such support clearly constitutes an illegal military intervention amounting to a use of force in the internal affairs of Bosnia. It is Bosnia’s contention that, in light of the scale of the support and the gross detrimental impact it has had on the political
independence and territorial integrity of Bosnia, the provision of arms and other support is of such a grave nature as to constitute an act of aggression.

In Nicaragua, the ICJ recognized that the provision of support by a state to opposition forces within a foreign state constituted prohibited intervention in the affairs of the foreign state. The Court went on to conclude that "acts constituting a breach of principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations." The prohibition on "sending armed bands" contained in Article 3(g) of the Definition of Aggression was also recognized as reflecting customary international law, constituting an act of aggression which raises the right of self-defense. However, the Court went on to draw a distinction between the provision of support and the sending of armed bands:

[T]he Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. Thus, the acts of the Nicaraguan Government were found to constitute a breach of the prohibition on the use of force, yet they did not constitute an "armed attack" sufficient to give rise to the right of collective self-defense claimed by the U.S.

The distinction between the sending of armed bands and the provision of arms to such bands may have been warranted on the facts of Nicaragua. However, this paragraph is open to the interpretation that the provision of weapons or logistical or other support can never constitute an "armed attack" or an act of aggression. Such an interpretation casts an overly broad restriction on the right of self-defense. The question is not whether the provision of weapons and other support is included in the meaning of "armed attack" but whether it is necessarily excluded in all cases. Given the magnitude of the Serbian support for the Bosnian Serb forces, Serbia's direct interest in the conflict, and the Serbs' stated goal of becoming part of a Greater Serbia, this provision of weapons and support is tantamount to an armed attack on the territorial integrity and political independence of Bosnia.

As Judge Schwebel noted in his dissenting opinion in *Nicaragua*, the arming of insurgent forces, when coupled with other involvement, could constitute aggression, particularly in the case of "pervasive and prolonged support . . . [which] has been a major, perhaps the critical, factor in the transformation" of the nature and scale of the insurrection.¹⁴⁰ Judge Sir Robert Jennings echoed this position in his dissenting opinion:

"The provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement. Accordingly, it seems to me that to say that the provisions of arms, coupled with "logistical or other support" is not armed attack is going much too far."¹⁴¹

The Court itself may not have intended to apply a rigid categorical approach to the question of aggression. In *Nicaragua*, the Court noted that the gravity of the breach of the principle of the nonuse of force was significant, stating that "such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack."¹⁴²

If indeed it is the gravity of the armed intervention, rather than the particular mode of its execution, which is determinative of the question of whether aggression has been committed, by any reasonable standard Serbia’s actions amount to gross acts of aggression against Bosnia. Serbia’s intervention on the side of the Bosnian Serbs has been a decisive factor in the unfolding of events in Bosnia. The JNA units provided the Bosnian Serbs with an ongoing supply of arms and other support that drastically shifted the balance of power between the factions within Bosnia. This military support was given in direct contravention of the terms of the U.N. arms embargo on the former Yugoslavia, an embargo which has been rigorously enforced against Bosnia. This one-sided impact of the arms embargo makes Serbia’s flagrant violations of it all the more serious: the Bosnian Serbs received an advantage from Serbia which could not be balanced by the Bosnian forces. The imbalance of arms has been the critically decisive factor in the success of Serb and Bosnian Serb military and genocidal activities.

¹⁴⁰ Id. at 346 (dissenting opinion of Judge Schwebel).
¹⁴¹ Id. at 543 (dissenting opinion of Judge Jennings).
¹⁴² Id. at 127 (emphasis added).
2. Bosnia Has an Inherent Right of Individual and Collective Self-Defense to Respond to Serbian Aggression and Genocide

Self-defense is a concept common to all legal systems which, in broad terms, "can be defined as a residual form of direct self-help permitted to a private individual whenever timely intervention by the centralized authority is impossible." 143 With the advent of the U.N. Charter, and the prohibition on the use of force enshrined in Article 2(4), self-defense remained a legitimate basis upon which individual states could use force outside of U.N. collective security actions. Given the barriers to effective collective security inherent in the Charter system, the scope of the right of self-defense is of fundamental significance to the proper functioning of the modern international legal regime:

These primary rules, in order to work, must therefore be readily perceivable, by people bearing the actual responsibility of government, to reflect the practical requirements of the world in which states must survive and conduct their affairs. It is not enough that they be internally coherent: they must be intrinsically compelling. 144

The customary right of self-defense preserved in Article 51 of the U.N. Charter must be interpreted in light of Article 2(4). It should first be noted that not all exercises of the right of self-defense involve the use of force against the territory of another state but might involve forcible measures strictly limited to the territory of a victim state repulsing an attack, even where such an attack did not amount to an "armed attack." The right of self-defense thus consists of two components: the right of a state to take defensive measures within its own territory and the right of a state to take measures involving the use of force against the territory of an aggressor state. It is only the second component which falls within Article 51, since the first component does not involve a use of force prohibited under Article 2(4).

Article 51 of the U.N. Charter declares:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council


has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\footnote{145}

\begin{itemize}
\item[a.] Bosnia Has an Inherent Right of Individual and Collective Self-Defense to Secure Its Territorial Integrity and Repel Serbian Aggression
\end{itemize}

There are two general schools of thought regarding the scope of the right of self-defense under the U.N. Charter. Under the first, applied by the ICJ in \textit{Nicaragua}, states may only take actions in self-defense when an "armed attack" has occurred.\footnote{146} Under the second, the phrase "if an armed attack occurs" is not interpreted to restrict the customary right of self-defense, which is understood to include the right to respond in self-defense even to uses of force not sufficiently grave to amount to aggression.\footnote{147} Under either interpretation, Bosnia possesses the inherent right of individual and collective self-defense to take necessary and proportionate measures in response to Serbian aggression.

As argued above, Bosnia has been the victim of Serbian aggression and thus of an "armed attack," even under the restrictive \textit{Nicaragua} approach to self-defense, as a result of the transfer of JNA units to the Bosnian Serb forces and continued provision of arms and other support to the Bosnian Serb forces by Serbia.\footnote{148} Bosnia thus has the inherent right of individual and collective self-defense to take necessary and proportionate measures to secure its territorial integrity and political independence. Such measures in this case could include: the reception of arms and other military aid from other states, including direct foreign

\begin{itemize}
\item[145.] U.N. \textsc{Charter} art. 51.
\item[146.] The Court left open the question of anticipatory self-defense in the face of imminent armed attack. As indicated already, the Court assimilated the concepts of "armed attack" and "aggression;" the French text reads "aggression armée." \textit{See supra} note 123.
\item[148.] \textit{See supra} part II.A.1.
\end{itemize}
armed involvement; the neutralizing of Serbian intervention; the reassertion of control over the territory of Bosnia; and the prevention of further Serbian interference in its affairs, including necessary strikes against Serb supply lines, bases, and command centers within Serbian territory.

If, however, Serbian involvement is held not to constitute an "armed attack" due to a restrictive interpretation of that term, it is submitted that Bosnia nonetheless has the right to take necessary and proportionate measures within its inherent right of self-defense. It must be noted that Article 51 of the Charter does not define the right of self-defense; rather, it is declaratory in nature. Even if dispositive weight were given to the term "armed attack" in Article 51, it is fallacious logic to suggest that the declaration "[n]othing in this Charter shall impair . . . until an armed attack occurs" implies that something in the Charter in fact does impair the right of self-defense in situations short of an armed attack.149

An overly textual approach to the phrase "armed attack" in Article 51 cannot be supported:

Article 51, as is well known, was not inserted for the purpose of defining the individual right of self-defence but of clarifying the position in regard to collective understandings for mutual self-defence, particularly the Pan-American treaty known as the Act of Chapultepec. These understandings are concerned with defence against external aggression and it was natural for Article 51 to be related to defence against "attack." Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an "armed attack."150

This approach was adopted by Professor Schachter in interpreting the interrelation between Article 51 and Article 2(4).151 The significance of

149. Prof. McDougal suggests that the right to use force in self-defense was implicitly preserved by art. 51. McDougal & Feliciano, supra note 147, at 235–36 ("The unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired").


151. The main interpretive difficulty with this is that the words "if an armed attack occurs" then become redundant, a conclusion which should not be reached without convincing evidence that such redundant use was in keeping with the drafters intention. The link with the Chapultepec Treaty provides a reason for the inclusion
the term "armed attack" to the scope of the right of self-defense under
the Charter system is further eroded by the fact that the U.N. has not
attempted to define "armed attack" but has instead undertaken an ex-
tensive process to agree on a definition of "aggression."

Thus, the phrase "if an armed attack occurs" was not intended to
restrict the scope of the right of self-defense by limiting it to a rigid
category of response to an armed attack. The form which an attack takes
should not determine what sort of response is lawful under the U.N.
system.\(^{152}\) Rather, it is the seriousness of the threat to the security of a
state, coupled with the principles of necessity and proportionality, which
should determine what level of response is appropriate. It would be
unfruitful to search for evidence in the practice of states that refrain
from exercising necessary action in "self-defense" when their funda-
mental security concerns were imminently threatened, even in situations
short of "armed attack."

State practice following the adoption of the Charter, however,
supports the proposition that, in some circumstances where force, partic-
ularly indirect force, is used against a state, forcible measures against
the territory of the attacking state are not justified. The proper explana-
tion for this restraint from armed response is that it is not strictly nec-
essary in all cases. Intervention, for example, is not contained in the
Definition of Aggression, although if forcibly exercised, intervention
will constitute a prohibited use of force; however, in many if not all
cases, intervention may be countered by completely internal, self-de-
fensive measures. If a state, in responding to acts of forcible interven-
tion, responded with force against the territory of another state, such
action would not constitute an exercise of the right of self-defense if
wholly internal measures would have been sufficient to repulse the
intervention; rather, by disproportionately responding to the intervention,
the victim state itself would be responsible for an unlawful use of force.

Although in many situations, of which the facts of Nicaragua are
particularly representative, an alleged intervention could be repulsed by
the taking of internal measures, it should not be inferred that interven-

\(^{152}\) of the words "if an armed attack occurs" and explains why it was not said that
self-defence is limited to cases of armed attack.

Schachter, Right of States, supra note 147, at 1634; see also Bowett, supra note 147, at
187-95; Mc Dougal & Feliciano, supra note 147, at 229-241.

152. Stone, Aggression and World Order, supra note 147, at 95 ("For such an
organisation could only become a protective shield for those States whose predatory and
imperial interests could sufficiently realise themselves without the need for 'armed attack'
upon other Members, and whose plaintive motto of self-assertion is, 'This is a very wicked
animal; when we attack it, it defends itself'.")
tion is necessarily precluded from constituting aggression in all cases. The value of a "mixed" definition of aggression is that it allows for the categorical condemnation of the worst acts of aggression without restricting the flexibility and ultimate authority of a victim state, the Security Council, or an international tribunal to determine, on an objective basis, when the fundamental security of a state has been threatened.

If the term "armed attack" is to have any role in these determinations, it must be given a flexible interpretation to cover all cases of fundamental threats to security. It cannot seriously be contended that any state would have consented to subjecting its right to use force to defend its vital security interests, in situations not constituting "armed attack," to the specific approval of the Security Council authorizing the use of force in response to what it determines to be a "threat to the peace, breach of the peace, or act of aggression" under Article 39 of the U.N. Charter and thus to the veto of any Permanent Member of the Security Council. States must be expected to have retained the right to take unilateral defensive action when grave and imminent threats to their security, territorial integrity, or indeed very existence occur.

In addition to its support based on a textual analysis to the Charter and the travaux préparatoires, this flexible interpretation of the right of self-defense is compelling from a principled approach. It is well accepted that all actions taken in self-defense must be necessary and proportionate to the security interest being threatened. Indeed, the principles of necessity and proportionality, strictly applied, generate a basis upon which to determine when armed response is legitimate. Simply put, armed response is permitted when other means of protecting fundamental security interests are ineffective. Any categorical approach can only serve as a rough guide to determining when force is necessary; rigid application of a categorical approach to self-defense would lead to the dangerous (and absurd) legal conclusion that an armed response, vitally necessary to the survival of a state, against an illegal attack which does not, however, meet the requirements of the category "armed attack," would be illegal under international law. As Judge Jennings

153. By "mixed" it is intended that the definition be a nonexhaustive enumeration of categories of aggression.

noted, such an interpretation should be avoided. Judge Jennings differed from the majority in *Nicaragua*, primarily on the jurisdictional question and the findings of fact. Unlike the situation found by the majority in *Nicaragua*, the facts of the Serbian activities in Bosnia demonstrate a grave and immediate threat to the security of Bosnia and of its people. In such an extreme case, this caution offered by Judge Jennings should influence the interpretation given to the scope of the right of self-defense.

The genocidal practice of "ethnic cleansing" carried out by Bosnian Serb forces is a sufficient threat to Bosnia to engage the right to respond forcibly in self-defense. Coupled with this threat to its population are the territorial ambitions of Serbia. If international law is to give any meaning to the term "self-defense," it must recognize the inherent right of a state to protect its population from forcible expulsion from their territory and to protect that territory from incorporation into another state. Given the grave and pressing threat to Bosnia presented by Serbia's intervention in support of the Bosnian Serbs, forcible response in self-defense would be justified on a strict application of the principles of necessity and proportionality. The arming and support of the Bosnian Serbs, coupled with Serbian knowledge of and indeed complicity in the Bosnian Serb campaign of aggressive genocide and "ethnic cleansing," constitute a use of force that would justify strikes against Serbian territory, at least to the extent that they would be used against Serb supply lines, bases, and command centers.

b. In the Alternative, Bosnia Has the Right to Seek and Receive Proportionate Counterintervention in Order to Neutralize the Serbian Intervention

If it cannot be conclusively proved that Serbia, in cooperation with Bosnian Serb forces, is responsible for engaging in acts of aggression,

155. This looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebel, and the like. The original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VII of the Charter, has never come into effect. Therefore an essential element of the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.


156. Note that the ICJ in *Nicaragua* left open the use of forcible countermeasures by a state while ruling that no such collective right existed. *See Nicaragua*, 1986 I.C.J. at 127.
then Bosnia possesses the right to seek and receive arms and other forms of counterintervention. This right is a fundamental aspect of Bosnia's inherent right of self-defense.

In state practice, there is a tendency to consider the provision of military aid or other intervention to any faction in an internal struggle illegal under international law, at least when that struggle has reached a sufficient scale to be categorizable as a civil war. However, in cases where this rule of nonintervention is violated through the provision of assistance to rebels, states may intervene on behalf of the government of the victim state. As Schachter notes, "[d]espite the danger, the law does not proscribe such counter-intervention."5

Although the right to request counterintervention is generally recognized, the decision of the ICJ in Nicaragua could be interpreted as narrowing this right. If "armed response" is interpreted as meaning an

157. Ian Brownlie, International Law and the Use of Force by States 321–27 (1963); Derek W. Bowett, The Interrelation of Theories of Intervention and Self-Defense, in Law and Civil War in the Modern World 38, 41–46 (John N. Moore ed., 1974); Quincy Wright, Subversive Intervention, 54 Am. J. Int'l L. 521, 529 (1960) ("International law does not permit the use of force in the territory of another state in invitation either of the recognized or the insurgent government in times of rebellion, insurrection or civil war. Since international law recognizes the right of revolution, it cannot permit other states to intervene to prevent it").

158. When foreign assistance is given to rebels, aid to the government threatened is now generally assumed to be legal. Whether this is permitted in relation to minor disturbances caused by foreign propaganda or other forms of interference remains an open question. It is also uncertain as to whether the foreign assistance must be a decisive element in the imminent and serious threat to the existing government or whether it is sufficient if the foreign assistance is a contributory cause. Finally, foreign assistance to the government will be confined to measures on the territory of the requesting state unless the foreign aid to the rebels amounts in fact and law to an "armed attack".

Brownlie, International Law and Use of Force, supra note 157, at 327. See also Elihu Lauterpacht, Intervention by Invitation, 7 Int'l & Comp. L.Q. 102 (1958). Lauterpacht comments as follows:

The fundamental difference between the two hypotheses appears in the magnitude of the requested intervention. If collective self-defence is invoked, the intervention may involve the territories of both the target State and the State responsible for the aggression or infiltration. If the victim State's consent is the sole legal basis, the intervention may not be extended beyond the borders of the victim State, whose consent cannot allow more.

Id. at 106. Thus, when the ICJ rules out collective countermeasures, it need not be read as having ruled out collective counter intervention, limited to the territory of the state suffering intervention. See also TANCA, supra note 143, at 92.

159. Schachter, Right of States, supra note 147, at 1642.

160. "In the view of the Court, under international law in force today — whether customary international law or that of the United Nations system — States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.' " Nicaragua, 1986 I.C.J. at 110.
international use of force directed against the aggressor state, then this statement fits the Court's general conclusion that an "armed attack" is required to justify the use of force against another state. If the Court has determined that the victim state would have no right to make an armed response, then surely no collective right to do the same could exist: the rights of states to act collectively cannot be greater in scope than the right of the individual victim state, since the legal justification for the collective countermeasures is the victim state's right of self-defense. If, however, the victim possesses the right to make an armed response against the aggressor, then surely it may do so collectively.\textsuperscript{161} To hold otherwise would be to impose arbitrary rules on the use of force which favor more powerful states which would be inconsistent with the principles of international cooperation lying at the core of the U.N. Charter system.

A more dangerous interpretation of the Court's decision in \textit{Nicaragua} would foreclose other measures of collective response which do not amount to the use of force. In particular, such an interpretation could limit, indeed eliminate, the right of counterintervention. Since the right of counterintervention is generally recognized in international law, such an interpretation is unwarranted. Indeed, the right to request counterintervention is necessary to give any weight to the norm of nonintervention. Serbia's complicity in the aggressive genocide occurring in Bosnia makes the right to request counterintervention all the more imperative. The Declaration on Friendly Relations recognizes that:

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.\textsuperscript{162}

If a people has the right to seek and receive support to liberate itself from foreign domination, it must also possess the same right to prevent the genocidal domination of its territory. Since self-preservation is a necessary logical precondition to self-determination, a people must also possess the right to seek and receive support to prevent genocide against

\textsuperscript{161} As noted earlier, the ICJ left open the individual right, thereby leaving open the potential for inconsistency. See supra note 156.

\textsuperscript{162} Declaration on Friendly Relations, supra note 137, at 8.
it. Bosnia thus possesses the right, as an element of its right of self-defense, to seek and receive counterintervention to the extent necessary to neutralize past and present Serbian intervention on behalf of the Bosnian Serbs, as well as to prevent the genocidal practice of "ethnic cleansing" inflicted upon its population by Serb forces. Such measures of counterintervention could be exercised within the territory of Bosnia with the consent of the Bosnian Government, irrespective of whether an "armed attack" has occurred against the State.

B. Article 51 Requires that a State's Inherent Right to Self-Defense May Be Suspended Only if the Security Council Undertakes Effective Measures to Maintain International Peace and Security

1. The Right to Self-Defense Is "Inherent" or "Natural"

As discussed above, the debate over the nature of the right to self-defense revolves around whether the customary right has been superseded by the Article 51 enunciation of the right. For the purpose at hand, the interesting aspect of the debate is that it has focused upon the significance of the phraseology of Article 51, namely its reference to the right to self-defense as an "inherent" right.

Although it has been suggested that the Charter's use of the word "inherent" is legally irrelevant or anachronistic, the generally accepted view is that the right to self-defense is "inherent," at least in the sense that Article 51 of the Charter does not impair the pre-Charter customary right of self-defense. This interpretation is reinforced by reference to the travaux préparatoires of the Charter. There was no provision


165. John N. Moore, *Crisis in the Gulf: Enforcing the Rule of Law* 151 n.23 (1992); Bowett, supra note 147, at 184–199; Stone, *Aggression and World Order*, supra note 147, at 92–103, 195 ("And beyond doubt, the Charter reserved to them — reserved, not granted — their 'inherent right of individual and collective self-defence'").

166. Interpretation of the U.N. Charter is governed by the 1969 Vienna Convention, supra note 45, particularly by art. 31. However, at least one author has argued that sole recourse to the "ordinary meaning" of the wording of a multilateral treaty concluded in several languages is inadvisable. Thus, reference to the travaux préparatoires, in accordance with art. 32 of the Vienna Convention, may be of some assistance. Ian Johnstone, *Treaty
concerning the right of self-defense in the original Dumbarton Oaks Proposals Concerning the Establishment of a General International Organization Agreement (Dumbarton Oaks Proposals) because it was thought unnecessary.\textsuperscript{167} To reiterate a point made earlier, Article 51 was included in the Charter under pressure from Latin American states in order to preserve their regional collective security regime,\textsuperscript{168} not in order to limit the existing inherent right to self-defense in customary international law.\textsuperscript{169}

2. The Inherent Right of Self-Defense Is a \textit{Jus Cogens} Norm

In the view of some commentators, the right of a state to exercise self-defense when subjected to an armed attack has acquired the status of a \textit{jus cogens} norm.\textsuperscript{170} Such a status is supported by the \textit{jus cogens} status of the corollary prohibition on the kind of force to which self-defense is a response. There is little question that the prohibition of the use of force is a \textit{jus cogens} norm,\textsuperscript{171} at least in a context in which a state is exercising its right to self-defense against armed attack or ag-


\textsuperscript{167.} G\textsc{reat} B\textsc{ritain} F\textsc{oreign} O\textsc{ffice}, A C\textsc{ommentary} on the C\textsc{harter} of the U\textsc{nited} N\textsc{ations} 9 (1945).


\textsuperscript{169.} L\textsc{eland} M. G\textsc{ooodrich} \& E\textsc{dvard} H\textsc{ambro}, C\textsc{harter} of the U\textsc{nited} N\textsc{ations}: C\textsc{ommentary} and D\textsc{ocuments} 297 (2d ed. 1949). In \textit{Nicaragua}, the I\textsc{C}J viewed self-defense as a customary right, even if confirmed and influenced by the Charter. \textit{Nicaragua}, 1986 I.C.J. at 94 (“Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter”). In \textit{Nicaragua}, the Court did not apply the U.N. Charter art. 51 right of self-defense \textit{per se} due to a U.S. reservation. Self-defense thus remains an inherent right and influences the interpretation and content of art. 51, as relevant “external” custom influences the interpretation of treaties generally. Oscar Schachter, \textit{Self-Defense and the Rule of Law}, 83 AM. J. INT’L L. 259, 260 (1989).

\textsuperscript{170.} S\textit{ee}, e.g., Thomas K. Plofchan, Jr., \textit{A Concept of International Law: Protecting Systemic Values}, 33 VA. J. INT’L L. 197, 234–37; K\textsc{elsen}, \textit{supra} note 164, at 791; Antonio Cassese, \textit{Article 51}, in \textit{LA CHARTE DES NATIONS UNIES} 769, 788 (J.-P. Cot \& A. Pellet eds., 1985).

\textsuperscript{171.} E. Jim\textsuperscript{e}nez de Ar\textsuperscript{é}chaga, \textit{International Law in the Past Third of a Century [General Course on Public International Law]}, 159 R.C.A.D.I. 9, 64 (1978-I); \textit{see also} I\textsc{an} S\textsc{inclair}, T\textit{he Vienna Convention on the Law of Treaties} 222–23 (2d ed. 1984) (“There is ample evidence for the proposition that, subject to the necessary exceptions about the use of force in self-defence or under the authority of a competent organ of the United Nations or a regional agency acting in accordance with the Charter, the use of armed or physical force against the territorial integrity or political independence of any State is now prohibited. This proposition is so central to the existence of any international legal order of individual nation States (however nascent that international legal order may be) that it must be taken to have the character of \textit{jus cogens}”).
gression (the most grave form of the use of force).\textsuperscript{172} Where the right of self-defense is being exercised to defend a state's territorial integrity and population against a genocidal use of force, there can be no doubt that aggression, and thus a \textit{jus cogens} norm, is implicated.

Given both that the prohibition of aggression (equated, in the \textit{Nicaragua} case, to an armed attack) is a \textit{jus cogens} norm, and that the prohibition of genocide is also a \textit{jus cogens} norm,\textsuperscript{173} the exercise of the inherent right to self-defense against genocidal aggression, contextually analyzed, must be understood as constituting a \textit{jus cogens} norm of the highest order. Indeed, one could refer to the right of self-defense in this context as a "double" \textit{jus cogens} norm. The fact that the right to self-defense is styled "inherent" in Article 51 independently confirms that it is a bedrock right of the international system and thus possesses the constitutional status of a \textit{jus cogens} norm, especially given the association between the natural law strain of international law and the concept of \textit{jus cogens}.\textsuperscript{174}

Despite the foregoing, it might seem unlikely that Article 51 contains a right to self-defense which constitutes a \textit{jus cogens} norm. The very fact that the right is limited under Article 51 could be argued to militate against such an interpretation. However, Article 51 does not so much limit the right to self-defense as structure or define it within a system of collective security. That is, the values underlying the right of self-defense are upheld via the U.N. Charter system.\textsuperscript{175} It is thus not inconsistent to view a state's right to self-defense (particularly defense in the face of aggressive genocide) as being simultaneously a \textit{jus cogens} norm and structured by Article 51.

\textsuperscript{172} \textit{Nicaragua}, 1986 I.C.J. at 100-01; \textit{see also} Belatchew Asrat, \textit{Prohibition of Force Under the UN Charter: A Study of Art. 2(4) 44-45 (1991)}.

\textsuperscript{173} G.A. Res. 96(l) states that genocide "shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations." G.A. Res. 96(l), supra note 84, at 189; \textit{see also} Reservations to the Genocide Convention, 1951 I.C.J. at 23, and Bosnia v. Serbia I, 1993 I.C.J. at 23 (citing G.A. Res. 96(l)); Lauri Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law} 456-66 (1988).

\textsuperscript{174} The French version of the phrase "inherent right" in art. 51, "droit naturel," expresses the natural law origins of the term and must be considered equally authoritative to the English version. \textit{See} 1969 Vienna Convention, supra note 45, art. 33 (concerning interpretation of treaties authenticated in two or more languages).

The creation of a doctrinal linkage between genocide and aggression, as encapsulated in the terms \textit{genocidal aggression} or \textit{aggressive genocide}, in a way that emphasizes the very special sense in which the right of self-defense is an "inherent" right in the context at hand, is not a spurious one. As recently as December 20, 1993, the General Assembly situated genocide within "the continuation of aggression in Bosnia." \textit{See} G.A. Res. 48/88, supra note 26, at 2.

\textsuperscript{175} \textit{See infra} part II.B.5.
Given this "inherent" status, it is reasonable to start from the presumption that a state's exercise of the right to self-defense may be suspended by the Security Council only in certain limited circumstances and then only where the Security Council replaces a state's inherent right to self-defense with its functional equivalent: effective collective intervention in lieu of self-defense. Accordingly, the purpose of the next section is to demonstrate that it is incoherent to require states to yield their right to self-defense, especially when styled an "inherent" right in Article 51, without receiving a corresponding guarantee that the Security Council will act to protect their interests. The Security Council’s monopoly on the legal use of force (which some commentators see as being beyond question, save for the exception of self-defense) carries with it a duty to protect vulnerable states from armed attack, particularly when it takes the form of genocidal aggression.

The two incontrovertible exceptions to Article 2(4), collective security actions and self-defense, must be interpreted symbiotically and not in a way that would allow one to subsume the other.

3. The Security Council Was Under an Obligation to Take Objectively Effective Measures to Ensure that Its Maintenance of the Arms Embargo Against Bosnia Did Not Fetter Bosnia’s Inherent Right to Self-Defense under Article 51 of the U.N. Charter that Bosnia Enjoyed from the Moment of Admission into the U.N.

A system of collective security requires that a collective body will ensure that individual states or nonstate actors need not and therefore

---

176. Jean Combacau, The Exception of Self-Defence in U.N. Practice, in The Current Legal Regulation of the Use of Force 9, 30 (Antonio Cassese ed., 1986) ("[T]he logic behind the Charter is plain to see; it was based on the link between a rule and a guarantee: the rule (to which self-defence was only a limited exception): that States should give up their legal right to use force; the guarantee: that a mechanism of collective security, put in motion by the S.C., in whose favour they gave up this right, would substitute the individual mechanism by which each State had until then been judge of the merits of its own case. The rule and the guarantee went together, and the success of the latter was a necessary condition for respect of the former").

177. Ian Brownlie, The U.N. Charter and the Use of Force 1945-85, in The Current Legal Regulation of the Use of Force, supra note 176, at 491, 496 ("the concept of a system of public order involves a structure pre-disposed to a quasi-monopoly of the use of force").

178. Brownlie, International Law and Use of Force, supra note 157, at 273 ("The whole object of the Charter was to render unilateral use of force, even in self-defence, subject to control by the Organization").

179. Waldock, supra note 147, at 496.

180. See GA Res. 48/88, supra note 26, at 2.
may not resort unilaterally to the use of force.\textsuperscript{181} This is aptly demonstrated by the view taken by the ILC of the general relationship between a principle of self-defense and any monopoly over the use of force claimed by a central authority. The ILC, in its commentary on the right to self-defense as a circumstance precluding wrongfulness, noted that self-defense is allowed "where . . . the use of force by the agencies of the central authority cannot be resorted to \textit{promptly and efficiently enough to protect a subject against an attack by another}."\textsuperscript{182} This statement of principle must be taken as a baseline for interpreting the scope of Security Council powers to fetter self-defense within Article 51.

Article 51 provides that a state may exercise its inherent right to self-defense "until the Security Council has taken measures necessary to maintain international peace and security."\textsuperscript{183} While the Security Council clearly has the power to suspend a state's right to self-defense, that power must be exercised within a legal framework. The central question to be determined is: what is meant by "measures necessary"? There is only limited state practice and U.N. practice to assist in the interpretation of the phrase.\textsuperscript{184}

The accepted view would seem to be that not every action of the Security Council amounts to "measures necessary": only when the Security Council adopts effective measures will a state's inherent right to self-defense be suspended. While this is the consensus on the substantive interpretive question, the crucial issue is that of the locus of legal authority to make the substantive determination. Debate has surrounded the issue of who determines whether the Security Council has undertaken the "measures necessary." Of course, there is likely to be a difference of opinion between the self-defending state (which is understandably concerned that the Security Council should take quick and effective measures in order to protect it against armed attack) and the Security

\textsuperscript{181} McDougal \& Feliciano, \textit{supra} note 147, at 255.

\textsuperscript{182} 1980 Draft Articles on State Responsibility, \textit{supra} note 32, at 52 (emphasis added). The interpretative weight to be accorded the ILC's statement of principle is considerable given that the ILC clearly regarded their statement as a generally accepted restatement of the principle of self-defense within any system under which "a central authority has a monopoly or virtual monopoly on the use of force." \textit{Id}. This follows from the ILC having made it clear that it had "no intention of entering into a continuing controversy regarding the scope of the concept of self-defence" with its brief commentary on art. 34 of the Draft Articles on State Responsibility. \textit{Id}. This unwillingness to enter into a controversial exegesis of self-defense emphasizes just how uncontroversial the ILC viewed the quoted passage to be.

\textsuperscript{183} Goodrich \& Hambro, \textit{supra} note 169, at 304 ("The theory of the Article would appear to be that the Security Council will take measures which after a time will supercede those taken in individual or collective self-defense").

Council itself. However, in its efforts to "maintain international peace and security," the Security Council does not have an entirely free hand. On the contrary, the Security Council is under an international legal obligation to ensure that the measures which it undertakes be effective before it supersedes a state's inherent right to self-defense.

Three views on this matter can be distilled. The first view suggests that it is for the self-defending state itself to determine whether the Security Council measures are "measures necessary" such that it is satisfied that its right of self-defense may be superseded. This approach has rightly been subjected to sustained criticism. The primary concern raised by commentators is, of course, that auto-interpretation of the adequacy of Security Council measures by the state (or states) in question would vitiate the system contemplated by the Charter of collective security under the aegis of the Security Council.

The second suggests that the Security Council itself may determine, on purely subjective (albeit partially collectivized) criteria, whether and when it has taken "measures necessary" such that it may suspend a state's inherent right to self-defense. This approach also has been subjected to sustained criticism and must be rejected. If the Security Council alone may decide the issue without reference to any objective criteria, a state may be subjected to the effects of an unlawful use of force without effective Security Council action. The concern is that the Security Council will sacrifice the individual interests of a state for

---


186. See Antonio Cassese, International Law in a Divided World 235 (1986).


188. Oscar Schachter, United Nations Law in the Gulf Conflict, 85 Am. J. Int’l L. 452, 471 (1991) ("The states claiming the right to use of force in collective self-defence cannot be the final arbiters of its legality"); Julius Stone, Legal Controls of International Conflict 244 n.9 (rev. ed. 1959) ("since, though express provision is lacking, this could scarcely be left to the attacking State, or the self-defending State").


190. Schachter, United Nations Law in the Gulf Conflict, supra note 188, at 458 ("the right of self-defense would be overridden whenever the Security Council adopted measures considered necessary in case of an armed attack on a state. This would be an implausible — indeed, absurd — interpretation"); Eugene V. Rostow, Until What? Enforcement Action or Collective Self-Defense?, 85 Am. J. Int’l L. 506, 508-513; Abraham D. Sofaer, Asking the U.N. Is Asking for Trouble, Wall St. J., Nov. 6, 1990, at A14 ("Otherwise, a state would be required to lay down its arms as soon as the Council takes any measure, however ineffectual").
political considerations. It cannot be an accurate statement of the law that the Security Council can suspend a state’s inherent right to self-defense (a right which has acquired the status of a *jus cogens* norm) merely by passing a resolution.

Apart from policy reasons, this interpretation is unsustainable on a textual basis because it would make one or the other of the two sentences in Article 51 redundant. Independent meaning must be given to words used similarly, but not identically, in the same text. The second sentence’s subjective standard (“deems necessary”) only refers to the Security Council’s ability to take action but does not provide the test for ousting or suspending the right of self-defense, found in the first sentence of Article 51. The subjective approach to the interpretation of “measures necessary” results in an untenable collapsing of the first and second sentences of Article 51.

The second phrase of Article 51 permits the Security Council to take any actions it “deems necessary” to restore international peace and security, although actions so taken must meet the test of being “measures necessary” in the language of the first sentence of Article 51 in order to oust the state’s inherent right of self-defense. The fact of different usage of “measures necessary” (first sentence of Article 51) and “such action . . . as it deems necessary” (second sentence of Article 51) suggests by implication that as to the term “necessary,” the second sentence constitutes a subjective test and the first sentence an objective test.

The purpose of the second sentence is clearly to ensure that the fact that a Member has undertaken action in self-defense does not oust the ability of the Security Council to take “such action . . . as it deems necessary.” However, the second sentence does not state that such action which the Security Council “deems necessary” on a subjective basis can, without more, oust the ability of a state to exercise its inherent right to self-defense; this remains governed by the objective test (“measures necessary” on the basis of *effectiveness*) contained in the first sentence of Article 51. Security Council action must be objectively effective before it can oust the self-defense action (either individual or collective) of a state.

191. *Bowett, supra* note 147, at 197 (“In theory this should not be so, but in fact the risk of a ‘political’ decision by the Council is always present”).

192. *Moore, supra* note 165, at 154 (“surely such an enormously important consequence [the removal of a State’s right to self-defense] could only result from a clear Security Council action to that effect”). For discussion of positions taken in various concrete contexts, such as the Argentine intervention in the Falklands, where a purely subjective approach is unacceptable, see *infra* notes 200–17 and accompanying text.
It has been argued that the second clause of Article 51 is "probably superfluous" and "without legal effect." The argument advanced here does not go that far. It is submitted, rather, that the second sentence represents an excess of caution: to make sure that the proper exercise of self-defense does not bar the Security Council's power to take action. It does serve, in that sense, to emphasize the Security Council's primary responsibility for the maintenance of international peace and security. It also lends support to the argument advanced above that not every Security Council measure will oust a state's right to self-defense. A state may exercise its right to self-defense, and the Security Council may then decide on a subjective basis to undertake certain measures which it "deems necessary" under the second sentence of Article 51. However, unless these measures are objectively "measures necessary" under the first sentence of Article 51, they will not affect the ability of a state to continue to exercise its inherent right of self-defense. What must be avoided is an overly loose interpretation of the article that reads the words "deems necessary," found in the second sentence, into the first sentence.

Thus, neither of these first two approaches is satisfactory, and neither can be definitively supported by reference to the travaux préparatoires of the Charter. Thus, a third approach suggests itself: it is the Security Council which must decide whether it has taken "measures necessary" such that a state's inherent right to self-defense may be suspended, but this decision must be made on the basis of objective criteria. There is support for this approach in state practice and in the practice of the Security Council. In 1965, Pakistan asserted a right to continue to use force in self-defense under Article 51 "until the Security Council has taken effective measures to restore international peace and security ..." In 1967, Pakistan reiterated this interpretation of Article 51.

193. Bowett, supra note 147, at 198.
196. Id. at 344-364.
197. See Bowett, supra note 147, at 196; Kelsen, supra note 164, at 795.
During the Falklands Islands crisis in 1982, the United Kingdom also argued that the right of self-defense under Article 51 continues until the Security Council takes "measures which are actually effective to bring about the stated objective." Given that Security Council Resolution 502 was demonstrably ineffective, "[t]he United Kingdom's inherent right of self-defence [was] thus unimpaired." The United Kingdom was of the opinion that the determination of whether a measure adopted by the Security Council under Article 51 must be an objective one, "reached in light of all the relevant circumstances."

Argentina had argued that the Security Council’s adoption of Resolution 502 had terminated the U.K.'s inherent right of self-defense. However, it is not coherent for such "measures" to be considered adequate to deprive the United Kingdom of its inherent right to self-defense, "since it cannot by itself be a sufficient alternative to the victim state’s right to meet and repulse the aggression." Resolution 502 cannot be considered to have been "measures necessary" effectively

S/PV.1360 (1967).


201. Resolution 502 ordered Argentina to withdraw its forces from the Falkland Islands, which it had not done. The United Kingdom held that this was sufficient evidence "to indicate that the decision of the Council has not, in fact, been effective to restore international peace and security because of Argentina’s refusal to comply." Letter from the Permanent Representative of the United Kingdom to the President of the Security Council, U.N. SCOR, 37th Sess. at 1-2, U.N. Doc. S/15017 (Readex 1982).


204. U.N. Doc. S/PV.2360, supra note 203, at 21. The representative argued:

It is known that under Article 51 of the Charter unilateral actions must cease when the Security Council has already taken measures. There is a legal obligation to suspend self-defence once the Security Council "has taken measures necessary to maintain international peace and security". The determination of whether such measures have been effective must be reached objectively and cannot be left to the arbitrary judgement of the Government of the United Kingdom itself.

Id. See also Letter from the Permanent Representative of Argentina to the President of the Security Council, U.N. SCOR, 37th Sess. at 1, U.N. Doc. S/15014 (Readex 1982) (arguing that "[t]hese illicit actions by the United Kingdom are claimed to be justified by a so-called right of self-defence. Among other reasons, that right cannot be invoked when the Security Council has adopted measures for the maintenance of international peace and security"). The representative of Argentina subsequently also rejected the U.K.'s theory of "effectiveness." See Letter from the Permanent Representative of Argentina to the President of the Security Council, U.N. SCOR, 37th Sess. at 1, U.N. Doc. S/15022 (Readex 1982).

205. McCoubrey & White, supra note 123, at 101.
suspending the U.K.'s inherent right to act in self-defense. The view of the United Kingdom is more persuasive than that of Argentina.

Few speeches by Security Council members clearly addressed the claims of Argentina and the United Kingdom on the issue of whether Security Council measures must be effective in order to deprive a state of its right to act in self-defense. It is true that many Latin American states were opposed to the U.K. claim of self-defense. Moreover, those states which supported the U.K.'s general position by and large tended not to evaluate or comment upon its specific position on the issue which concerns us here. However, any objections or ambiguities on this point were decisively met by the following arguments made in the Council by the United Kingdom:

Undersecretary Ros [of Argentina] also argued that there is an obligation to suspend self-defence once the Security Council “has taken measures necessary to maintain international peace and security” [citation omitted]. He went on to say that: “The determination of whether such measures have been effective must be reached objectively and cannot be left to the arbitrary judgment of the . . . United Kingdom” [citation omitted].

The United Kingdom accepts that the determination must be an objective one. It must be reached in the light of all the relevant circumstances . . .

By resolution 502 (1982) the Council demanded the immediate withdrawal of all Argentine forces from the Falkland Islands. Argentina did not withdraw any of its forces: it did quite the opposite . . .

206. Rosalyn Higgins, The Attitude of the Western States Towards Legal Aspects of the Use of Force, in The Current Legal Regulation of the Use of Force, supra note 176, at 435, 441–42 (“Such an interpretation would make a mockery of the ‘inherent’ right of self-defence. It would affirm that once an invasion — even one declared unlawful — was successful, it could not be reversed at all speed because the invaded state was under a duty to settle disputes peacefully. This cannot be a correct view of the Charter generally nor of Resolution [sic] 502 specifically”).


Accordingly, the breach of the peace still subsisted despite the adoption of the resolution. How, then, can it seriously be maintained that resolution 502 (1982) amounted to a measure "necessary to maintain international peace and security"?

In my letter to the President of the Council dated 30 April, I pointed out that the reference in Article 51 to measures necessary to maintain international peace could "only be taken to refer to measures which are actually effective to bring about the stated objective. Clearly, the Security Council's decision in its resolution 502 (1982) has not proved effective. The United Kingdom's inherent right of self-defence is thus unimpaired" [citation omitted] . . .

A State which has committed an act of aggression is told to stop its aggression and to withdraw by the Security Council. That State does not heed the demand. The victim, according to Mr. Ros, would then be obliged to fold his arms and allow the aggressor to continue his aggression and to digest its fruits.\(^1\)

Not only does this passage clearly set out the substantive case that the Article 51 necessity test must be an objective one, but it also very effectively lays bare the inconsistency between Argentina's position that the right of self-defense was ousted by the mere adoption of Resolution 502 and its clear acceptance that the test was an objective one.\(^2\) Further evidence of the fragility of Argentina's contention (that effectiveness of Security Council measures does not have to be objectively established) can be found in the position that Argentina took before the full conflict started. After Argentine forces had landed on the British dependency of South Georgia ("San Pedro" to the Argentines), Argentina itself invoked a right to self-defense in anticipation of British action to retake the islands:

> The system of collective security set forth in the Charter cannot be interpreted in a way that would mean that provisions for legitimate defence would become inoperable . . . The Charter has provided that Members of the United Nations, when complying with its principles and purposes, should not be left in a defenceless state against any act of aggression perpetrated against its territory or population.\(^3\)

---

211. See id. and accompanying emphasized text.
Thus, upon analysis, it turns out that both the United Kingdom and Argentina accepted in the Falklands crisis an objective test for the phrase "measures necessary." Significantly, the United Kingdom took a somewhat similar view during the 1990-1991 Gulf War. As the view of a Permanent Member with power to vote on analogous situations before the Security Council, the United Kingdom's view may also have some element of independent legal effect based on a requirement of consistency between the legal positions taken by a Permanent Member in its own defense and those taken in judgment of actions by other states. Thus, under Article 51, "measures" must mean at minimum the use of armed force, the imposition of economic sanctions, or both. Even during the debates during the Gulf War as to whether economic sanctions were preferable to the use of force, the unarticulated assumption was that the criterion by which either option was to be measured was effectiveness. This third approach avoids the dangers of auto-interpretation by the state(s) concerned while holding the Security Council to certain objective standards.

---

213. It is worth noting that one of Argentina's strongest supporters on the facts of the situation supported Argentina in terms that not only hint at an objective test but also emphasize facts that distinguish the U.K. claim from the current Bosnian claim in a manner favorable to Bosnia:

As has been said, one cannot invoke self-defence in this case as [self-defense] would only apply, following the adoption of a resolution by the Council, if the state of hostilities continued without interruption — which clearly has not happened. On the contrary, Great Britain's actions led to a new opening of hostilities.

U.N. Doc. S/PV.2362, supra note 203, at 26 (emphasis added). During the Falklands crisis, there was a question as to whether the U.K. could invoke the right of self-defense given that active hostilities had ceased by the time new U.K. forces had travelled the great distance to the Falklands, whatever the test adopted for art. 51. In the case of Bosnia, there is no question that hostilities to which it claims the right to respond in self-defense have continued without significant interruption.

214. Warbrick, supra note 184, at 487-88 (highlighting the U.K.'s view that art. 51's requirement that the Security Council take measures necessary to maintain international peace and security "must be related to the aims the Council sets itself, here the withdrawal of Iraq and the restoration of the legitimate government in Kuwait. Since these objectives had not been attained, the 'measures necessary etc.' had not been taken" (emphasis added)).

215. McCoubrey & White, supra note 123, at 101-02; see also Oppenheim's International Law 423 n.22 (Sir Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("The actions of Kuwait and its allies in 1990 in responding to Iraq's aggression against Kuwait suggests that [Article 51] does not prevent continued resort to self-defence even after the Council has taken some measures (e.g. the imposition of economic sanctions), if those measures have not had the necessary effect" (emphasis added)).

216. Schachter, Legal Aspects of the Gulf War, supra note 163, at 17.

217. Oppenheim's International Law, supra note 215, at 159 ("Unless it is to become an occasion for licence and lawlessness, an inherent right [to self-defense] must be controlled by and accountable to a higher authority — provided that that authority is in a position to act effectively in accordance with its constitution" (emphasis added)).

Of what, then, should these objective criteria consist? Certainly, they must consist of more than "[m]erely being seized of the matter." Various options might include: (i) a direction to participants to stop fighting; (ii) the imposition of economic sanctions; or (iii) the use of force to undo aggression. However, it is clear that (i) is unsatisfactory, and even (ii) will likely be insufficient in many cases. The overall consideration must be that the "measures necessary" result in action "that definitely restores and maintains international peace and security." The measures in question must be effective on some objective standard.

The best approach is a purposive one. This is consistent with both Article 31(1) of the 1969 Vienna Convention and Article 24(2) of the U.N. Charter. Article 51 has a dual purpose: it reiterates the inherent right of self-defense while placing it within the U.N. collective security framework. Read together, this produces (vis-à-vis a self-defending state) a quasi-monopoly on the use of force in the hands of the Security Council, but not a complete monopoly. Article 51 must be interpreted to require that states yield their right to self-defense to the Security Council on the understanding that the Security Council will undertake measures which will have the equivalent effect of individual (or collective) self-defense. That is, the Security Council measures must actually be effective in establishing international peace and security, not merely in freezing the aggression into a stalemate situation or in sacrificing the territorial integrity of the aggrieved state to political considerations.

220. Kaikobad, supra note 207, at 344.
221. Plofchan, Article 51, supra note 195, at 342; Higgins, International Law and the Avoidance, Containment, and Resolution of Disputes, supra note 218, at 333 ("In a decentralized legal order, Members should be free to act in collective self-defence until the Security Council was in a position to take over the task and secure the common objective").
222. Nguyen Quoc Dinh, La légitime défense d'après la charte de Nations Unies, 52 REV. GÉN. INT'L PUB. 223, 234 ("Le dessaisissement n'aura lieu que le jour où l'organisme international aura pris des mesures effectives en vue de faire face à la situation").
The action required of the Security Council to suspend a state’s inherent right of self-defense must be determined in light of the threat to international peace and security to which it is a response. To this end, objective criteria to determine effectiveness may be gleaned from the very principles which guide a state’s exercise of individual or collective self-defense under customary international law. These principles are proportionality and necessity. But these principles, which ordinarily serve as limits in the case of an individual state, may also serve as positive guidelines for the margin of discretion within which the Security Council can take what it perceives to be “measures necessary” in order to invoke the machinery of collective security and suspend a state’s inherent right to self-defense.

Whatever general power the Security Council may have to fetter a state’s right to self-defense, when the state is, in the same instant, attempting to protect its population from genocide and to defend itself from aggression, special considerations must apply. The effect of these considerations is to impose a higher threshold in the determination of “measures necessary.” The Security Council as an agent of the international community (and not simply an expression of the views of its current fifteen members) must ensure that there is an effective substitute for the right of self-defense, particularly if the result of its actions (here, the imposition of an arms embargo) would otherwise impede the ability of the state’s population to defend itself from genocidal aggression. It may only do so if it insures that such defense is carried out on behalf of the otherwise self-defending state by the organized international community. This view is reinforced by the “constitutional” status of the right to self-defense as an “inherent,” “naturel” norm: the right cannot be viewed as a right with which the Security Council may easily dispense. The significance of the right necessarily means that the Security Council may terminate it only by replacing it with its functional equivalent, that is, collective intervention on behalf of the aggrieved state.

Thus, in the case of self-defense against genocide, the threshold of effectiveness required to oust the inherent right of self-defense is even higher than in situations in which genocide does not accompany aggression. There must therefore be a correlation between the degree of international integration and the limitation of the rights of self-defense and collective defense. If the Security Council is unable, for whatever
reason, to act effectively, it must not interfere with the inherent right of a state to defend itself, subject of course to the customary international law requirements of necessity and proportionality. What the Security Council must not do is impose measures (such as the arms embargo) which seriously impair the ability of a state to defend itself from an armed attack, without also undertaking effective measures to defend the state itself. This is particularly important in the case of aggressive genocide. Given the deeper understanding of the *jus cogens* nature of the norm against genocide developed earlier in this Memorial,\(^\text{225}\) it is essential that the right of self-defense against (*jus cogens*-prohibited) armed attack/genocidal aggression be recognized as a *jus cogens* norm itself with the highest degree of peremptory force. Thus, as already indicated, to the extent that the character of self-defense as a legal norm is partly a function of that to which it responds, we have a “double” *jus cogens* norm. This enhances both the certainty with which objective criteria for effective measures must have been fulfilled before a state’s right to self-defense may be suspended and the strictness of any review that the role of the ICJ permits, indeed mandates.

The reasoning in the immediately preceding two paragraphs is premised on the notion that, within Article 51, there is a one-to-one relationship between what it is necessary for a state to do in self-defense and what is necessary for the international community to do in order to impair the state’s right.\(^\text{226}\) That this should be the presumptive starting

---

\(^{225}\) See supra part I.A.2.

\(^{226}\) Franck & Patel, supra note 189, at 63 (“If states use armed force under the self-defense rubric of Article 51, their individual activities are subsumed by, or incorporated into, the global police response once it is activated. That is, the old way is licensed *only until the new way begins to work*” (emphasis added)). The problem with this view is that there is a disparity between beginning to work and actually being effective. That disparity may be accounted for in terms of a certain margin of appreciation to be accorded the Security Council by other actors on the grounds that the Council is best-situated to evaluate whether the measures adopted will work. Such a margin of appreciation follows from the general proposition that a *normative* standard (here, that measures taken must effectively substitute for the ability of a state to defend itself) does not itself allocate *institutional* competences to make the appraisal of whether that standard has been met. Thus, as a general matter, it may make a good deal of sense to take the view that, within the margin of appreciation, states may be under a duty not to take unilateral measures of self-defense and the ICJ may be under a duty not to substitute its judgment as to whether the one-to-one relationship between measures taken and protection from attack has been made out. However, as argued *infra* part III.A, where *jus cogens* norms other than aggression, notably genocide, are implicated, the margin of appreciation should be narrow indeed, perhaps even non-existent. At minimum, a contextual judgment by the ICJ of the appropriate scope of review is required.
point for Article 51, as a general matter, is reinforced by the earlier quoted view of the ILC that the right of self-defense lapses when the central authority has acted "promptly and efficiently enough to protect" the subject from attack. However, it might be argued that the wording of Article 51 itself points to a possible disjunction between "measures necessary" and what may be necessary to protect a state from attack; this possible disjunction arises from the fact that the first sentence of Article 51 allows the right of self-defense to be impaired when "the Security Council has taken measures necessary to maintain international peace and security." Thus, it can be seen that there is a textual indication that a utilitarian trade-off may be contemplated by Article 51, such that the Council might take measures that effectively protect a collective interest in peace and security (for example, as here, by cordoning off a region in an attempt to prevent the spread of conflict) at the expense of the protection of the substantive interests of the state being attacked.

As a general interpretive matter, it would seem contrary to the "inherent" nature of the right of self-defense to allow for such a trade-off, and accordingly the words "international peace and security" in Article 51 must be interpreted to give priority to the peace and security interests of attacked states. That this must be the case can be shown if necessity as a background norm in international law is called upon to help interpret what could be called the "interaction of necessities" within Article 51. One does not have to go so far as to collapse the right of self-defense into the classical right of necessity for purposes of self-preservation to see the value of interpreting the right of self-defense as continuing coterminously with necessity. In this respect, the ILC has recognized a defense of "state of necessity" according to which a state may plead that the act in question "was the only means of safeguarding an essential interest of the State against a grave and imminent peril."

One only has to imagine a situation in which genocide occurs entirely within a state without external involvement, such that there would be no element of aggression. The question would then be whether it would be lawful for that state to breach an international obligation not to acquire arms if those arms were essential to protect people in its territory from genocide. The ILC gives as a clear example of the neces-

---

227. See supra note 182 and accompanying text.

228. U.N. CHARTER art. 51 (emphasis added).

229. Note that the ILC in its commentary on art. 34 of the Draft Articles on State Responsibility draws attention to the lingering relevance of notions of necessity for the scope of the right of self-defense. 1980 Draft Articles on State Responsibility, supra note 32, at 52-53.

230. Id. at 34-35.
sity defense a situation in which there is a "grave danger to . . . the survival of part of the . . . population" of a state.\textsuperscript{231} If the element of state-to-state aggression is then added, it must follow that the necessity at issue does not abate, but rather becomes more acute \textit{and}, at the same time, merges with the right of self-defense. The only question that would then arise within the framework of the Security Council's powers is whether the Council could invoke a higher necessity, such as prevention of regionalization of a conflict, as a justification for depriving the state of that which remains necessary to resist the genocidal aggression. While the ILC discussion of the necessity defense is premised on a framework of state responsibility, the general thrust of the principle of necessity must be taken to have an independent existence (as either a general principle or customary norm) that applies to all international persons including the U.N. As the ILC comments: "The rule outlawing genocide . . . [was] mentioned in the discussion as . . . [one] example . . . of [a] rule[] whose breach is in no event to be justified on any ground of necessity."\textsuperscript{232} If there is any situation in which community measures justified in the name of international peace and security become, in reality, a sacrifice of one member of the community on the altar of necessity, it is the case at hand. The maintenance of the arms embargo amounts to such a utilitarian sacrifice because it does not accord sufficient weight to the principle of the proportionality of the necessities which interact within Article 51.\textsuperscript{233}

Bosnia is faced with an armed attack against its territory of a special kind, namely a campaign of aggressive genocide waged against its population. In such a case, the principles of necessity and proportionality lead to the inexorable conclusion that only concerted military intervention under the aegis of the Security Council will be effective to restore international peace and security. In the face of genocide, mere economic sanctions or deployment of lightly armed troops for humanitarian purposes is manifestly ineffective and insufficient; the deployment of armed force must bear some proportionate relationship to the threat to Bosnia in order to oust its inherent right to self-defense.

The Security Council may balk at using armed force and choose not to intervene.\textsuperscript{234} In so deciding, in a case of aggressive genocide, it

\begin{itemize}
\item \textsuperscript{231} \textit{Id.} at 35.
\item \textsuperscript{232} \textit{Id.} at 50 (emphasis added).
\item \textsuperscript{233} "[T]he interest sacrificed on the altar of 'necessity' must obviously be less important than the interest it is thereby sought to save." \textit{Id.} at 50.
\item \textsuperscript{234} It could be argued that the Security Council, as a representative of the international community, is legally obligated to intervene to prevent genocide. It is arguable that the subtext of the recent ILC discussion leaves open the question of a positive duty of the
\end{itemize}
cannot purport to suspend Bosnia’s inherent right to self-defense by the imposition of ineffective measures (here, an arms embargo, economic sanctions against Serbia, and a meager deployment of lightly-armed troops clustered around porous “safe-zones” with no mandate to protect the general population) which are inadequate to the task.

This is not to argue that in some (if not many) cases, the imposition of an arms embargo or economic sanctions against an aggressor state cannot be both appropriate and effective. The principles of necessity and proportionality are flexible and adaptable to changing circumstances. But an arms embargo and economic sanctions are clearly an inadequate substitute for collective armed intervention when the threat to international peace and security is genocide and “ethnic cleansing” and when the bulk of the evidence indicates that the arms embargo has been far more effectively enforced against the victim rather than the perpetrator. In such circumstances, which are unquestionably present in this case, the sole alternatives are effective armed intervention on behalf of the international community or, failing that, a lifting of the arms embargo so as to enable Bosnia to exercise its inherent right to individual and collective self-defense. In the latter case, the Security Council should condemn the combined armed attacks and acts of genocide, reaffirm Bosnia’s right to self-defense, and request that Member States extend assistance to Bosnia. 235

5. The Legitimacy of the U.N. System of Collective Security Demands an Interpretation of the Inherent Right of Self-Defense Consistent with the Principles Underlying the System

The legitimacy of the U.N. system of collective security is to a significant degree based upon its ability to secure the political and territorial integrity of Member States. Indeed, Article 1 of the U.N. Charter provides that among the primary purposes of the U.N. is the maintenance of international peace and security. If the system of collective security upon which the Charter is premised cannot provide this, then states have the right to defend themselves through the use of force. The very preservation of the inherent right to self-defense in Article 51 makes it clear that the Member States were wary about entrusting all international community as a whole to intervene to prevent ongoing international crimes such as genocide. 1993 Draft Articles on State Responsibility, supra note 116, at 114–29.

aspects of international peace and security to the Security Council.\textsuperscript{236} This adds to the need for a symbiotic interpretation of a state’s right to self-defense and the Security Council monopoly on the legitimate use of force. It is not an exaggeration to suggest that “[t]he debate over the interpretation of Article 51 is significant because it focuses on the relationship between the U.N. organization and the U.N. Charter. It thus goes to the heart of the U.N. vision of world order.”\textsuperscript{237}

Among the other primary purposes of the U.N. is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .”\textsuperscript{238} It is important to view the promotion of human rights as a coprimary principle which must inform the Court’s interpretation of the right to self-defense, particularly self-defense against aggressive genocide, the very aim of which is the ultimate denial of all other human rights.

Through Article 24(1) of the U.N. Charter, states entrust primary responsibility for the maintenance of international peace and security to the Security Council.\textsuperscript{239} Significantly, however, Article 24(2) provides that “[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” When the purpose of the maintenance of international peace and security and the purpose of the promotion of human rights and self-determination are read together, they cover precisely the situation at hand: genocidal aggression.\textsuperscript{240} The interpretation of Articles 24 and 51 and Chapter VII as a whole thus must account for this specific situation.

A broader view which takes the structure of the U.N. system of collective security into account must consider that the right to self-defense is suspended only when the Security Council takes actions equivalent to collective self-defense by the Member States on behalf of the state in question.\textsuperscript{241} Effectiveness is essential. Another central con-

\textsuperscript{236} Nigel Bentwich & Andrew Martin, A Commentary on the Charter of the United Nations 106 (1950) (arguing that the self-defense clause “was a measure of [the] lack of confidence in the perfection of the system of collective security based upon the Charter”); Nguyen Quoc Dinh, Droit International Public 757 (1975).

\textsuperscript{237} N. Rostow, supra note 185, at 418.

\textsuperscript{238} U.N. Charter art. 1(3).

\textsuperscript{239} Id. art. 24(1). “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security” and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. Note that the responsibility is “primary” but not “exclusive.” Certain Expenses of the United Nations (Advisory Opinion), 1962 I.C.J. 151, 163 (July 20).

\textsuperscript{240} See G.A. Res. 48/88, supra note 26.

\textsuperscript{241} McCoubrey & White, supra note 123. These authors state that “[t]he only way of interpreting article 51 without undermining the Charter edifice is to interpret it to mean that
sideration is that the collective security regime of the Charter must not have the effect of making Member States worse off than if they were not Member States.\textsuperscript{242}

III. PERMISSIBILITY OF AN ICJ JUDGMENT ON THE STATUS OF SECURITY COUNCIL RESOLUTIONS AND THEIR EFFECTS ON THE LEGAL OBLIGATIONS OF STATES

A. The Provisions and Structure of the U.N. Charter and the ICJ Statute Permit, and in Matters of Jus Cogens Require, the ICJ to Pass Judgment on the Lawfulness of Security Council Resolutions

1. The ICJ Is Not Precluded from Addressing a Dispute or Situation Which Is Simultaneously Before the Security Council

a. There Are No Provisions in the U.N. Charter or in the ICJ Statute Which Preclude the Two Organs from Simultaneously Addressing the Same Matter

The ICJ Statute states in Article 38(1) that it is the function of the Court “to decide in accordance with international law such disputes as are submitted to it . . . ”\textsuperscript{243} Further, Article 36(1) states that “[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”\textsuperscript{244} Neither the ICJ Statute nor the Charter contains any provisions which expressly or impliedly limit these jurisdiction-conferring articles. The Court’s power to address a dispute over which it otherwise has jurisdiction cannot be

only those measures which can effectively take the place of potential actions in self-defence can be said to suspend the right. \textit{If the measures prove ineffective, then the right of self-defence must revive.” Id. at 102 (emphasis added). A corollary of the emphasized words must of course be that until the measures prove effective the right of self-defense does not lapse.}

\textsuperscript{242.} \textit{Asrat, supra} note 172, at 207 (“[T]he scope of self-defence under the Charter and the construction of Art. 51 should be guided by the Charter’s policy on the international use of force. That policy is manifestly the implementation of the UN purpose of effectively maintaining international peace and security by providing, among other things, for the regulation of the unilateral use of force. That regulation was presumed to give States more security. If an interpretation of Art. 51 would result in putting States in a more vulnerable situation vis-à-vis different types of illegal use of force, and hence less secure in their international relations, it would be a disservice to the Charter’s policy on the international use of force” (footnotes omitted)).

\textsuperscript{243.} \textit{ICJ Statute} art. 38(1).

\textsuperscript{244.} \textit{Id.} art. 36(1).
limited simply because the same matter is simultaneously before the Security Council.

Chapter V of the U.N. Charter delineates the functions and powers of the Security Council. In Article 24, U.N. Members confer on the Council "primary responsibility for the maintenance of international peace and security ...."245 As already noted, it is significant that the Council's responsibility is primary and not exclusive.246 The fact that the issue before the Council concerns the maintenance of international peace and security, therefore, does not exclude the power of the Court to fulfill its judicial function by interpreting the legality of Charter-delegated acts taken by the Security Council.

Furthermore, the Security Council is specifically instructed in Article 36(3) of the Charter to remain cognizant of the judicial function: "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."247 It is clear from these Charter provisions that the Security Council is not in any sense "superior" to the Court in addressing matters concerning the maintenance of international peace and security. There is no hierarchical structure in the Charter as between the Council and the Court; therefore, the appropriate conceptual paradigm for understanding judicial involvement in disputes or situations with which the Security Council deals is one of concurrent authority rather than one of either "judicial supremacy" or "executive supremacy." That the Court is understood to have an interpretive function to play with respect to the constituent instruments of international organizations is confirmed by Article 34(3) of the ICJ Statute, which requires the Court to notify the relevant organization "[w]henever the construction of the constituent instrument of a public international organization ... is in question in a case before the Court."248 Given that the Court is one of the organs of the U.N. and given its recognition as the "principal judicial organ" of the U.N. system, it would be odd to interpret Article 34(3) as referring to all constituent treaties but the U.N. Charter.

The framers of the Charter explicitly limited the recommendatory powers of the General Assembly during any period when the Security Council is exercising the functions assigned to it under the Charter in

247. U.N. CHARTER art. 36(3).
248. ICJ STATUTE art. 34(3).
respect of any dispute or situation. No similar provision exists to constrain the jurisdiction of the Court, and together with the other provisions referred to above, this clearly points to the intent of the framers to enable the primary political organ (primary vis-à-vis the matters at hand) and the primary judicial organ to exercise their jurisdiction concurrently with respect to the same dispute or situation.

The municipal law doctrine of *litispendence* prevents two organs from exercising concurrent jurisdiction where there exists: (a) an identical question; (b) pending between the same parties; and (c) before organs which possess jurisdiction of identical or similar character. It is primarily a rule of convenience to avoid duplication of litigation and contradictory results in the municipal context. It does not imply any sense of hierarchical ordering of functions. This doctrine is not a general principle of international law and has no application to the organs of the U.N.

Professor Shabtai Rosenne suggests that the doctrine should be adopted in international law to prevent a dispute from being recommended for both judicial and political settlement concurrently. However, the doctrine is incapable of application as between the organs of the Security Council and the ICJ because of the different nature of their functions. *Litispendence* is applicable only to cases with which organs of an identical or similar character simultaneously deal. The Security Council is a political organ and the ICJ a judicial one. Although both jurisdictions overlap, their functions are not identical.

The practice of the ICJ and its predecessor the Permanent Court of International Justice (PCIJ) establishes categorically that the doctrine does not apply to the U.N. The PCIJ observed that:

> [T]wo or more international organs which have been seized of the same matter may follow independently their own procedures, touch on the merits, and possibly arrive at different conclusions as to the contested facts, the applicable law, the admissible evidence, and the most appropriate way for the resolution of the pending dispute.

249. U.N. CHARTER art. 12(1) ("While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests").


251. Certain German Interests in Polish Upper Silesia, 1925 P.C.I.J. (ser. A) No. 6, at 20 (Aug. 25). For further elaboration of the case law, clearly establishing the fact that a dispute might be simultaneously seized by both the I.C.J. and a political organ of the U.N., a state of
The other condition of the doctrine of litispendence — that the question before the two organs is identical — arguably cannot arise in respect of matters submitted simultaneously before the Security Council and ICJ. Interstate questions most often have both political and legal aspects. Thus, questions before various international organs may be identical from one point of view, yet different from another, and the condition of identity of questions may not be as self-evident as in municipal law.

In submitting to the compulsory jurisdiction of the Court under ICJ Statute Article 36(2), some states have specifically reserved the right to suspend proceedings before the ICJ where the Security Council is exercising its functions in respect of the same matter. This suggests that unless a reservation specifically excludes the concurrent jurisdiction of the ICJ, there is no requirement inherent in the Charter that the Court defer to the Council. Moreover, it should be noted that even if a state reservation specifically sought to preclude simultaneous jurisdiction, the Court would still retain the inherent authority to interpret the scope of the matters covered by the reservation in light of its overriding duty to consider matters of jus cogens.

b. The Jurisprudence of the ICJ Clearly Establishes Not Only Its Competence But Also Its Willingness to Exercise Its Jurisdiction in Respect of Disputes or Situations Which Are Simultaneously Before the Security Council

In Aegean Sea Continental Shelf, the Court was cognizant of the fact that, simultaneously with the provisional measures proceedings before it, the Security Council was seized of the matter; nevertheless, the Court did not decline to exercise its jurisdiction. In a separate opinion, the late Judge Lachs wrote that “[t]he pronouncements of the Council did not dispense the Court, as an independent judicial organ, from expressing its own view on the serious situation in the disputed area.” Similarly, in Tehran Hostages, the Court held unanimously that it was competent to entertain the U.S. request for an indication of provi-

affairs which cannot in itself be regarded in either organ as a bar for its further action, see infra part III.A.1.b and III.A.1.c.

252. Dan Ciobanu, Litispendence Between the International Court of Justice and the Political Organs of the United Nations, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 209, 210 (L. Gross ed. 1976) (advocating the application of the litispendence doctrine between the political organs of the U.N. and the I.C.J. to prevent concurrent jurisdiction).
254. Id. at 12-13.
255. Id. at 21 (separate opinion of Judge Lachs).
sional measures even though the Security Council was "actively seized of the matter." 256 Again in Nicaragua (Jurisdiction), 257 the Court definitively stated that "the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued pari passu." 258

c. The Court, as the "Principal Judicial Organ" of the U.N., Is Competent to Deal with All the Legal Issues Duly Put Before It, Irrespective of the Political Implications of Its Analysis or Decision for Security Council Proceedings with Respect to the Same Dispute or Situation

According to the distribution of roles between the Council and the Court in the Charter framework, their respective missions are on two distinct, albeit reinforcing, planes. The Council, as the only political organ with the power to bind the entire membership of the organization, is concerned primarily with the "political" or policy aspects of the dispute. The Court, as the "principal judicial organ of the United Nations," 259 the guardian of international law, and the only permanent judicial institution to which all states have potential access, is under an obligation to attend to all the "legal" aspects of the dispute. Included in this obligation on the part of the Court is its duty to set the parameters for the situations in which it will prefer, adopt, or defer to the legal interpretations of other U.N. organs; that is to say, even when the Court limits the circumstances when it will offer a judicial opinion on the requirements of law, it is the Court itself which decides those limits in light of the kind of normative and factual situation presented to it. 260

The essential point is that while it is inevitable that "legal" matters will have a political character, and "political" matters will have legal implications, that fact cannot operate as a dispositive fetter on the competence of either organ to fulfill its mission. The jurisprudence of this Court is definitive on this issue:

258. Id. at 433.
259. U.N. CHARTER art. 12.
260. Thus, for example, the Court may decide as a matter of judicial policy and inter-institutional comity that the interpretive practice of other U.N. organs (interacting with the acquiescence of states) shapes the law on one kind of question (for example, whether abstentions count as a "concurring votes" under art. 27(3) of the Charter). See Namibia, 1971 I.C.J. at 22. On another kind of question (such as presents itself here) involving the bedrock norms of the entire legal system, such a quasi-renvoi to the interpretation of other organs will not be justified.
It is for the Court, the principal judicial organ of the United Na-
tions, to resolve any legal questions that may be in issue between
parties to a dispute; and the resolution of such legal questions by
the Court may be an important, and sometimes decisive, factor in
promoting the peaceful settlement of the dispute.261

Moreover, by acting in such a manner, the Court is not to be seen as
fettering the ability or duty of the Security Council to act within the
powers that the Charter delegates to it. Nor is the Court to be seen as
ousting the Council's powers to interpret the constraints placed by law
on those powers (both by the text of the Charter itself and by relevant
background norms external to the Charter). Rather, the Court need only
be recognized as having, within the Court's institutional legal realm,
competence to give its opinion, as a cointerpreter of the U.N. Charter,
on the nature of these constraints, on whether such constraints have in
the opinion of the Court been transgressed, and on the legal conse-
quences of any finding of transgression for proceedings before the
Court. Thus, the concurrent or parallel jurisdiction of the Security
Council and the ICJ is not only temporal, in that each can simulta-
neously be seized of the same dispute, but it is also concurrent with
respect to subject matter, in that overlap between what is "political" and
what is "legal" does not divest either organ of its competence to carry
out its functions in accordance with its interpretations of that compe-
tence.

Thus, the fact that the legal decision requested by the applicants in
the present case is intertwined with "political" matters in no way re-
lieves the Court of its duty to exercise its judicial function. The Court
has definitively stated as much in Certain Expenses of the United Na-
tions:

It has been argued that the question put to the Court is intertwined
with political questions, and that for this reason the Court should
refuse to give an opinion. It is true that most interpretations of the
Charter of the United Nations will have political significance, great
or small. In the nature of things it could not be otherwise. The
Court, however, cannot attribute a political character to a request
which invites it to undertake an essentially judicial task, namely,
the interpretation of a treaty provision.262

The request for the rendering of a judicial opinion on the lawfulness of the maintenance of the arms embargo which Bosnia is today putting before the Court involves not only issues of treaty interpretation of the Charter and of the Genocide Convention but also the quintessentially legal-judicial issue of *jus cogens*. In most instances and certainly in this case, the severability of the legal from the political is impossible and consequently cannot be a condition precedent to this Court's valid exercise of its jurisdiction.

d. Although the Security Council and the ICJ Are Both Devoted to the Purposes and Principles of the U.N. and Should Fulfill Their Mandates in a Complementary Manner, It Is Possible That in the Exercise of Their Respective Jurisdictions, the Two Organs Could Reach Conflicting Results

While both Council and Court are independent and sovereign in their own domain, they are also part of a single, overarching U.N. legal system, and both owe their existence to the pursuit of the same purposes and principles enshrined in the preamble and the first two articles of the U.N. Charter. Both organs must seek to fulfill their mandate in respectful cognizance of the role that the other organ is "constitutionally" called upon to play within the Charter regime. The majority in *Nicaragua (Jurisdiction)*, for example, stated that "[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events."263

Bosnia is asking the Court, as the judicial organ of the U.N., to address from a strictly juridical point of view the question of whether Bosnia's inherent rights under international law have been infringed and the legal significance of the status of the prohibition and prevention of genocide and aggression as *jus cogens* norms from which no derogation is permitted. It is incumbent upon the Court to address these questions, all duly brought before it, irrespective of political consequences, to the extent that its disposition of the case does not preclude the Security Council from fulfilling its mandate. Only if the Court's disposition of the dispute before it frustrates or renders impossible or impracticable the Security Council's exercise of its jurisdiction can it be said that the limits of the Court's powers will have been reached. Even at this point, what the Charter demands of the Court is best understood not as defer-

ence but as the pursuit of comity, or, to use the language of the *Nicaragua (Jurisdiction)* judgment, "complementarity."

It necessarily follows from the ICJ's consistent jurisprudence regarding the differing missions of the two organs that the ICJ accepts the possibility that the Security Council and the Court will reach conflicting conclusions with respect to the same disputes. To quote again from Judge Lachs in *Aegean Sea Continental Shelf*, "both organs are competent each in its own sphere to deal with the matter submitted to it and come to its own conclusions thereon."264 Clearly, then, the Security Council is not "superior" to the Court, a fact that this Court most recently made clear in *Lockerbie*.265

2. The ICJ Has the Authority Under the Charter to Consider the Validity of Security Council Resolutions if This Is Required in Order to Fulfill Its Judicial Mandate

a. The *Travaux Préparatoires* of the U.N. Charter Establish that Security Council Resolutions Which Violate *Jus Cogens* Are Not "Generally Acceptable" and Are "Without Binding Force," and the Court Is Preeminently Qualified to Make This Determination Where the Jurisdiction of the Court Is Otherwise Established

The interpretive significance of the failure of the Charter to address expressly, let alone in detail, the question of the ICJ's power to pass judgment on Security Council conduct must be addressed. At the U.N. Conference on International Organization in San Francisco in 1945, the delegation of Belgium submitted the following proposal as an amendment to the Dumbarton Oaks Proposals, the precursor to the present U.N. Charter:

Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.266

It is of significance that this language of “essential rights” comes close to the language associated with the concept of *jus cogens*.

In elaborating the reasons for which Belgium submitted this proposal, its delegate stated:

Next to political security, comes juridical or legal security. Several Delegations have expressed concern lest influence or political pressure might induce the Security Council to impose on a State modifications of essential rights which are derived, in the case of that State, from the general rules of international law or from treaties.\(^{267}\)

These concerns are as pressing and substantial today as they were in 1945. Having finally broken free from its Cold War shackles, the reinvigorated Security Council is, for the first time in its history, finally able to fulfill its mandate. The Council’s ability effectively to maintain international peace and security hinges directly upon the consolidation of its still precarious legitimacy. It would be a lamentable stage in the evolution of the U.N. if the Council, freed from legal scrutiny, were able to disregard fundamental international law in the process of binding states to the positive law content of its resolutions. If Member States cannot turn to the Court when their essential *jus cogens* rights have been breached by Council action, then there is no “rule of law” within the U.N. system. These concerns, first raised by Belgium in 1945 by reference to all legal rights of states whether or not *jus cogens* may well continue to become more acute as the corpus of international law develops.

As to what the Court should do when confronted with claims that the Security Council has breached the essential rights of states, Belgium was of the opinion that: “If the Court should consider that such rights have in fact been threatened or disregarded, it would be the duty of the Council either to reconsider the question and maintain or modify its conclusions, or to refer the matter to the Assembly.”\(^{268}\) The Belgian amendment met with opposition from all the major powers, including eventual Permanent Members of the Security Council (the United States, the Soviet Union, and the United Kingdom), and was ultimately defeated. The U.S. delegate, in response to Belgium’s concerns, emphasized that the Council is already required by the terms of the Charter to act

\(^{267}\) *Id.*

\(^{268}\) *Id.* at 336–37. Note as well how the Belgian proposal was clearly assuming a more authoritative role for the U.N. General Assembly than was *expressly* included in the U.N. Charter text.
“in accordance with the purposes and principles of the Organization”\textsuperscript{269} and referred explicitly to the Council’s obligation to act in accordance with principles of international law.\textsuperscript{270} It becomes apparent from this negotiating history that the drafters did want to ensure the legality of Council action but did not want to encumber unduly the Council’s ability to act swiftly by granting states an automatic or routine right of appeal to the Court from Security Council decisions. Thus, the ultimate defeat of the Belgian amendment is in no way indicative of a desire to free the Council from normative controls; rather, the travaux show conclusively that this amendment was rejected on the understanding that the Council was bound to act within the limits imposed by principles of international law. The difficult interpretive question is whether the travaux dictate the conclusion that the drafters intended to free the Council from any form of direct or indirect judicial control.

Upon being assured by the U.S. and U.K. delegates that the word “recommend” in the Dumbarton Oaks Proposals (now Article 36 (Chapter VI) of the U.N. Charter) entailed no compulsion or enforcement, Belgium withdrew the amendment.\textsuperscript{271} However, it introduced a similar amendment in the Commission on Judicial Organization,\textsuperscript{272} which was also defeated because states were of the view that it was not a practicable procedure. However, the Statement on Interpretation of the Charter, which was ultimately adopted by the Committee on Legal Problems as a result of Belgium’s proposals, provided that each U.N. organ would, in the first instance at least, interpret the parts of the Charter applicable to its functions itself. In the event that two organs expressed or acted upon different interpretations of the Charter, they could ask for an advisory opinion of the Court or set up an ad hoc committee of jurists to examine the question. Most importantly, the Committee concluded that “[i]t is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force.”\textsuperscript{273} It is beyond doubt that an interpretation of the Charter which contravenes jus cogens norms cannot be “generally acceptable” and was thus understood by the framers of the Charter to be without binding force. This language parallels the words used in Article 53 of the 1969 Vienna Convention, which states that a

\begin{itemize}
\item \textsuperscript{269} Virtually identical language to this would, of course, eventually appear in art. 24(2) of the U.N. Charter.
\item \textsuperscript{270} Doc. 433, III/2/15, 12 U.N.C.I.O. Docs. 49 (1945).
\item \textsuperscript{271} Doc. 498 III/2/19, 12 U.N.C.I.O. Docs. 65–66 (1945).
\item \textsuperscript{272} Doc. 873 IV/2/37(1), 13 U.N.C.I.O. Docs. 653–54 (1945).
\item \textsuperscript{273} Doc. 933 IV/2/42(2), 13 U.N.C.I.O. Docs. 710 (1945) (emphasis added).
\end{itemize}
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 . . ." What nonetheless remains unclear from the travaux is how, institutionally, it is to be determined whether a given interpretation of the Charter is not generally acceptable.

b. It Falls upon the ICJ, as the Guardian of Legality in the U.N. System and the Only Permanent Judicial Institution to Which All States Have Potential Access, to Determine the Conditions Under Which Security Council Action Is "Generally Unacceptable"

One is forced to conclude from an analysis of the travaux préparatoires of the Charter that the framers were certain of the need to circumscribe the powers of the Security Council within the normative parameters of international law but did not unambiguously record their understanding of how, institutionally, it would be determined whether a particular interpretation of the Charter was not "generally acceptable." Professor G. R. Watson concludes from this that "the text and negotiating history of the relevant U.N. instruments do not rule out all forms of judicial review. Instead, they suggest that any U.N. organ, including the Court, should ignore a 'generally unacceptable' interpretation of the Charter by another organ." The applicants submit that the following propositions are fair conclusions to draw from the travaux préparatoires of the Charter. First, the Court does not have powers akin to that of a constitutional court in a system based on a model of judicial supremacy to pass directly binding or routine judgment on the legality of Security Council action. The Court was quite definitive on this matter in Namibia, stating that "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the U.N. organs concerned." The applicants also do not dispute the proposition, affirmed most recently by this Court in Lockerbie, that the Court is bound, as part of

274. 1969 Vienna Convention, supra note 45, art. 53.

275. G. R. Watson, Constitutionalism, Judicial Review, and the World Court, 34 HARV. INT'L L.J. 1, 14 (1993); see also infra note 304 (concerning ICJ consideration of the validity of Council resolutions as being analogous to an “act of state” situation for domestic courts). Significantly, Watson’s language regarding ignoring other organs’ interpretations suggests that the appropriate way to conceptualize the effect of an ICJ determination that a Council resolution is contrary to jus cogens is to think of the ICJ as treating the resolution as void rather than as voiding the resolution.


277. Judge Lachs stated in his separate opinion in Lockerbie that “[w]hile the Court has
its vocation of applying international law, to respect as part of that law the binding decisions of the Security Council. However, just as Security Council decisions comprise part of the corpus of international law that this Court must apply, so too, indisputably, do jus cogens norms of international law, which, by definition, cannot be superseded by contrary Security Council action.

The applicants also accept the proposition that all U.N. organs are empowered, in the first instance, to interpret for themselves the relevant provisions of the Charter and that the interpretation must in some presumptive sense be respected by other U.N. organs, including the Court. The Court stated in Certain Expenses of the United Nations that "[p]roposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted . . . As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction."278 However, judicial obeisance to the Security Council's interpretation of its powers under the Charter is not without limits. It is permissible only so long as it does not encroach upon or fetter the Court's institutional role within the U.N. system. To this extent, the independence and sovereignty of all U.N. organs must be respected.279

Whenever it is plausibly argued that an organ of the U.N. acts in such a way as to violate a jus cogens norm, there is a prima facie engagement of the jurisdiction of the Court. If the concept of jus cogens is to have any meaning at all, the Council must not be permitted to be the exclusive interpreter of when jus cogens norms are in play and

the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council." Lockerbie, 1992 I.C.J. at 138 (separate opinion of Judge Lachs).

279. Judge De Castro stated, in his separate opinion in Namibia:

Each of these [three U.N. organs] has the power to interpret the provisions of the Charter verbis et factis. Such interpretation must be respected by the other organs provided it does not encroach upon their jurisdiction. Any other solution would be inconsistent with the independence and sovereignty of each organ. On this view of the matter, the Court does not have the powers of a constitutional court to pass judgment on the validity or the resolutions of the General Assembly and Security Council.

Namibia, 1971 I.C.J. at 180 (separate opinion of Judge De Castro). In this passage, Judge De Castro is recognizing only that the Court does not enjoy a direct power of review and that all U.N. organs must enjoy a presumption of validity, a proposition with which this Memorial does not quarrel. As for the responsibility of the Court to uphold the law within its own sphere, it is worth noting that the view that any Security Council action which violates jus cogens is a prima facie encroachment on the jurisdiction of the Court comports with Judge De Castro's own recognition elsewhere in his opinion that principles of fundamental law must prevail over considerations of inter-institutional comity. Id. at 180–85.
infringed. When another U.N. organ attempts to derogate from such norms, in the enforcement of which all states have the most fundamental of interests, it naturally falls upon this Court to ensure that the rule of law is respected within the U.N. system. Matters of everyday interpretation of much nonfundamental U.N. law may well be conceded by the Court to fall largely within the ambit of the U.N. political organs, but fundamental law must be the jealous preserve of the U.N.’s principal judicial organ.

However, it is worth noting at this point that such a role for the ICJ does not entail a power to render of no force or effect a Security Council resolution in the sense analogous to the power of domestic courts to strike down laws and regulations from the statute books. This would suggest a model of institutionalized judicial supremacy which would be as inappropriate to the textual provisions of the Charter and Statute as to the structure of the current international legal system. Rather, it entails a power in the Court to declare that the legal effect of jus cogens is to make the resolution unenforceable within the Court’s juridical realm in that the Court may (indeed, must) treat the resolution as having no legal force or effect for the purposes of its legal determination. This is compatible with a model of concurrent authority. Given the absence of any mention of jus cogens in the Article 103 paramountcy clause, combined with the Committee on Legal Problem’s reference in its Statement on Interpretation to “interpretation[s] . . . not generally acceptable,” such a role for the Court was not foreclosed by the rejection of the Belgian amendment and is justified by the Charter and the evolution of the U.N. since 1945.

c. The Development of the Charter Through the Practice of U.N. Organs Since 1945 Establishes the Power of the Court to Ensure that the Security Council Respect Jus Cogens Norms, Where the Jurisdiction of the Court Is Otherwise Established

If the Court rejects the argument that the ICJ had subject matter jurisdiction over the violations of jus cogens by U.N. organs, as a matter of conformity with the ordinary understanding of the U.N. Charter as reflected in and confirmed by the travaux, it is submitted in the alternative that such a power has been acquired by this Court over the course of the evolution of the U.N. since 1945.

The 1969 Vienna Convention states in Article 31(3)(b) and (c) that as a “general rule of interpretation” of treaties “there shall be taken into account, together with the context . . . (b) any subsequent practice in the
application of the treaty which establishes the agreement of the parties regarding its interpretation; [and] (c) any relevant rules of international law applicable in the relations between the parties." 281 According to Professor Watson, "[a]ctual exercise of judicial review by the World Court, it seems, would constitute this sort of 'subsequent practice.' Indeed, states themselves may have established a 'subsequent practice' by their unanimous acquiescence in the Court's de facto exercise of judicial review." 282 Professor Schachter makes a similar, though more general comment, that "[i]t is understood that the world has undergone radical transformation since 1945 and that the expectations of the governments at that time cannot be controlling at present." 283

Thus, rejection of the Belgian amendment at San Francisco is by no means dispositive of the issue whether the Court has the power to declare Security Council actions to be in violation of jus cogens. In 1945, there was no need to provide the machinery to ensure the constitutionality of acts of the political organs of the U.N.; however, today, as pointed out by Professor Leo Gross:

It has often been observed, sometimes with regret, that the Charter has not provided for judicial control or review of the constitutionality of acts of the political organs of the United Nations. There was no need for it when the Organization was set up. This is a matter which has assumed major significance with the rapid development of the United Nations and the increasingly dynamic conception of its role. The United Nations desires to promote the rule of law in the life of nations. It is perhaps not too soon to start thinking whether and in what form and in what circumstances such a control or review could be established. 284

As early as 1949, the Court recognized in Reparations to United Nations Servants that the U.N., and by implication its constituent organs, "[m]ust be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. 285 It is essential to the performance of the Court's duties and the exercise of its jurisdiction to decide in all legal disputes over which it properly has

---

281. 1969 Vienna Convention, supra note 45, art. 31(3)(b)(c).
282. Watson, supra note 275, at 14.
jurisdiction "any question of international law,"286 that it have the power to uphold the integrity of jus cogens norms. Jus cogens norms are the most vital part of the international legal order which the Court is duty-bound to uphold.

The Court was willing to consider the validity of General Assembly and Security Council resolutions in Namibia, even though this was not the subject matter of the request for an advisory opinion.287 However, perhaps the most oft-cited case of judicial exercise of a review power is Certain Expenses of the United Nations, referred to by Professor Gross as a "landmark" in the jurisprudence of the Court and the evolution of the U.N.288 Professor Watson concludes from his analysis of this case that:

The Court did not deny that it might have some authority to interpret the Charter — only that it did not have the ultimate authority to do so. It left open the possibility, in other words, that its interpretation might be binding only on the parties before it, just as its decisions in contentious cases.... If each organ must determine its own jurisdiction "in the first place at least", it seems plausible that some other organ might pass on jurisdictional questions after a political organ makes a prima facie determination that it has jurisdiction to act.289

In matters concerning jus cogens, the most appropriate "other organ," it has been argued throughout this Memorial, must be the ICJ. Complementarity requires the Security Council to exercise its judgment in matters of international peace and security and for the ICJ to pass judgment where jus cogens norms are implicated (whenever the opportunity presents itself in advisory or contentious proceedings that are independently jurisdictionally well founded).

The most recent case in which the Court was required to consider directly the relationship between the Council and the Court was Lockerbie. Several commentators read that case as presaging a willing-

286. ICJ Statute art. 36(2)(b).
287. Namibia, 1971 I.C.J. at 45:

The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.
288. 2 Gross, supra note 284, at 901-07; see also Certain Expenses of the United Nations, 1962 I.C.J. at 151.
289. Watson, supra note 275, at 16.
ness of the Court to play the role argued for in this Memorial. According to Professor Watson:

[T]he *Libya* decision marked the first time a significant portion of the World Court intimated it could exercise a power of judicial review in contentious cases . . . . The decision implies that the international community is moving toward a broader acceptance of judicial review than the framers of the U.N. Charter perhaps envisioned — that subsequent practice under the Charter may have altered its interpretation. 290

In his case comment on the *Lockerbie* decision, Professor Franck also observes:

The legality of actions by any U.N. organ must be judged by reference to the Charter as a "constitution" of delegated powers. In extreme cases, the Court may have to be the last-resort defender of the system's legitimacy if the United Nations is to continue to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground. 291

*Jus cogens*, the effects of which the Court was not required to consider in *Lockerbie*, sits atop the hierarchy of legal norms which the Court must apply, and any allegation that it has been violated is most definitely an "extreme case."

3. The Contention that the ICJ Has No Authority Within the "Constitutional" Framework of the U.N. to Pass Any Judgment on the Legal Vires or Effects of Security Council Resolutions Cannot Be Sustained

A contrary strain of argument to that articulated in the preceding subsections has been encapsulated in a recent article by a leading publicist, Professor Michael Reisman. 292 Such arguments must be addressed.

a. Are the Internal Checks on the Security Council a Sufficient Constraint on Its Conduct?

Professor Reisman's central thesis appears to be that the Charter itself imposes sufficient intrinstitutional constitutional limitations on

290. *Id.* at 27.
Council conduct to obviate the need for any judicial role in most circumstances. Specifically, he points to the existence of the veto, and the expansion of the nonpermanent seats in the Council in 1963 from six to ten, to show that these political checks and balances are an adequate constraint on Council conduct.293 Driving the Reisman analysis is the overriding concern that the Council be free to act as it sees fit in discharging its primary responsibility to maintain international peace and security. In his opinion, if states could object to Council conduct based on treaty or custom-based rights, the entire Charter scheme for the maintenance of international peace and security could fail. The existing internal checks, such as they are, ensure the requisite freedom of action for the Council, and it is this degree of freedom which, in the Reisman view, is essential to the fulfillment of the Council's "primary role."294

Putting aside issues of *jus cogens* for the time being, an initial objection to the Reisman view is the implication that the Security Council is in some sense "superior" to the Court as concerns the maintenance of international peace and security. His discussion of the internal checks and balances is premised on the existence of a Charter-mandated circle of freedom within which the Security Council's authority is (or should be) unfettered by external sources. As argued above, there is no general hierarchical structure in the Charter as between the Security Council and the Court. The operative principle is one of concurrent rather than exclusive authority.295 If such a system is to be effective, then by definition the checks and balances which set the bounds of each organ's authority cannot be exclusively internal to each organ. This is one of the necessary components of inter-institutional comity and the "fruitful interaction," to use Judge Lachs' phrase in his *Lockerbie* opinion,296 required between the Security Council and the Court if both are to be effective in their respective missions.

b. Does a Judicial Role in Reviewing Security Council Conduct Unduly Interfere with the Flexibility Required by the Security Council?

Professor Reisman's analysis on this point starts from his reading of *Lockerbie*. He expresses concern about the fact that, when the Council is

---

293. *Id.* at 83-84.
294. *Id.*
295. See *supra* part III.A.1.
296. See *infra* note 335 and accompanying text for the full quotation.
acting under Chapter VI of the U.N. Charter, a state that is the target of its resolutions could sidestep Council recommendations by initiating an action in the Court based on treaty or customary law. In his view, it would impose undue rigidity on the range of options available to the Council if, in an effort to insulate its resolutions from ICJ treatment, the Council were required to move more quickly to a Chapter VII decision from its Chapter VI recommendatory mode. In his view, where the Council is factually, rather than explicitly, in a Chapter VII mode, even recommendations should have the effect of overriding treaty or custom-based rights. Because the Court declined to take this route, the full range of nuanced devices available for it to achieve its primary mission will be harder to use according to this argument.  

Professor Reisman's conclusion is that, since Lockerbie, "the Council will be obliged to go directly to a Chapter VII decision if it fears that the delinquent state may 'jump the arena' and try to rely on other preexisting, but now inconsistent, rights it believes will be cognizable in the Court." While Professor Reisman does not address the possibility of jus cogens-based ICJ scrutiny, even once the Council has acted in its Chapter VII decision-making role, the logic of his arguments would suggest that his concerns about the inhibition of flexibility would apply at least as strongly to such a role for the ICJ.

In response, it is essential to reiterate the point that, because of the inevitability of "legal" matters having a political character, and "political" matters having legal implications, there will be overlap (indeed, perhaps even tension) between the jurisdiction of the Council and of the Court. In fulfilling its mandate and addressing the matters duly put before it, the Court should not be seen as fettering the ability or duty of the Security Council to act within the powers that the Charter delegates to it. Just as the Council interprets the Charter to determine the scope of its authority, the Court is also an interpreter of the Charter. This overlap between what is "political" and what is "legal" does not divest either organ of its competence to carry out its functions. What needs to be recognized is that the Court is competent to give its opinion where such opinion is necessary to determine the legal issues before it. Professor Reisman's concerns only materialize where the Court's disposition of a dispute before it frustrates or renders impossible or impracticable the

297. Reisman, Constitutional Crisis, supra note 292, at 89.
298. Id. at 89-90.
299. See supra part III.A.1.
Security Council’s exercise of its jurisdiction. In such an event, the limits of the Court’s powers will have been reached.\textsuperscript{300}

It must be reiterated that Professor Reisman does not address the issue of the Court’s role when confronted with possible action by the Security Council which produces a conflict with \textit{jus cogens} norms. This is clearly not a situation, by definition, in which internal \textit{political} checks and balances can be effective. In this respect, the nonjudicial dimensions of the Security Council’s institutional character need to be squarely kept in mind. The ILC has recently put the matter in terms that draw attention to the problems of insulating the Council from ICJ “review”:

The question arose whether the Security Council — with a restricted composition in which some members enjoy a privileged status — should be vested with the competence to act for the “international community as a whole” in \ldots matters \ldots [related to the determination of the existence, attribution and consequences of international crimes of States]. As a political body, the Council was entrusted with the essentially political function of maintaining peace, so that it operated with a high degree of discretion; it acted neither necessarily nor regularly in all the situations that would seem to call for action; it operated, on the contrary, in a selective way. The Council was not bound to use uniform criteria in seemingly similar situations; crimes of the same kind and gravity could be treated differently or not be treated at all. Indeed, serious crimes could be ignored. Lastly, the Council was under no duty to state the reasons for its decisions or its action or inaction. \ldots

Whatever the position regarding aggression, the propriety of relying too much on political bodies for the implementation of State responsibility for crimes was highly questionable with regard to the other delinquencies contemplated in subparagraphs (b), (c) [which includes genocide], and (d) of paragraph 3 of article 19 [of Part I

\textsuperscript{300} Such a situation might arise where State X sues State Y for breach of treaty before a Security Council resolution produces any conflict of obligation. If X were to seek an indication from the Court, by way of provisional measures, that Y must not seek a Chapter VII decision from the Council or must not vote on a particular kind of resolution (if Y is a Member of the Council), this may be the kind of action by the Court which could be viewed as \textit{frustrating the Council} by virtue of making it unlawful, within the Court’s realm, for a state to participate in a Council act which art. 103 would suggest is within the Council’s jurisdiction. This is where a “mere” treaty obligation is at issue. Where \textit{jus cogens} norms would be detrimentally affected by a potential resolution, it may be that it would be a \textit{frustration of the Court’s jurisdiction} to expect that it \textit{never} issue provisional measures. (Note that, even on the first scenario, the Court might not be viewed as frustrating the Council if provisional measures are viewed, as a general matter, as \textit{nonbinding} on the state(s) addressed or if, in the particular case, the Court took care to phrase its order as recommendatory only).
of the Draft Articles on State Responsibility] which should be met by judicial means . . . . [T]he Security Council did not seem to meet the requirements of criminal justice or indeed those of justice in general.³⁰¹

Genocide as a concrete phenomenon and *jus cogens* as a juridical concept are uniquely suited to judicial interpretation and to a recognition that the ICJ has a special role in such matters. For the Court to declare its opinion on the matter, with the *de facto* result that the issue is sent back to the Council for further consideration in light of the Court’s ruling, fosters a process consistent with the model of concurrent authority that Bosnia sees as deriving from the Charter.

c. Does the Charter Give the Court Competence to Review Chapter VII Actions by the Council?

Professor Reisman seems to take the view that if there are any substantive controls available to the Court, they must be found in the Charter itself. He discounts the process of “implying” restraints from the Charter and points instead to the lack of substantive and procedural standards for review of Chapter VII actions in the Charter as telling of the intention of the framers. In his view, “[t]heir very absence, in a context where so much power is assigned to the Council, is telling. A judicial review function, viewed in the formal Charter regime, seems somewhat difficult.”³⁰² It is arguable that Professor Reisman moves from the unassailable argument that the Court possesses no direct review powers over the Council akin to domestic law judicial review to the conclusion (at least the implicit conclusion) that the Court can exercise nothing in the way of indirect review through its contentious jurisdiction with respect to the obligations of states (as well as through its advisory opinion jurisdiction).

Bosnia has sought to argue that while the drafters did not build into the Charter or the ICJ Statute a species of direct review of the Security Council, the drafters left entirely open the power of the Court to engage in forms of indirect review if the status of a Security Council resolution is a necessary part of the legal issues properly before the Court. Absent an explicit textual qualifier, the Court must be taken to have been granted full powers to give advisory opinions, when properly requested, that necessitate deciding *jus cogens* issues raised by Security Council resolutions. It must also be assumed that in contentious cases, where the

³⁰². Reisman, *Constitutional Crisis, supra* note 292, at 94.
A Memorial for Bosnia

determination of states’ obligations is dependent on deciding the prior question of the legal status or effect of a Security Council resolution, the Court has the power to decide whether or not to give effect to that resolution in deciding the case at hand. In neither scenario (contentious jurisdiction or advisory jurisdiction) will the Security Council be placed in a position of being a party before the Court or being formally bound by the judgment of the Court. 303

It is in this sense that any judgment by the Court of Security Council conduct can only have an indirect effect on the Security Council. Any “binding effect” of the view taken by the Court as to the status of a resolution will be dictated by general principles of good faith and principles of comity between coequal organs. 304

Keeping in mind these limitations on binding effect produced by the Court’s limited formal jurisdiction, it cannot be doubted that it possesses

303. It may well be arguable that any U.N. organ or agency that puts a question to the ICJ is bound in good faith to respect the answer given. Even if this is not the general situation for advisory opinions, opinions on matters of jus cogens may represent a special case. Normative authority for such an effect might be bolstered by the provision in the 1986 Vienna Convention, which provides that any organ of an international organization that requests an advisory opinion to resolve a jus cogens issue surrounding a treaty provision must treat the I.C.J.’s answer as “decisive.” See Vienna Convention on the Law of Treaties, art. 66(2)(e), 251 I.L.M. 543 (1986) [hereinafter 1986 Vienna Convention].

304. Of course, in a contentious case, all states before the Court will be bound by the Court’s judgment, including the view it has taken on the status of a Council resolution. For example, in a case brought under the Genocide Convention challenging a state’s active participation in an arms embargo that is implicated in genocide, the state sued is bound by a Court decision, for example, that the duty to prevent genocide in art. I of the Genocide Convention is an ongoing obligation unaffected by a Security Council resolution that conflicts with jus cogens.

In order to grasp the conceptual structure of situations in which the validity of Security Council resolutions may be reviewed in a contentious case between states, there would appear to be a direct analogy to the standard “act of state” problem faced by domestic courts. In such “act of state” cases, by the very decentralized nature of the international system, the courts of one state exist in a coordinate, not hierarchical, relationship with official organs of other states. Even when a court appeals to international law in order to judge the validity of an official act of another state, there is no question of one state’s courts being able to pass judgment on the acts of another state in a way that has direct legal effects in that foreign state’s legal system. However, within its sovereign realm, the domestic courts of one state may nonetheless be called upon to decide the validity of acts of a foreign state as a necessary step in deciding the rights and obligations of the two (usually private) parties before that court. When that court decides not to recognize the foreign act as having the legal effects that it purports to have and decides thereby that it is without legal effect (whether the label used is “void,” “invalid,” “inoperative,” or “unenforceable”), the foreign state, not being a party, is not bound to the judgment, and the status of its official act in its own legal system is not changed as a direct legal effect of the court’s decision. The private parties before the court, however, are bound to the substantive determination of their rights and, within the legal system where the litigation is occurring, the validity of the foreign official act is as determined by the court before whom they are appearing.

For “domestic court,” “foreign state,” “foreign official act of state,” and “private parties,” substitute, respectively, “the ICJ,” “the Security Council,” “a Council resolution,” and “states parties,” and the analogy should make itself clear.
some power to pass judgment on acts of the Security Council, even if, to reiterate, that "review" is indirect. It has been conceded that this Court does not exercise direct review or appellate jurisdiction analogous to that which exists in many municipal legal systems; however, where deciding a matter "in accordance with international law" (per Article 38 of the ICJ Statute) requires determining the validity or legal effects on the obligations of states of Security Council action, the Court must undertake this evaluation. To do otherwise would be for the Court to abdicate its role as the "principal judicial organ" of the U.N. This sentiment was well expressed by Judge Onyeama, in his separate opinion in Namibia, where he stated:

The Court's powers are clearly defined by the Statute, and do not include powers to review decisions of other organs of the United Nations; but when, as in the present proceedings, such decisions bear upon a case properly before the Court, and a correct judgment or opinion could not be rendered without determining the validity of such decisions, the Court could not possibly avoid such a determination without abdicating its role of a judicial organ.\(^5\)

In coming to a similar conclusion in his separate opinion in Bosnia v. Serbia II, Judge Lauterpacht concluded that the Court, "as the principal judicial organ of the U.N., is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation."\(^6\)

On the theme of the rule of law, it should finally be noted that Professor Reisman's argument regarding the sufficiency of the internal checks and balances on the Security Council ignores the evolving body of higher law which has developed alongside the Charter before, during, and since the 1963 amendment to the Security Council membership and voting rules upon which he places near-dispositive reliance. It is a stream of law which demands for its interpretation and application a special role for the ICJ, and the quintessential example of this is genocide. The proper approach to the Court's role, while respecting the Council's need for freedom of action, is much more nuanced than the type of judicial review which spawns Professor Reisman's fears. To use Professor Reisman's own juridical language, the "authority signals" that the international community has been sending cannot be concentrated — and frozen — in one historical and textual moment, namely 1963. It is

---

to these special "authority signals" of the international community regarding the special authority of the ICJ in matters of both genocide and *jus cogens* that the argument now turns.

**B. The ICJ Has Special Authority to Pass Judgment on the Actions of All International Actors, Including Organs of International Organizations, that Are Related to the Genocide Taking Place in Bosnia**


*Jus cogens* is *ipso jure* a legal, not a political question," and so it exists in the primary domain of the judicial branch of the U.N. At the very least, such matters fall within the coordinate domain of the ICJ and Security Council, but no less firmly within the ICJ’s domain for that. Articles 53 and 64 of the 1969 Vienna Convention support an understanding of just such a role for the Court as they suggest certain analogies with higher, constitutional norms in national legal systems. Analogized in this way, it becomes clear that the ICJ is the institution in the international system best placed to interpret the scope of these norms and their legal effects on the actions of participants in the "constitutional order."  

The Court is institutionally situated to breathe substance into the all-too-abstract doctrine of *jus cogens*. If U.N. institutions, such as the Security Council, do err in defining permissible action in the context of genocidal aggression, the ICJ stands as the only viable mechanism by which such errors may be rectified (at minimum, judicially remarked upon) before the impugned conduct reaches catastrophic proportions.

A fundamental policy consideration for the Court to bear in mind is that "constitutionalism" should not be relegated solely to the realm of analogy. The progressive deepening of the rule of law in international affairs is a crucial value for the Court to seek to promote in assessing its role in elaborating the content and consequences of *jus cogens* norms.

---


308. The relevance of the 1969 Vienna Convention goes beyond analogies, however, when one notes the existence of art. 66(a), which allows unilateral submission of disputes concerning the application or interpretation of arts. 53 or 64 to the ICJ. For an argument that the Court has a clearly mandated extraordinary role to play regarding *jus cogens* norms, see *infra* part III.B.
Once such a law-promoting role for the Court is entrenched in the international system, common standards of behavior will be made more explicit and expectations on the part of international actors will be established. Future behavior will be influenced accordingly. It is, as Professor Suy puts it, imperative that if "public international law is to transform itself . . . into a highly organized and effective legal system, international *jus cogens* must develop."  

309°

It is this constant evolution that is the true character of a legal order.

2. Proper Interpretation of the Genocide Convention Suggests a Broad Power for the ICJ to Judge the Legality of Acts of the Security Council in This Situation

The Introduction to this Memorial argued that the ICJ has a wide jurisdiction under Article IX of the Genocide Convention that can be unilaterally initiated by a single State. Of equal significance are the signals sent by Articles VIII and IX — not simply about formal jurisdiction but also about justiciability once jurisdiction has been established — about how far the Court should feel empowered, indeed obligated, to determine the requirements of international law. In other words, where, as here, another authoritative actor in the U.N. system, the Security Council, has adopted positions contrary to those argued before the Court, what level of deference should the Court show to these Council positions? Such deference could take the form of either refusing to address certain questions or of according a certain margin of discretion to the Council's views of matters.

It is clear that the Genocide Convention's provisions are incompatible with any interpretation other than one which accords the Court a prominent, if not preeminent, role in setting out the precise requirements, as the Court determines them, of *jus cogens* norms and of Genocide Convention obligations and rights. The most obvious point in this regard is that Article IX of the Convention clearly singles out the ICJ as the organ of choice to resolve disputes of several kinds ("relating to . . . interpretation, application or fulfillment") and places no procedural hurdles at all in the way of the Court's being seized of such broadly defined matters by one party. A survey of multilateral treaties will reveal how very rare compromissory clauses of this sort are. According the Court such a supreme jurisdictional role is wholly incompatible with the Court's subsequent adoption of a deferential review stance once jurisdiction has been established.

Another point to keep in mind is the wording of Article VIII, which refers to "competent organs of the United Nations . . . tak[ing] such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of" genocide. It is of course possible to read Article VIII conservatively as effecting nothing more than a renvoi to the competences of organs such as the ICJ as they are spelled out under the U.N. Charter, of which the ICJ Statute may be considered an integral part. It is equally possible to read Article VIII as conferring a broader jurisdiction on the Court than it would otherwise possess to deal with issues under the Convention. For instance, a very liberal interpretation would allow the Court, simply on the basis of being "call[ed] upon" by a single state, to invoke its role under Article 92 of the U.N. Charter as the "principal judicial organ" of the U.N. in order to pass judgment as it considers "appropriate" on the acts of other U.N. organs. It may be conceded that such an interpretation would probably stretch the principles of interpretation of human rights treaties too far, especially given the presence of Article IX, which specifically addresses the jurisdiction of the ICJ. However, what must be given the fullest possible interpretation is Article IX's directive to act "as [the ICJ] consider[s] appropriate." This is a purely subjective phraseology which at minimum must be taken to mean that, in the common enterprise of combatting the scourge of genocide, judicial reticence in asserting the legal point of view (interpretive and/or remedial) is unjustifiable.

Of course, Article VIII equally applies to other organs of the U.N., such as the Security Council and the General Assembly, and what one organ considers "appropriate" another might consider "inappropriate." Article VIII alone cannot resolve the clash of institutional subjectivities of U.N. organs. However, read in tandem, Articles VIII and IX, which so clearly place genocide in the framework of law and judicial consideration, establish in the clearest of textual terms that the ICJ's role in relation to genocide goes beyond its characterization in the U.N. Charter as the "principal" judicial organ. The ICJ is clearly treated in the text of the Convention as having a special authority to play an active role once its formal jurisdiction has been established.

While recourse to travaux should be viewed with suspicion in interpreting human rights documents where such recourse seeks to cut back on a purposive and effectivist interpretation of the document, it is worth noting that the travaux confirm the above interpretations based on text tied to purpose. There is ample support for the view that the origi-
nal signatories to the Convention equally perceived the Court to be the most institutionally suitable organ of the U.N. to perform this grave function. In the discussion of the Draft Convention, it is crucial to note that it was proposed that the Security Council be given express jurisdiction to deal with cases of genocide. This proposal was rejected for a number of reasons, including that voiced by Mr. Maurtua of Peru who stated that the Security Council was a political organ and that primary jurisdiction over genocide should reside in a judicial body. The U.S. representative, Mr. Matkos, also “expressed the fear that politically influential States might bring or refer allegations of genocide to the Security Council rather than to the ICJ in order to ensure that the controversy was adopted on political rather than on legal grounds.” It is evident, therefore, that the Convention provides for active judicial involvement in the elaboration of duties that flow from a *jus cogens* violation and in the examination of concrete allegations.

3. The 1969 and 1986 Vienna Conventions on the Law of Treaties Represent the International Community’s Recognition of the ICJ as the Principal Judicial Authority for Passing Judgment on Disputes Involving *Jus Cogens* Norms

The Court’s fundamental role in reviewing disputes involving *jus cogens* norms affecting the entire international community is also emphasized in the 1969 Vienna Convention and more recently in the 1986 Vienna Convention.

Article 65 of the 1969 Vienna Convention provides a procedural framework which states and international organizations must follow with respect to invalidity, termination, withdrawal from, or suspension of the operation of a treaty to which they are parties. If one state party to a convention raises an objection to another party’s action within the context of Article 65, Article 65(3) stipulates that “the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.” In Article 66, where “no such solution has been reached within a period of 12 months following the date on which the objection was raised” and the dispute concerns “the application or the interpretation of article 53 or 64,” the dispute may be unilaterally

---

313. 1969 Vienna Convention, *supra* note 45, art. 65(3); 1986 Vienna Convention, *supra* note 303, art. 65(3).
submitted to the Court for review pursuant to Article 66(a) "unless the parties by common consent agree to submit the dispute to arbitration."\textsuperscript{314}

Considering the existence of Article 66, Bin Cheng goes so far as to assert that "under general international law at the auto-interpretative level, there can be no \textit{jus cogens} . . . for the Vienna Convention provides for \textit{jus cogens} only at the arbitrable and ultimately at the judicial level."\textsuperscript{315} Danilenko similarly asserts that "it is possible to claim that the peremptory law-making process cannot be finalized by states alone: \textit{jus cogens} effectively crystallizes only with the Court's imprimatur."\textsuperscript{316} He further adds that:

In the absence of a precise definition of the concept, the ICJ is presented with an ideal opportunity not only to develop the actual content of the \textit{corpus} of \textit{jus cogens} norms, but also to shape the basic constitutional requirements relating to the creation and application of the "higher law" of the international community.\textsuperscript{317}

Article 66 of the 1986 Vienna Convention duplicates the procedure found in Article 66 of the 1969 Vienna Convention, where the parties to a dispute are both (or all) states,\textsuperscript{318} but it provides different procedures for such disputes involving international organizations. This difference in treatment was due to the fact that international organizations do not have standing before the Court under the ICJ Statute. Therefore, to have provided for unilateral initiation of contentious proceedings for disputes involving international organizations might not have been technically possible due to the procedural barriers contained in the Statute. In particular, where a state is party to a dispute to which one or more international organizations are also parties, either the state (by virtue of Article 66(2)(b)) may seek to initiate the normal U.N. process for an advisory opinion\textsuperscript{319} or the international organization (by virtue of Article

\textsuperscript{314} 1969 Vienna Convention, \textit{supra} note 45, art. 66(a). Note that, according to art. 66(b) of the 1969 Vienna Convention, a State Party may choose instead unilaterally to set in motion a conciliation procedure for any dispute concerning the articles in Part V (which includes arts. 53 and 64), the details of which are set out in an Annex to the 1969 Vienna Convention. It is worth noting that the conciliators are specifically required by para. 1 of the Annex to be "qualified jurists." Thus, both alternatives to the ICJ, arbitration and conciliation, are explicitly legal or juridical in nature.


\textsuperscript{316} GENNADII M. DANILENKO, \textit{LAW MAKING IN THE INTERNATIONAL COMMUNITY} 264 (1993).

\textsuperscript{317} \textit{Id.} at 265.

\textsuperscript{318} See 1969 Vienna Convention, \textit{supra} note 45, art. 66(a); 1986 Vienna Convention, \textit{supra} note 303, art. 66(2)(a).

\textsuperscript{319} International organizations which are not authorized under art. 96 of the ICJ Statute
Michigan Journal of International Law

66(2)(c)) may directly request an advisory opinion of the Court in accordance with Article 65 of the ICJ Statute.\textsuperscript{320} According to Article 66(2)(e), any advisory opinion that issues "shall be accepted as decisive by all the parties to the dispute concerned," a phraseology that avoids the word "binding" but which suggests that the ICJ Statute's state-centeredness has been substantially supplemented by the 1986 Vienna Convention. In effect, a \textit{de facto} contentious procedure involving not just states and involving a "decisive" legal effect has been created, and in this way the state-state procedures of the 1969 Vienna Convention have all but been duplicated. The only cause for hesitation with respect to the foregoing is the failure of Article 66(2)(b) to require \textit{explicitly} that the intermediary international organs (through which a state must funnel a request for an advisory opinion) act on the request and forward the request for the advisory opinion to the ICJ. However, on the basis of a principle of equality of international persons in a treaty relationship, an implied duty to pass on the request for an advisory opinion could be read into the provision. Some hints that such a duty is indeed implicit can be found in Article 66(2)(f), which states that if a request for an advisory opinion, including under Article 66(2)(b), is "not granted" (by the Court itself), then any party may unilaterally initiate an arbitration procedure (again involving only "qualified jurists") set out in the Annex. The situation where competent bodies refuse to pass on a state's request for an advisory opinion appears not to have been contemplated, which suggests an interpretation whereby such a situation cannot arise due to there being an implied duty to pass on the request.

\textsuperscript{320} The 1986 Vienna Convention provides:

With respect to a dispute concerning the application or the interpretation of article 53 or 64 . . .

(b) if a State is a party to the dispute to which one or more international organizations are parties, the State may, through a Member State of the United Nations if necessary, request the General Assembly or the Security Council or, where appropriate, the competent organ of an international organization which is a party to the dispute and is authorized in accordance with Article 96 of the Charter of the United Nations, to request an advisory opinion of the International Court of Justice in accordance with article 65 if the Statute of the Court;

(c) if the United Nations or an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations is a party to the dispute, it may request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court.

1986 Vienna Convention, \textit{supra} note 303, art. 66(2).
The textual provisions which provide for a virtually novel procedure for the ICJ to decide cases involving international organizations confirm and, if anything, enhance the centrality of the ICJ in matters related to *jus cogens*. The alternative procedure envisaged, that of arbitration, is itself a clearly juridical procedure, which only can come about if the parties give their common consent or if the ICJ itself does not grant the request for the advisory opinion. It must be emphasized that the text of the 1986 Vienna Convention makes strikingly clear that the ICJ should have the authority not only to pass judgment on the conduct of international organizations, including the U.N., but also to issue legal opinions that are "decisive." The signals sent about the special authority of the ICJ in matters of *jus cogens* add strength to those emitted by Article 92 of the U.N. Charter, by the combination of Articles VIII and IX of the Genocide Convention, and by Article 66 of the 1969 Vienna Convention.

The drafting history of Article 66 of the 1986 Vienna Convention further suggests how widespread and deeply rooted is the international community's acceptance and recognition that the Court is the principal judicial body which should review disputes involving *jus cogens* norms. It is crucial to note that the ILC, in its 1980 report proposing draft language for Article 66 of the 1986 Vienna Convention, provided for disputes involving international organizations only to go to a conciliation procedure like that found in the annex to the 1969 Vienna Convention. The ILC saw no problem extending the preeminent role of the ICJ in state-state treaty disputes from the 1969 to the 1986 Vienna Conventions and indeed emphatically noted in its 1980 report to the General Assembly that the 1969 Vienna Convention "intended to give the supreme world tribunal the principal responsibility for deciding matters of such gravity as the existence, the interpretation or the application of a peremptory norm." The reason given by the ILC for not seeking to make the ICJ as central outside of state-state treaty disputes was elliptical:

[The Commission] discarded the idea of referring to the possibility of requesting an advisory opinion and at the same time conferring binding force on that opinion. The possibility of setting in motion an advisory opinion procedure seemed to be fraught with too many uncertainties for a binding character to be attached to the opinion thus obtained.


323. Id.
Significantly, states themselves were bolder than the ILC and took issue with the tentative ILC approach. In their responses to the 1980 Draft Articles on State Responsibility, especially Draft Article 66, states showed that the concept of *jus cogens* and its alliance with a special role for the ICJ was firmly embedded in the collective international juridical conscience. For example, the U.K. Government, in a report analyzing the ILC's 1980 Draft Article 66, criticized the ILC's initial rejection of advisory procedures and stated that "jurisdiction over *jus cogens* questions should specifically be conferred on the International Court of Justice, as the principal judicial organ of the United Nations, in view of the fundamental nature of *jus cogens* claims and the severe repercussions of claims to nullify treaty obligations on this ground." The actual text adopted by the conference of states in 1986 was, as outlined above, much more creative than the draft advanced by the ILC and took more seriously than the ILC itself the ILC's own view that the Court should be accorded "principal responsibility" in matters of *jus cogens*.

The significance of Article 66 of both the 1969 and 1986 Vienna Conventions goes well beyond the creation of jurisdiction-conferring provisions. The collective *opinio juris* represented by these texts and their related *travaux* generates the parameters for understanding the preeminent interpretive role that the ICJ must play once its jurisdiction is secured, including in cases where the ICJ is called upon to judge the conformity of acts of international organizations, and not only states, with the dictates of *jus cogens*.

Language used by the Court has suggested its principal role in developing international law as a general matter. However, the very special role of the Court in matters of *jus cogens* requires a stance of creative confidence in pursuing the opportunities presented to it (rare as they may be) in order to clarify the content and effects of *jus cogens* norms. The dissenting opinion of Judge Alvarez in *Reservations to the Genocide Convention* presages the approach which the Court should adopt:

In appraising multilateral conventions — and specifically that on genocide — in the future, we shall be forced to abandon traditional

---


325. *See* Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 92 (Feb. 24). Danilenko suggests that art. 62 of the ICJ Statute (which gives a third party state the right to intervene) demonstrates recognition of the Court's influence on developing international law beyond the parties involved in a dispute. Danilenko, *supra* note 316, at 256.
criteria, because we are now confronted with an international situation very different from that which existed before the last social cataclysm; the latter has caused profound and rapid evolution of facts and ideas in the international sphere... it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect, all the more so because in virtue of Resolution 171 of the General Assembly of the United Nations of 1947, it is at liberty to develop international law, and indeed "to create law," if that is necessary, for it is impossible to define exactly where the development of this law ends and its creation begins. To proceed otherwise would be to fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited.

The method I have just indicated is that applied to domestic constitutional law... After the social cataclysm which we have just passed through, a new order has arisen and, with it, a new international law. We must therefore apply and interpret both old and new institutions in conformity with both this new order and this new law.326

In a similar vein, Professor Franck concluded in a recent article that "[i]n the inevitably rough spots ahead, it is reassuring to note that the Court has carefully, and quietly, marked its role as the ultimate arbiter of institutional legitimacy."327 In the present case, not only is the institutional legitimacy of the entire U.N. directly at issue but also the effectiveness (and, by extension, the normative legitimacy) of the doctrine of jus cogens. If the Security Council is permitted by the Court to derogate from such norms, then institutional reticence (on the part of the institution most associated in the juridical conscience of the international community with defending and elaborating jus cogens norms) will help foster an understanding that the norms themselves have only an illusory peremptory status.

326. Reservations to the Genocide Convention, 1951 I.C.J. at 50–51 (dissenting opinion of Judge Alvarez) (emphasis in original).
327. Franck, supra note 291, at 523.
C. Appropriate Treatment of the Arms Embargo Resolutions and Obligations Generated by Them Within the Court's Juridical Order in Light of a Presumption of Validity of the Resolutions of the U.N. Political Organs

It is conceded by the applicant that resolutions of the Security Council must enjoy an initial presumption of validity. This Court has definitively stated that "[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted." However, such a presumption can be no more than a starting point and cannot relieve the Court of its Charter-based duty to address the legal aspects of the dispute brought before it. The presumption of *intra vires* which the Security Council enjoys in the exercise of its jurisdiction is not indicative of a desire by the framers to place Council conduct beyond the reach of the Court. Rather, as Judge Lauterpacht has argued in his scholarly capacity, it actually reflects, rather than rejects, the importance of legality in the U.N. system:

> [The ICJ] did not seek to avoid the proposition that every act must be justified by reference to the powers of the Organisation. Instead, it stated merely that there is a presumption that an act is within the powers of the Organisation if it is done for the purposes of the Organisation.

Professor Lauterpacht went on to observe of the presumption of *intra vires* that "[t]his presumption is not an irrebuttable one; and its weight may vary according to the context in which it is being applied."

In the case at bar, context is everything. Context must include, *inter alia*, the jurisdictional context, including the stage of proceedings of a contentious case; the nature of the juridical opinion or relief being requested; the nature of the norms at issue and the extent to which the organs whose legal acts are in question considered the applicability of the norms; and the facts, including their degree of proof before the Court as well as the susceptibility of the facts to relevant changes. But it has been the burden of Bosnia's arguments to make the case for one

330. *Id.* at 117.
contextual consideration with which all other contextual variables must contend. Whatever standards of judgment and associated curial deference may be appropriate to the "ordinary" task of interpreting the intricate text of the Charter, these standards are manifestly inappropriate where the context is a challenge to Security Council action or its effects based on conflict between that action or the conduct it requires of states and peremptory norms, especially those related to genocide. As put by the ILC, the body with the "principal responsibility for deciding matters of such gravity as the existence, the interpretation or the application of a peremptory norm" is the ICJ.331 The travaux préparatoires of the Charter and the emphasis therein on the notion of "general acceptability," the history and text of the Genocide Convention, the normative signals sent by the two Vienna Conventions, and the general principles of interpretation applicable where human rights and the natural law strain in international law intersect — all speak to the very special role to be played by the Court in contexts such as that at bar. The result is that the weight to be given to the presumption of validity must be appropriately tailored (i.e., significantly lessened) where jus cogens norms are implicated.

In several cases decided by the Court over the years, judges in separate opinions have suggested tests for when the presumption should be overcome. What they tend to have in common is extreme deference to the political organs of the U.N. Judge De Castro suggested a possible dividing line in his separate opinion in Namibia:

To challenge the validity of a resolution, it is not sufficient merely to allege that it is possible to find a better interpretation; a resolution can only be criticized if it is demonstrably absolutely impossible to find any reason whatsoever, even a debatable one, upon which an interpretation favourable to the validity of the resolution may be based.332

Judge Morelli in Certain Expenses of the United Nations referred to "manifest excès de pouvoir" as the governing standard.333 And Judge Fitzmaurice in the same case stated that there must be a strong prima facie presumption of validity of General Assembly expenses resolutions;

332. Namibi, 1971 I.C.J. at 173 (separate opinion of Judge De Castro). Note that this phrasing is often read as setting out a highly deferential standard of review, an interpretation which will be assumed for purposes of the current discussion. However, the passage may also be consistent with a more scrutinious judicial role according to which the active search for an interpretation that avoid invalidity reinforces the "constitutional" role of the court. See infra part IV.B.3 for a discussion of the doctrine of "reading down."
in his view, the presumption does not arise, however, where invalidity of the expenditure is apparent on its face and too manifest to be open to reasonable doubt. None of these judges had *jus cogens* norms in mind nor would they, at the historical junctures in question, have appreciated the very special role that the international community has come to expect the Court to play in respect of such norms. Interpreting questions surrounding the U.N. budget at issue in the *Certain Expenses of the United Nations* case is categorically distinct from the issue of the involvement of the U.N. and its members in support, albeit unintended, of genocide.

The applicant has, however, never sought to argue for the exclusive, let alone the hierarchically supreme, competence of the Court in these matters. Concurrent authority necessarily entails overlap, but it also calls for attention to differentiation of function in a way that respects the specific institutional capabilities and legitimacies of the relevant organs. In carving out its own function, due respect must therefore be paid by the Court to the place of the Security Council in the overall U.N. system. Although the Court must zealously guard the integrity of the judicial function, it must also recognize it is a coequal organ of the U.N. and, as such, exists to achieve the same general objectives as the Security Council. The complementarity of the judicial and political roles must be recognized. According to Judge Lachs:

> The framers of the Charter, in providing for the existence of several main organs, did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim... In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction.

The form that inter-institutional differentiation of functions and cooperative dialogue should take in order to realize this vision of fruitful interaction are questions to be worked out with the passage of time and as concrete cases and specific advisory questions present themselves.

---

334. *Id.* at 204–05 (separate opinion of Judge Fitzmaurice).
336. This will necessarily involve laying down principles to distinguish the appropriate judicial response at the Provisional Measures stage as opposed to the Merits stage of a contentious case. It is worth noting that the Provisional Measures stage represents somewhat of a paradox for the Court. On the one hand, in the context of genocide, the need for immediate and effective relief (i.e., from the effects of an arms embargo) suggests an active,
However, the following parameters suggest themselves as within the range of options for the Court in the current case. All of what follows assumes as established the Court’s very special legitimacy in inserting itself into situations involving possible breaches of *jus cogens*. Any cutting back on how far the Court can go in any instance will therefore be less a function of the counterbalancing *institutional legitimacy* of the Security Council’s involvement than it will be a function of both respecting and enhancing the comparative *institutional capacities* of the two organs. In particular, the Court will need to give due effect to the particular capabilities of the Council in the realm of fact determination and fact assessment in ongoing and therefore fluid situations. The Court will also need to recognize fully that the Council must be accorded the space to act flexibly and effectively, even in contexts in which the Court insists that legal considerations must be better integrated into Council decision-making if the Court is to be expected to give legal effect to the resulting decisions.

It is submitted that the Court has full authority to carry out the following without fear that it is compromising the specific functions of the Council: (1) determine and declare the precise contours of those norms that enjoy *jus cogens* status; (2) determine and declare the legal consequences of a breach of *jus cogens* norms; (3) apply extant norms to a putative fact situation (in a contentious case, notably at the Provisional Measures stage) or hypothetical fact situation (in some advisory opinions) in order to determine and declare what breaches and legal consequences *would* result if those facts proved to be true or, if true, remained unchanged; and (4) based on full factual argument and proof, judge the conformity of past conduct of the Security Council with peremptory norms and judge what the legal effects of any lack of conformity were for the period in question.

In all of the above situations, in the interests of complementarity, the Court must give full consideration to the Council’s evaluation of the factual situation (including the Council’s appreciation of whether causation is proved in terms of a cause-effect relationship between conduct mandated or precluded by a Council resolution and breach of a peremptory norm). However, also in the interests of complementarity, the Court must not shy away, especially in the context of provisional measures applications, from addressing itself to the Security Council in order specifically to ask the Council to consider whether or not it is in breach of international law in light of the Court’s enunciation of the applicable nondeferential role for the Court. On the other hand, problems of proof of facts (due to difficulty of obtaining accurate information, the short time frame in which facts must be sufficiently proved before the Court, and the knowledge that facts may be changing significantly and quickly) may suggest more that a stance of deference to the Council’s appraisals of the requirements of the situation is appropriate.
law and in light of the Court’s own appreciation of the facts (however preliminary).

It may be the case that the Court may not feel in a position at the Provisional Measures stage, when facts are not yet fully established, to treat a resolution as unenforceable before it by way of granting a provisional remedy. However, the words of Article VIII of the Genocide Convention, empowering all U.N. organs to “take such action . . . as they consider appropriate,” suggest at minimum that the Court can expressly inform the Council of the Court’s provisional appraisal of the legal situation and encourage reconsideration. And, furthermore, the possibility cannot and should not be excluded of the Court’s gradually assuming the power, even in the provisional measures context, to treat a resolution as being of no force and effect before it, if three conditions are satisfied: (1) that the law of jus cogens has become clarified and articulated by the Court sufficiently for the Security Council to have been fully aware of the relevant law; (2) that the factual situation is manifestly clear and manifestly grave; and (3) that the causal link between obligations placed on states by a Council resolution and breach of a peremptory norm is itself proven to the satisfaction of the Court.

IV. LEGAL STATUS OF SECURITY COUNCIL RESOLUTIONS AND LEGAL CONSEQUENCES FOR THE OBLIGATION OF STATE PARTIES TO THE GENOCIDE CONVENTION TO PREVENT GENOCIDE AND FOR THE RIGHT OF BOSNIA TO ENGAGE IN SELF-DEFENSE ASSISTED BY OTHER STATES

A. Resolution 713 and Resolutions Reaffirming It May Be Conceptualized as Ultra Vires Juridicial Acts of the Security Council to the Extent that They Are Not in Accordance with the Jus Cogens Prohibition of Genocide or with the Inherent Right of Self-Defense

1. The Principle of Jus Cogens Renders Unlawful All Purportedly Juridical Acts, Including Acts of Organs of International Organizations, such as the U.N., and Does Not Merely Invalidate Treaties or Treaty Provisions Which Derogate from It

Given that jus cogens principles exist at the apex of international legal prescriptions, be they defined as inviolable principles of morality

337. Which is by and large the route chosen by Judge Lauterpacht in Bosnia v Serbia II, 1993 I.C.J. at 441 (separate opinion of Judge Lauterpacht); see also supra note 30 and accompanying text.
or as eternal elements of public order common to all legal systems, it is only logical that their nonderogability should extend to all international juridical acts and not simply to treaties. Whether as self-standing natural law edicts, as prescriptions embedded in general principles of international law, or as the highest form of customary international law, \textit{jus cogens} norms "exist and are enforceable independently of treaties, and are immune from many judicial doctrines that have frustrated redress."  

Literally, the term means "cogent law," "compelling or having the power of compelling or constraining." Framed as such, it is a prescriptive rule that aims to regulate the behavior of international actors in order that the international system itself may function according to minimum dictates of order as well as justice. It is therefore not inconsistent with its literal meaning that the principle of \textit{jus cogens} gathers up all purportedly lawful or juridical acts in its sweep. Furthermore, the behavior of all international persons must be constrained or compelled if \textit{jus cogens} norms are to play the pervasive and foundational role inherent in the concept itself.

As the ILC noted in 1975, the international legal personality of the U.N. and its organs has "a particularly firm foundation" in the reasoning

---

338. These two characterizations of \textit{jus cogens} and their mutually reinforcing quality are perhaps best captured by the Mexican delegation at the U.N. Conference on the Law of Treaties, which argued that "[t]he rules of \textit{jus cogens} are] those rules which derive from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community." Parker & Neylon, \textit{supra} note 64, at 414; see also Meron, \textit{supra} note 58, at 221–222.

339. D'Amato, for instance, characterizes \textit{jus cogens} norms as functioning essentially as "very strong rule[s] of customary international law." Parker & Neylon, \textit{supra} note 64, at 417. Alternatively, Lauterpacht and Verdross attribute the norm's origins to a continuing natural law strain in international law. H. \textit{Lauterpacht}, \textit{supra} note 49, at 58.

340. Parker & Neylon, \textit{supra} note 64, at 417 (emphasis added).

of the ICJ in *Reparations to United Nations Servants*. The legal personality of international organizations more generally (at least as it pertains to their capacity to be parties to treaties) has been reconfirmed in the 1986 Vienna Convention. Significantly, the 1986 Vienna Convention precisely replicates the wording of three of the four articles from the 1969 Vienna Convention that deal with *jus cogens* (Articles 53, 64, and 71) and numbers them identically.

While no treaty to which an international organization is party is in issue in the current proceedings, the 1986 Vienna Convention nonetheless constitutes strong evidence not only that the concept of *jus cogens* is an indelible part of the modern international legal fabric but also that this concept is no less applicable to the conduct of international organizations than it is to the conduct of states. The ILC took the view that the 1969 Vienna Convention (dealing only with state-state treaties) had taken a preexisting legal concept and had given it "both a precision and a substance which made the notion [of *jus cogens*] one of [the 1969 Vienna Convention's] essential provisions." For that reason, the ILC "had no hesitation" in mapping Articles 53, 64, and 71 of the 1969 Vienna Convention directly onto Articles 53, 64, and 71 of the ILC's 1980 Draft Vienna Convention. It appears that between the time that the ILC adopted these Draft Articles 53, 64, and 71 in 1980 and the adoption by states of the 1986 Vienna Convention, states did not take issue with the fact that the concept of *jus cogens* applied equally to international organizations. Thus, there is no controversy with respect to the applicability of the norms of *jus cogens* to international organizations.

The same reasons which justify the expansion of the concept of *jus cogens* to the acts of international organizations apply with equal force to moving the applicability of *jus cogens* beyond the realm of international treaties. Although the 1986 Vienna Convention imports the con-

---


343. 1986 Vienna Convention, *supra* note 303, arts. 53, 64, and 71.

344. The differences as well as similarities in dispute settlement procedure between art. 66 of the 1969 and 1986 Vienna Conventions were discussed *supra* part III.B.3.


346. *Id.*

cept of *jus cogens* only into the sphere of treaty relations of international organizations, if the function of *jus cogens* is to express "moral fundamentals and public welfare"\(^{348}\) or to fix "the most important moral-political demands of the ruling social forces,"\(^{349}\) then it is no more defensible to limit the concept's scope to only one kind of juridical act (i.e., treaties) than it would have been to limit its applicability to a single kind of international person (i.e., states).\(^{350}\)

In keeping with the view that *jus cogens* assists in the development of an objective international legal order that governs the behavior of all international persons, Professor Suy notes that "it is not only forbidden to conclude treaties contrary to these [*jus cogens*] principles, but *any other act or action whose object or aim is not in conformity with these principles must also be considered as being without effect."\(^{351}\) Professor Murty similarly observes that a "course of uniform behaviour in the past" may also be repugnant to *jus cogens* and that governments could legitimately claim that it is not obligatory to follow the impugned conduct.\(^{352}\)

It would be, therefore, unduly formalistic to restrict the breadth of *jus cogens* to the context of treaty lawfulness simply by virtue of the fact that, to date, it has only been formally codified in the two Vienna Conventions. As the concept of *jus cogens* predates the Vienna Conventions by many decades,\(^{353}\) as its association with treaty law can be

---

\(^{348}\) 3 Fredrich Carl von Savigny, System des heutigen Romischen Rechts 35 (1849).


\(^{350}\) Hannikainen, *supra* note 173, at 9 ("Arts. 53 and 64 [of the 1969 Vienna Convention] prescribe the invalidity of treaties which conflict with peremptory norms. It can be asked why, logically, the same effect should not be prescribed for violations of peremptory norms by means other than treaties"). The point to be drawn from this is that *jus cogens* as a matter of systemic logic must apply to juridical forms and acts other than treaties. Hannikainen goes on in the next sentence to state that, while norms of *jus cogens* logically apply beyond treaties, the specific legal effect of invalidation need not be the universal result. For a discussion of legal effects other than invalidation (i.e., making or treating as void), see *infra* part IV.B.

\(^{351}\) Suy, *supra* note 50, at 60 (emphasis added). It might be noted, in passing, that the use by Suy of the phrase "without effect" is a suitable umbrella phrase for a range of possible specific effects that result from *jus cogens*-based unlawfulness. As will emerge from the discussion in part IV, expressions such as "unlawful" or "having no force or effect" should be used in lieu of using the language of invalidation or voidness, which language does not necessarily have a general applicability.

\(^{352}\) Murty, *supra* note 71, at 79.

\(^{353}\) While in theory the term *jus cogens* has appeared only recently (since the beginning of the 1930s), ideas of compulsory rules of law of a higher nature has existed in the doctrine of international law for centuries, in the works of Francisco de Vitoria, Alberico Gentili, and Hugo Grotius among others. See Alexidze, *supra* note 349, at 228. As indicated earlier, its deeper historical roots are attached to the still relevant natural law tradition. *See Bosnia v.*
seen as simply a specific instance of a more general application, and as the very definition of a "peremptory [i.e., *jus cogens*] norm" in Article 53 of both Vienna Conventions in no way limits the concept to the treaty context, it would be faulty to deduce that *jus cogens* norms shall serve only to restrict state conduct in matters of treaty formation (Article 53) and treaty continuation (Article 64). As guiding principles of minimally acceptable conduct in the world order, peremptory norms must equally proscribe noncontractual international acts that would otherwise be permitted by international law, including acts such as resolutions of organs of international organizations that would themselves have juridical consequences if treated as valid. Indeed, in the area of human rights, which comprises a large part of the substantive rules of *jus cogens*, and where gross violations:

almost always result from unilateral acts of states rather than from international agreements, the nontreaty aspect of the problem is far more important than the treaty aspect. Even scholars who reserve *jus cogens* to treaty law tend to agree with the elementary proposition that international public order, public order of the international community and international public policy do not allow states to violate severally such norms as they are prohibited from violating jointly with other states.\(^{354}\)

This position is echoed by Sir Gerald Fitzmaurice who, in his course at the Hague Academy, adopted the position that "[t]here are cases in which overriding rules of *jus cogens* produce a situation of irreducible obligation and demand that illegal actions be ignored or not allowed to affect the obligations of other States."\(^{355}\)

That the concept of *jus cogens* is relevant to the entire field of international obligations, not just to treaty obligations, is authoritatively confirmed by the manner in which the ILC has treated "peremptory norms" as an integral component of its Draft Articles on State Responsibility.\(^{356}\) Article 17 of Part I of the Draft Articles makes clear that state responsibility is incurred whenever an international legal obligation is breached "regardless of the origin, whether customary, conventional or

---


other, of that obligation." Article 18(2) sets out a modification of normal principles of intertemporal law in its contemplation of the availability of a retroactive defense if conduct that was in breach of international law at the time of the conduct subsequently becomes obligatory according to a newly arisen peremptory norm. It is then further clarified that there are some obligations (customary, conventional, or other) which are to be conceptualized as giving rise to "international crimes" as opposed to less serious "international delicts" when they are breached; the formulation of such obligations in Article 19 bears a close resemblance to the concept of jus cogens. Perhaps most significantly, the notion of "peremptory norms," defined in identical terms to the definition in Article 53 of the both Vienna Conventions, appears as a limiting condition in the enunciation of certain defenses ("circumstances precluding wrongfulness") available to states that will relieve them of state responsibility for acts that would otherwise be illegal. Finally, although at a far less advanced stage of development by the ILC, it is likely that Part 2 of the Draft Articles will seek to follow through on the distinction between international crimes and delicts by attaching additional consequences to breach of an international criminal norm.

Just as the applicability of jus cogens to international organizations was seen by the ILC and by the community of states as a direct extension of the applicability of the concept to states, there seems to be no barrier to a similar direct extension of the relevance of jus cogens from

357. Id. at 32.
358. Art. 18(2) states that:

[an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

Id. It should be noted that art. 18(2) is clearly premised on the view that peremptory obligations prevail over nonperemptory obligations in situations of conflict of obligation.

359. Art. 19(2) reads: "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime." Id.

360. See id. at 33 (art. 29(2)) (defining peremptory norm). Neither the defense of "consent" (art. 29(1)) nor of "state of necessity" (art. 33(1)) can be invoked if the obligation (breach of which would be otherwise precluded by the availability of the defenses) arises out of a peremptory norm. See id.; see also discussion of state of necessity supra part II.B.4.

361. See Riphagen, supra note 117, at 3-4. Mr. Riphagen has been replaced by Mr. Arangio-Ruiz. There are some hints in both the reports of Mr. Arangio-Ruiz and the response to them by the ILC that the Draft Articles proposed for Part 2 by Mr. Riphagen may not survive ILC scrutiny, at least in their present form. Ongoing events, including the reinvigoration of the Security Council, have clearly injected a new dimension into the ILC's approach to and consideration of Part 2.
the field of the responsibility of states to the field of the responsibility of international organizations.\textsuperscript{362} The conduct and juridical acts of international organizations (such as resolutions purporting to have legal effect) cannot be in a privileged position when compared to the relevance of \textit{jus cogens} to all conduct and juridical acts of states. As Professor Brownlie explains:

\begin{quote}
The correlative of legal personality and a capacity to present international claims is responsibility \ldots{} General international law provides criteria according to which an organization may be held to be unlawful in conception and objects, and, apart from this, \textit{particular acts in the law may be void if they are contrary to the principle of jus cogens}.\textsuperscript{363}
\end{quote}

Therefore, even though the act disputed in the current case before the Court is a Security Council resolution, this should have no bearing on the assessment of its lawfulness according to \textit{jus cogens} norms. The above argument has shown that a juridical act needs to be neither a treaty provision nor the act of a state in order for \textit{jus cogens} to operate.

However, to the extent that assessing the obligations of international organizations must largely proceed by reasoning from principle, logic, and analogy due to a dearth of practice or doctrinal opinion, it must also be noted that scrutinizing Security Council resolutions in light of \textit{jus cogens} norms is very close to scrutinizing treaty provisions themselves. The personalities of the U.N. and its various organs are themselves treaty-constituted and, more immediately, the formal validity of all Security Council resolutions is traceable to treaty-conferred procedures and powers. Most significantly, the legal obligation of states to obey Security Council resolutions is treaty-dependent, existing only by virtue of Articles 2(5), 25, and 48 of the U.N. Charter. If treaty provisions must conform to \textit{jus cogens} duties, it seems indisputable, as a matter of both principle and \textit{a fortiori} logic, that treaty provisions cannot authorize or delegate authority to engage in juridical acts that would be treated as void according to the law of treaties if they were directly spelled out in the treaty itself.

Indeed, it would be reasonable to take the position that Article 53 of the 1969 Vienna Convention must include, by necessary implication, not

\textsuperscript{362} On the legally uncertain dividing line between state responsibility in relation to the activities of international organizations and the direct responsibility of international organizations for the conduct of their organs (e.g. the U.N. Security Council), see 1975 Draft Articles on State Responsibility, \textit{supra} note 342, at 86–91.

\textsuperscript{363} \textsc{Brownlie}, \textit{Principles of Public International Law}, \textit{supra} note 49, at 701 (emphasis added).
just treaty provisions but also sub-treaty (i.e., treaty-delegated or treaty-authorized) rules. As made clear in *Reparations to United Nations Servants*, the U.N.'s personality is clearly objective and separate from that of Member States. But this is not to deny that such personality is simultaneously intimately bound up in the interstate treaty that is the U.N. Charter. Thus, while there is no question that Article 53 of the 1969 Vienna Convention does not apply directly to the U.N. (since the Convention creates treaty obligations only for ratifying states), the objective legal order of customary or general international law that parallels Article 53 must be reasoned to merge two sets of prohibitions: the prohibition against states' adopting treaty-authorized rules that conflict with *jus cogens* norms and the prohibition against nonstate actors whose personality and specific capacities are constituted by a state-state treaty from doing what the states parties could not do themselves.

The discussion to this point has assumed situations in which the conflict of a treaty-delegated act with *jus cogens* norms is both *purposeful* and *immediate*. However, such an act can still potentially be repugnant to *jus cogens* if the conflict of obligation occurs due to the *effect* of the norm or act or only *after the passage of time*. Hersch Lauterpacht reasoned in a similar vein, although he was not expressly addressing the status of treaty-authorized acts. In a 1953 report to the ILC, he stated that “[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law . . . .”364 A treaty which on its face is lawful may therefore be rendered unlawful by virtue of illegal effects to which it subsequently gives rise. In part IV.B infra, the question of whether a legal instrument, notably a treaty-delegated instrument such as a resolution, need necessarily be rendered void as a result of an effects-based conflict with *jus cogens* norms will be addressed. While it will be contended that voidness is neither necessary nor always desirable as a legal effect, it will be taken for granted that the lawfulness of a resolution of an international organization is affected in some way when that resolution requires performance that conflicts with other obligations held by those to whom the resolution is addressed.

2. For the Resolutions of the Security Council to be Treated as Having Legal Force and Effect, the Council Must Act in Accordance with the U.N. Charter Which Incorporates by Reference Principles of Justice and International Law Which, in Turn, Are at Minimum Comprised of *Jus Cogens* Norms

a. By the Combined Operation of Articles 24(2), 1(1), and 25 of the U.N. Charter, the Charter Must be Interpreted to Incorporate *Jus Cogens* Norms as an Integral Part of U.N. Law

The provisions of the 1969 Vienna Convention relating to principles of treaty interpretation have assumed the status of customary international law and thus apply to the interpretation of the Charter.\(^{365}\) The “ordinary meaning” of the Charter requires the Security Council to act in accordance with international law in order for its decisions to have binding force. Article 24(2) of the Charter requires that the Security Council, in discharging its duties, “act in accordance with the Purposes and Principles of the United Nations.” These purposes and principles, found in the first two articles of the U.N. Charter, include the directive in Article 1(1) that the U.N. maintain international peace and security “in conformity with the principles of justice and international law.” As the concept of *jus cogens* is indisputably simultaneously a “principle of justice” and an aspect of “international law,” it is uniquely apt to be included within the phrase contained in Article 1(1) and thereby incorporated by reference into Article 24(2). Consequently, the Security Council is at minimum required by these articles to act in accordance with *jus cogens* norms. It may be that, as a matter of the best interpretation of the Charter, the Security Council is also bound to respect, or at least consider, other principles of international law that have not achieved the status of *jus cogens*. However, it is only necessary to the case at bar to accept the overriding relevance of *jus cogens* norms. Once this interpretation is established, it is further necessary to accept that the Court is *institutionally suited*\(^{366}\) to judge the scope of such norms and to

---

365. “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” 1969 Vienna Convention, supra note 45, art. 31.

366. See *supra* part III.B (discussing the various normative indicators, notably the universal treaties such as the Genocide Convention, the 1969 Vienna Convention, and 1986 Vienna Convention, which clearly situate the Court in this way).
offer its opinion of what kinds of circumstances occasion a breach of these norms. 367

(i) An Analysis of Article 1(1) Reveals that the Security Council Must Act in Conformity with “Principles of Justice and International Law” in the Context of Maintaining the Arms Embargo on Bosnia

As the wording of Article 1(1) goes to the heart of both normative and institutional issues at stake in this case and because the placement of the words “principles of justice and international law” in Article 1(1) produces some ambiguity in terms of what those words modify, it is necessary to look at the travaux préparatoires for Article 1(1). 368 Article 1(1) of the Charter enunciates the fundamental purpose of the U.N. and reads in its entirety:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

It appears that there is a two-fold purpose in Article 1(1): (1) the taking of effective collective measures against threats to the peace and (2) the adjustment or settlement of disputes before (an initial or further) breach of the peace occurs. 369 One reading of Article 1(1) suggests that the requirement of acting “in conformity with the principles of justice and international law” modifies only the second of these purposes. Thus,

367. As has been acknowledged supra part III.B, the Court and Council are probably best thought of as coequally suited to pass judgment on whether or not conformity with those norms has been achieved in a particular factual situation. Within this shared responsibility, the Court has a particular responsibility to judge the conformity of past conduct with jus cogens in light of facts proven before it and the Council has a particular responsibility to judge conformity of ongoing or contemplated conduct with jus cogens in light of a fluid factual situation.

368. A detailed account of the travaux debates on the wording and on the specific location of this phrase within art. 1(1) can be found in Jose Maria Ruda, THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS CHARTER (A LEGISLATIVE HISTORY OF THE PREamble, ARTICLE 1 AND ARTICLE 2) 108-27 (1983). For ease of reference and as testimony to the thoroughness of Ruda’s digesting of the travaux, all subsequent references are to both Ruda and the primary source in question.

369. Indeed, at one stage in the drafting of art. 1(1), the paragraph was divided into subparagraphs to draw a distinction between these two elements of this purpose. However, the indentation and punctuation was later modified by the Co-ordination Committee. See Ruda, supra note 368, at 95-96.
on this superficial reading, Security Council actions do not need to conform with international law if they involve the taking of collective measures against threats to the peace.

Of course, the absence of a provision requiring conformity with international law does not amount to an exemption from the need to conform with these principles. Indeed, if the Security Council and other U.N. organs were not required to respect international law in the exercise of their duties, one would expect that a provision specifically to this effect would have been included in the Charter. The absence of such a provision indicates that, at the very least, a narrow interpretation of the extent to which the Security Council may deviate from accepted norms of customary international law should be applied by the Court. At a minimum, Article 1(1) must require the Security Council to respect jus cogens norms. Also, since the eventual settlement of an underlying dispute must be resolved in conformity with principles of justice and international law, the Security Council must avoid taking collective measures which would significantly prejudice fundamental rights implicated in the dispute. In this respect, it is important to note that the arms embargo has been maintained as part of a strategy for producing a (peacefully) negotiated settlement to the underlying dispute. Viewed in this way, the need for conformity of the arms embargo with "principles of justice and international law" is directly triggered even on an interpretation that limits that phrase to only the latter part of Article 1(1).

Admittedly, the requirement that Security Council action conform with international law was the subject of significant debate in the travaux préparatoires of the Charter. At several stages in the drafting of Article 1(1), the issue arose of whether and where to refer to the principles of justice and international law. The initial draft of Article 1(1) provided by the Four Powers made no reference to either justice or international law. In the Dumbarton Oaks Proposals produced by the Four Powers, Article 1(1) read as follows:

To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means

---

370. Art. 103 does not provide such an exemption; rather, it is a paramountcy provision which requires a valid obligation to exist under the Charter before it operates to exclude non-Charter obligations. It thus does not inform the question of whether conformity with justice and international law is required before an obligation can be created by the Security Council.
adjustment or settlement of international disputes which may lead to a breach of the peace.\textsuperscript{371}

Many states favored stronger language regarding respect for justice and international law. In order to address these concerns, several revisions were proposed, of which there were two main variants: (1) to amend the first clause to read "[t]o maintain international peace, security and justice;\textsuperscript{372}" and (2) to amend the first clause to read "[t]o maintain international peace and security in accordance with the principles of justice and international law . . . .\textsuperscript{373}

As an initial attempt to meet the concerns of the delegates, the Four Powers submitted an amendment to insert the words "with due regard to the principles of justice and international law" following the words "by peaceful means" that appear in the original Dumbarton Oaks proposal, which amendment was adopted by Subcommittee I/1/A.\textsuperscript{374} However, a number of other states were concerned that the phrasing suggested that international law would not be determinative in the settlement process. As Ruda has noted:

In their opinion, it was not sufficient to mention "justice" as a means of achieving a purpose. They felt that the prevailing opinion at the Conference had been that the chief purpose of the Organization must be accomplished in accordance with some rules, and that there was an inference that the Organization did not intend to follow the rule of justice. They feared that its omission might mean that the Organization intended to impose a peace of expediency, rather than a peace founded on justice.\textsuperscript{375}

In light of these concerns, the subcommittee unanimously held that "in conformity with" should replace "with due regard to."\textsuperscript{376}
This alteration did not, however, meet all of the concerns of the delegates to Committee I/1. Other amendments were proposed which would, if adopted, strengthen even further the requirement of conformity with international law. A motion to alter the first clause of Article 1(1) to read “[t]o maintain international peace, security and justice” was put forward, although a similar proposal had been rejected by Subcommittee I/1/A.\textsuperscript{377} Delegates to Committee I/1 voted 19–12 in favor of the proposal, but it was not adopted since it lacked the necessary two-thirds majority.\textsuperscript{378} A further amendment was proposed in Committee I/1, to change the first clause of Article 1(1) to the following: “To maintain international peace and security in accordance with the principles of justice and international law.” This amendment received a majority of votes in Committee I/1, but did not receive the two-thirds majority necessary to carry.\textsuperscript{379}

The Rapporteur of Committee I/1 in his report to Commission I noted the distinction between collective measures to stop a breach of the peace and the subsequent settlement of the underlying dispute giving rise to the breach of the peace and discussed the impact of this distinction upon the requirement of the organization to act in conformity with international law:

When the Organization has used the power given to it and the force at its disposal to stop war, then it can find the latitude to apply the principles of justice and international law, or can assist the contending parties to find a peaceful solution.

The concept of justice and international law can thus find a more appropriate place in context with the last part of the paragraph dealing with disputes and situations. There, it can find a real scope to operate, a more precise expression and a more practical field of application.\textsuperscript{380}

The Rapporteur noted that the concern with placing “justice” within the first clause of Article 1(1) would be to provide a “loophole for question-
ing any specific actions, and a possibility for delaying measures and procedure while discussing abstract definitions,” which would detract from the ability of the Security Council to promptly stop any breach of the peace.381

At Commission I, the Egyptian delegation again proposed an amendment to insert the phrase “in accordance with the principles of justice and international law” following “peace and security” in the first clause.382 Arguing in support of the amendment, the Egyptian delegate noted:

We were also told later that the adoption of our proposal might result in delaying or even preventing action by the Security Council. We were told that common sense and reason would suffice to make it imperative for the Security Council to take action if and when necessary. But we feel that the Council, the Security Council, will really play the part of the political court of law and it is indispensable that the principles of justice and law should always be present in its deliberations.383

Egypt’s concern that a state’s legal rights might be prejudiced if the Security Council were not required to act in accordance with justice and international law was shared by the delegate of Uruguay, who emphatically noted:

We firmly support a drastic system of effective security measures, but we conceive it only on the basis of justice and in conformity with the rules of international law. . . . The day when there occurs anew the illusion that by sacrificing the rights of the weak in the face of threats by the strong the peace would be saved, on that day the fuse will have been lighted which sooner or later would set off the explosion of war. Injustice is not a propitious atmosphere for peace.384

In responding to the amendment, the U.K. delegate noted that the original wording would ensure “that the actual business of maintaining peace and of preventing the guns beginning to go off, should not, in any

381. Doc. 885, I/1/34, 6 U.N.C.I.O. 394 (1945). These are the kinds of concerns that Prof. Reisman has expressed, see supra part III.A.3. It is worth emphasizing, however, that Prof. Reisman accepts that the Council is bound by international law, directing his concern only to the institutional question of whether the Council alone can judge whether and to what extent international law is relevant.

382. RUDA, supra note 368, at 119; Doc. 1006, I/6, 6 U.N.C.I.O. 21 (1945).

383. RUDA, supra note 368, at 121; Doc. 1006, I/6, 6 U.N.C.I.O. 24 (1945).

384. RUDA, supra note 368, at 125; Doc. 1006, I/6, 6 U.N.C.I.O. 33 (1945).
circumstances, be delayed." The U.K. delegate stressed that, on the original wording, the actual settlement of disputes would occur in accordance with justice. Likening the Security Council’s role to that of a police officer, the delegate noted: “He does not stop at the outset of what he does to inquire where exactly lies the precise balance of justice in their quarrel. He stops it, and then, in order to make adjustment and settlement, justice comes into its own.” On the U.K.’s view, there was no need for the amendment, since the rights of the states involved would not be affected by the exercise of the Security Council’s “police” function: the Council would take immediate steps to effect a ceasing of hostilities, at which point a peaceful settlement in accordance with law and justice could be reached. Commission I was divided 21 in favor and 21 against. Thus, the amendment did not obtain the two-thirds majority necessary to carry.

It is apparent from the travaux préparatoires that a majority of states did not support the position that the Security Council may act without conformity to justice and international law. However, amendments to clarify this understanding did not gain the necessary super-majorities required under the drafting procedures. At this point, a comment on the interpretive weight to be given to the travaux is called for. When interpreting the significance of failed amendment votes, due weight must be given to the following considerations: (1) the baseline, indeed status quo, text to which changes were proposed was drafted by a very few states (the Four Powers); (2) even the combined will of well over fifty percent of the participating states was insufficient to change the text; and (3) original meaning must itself be subservient to an evolutionary interpretation. States opposing the various proposed amendments did so not because they opposed the rule of justice but because they were concerned that inclusion of the concept of “justice” within the exercise of the Security Council’s “police” function might impede the Council’s ability to take prompt and effective measures to end hostilities. Given the problem of extending into the 1990s the narrow view asserted by the most powerful states who controlled the initial draft text, and given the evolution in signals sent by the international community on the all-pervasive significance of jus cogens, any interpretation of

385. RUDA, supra note 368, at 123; Doc. 1006, I/6, 6 U.N.C.I.O. 25 (1945).
386. Doc. 1006, I/6, 6 U.N.C.I.O. 25 (1945).
387. Id.
388. RUDA, supra note 368, at 126; Doc. 1006, I/6, 6 U.N.C.I.O. 34 (1945).
389. RUDA, supra note 368, at 117–18.
what in Article 1(1) is modified by the words "principles of justice and international law" should be limited to this narrow concern.\textsuperscript{390}

In any case, broad interpretations based on Article 1(1) of the scope of unfettered power for the Council rely on dichotomizing the Security Council's role into a "police function" and a "settlement function." Even those states that opposed an explicit requirement in Article 1(1) of conformity with justice and international law with respect to the exercise of the police function did not suggest that the eventual settlement of a dispute which gave rise to a threat to the peace should not be based on the principles of justice and international law. This suggests that a narrow interpretation of the extent to which the Security Council may take collective measures without regard to justice or international law is appropriate. By requiring that all disputes be settled according to the principles of justice and international law, the framers of the Charter recognized that a state's legal rights should not be impaired by the collective enforcement measures taken by the Security Council. This requirement reveals, at the same time, that the police/settlement dichotomy is a false one, at least in the context of the present dispute.\textsuperscript{391}

(ii) Article 25 of the Charter Does Not Make Resolutions Binding if Their Adoption or Maintenance Is Not in Accordance with Article 1(1)'s "Principles of Justice and International Law"

\textsuperscript{390} In turn, this concern is addressed mostly, if not entirely, to institutional issues, notably that of whether states can act unilaterally based on their interpretation of the conformity of a resolution with "justice and international law" and the extent to which another institution, like the General Assembly or the ICJ, can judge conformity with these principles. The concern does not go to the purely normative issue of whether Security Council actions are governed via art. 1(1) by these principles. This Memorial addresses neither unilateral action nor General Assembly powers, but the discussion of the role of the ICJ supra part III explicitly acknowledged the relevance of questions of inter-institutional comity, particularly avoidance of frustration of the jurisdiction of the other organ.

\textsuperscript{391} If the Security Council were entitled to limit through collective measures Bosnia's ability to protect itself from aggressive genocide, Bosnia's rights under international law would be fundamentally prejudiced. Bosnia's right to insist upon settling the dispute in conformity with the principles of justice and international law would indeed be a hollow one. The immeasurable human suffering caused by the ongoing genocide against the population of Bosnia cannot be settled or adjusted \textit{ex post facto}.

It is arguable that Bosnia's right to territorial integrity is not implicated in a similar manner, because the legal borders which are the subject of a dispute can be adequately adjusted through peaceful means following the cessation of hostilities. At a minimum, however, the Security Council must respect \textit{jus cogens} norms regarding the protection of human populations, since breaches of these norms cannot be redressed at the settlement stage. Even if one accepts the unlikely possibility that a declaration of responsibility and compensation for genocide against Bosnia's population could constitute elements of a peaceful settlement, it is untenable to suggest that such relief would constitute a just substitute for Bosnia's right to be free of genocide.
Article 25 clearly circumscribes the powers of the Security Council. Council decisions, if they are to have binding effect, must be "in accordance" with the Charter: "The Members of the U.N. agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Clearly, Article 25 does not operate so as to make all Security Council decisions binding. Otherwise, the words "in accordance with the present Charter" would be superfluous. Together, Articles 24 and 25, based on their ordinary meaning, establish compliance with international law, notably *jus cogens*, as the *sine qua non* for binding and valid Security Council action. These articles provide the Court with a legal basis for treating as inoperative any Security Council decision that, in its judgment, conflicts with peremptory norms. This is of particular importance in the present case because the international legal norms at hand are themselves the quintessential examples of "principles of justice" that have attained the status of being "accepted and recognized by the international community as a whole" (*per* Article 53 of the two Vienna Conventions) as peremptory legal standards. The effect of Article 1(1) of the Charter is to bring *jus cogens* norms, which arise "outside" the Charter, within the corpus of U.N. law (broadly characterized) that the Security Council must obey. The fact that the Council may have complied with all other provisions of the Charter cannot validate conduct which derogates from *jus cogens*.

A caveat is in order. The above reasoning is not strictly necessary to the case as it is contended that *jus cogens* obligations can prevail over obligations created by the Security Council as a matter of general international law. In other words, Bosnia's case does not depend on an interpretation of *jus cogens* norms as part of the positive legal ("constitutional") order of the Charter through an incorporation by reference through Article 1(1) and a renvoi from there to Article 24. The argument has been made that it is consistent with both the concept of *jus cogens* and the nature of the U.N. legal order to treat the fundamental precepts of *jus cogens* to be part of internal Charter law. The alternative, always available, is to treat Security Council resolutions that do not conform with *jus cogens* as *intra vires* the Security Council but subject to the higher law of *jus cogens* which comes from "outside" the Charter.

392. See Namibia, 1971 I.C.J. at 293 (dissenting opinion of Judge Fitzmaurice) ("If, under the relevant chapter or article of the Charter, the [Security Council] decision is not binding, Article 25 cannot make it so. If the effect of that Article were automatically to make all decisions of the Security Council binding, then the words 'in accordance with the present Charter' would be quite superfluous.").

393. In the case at bar, the failure to conform with art. 51 and the failure to conform with *jus cogens* norms are interconnected. See supra part II.B.1 and II.B.2.
either to render a resolution directly unlawful or to deprive of legal force and effect the obligations that it purports to generate for states. \(^{394}\)

b. Article 103 of the Charter Does Not Relieve the Security Council of Its Duty to Comply with Jus Cogens Norms

Article 103 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." \(^{395}\) Read together, Articles 25 and 103 require Member States to "accept and carry out" all Security Council decisions that are "in accordance with the present Charter," even if there are contrary obligations under an international treaty other than the Charter. \(^{396}\) It was due to this Article 103 paramountcy clause that the ICJ declined to grant Libya provisional measures in *Lockerbie*.

ICJ President Oda stated in *Lockerbie* that he did "not deny that under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources." \(^{397}\) If Judge Oda intended by these words to imply that the "positive law" of the Charter ends the legal issues surrounding Article 103, such an interpretation of the Charter would ignore completely the "ordinary meaning" of the Charter's words, which expressly require U.N. organs to act in accordance with international law. \(^{398}\) As Article 103 only refers explicitly to "international agreements," it is arguable that the overarching language in Article 24(2) referring to the purposes and principles of the U.N. and the reference in Article 1(1) to "international law" preserves customary international law and general principles of

\(^{394}\) See infra part IV.B (canvassing the possibilities with respect to voidness, inoperativity, and interpretive reading down).

\(^{395}\) U.N. CHARTER art. 103.

\(^{396}\) Note that Judge Bedjaoui, in his dissenting opinion in * Lockerbie*, argued that art. 103 is aimed only at "obligations," not at "rights," so that Charter-imposed obligations trump other obligations but not rights that derive from other sources of international law. * Lockerbie*, 1992 I.C.J. at 143–159 (dissenting opinion of Judge Bedjaoui). Whether Judge Bedjaoui's distinction stands up to analysis cannot be dealt with here; no other authority for this proposition has been found. However, assuming, arguendo, its validity, it could be argued that Bosnia's right to the means to prevent genocide under art. 1 of the Genocide Convention remains unfettered despite the operation of arts. 25 and 103.

\(^{397}\) * Lockerbie*, 1992 I.C.J. at 129 (separate opinion of Judge Oda).

\(^{398}\) Id. at 131. Note that such an interpretation need not be given to Judge Oda's words. While concurring in the treatment of the Security Council resolution as dispositive due to the effect of art. 103, he indicated that the Court might be called on to pass judgment on the conformity of the resolution with international law if it were, in another case, argued that a state has been deprived of what he called "sovereign rights."
international law (i.e., non-conventional sources of law) as constraints on the Security Council.

However, once again, it is not necessary to the applicant's argument that the Court must find that the Council has a duty to comply with all nontreaty international law. The Court could accept the proposition that a resolution of the Security Council may have binding force irrespective of its consonance with international law and still find a narrower basis for decision in the case at bar, namely that the situation is qualitatively different where *jus cogens* norms are involved.

As has been argued at length earlier, *jus cogens* norms of international law are, by definition, norms from which no derogation is permitted, even by the Security Council. Thus, to the extent that Article 103 analogizes Charter obligations to domestic law constitutional obligations, that analogy must be modified so as to accord *jus cogens* norms a constitutional status vis-à-vis Charter-delegated decisions of U.N. organs. It would be contrary to the rule of law for the Council to be *completely* insulated from legal scrutiny. The Security Council is not infallible, and, when it errs, the Court, as the guardian of the legality of the U.N. system, must not decline to make a legal judgment. If the phrase "principles of justice and international law" in Article 1(1) is to have any concrete meaning within the U.N. system, then *at a minimum* the Council must not be permitted to derogate from such fundamental legal norms as those with the peremptory status of *jus cogens*.

It is of utmost significance that Article 103 makes no explicit reference to the status of Charter obligations that conflict with customary international law or, at the very least, with *jus cogens*. *Jus cogens* norms such as those related to the prohibition of genocide (whether understood as a higher form of custom or as fundamental general principles of law) clearly do not fall within the paramountcy effect of Article 103. According to Professor Watson:

The omission makes more sense, however, when one considers the doctrine of *jus cogens* — the rule that states cannot agree by treaty to violate certain peremptory norms of customary international law. Indeed, the framers of the Charter seem to have had such a limitation in mind when they wrote that an interpretation of the Charter that was "generally unacceptable" would be "void" [see discussion *infra*]. It is quite reasonable to conclude that the U.N. Charter, itself a treaty, does not authorize acts that violate peremptory norms of international law.399

The status of *jus cogens* norms as a body of law superior to both customary international law and treaty law requires, as a matter of the

399. Watson, *supra* note 275, at 37.
hierarchy of legal norms which the Court must apply, that Article 103 provides no relief where Council conduct conflicts with *jus cogens*. As Judge Lauterpacht incisively stated in his separate opinion in *Bosnia v. Serbia II*:

The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus — that a Security Council resolution may even require participation in genocide — for its unacceptability to be apparent.400

The continued enforcement and application of Security Council Resolution 713 is not “in accordance with the Purposes and Principles of the United Nations” (Article 24(2)) and is thus also not “in accordance with the present Charter” (Article 25) because it violates the *jus cogens* prohibition against genocide. Consequently, Member States are not obliged by the operation of Articles 2(5), 25, or 48 to “give . . . every assistance in,” to “accept,” or to “carry out” this Security Council decision. Thus, there is no legal obligation deriving from the Charter to which to accord paramount effect under Article 103.

In *Lockerbie*, a majority of the Court relied heavily on the operation of Article 103 to reach the conclusion that obligations imposed upon Libya by the Security Council trumped any contrary rights Libya might have pursuant to the Montreal Convention. However, to summarize by way of reiterating the foregoing argument, Article 103 is clearly not determinative of Bosnia’s case. According to its ordinary meaning, Article 103 provides that Charter obligations prevail over “other international agreements.” It does not provide that Charter obligations prevail over *jus cogens* norms,401 such as those embodied in the Genocide Convention. It is clear that Article 103 has no application to provisions of international agreements which have *jus cogens* status. The reason is that the operation of Article 103 is conditional on the underlying validity of the Charter obligation. In the present case, the operation of *jus cogens* prevents such an obligation from arising in the first place. The peremptory status of the norms found in the Genocide Con-


401. Professor Watson states that “Article 103, relied on so heavily by the majority [in *Lockerbie*], provides that Charter obligations prevail over ‘other international agreements’; it does not provide that Charter obligations prevail over *jus cogens* and other forms of customary international law.” Watson, supra note 275, at 25.
vention, in the guise of either customary norms or general principles of law, nullifies the obligation on Members to abide by contradictory Council resolutions. Furthermore, one cannot avoid this result by pointing to the wording in Article 103 of "any other treaty obligation" as a way to allow the Security Council to trump the Genocide Convention. Given that the obligation to abide by the Council resolution does not legally exist, no question of conflict arises, and Article 103 accordingly is not triggered. Thus, by virtue of the fact that *jus cogens* norms found in a treaty have a simultaneous existence outside the treaty, a zone of immunity from the application of Article 103 is carved out for treaty provisions such as that in Article I of the Genocide Convention.402

3. Resolutions 713 and 727 as Maintained Against Bosnia Contravene Article 51 and Are Not "in Accordance with the Charter" Under Article 25

The preceding sections argued that Security Council resolutions that do not conform to *jus cogens* norms are *ultra vires* according to the internal legal order of the Charter. As a result, no binding Article 25 obligation emanates from such a resolution as long as it is *ultra vires* and, as a further result, Article 103's paramountcy effect is not even triggered. The same reasoning applies with respect to Article 51 and self-defense: the Security Council must act with a view to Articles 24 and 25. Articles 24 and 25 mean that the Security Council's power of interpretation of the validity of a state's claim to self-defense under Article 51, or determination as to whether "measures necessary" have been taken under Article 51, while not reviewable on a prospective basis, is not immune from normative constraint. Their effect is to ensure that the collective security system benefits not only from a political body's decision to act (thereby valuing timeliness and effective action) but also from the fact that such decisions must be made within a legal framework. The decision to suspend a state's right to self-defense through the imposition of an arms embargo must be implemented quickly in order to be effective. At the same time, the Security Council's "primary responsibility for international peace and security," premised upon the practical political need "to ensure prompt and effective action," must cohere with considerations of legality of the imposition of the embargo under the U.N. Charter.

Article 24(2) dovetails with Article 25; as noted in the preceding section, the binding nature of Security Council decisions *per Article 25*

---

402. Of course, if a resolution has no legal force because of a conflict with a *jus cogens* norm, *any* treaty obligation, whether or not itself a *jus cogens* obligation, which would otherwise conflict with the resolution, is immune from the paramountcy effect of art. 103.
is qualified by a phraseology ("in accordance with the present Charter") which parallels the language of Article 24(2) ("in accordance with the Purposes and Principles of the United Nations"). While the purposes and principles can be explicitly appealed to as one basis for challenging the force and effect of a Security Council resolution, the argument in the current section is simply that the Security Council has not acted "in accordance with" Article 51 and thus cannot be said to have acted "in accordance with the present Charter" within the meaning of Article 25. For the present argument related to Article 51, there is no need to rely on the Article 24(2) test of whether the Security Council resolutions are also not "in accordance with the purpose and principles" of the U.N. (except to the extent that such purposes and principles aid in the interpretation of the parameters of Security Council powers under Article 51).

The objective approach adopted for the interpretation of the words "measures necessary" in Article 51 necessitates a limited review role for the ICJ, or at least a joint role in codetermining whether the objective test of "measures necessary" has been met. The Security Council makes the initial determination of whether the objective criteria had been met, with the Court's showing requisite deference to the Council where fluid factual evaluations are at issue. But even in such fluid situations, the ICJ retains a residual role as the arbiter of legality. Certainly, the Court has not in the past shrunk from a determination of the legality of the use of force, including in situations involving Permanent Members of the Security Council. There is no reason to believe that it could not fulfill this role here.

B. Legal Effects of Resolution 713 and Resolutions that Reaffirm It and Thus Maintain the Embargo Against Bosnia

1. Should Resolution 713 Be Treated as Void?

As Hannikainen has noted, there is a tendency to see jus cogens as a rather blunt instrument in terms of legal effects. This is a result, it would seem, of over-assimilating the effects mandated by the law of treaties to the entire law of jus cogens. The only nuances acknowl-
edged by the two Vienna Conventions are with respect to treaties that become void not from the moment of formation but only after the passage of time due to the advent of a new *jus cogens* norm with which the treaty only then comes into conflict; in this instance, only continuing effects of the formerly valid treaty must be eliminated and, furthermore, the offensive provision may be separated (severed) from the rest of the treaty rather than bringing down the entire treaty as a result of its conflict with higher law.\(^4\) This tendency to assimilate the unlawfulness produced by *jus cogens* conflicts to voidness can arguably be seen in the reasoning of Judge Lauterpacht:

What legal consequences may flow from this analysis? One possibility is that, in strict logic, when the operation of paragraph 6 of Security Council Resolution 713 began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that members of the United Nations then became free to disregard it.

Instead, it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court’s Order, so that the Security Council may give due weight to it in future reconsideration of the embargo.\(^5\)

Judge Lauterpacht seems to have opted for a softer approach than a straightforward declaration of voidness only as a remedial choice in light of considerations related to proof of facts, institutional relations, and jurisdictional context. Thus, he still thought in terms of voidness as the normative effect whatever the Court’s institutional position to make that declaration. Others have seen voidness as the only possibility in even more assured terms. Citing only Judge Lauterpacht for support, Professor Gowlland-Debbas has stated simply that “[f]inally, nullity *ab initio* would be the result of any violation of a peremptory norm.”\(^6\)

\(^4\) See *id.* art. 71.

\(^5\) *Bosnia v. Serbia II*, 1993 I.C.J. at 441 (separate opinion of Judge Lauterpacht).

\(^6\) V. Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 Am. J. Int’l L. 643, 673 (1994). Gowlland-Debbas also considers, as a general matter, whether Security Council resolutions should be considered *voidable* as opposed to *void*. No resolution is reached, but it is worth noting that a similar argument is made as being the effect of art. 66 of the two Vienna Conventions, i.e., that *jus cogens* has no independent normative existence other than specific rulings produced through dispute settlement procedures. Shabtai Rosenne, however, has noted that the ICJ’s own practice:

does not lend support to the view that as a matter of positive international law as expressed in the Vienna Conventions, the substantive rules regarding invalidity and
Yet, as Hannikainen notes:

[T]here is little basis for the invalidation of the effects of any and all violations of peremptory norms. A sufficient reason should be that the presumption of “invalidity” [as a result of such violations] is not a suitable sanction to apply in any and all kinds of violations. There is little point in declaring “void” concrete violative acts which may have produced all their results by the time the validity is challenged, for example, concrete violations of human rights. International law has not formulated any specific effect for concrete violations of peremptory norms beyond the finding of unlawfulness and the consequent assignment of responsibility.510

It is possible to make the case that arms embargo resolutions are void from the moment that a conflict with jus cogens occurred or from the moment that the right of self-defense was impaired in an ultra vires way. This requires acceptance of the proposition that a legal instrument that has the effect of mandating unlawful conduct is permanently flawed as a result. The arguments for this position are evident: the need for the strongest sanction known to international law; the fact that the arms embargo produces effects that resonate well into the future in terms of assisting in producing the position of strength from which Bosnian Serbs “negotiate”; and the fact that the unwillingness of the U.N. to act collectively in a way that would adequately substitute for Bosnia’s own ability would seem to mean that the effects produced by Resolution 713 are permanent and irreparable. However, Bosnia’s arguments need not go this far. Given that the arms embargo resolutions are not in conflict with jus cogens on their face and that the conflict is produced only over time and with the existence of certain factual circumstances, it may be open to the Court to consider other possible ways to conceptualize the legal effects of the unlawfulness of the arms embargo resolutions, particularly if the Court would see such alternatives as more compatible with producing fruitful interaction between the Court and Council in a way that protects the fundamental rights at stake without frustrating the beneficial

termination and their procedural complement [i.e. art. 66] are inherently linked in the sense that the invocation of the rule must follow the prescribed procedure or equivalent.

ROSENNE, supra note 250, at 351. The most important thing to note is the following: (1) whether an ICJ ruling only makes voidable as opposed to void an act of a U.N. political organ is a false problem to a large degree in light of the fact that the ICJ can, in any case, never be in a binding jurisdictional relationship that allows its acts to void acts of other organs; and (2) if Rosenne’s observation is followed, recourse to the ICJ would not be necessary in order to argue for effects of clashes with jus cogens other than that of voidness.

410. HANNIKAINEN, supra note 173, at 9. Note the use of the generic term “unlawfulness.” See discussion supra note 351.
policies that an arms embargo was initially designed to serve and could possibly still serve. In particular, it will be suggested that the resolutions might be considered not as void but as inoperative or inapplicable under a doctrine of reading down. 411

2. Should Resolution 713 Be Treated as Inoperative?

It is arguable that one should focus on the contingent nature of the unlawfulness produced by Resolution 713. That unlawfulness is neither necessary nor necessarily permanent. The unlawfulness depends on the development of a state of affairs which places obligations to maintain the arms embargo in direct conflict with both obligations against genocide and rights of self-defense. If the international community were to act in such a way as to cut the connection between the embargo and these effects, notably by intervening in an effective way which would remove the need for the Bosnian Government to prevent genocide or engage in self-defense on its own, then the unlawful effects would have ceased. Ultimately, any unlawfulness of Resolution 713 and resolutions that reaffirm it stems from the conflict of obligations that the resolutions create for states. So long as such conflict exists, the obligation stemming from *jus cogens* norms must be taken to prevail over the obligation stemming from the Security Council resolution(s). In that period, it would seem to make sense to say that the resolution that generates the obligation is made inoperative because the *jus cogens* obligation is paramount. However, if and when such a conflict disappears or is actively removed through other action taken under the aegis of the Council, then the obligations to obey the resolution would revive or bounce back into place. Whether *jus cogens* is considered part of internal Charter law or as prevailing upon Council-generated obligations from "outside," the same contextualized and contingent approach can make conceptual sense. Similarly, where the unlawfulness in the resolution is treated in terms of the effects it has on self-defense, that unlawfulness itself is also contingent; the inoperativeness of the resolution exists so long as there is an unfulfilled necessity for Bosnia to receive arms in order to defend itself against genocidal aggression. The moment at which the international community takes "measures [truly] necessary" to protect Bosnia from armed attack is the moment at which the arms embargo resolutions can begin to operate again according to their origi-

411. See Kent Roach, *Constitutional Remedies in Canada* (1994) for a comparative U.S.-Canada discussion of the range of remedies that North American constitutional jurisprudence has created that do not entail immediate and automatic invalidation.
nal legitimate purposes. The doctrine of inoperativity is a way in which to harmonize the law of state responsibility and the effects of treaty-based juridical acts whose unlawfulness stems from placing states in breach of higher obligations.

3. Should Resolution 713 Be Treated as Inapplicable to Bosnia Under a Doctrine of Reading Down?

In municipal constitutional law, it is not uncommon for courts to have recourse to what is sometimes called the doctrine of reading down. This doctrine calls for a technique of interpretation whereby a potentially unconstitutional statute or regulation is construed in such a way as to make it consistent with higher legal norms. In this way, a court thus avoids the need to find the statute or regulation (or provision thereof) to be unconstitutional. Such an interpretive approach requires a legal text that is sufficiently general or otherwise ambiguous so as to allow the courts to choose an interpretation that avoids placing the statute or regulation in conflict with constitutional norms over an interpretation that results in such a conflict of norms. As Kent Roach has put it:

Although interpreting a statute is not technically a remedy for a constitutional violation, it is, in a functional sense, an alternative to invalidation of a potentially unconstitutional law . . . . [R]eading down . . . is an alternative to a declaration of invalidity and is more often driven by judicial concerns about constitutionality than by concerns about legislative intent and purposes.

This constitutional law doctrine resembles another well known interpretative principle of many municipal legal systems. This principle calls upon the judiciary to interpret municipal statutes and regulations consistently with international legal obligations where at all possible (i.e., within limits of the reasonable range of contending interpretations that the text in question can bear). What each of these interpretive doctrines has in common is a judicial policy of giving effect to the superior status of higher legal norms through the workings of an interpretive presump-

412. It might be said that the effects in question could be analogized to those produced by art. 103 of the Charter, which, it is generally accepted, does not render void obligations with which it conflicts but rather “prevails” without invalidating. See Hannikainen, supra note 173, at 14–15.

413. Recall especially art. 18(2) of the Draft Articles on State Responsibility. See supra note 358.


415. Id. at 14–17 and 14–18.
tion that the lawmaker in question did not intend to infringe the higher law. Accordingly, if an interpretation will result in putting a statutory or regulatory norm in conflict with a higher norm, an alternative interpretation that would avoid the conflict may, all things being equal, be preferred.

An analogous judicial policy should be adopted by the ICJ as one arrow in its remedial quiver. From the perspective of interinstitutional comity, the strength of the doctrine lies in its simultaneous grounding in several desirable premises: (1) that *jus cogens* (the highest "constitutional" norms of the international system) apply to the Security Council; (2) that the Security Council should not easily be presumed to have meant to produce a conflict between the obligations emanating from its decisions and *jus cogens* norms; and (3) that the ICJ should select, all things being equal, the least intrusive remedy in order to avoid as much as possible any sense that, even indirectly, the Court is exercising judicial review powers over the Security Council.

As noted in the Introduction, Bosnia has consistently maintained that the arms embargo should not be interpreted to apply to Bosnia. This argument has always, of course, been accompanied by the further argument that, if the resolutions are interpreted to apply to Bosnia, then obligations to obey the arms embargo obligations are of no force or effect because of conflict with fundamental norms related to genocide and self-defense. There may be an understandable tendency to view the applicability arguments as technical and unpersuasive in light of what might seem to be a *de facto* consensus in the Security Council to treat the arms embargo as applicable to Bosnia. However, it is contended that the "technical" nature of the arguments dissipates in direct proportion to the extent to which those interpretations are located in imperative "constitutional" policy rather than in simple semantic analysis. It is in this sense that it may be useful to think of interpretive inapplicability as following from all the foregoing arguments about how the Security Council arms embargo obligations would have to be found not to conform to higher law if the resolutions were to be interpreted as applying to Bosnia. Thus, it is through the lens of the desirability of avoiding placing the Security Council at the center of violations of both the U.N. Charter and independently existing *jus cogens* norms that the two following arguments on applicability should be evaluated.

---

416. Indeed, even Judge Lauterpacht in *Bosnia v. Serbia II* interpreted a defeated draft resolution as a failed effort to lift the arms embargo on Bosnia (entailing a logical acknowledgement that there is something to lift) and not as an attempt to clarify an existing state of affairs (which would indicate that the embargo has not applied and does not apply). *Bosnia v. Serbia II*, 1993 I.C.J. at 438 (separate opinion of Judge Lauterpacht); see also supra note 10 (quoting the relevant text).
a. The Legal Circumstances: the Arms Embargo Did Not Apply as Against Bosnia After Its Admission as a Member of the U.N.

Any application of the arms embargo to Bosnia could only have come about through Resolution 727. It is inaccurate to view Resolution 727 as extending definitively the arms embargo to the independent states emerging from the former Yugoslavia.

It is essential that recognition as a state under international law be distinguished from admission to the U.N. Bosnia was admitted as a member of the U.N. on May 22, 1992. While this constitutes a form of collective, centralized recognition, Bosnia existed and was recognized as a state prior to its admission to the U.N.; indeed, as one criterion for admission to the U.N. is statehood, the decision to admit Bosnia is premised upon Bosnia's already existing as a state, which is itself a status partially brought about by the cumulative effect of widespread recognition by other states. As of May 22, 1992, therefore, Bosnia possessed the "inherent right of self-defence" as set out in Article 51 of the U.N. Charter. The facial interpretation of Resolution 727 is that it applies the arms embargo to those areas of the former Yugoslavia.

417. S.C. Res. 727, supra note 7 ("decides that the embargo applies in accordance with paragraph 33 of the Secretary-General's report (S/23363)"). The relevant paragraph of that report reads, in part:

To all interlocutors, during his recent fifth mission to Yugoslavia, Mr. Vance pointed out that the arms embargo imposed by the Council in resolution 713 (1991) and reinforced by resolution 724 (1991), continues in force and will retain its application unless the Security Council determines otherwise. Indeed, Mr. Vance added that the arms embargo would continue to apply to all areas that have been part of Yugoslavia, any decisions on the question of the recognition of the independence of certain republics notwithstanding.


419. See generally DUGARD, supra note 115.


which had not yet become independent states, or having become independent states, had achieved a measure of recognition but had not yet been admitted to membership in the U.N. ("any decisions on the question of the recognition of the independence of certain republics notwithstanding"). A simple reading of the provision suggests that it was not intended to continue to apply the arms embargo imposed upon Yugoslavia to Bosnia, notwithstanding Bosnia's admission to the U.N., a status which, as was argued above, is distinct from recognized independence. After Bosnia's admission to the U.N., no resolution of the Security Council ever purported independently to apply an arms embargo against Bosnia. On the contrary, the numerous resolutions which have followed merely reaffirm Resolutions 713 and 727.

As was already noted, the admission of Bosnia to the U.N. means that it enjoys the rights accruing to a Member of the U.N. under the Charter. Among these rights is the "inherent right to self-defence" under Article 51. No resolution of the Security Council passed after the admission of the Republic of Bosnia and Herzegovina to the U.N. has ever purported to suspend its right to self-defense. The Security Council cannot suspend an inherent right of a Member State by implication or inference; if it is to apply an arms embargo to a Member State, it must do so specifically and explicitly. In light of the purpose and operation of the doctrine of reading down, Resolutions 713 and 727 should accordingly be read down so as not to apply to Bosnia.

b. In the Alternative, the Failure of the Security Council to Adopt Resolution 727 Under Chapter VII Means That the Purported Extension of the Arms Embargo in That Resolution Is, as an Interpretive Matter, Only a Recommendatory Measure

As discussed in the preceding section, the Security Council has itself confirmed that Resolution 713 does not automatically apply to all of the former Yugoslav republics. Otherwise, the need to adopt Resolution 727 could not be explained.

Resolution 727 reaffirms the embargo contained in Resolution 713, as do a number of subsequent Security Council resolutions. However, Resolution 727 then goes on, as a separate step, to decide, by reference to the report of the U.N. Secretary-General, that the embargo should be extended to "all areas that have been part of Yugoslavia," a phrase which shall be assumed to include Bosnia for purposes of this alternative applicability argument. From this vantage point, Resolution 727 would therefore not amount to a procedural means of clarifying the situation. Rather, it would contain a substantive decision which purports to establish an arms embargo covering Bosnia.
Because the possible restriction of the right of self-defense touches on the very survival of the target state of an embargo and its population, the U.N. Charter has established an elaborate procedure for the imposition of mandatory sanctions resolutions. The importance of these procedures can only be enhanced when norms related to genocide enter the picture in interaction with the inherent right of self-defense. In its practice over the decades, the Security Council has consistently adopted mandatory sanctions resolutions either with a formal reference to Chapter VII or a formal invocation of Article 41. The need for such a formal invocation cannot be dismissed as a mere technicality. It is a crucial component of a structure of legal signals that the Security Council not only is justified in acting but also wishes to place mandatory obligations upon Member States.

The decision of the Council concerning the extension of the arms embargo to the former Yugoslav republics was not adopted under Chapter VII. Particularly in light of the consistent practice of the Security Council since 1946, the failure to send this signal must be taken to be of crucial interpretive significance for understanding what the Council as a collectivity intended by Resolution 727. The necessary interpretive implication is that Resolution 727's extension of the arms embargo to Bosnia must be taken to be a recommendatory rather than a mandatory measure. This interpretation follows from giving interpretive weight to the Council’s own consistent practice with respect to adopting mandatory as opposed to recommendatory measures. The interpretation can only be bolstered in light of the presumption that the Council is not to be taken to have intended to adopt a binding resolution that would either be ultra vires the Charter or in conflict with jus cogens norms. It is submitted that where an interpretation that would avoid placing acts of the Security Council in a position of unlawfulness also coincides with consistent practice of the Council, then the adoption of that interpretation by the ICJ is clearly a legitimate judicial course of action in lieu of finding either invalidity or inoperativity.

**Submissions**

On the basis of the presumed evidence, on the basis of multiple jurisdictional contexts relevant to this Memorial, and on the basis of the legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare:

1. That State Parties to the Genocide Convention that have engaged in maintenance of the arms embargo on Bosnia
have been in breach of their respective obligations under Article I of the Convention to prevent genocide in Bosnia;

2. That Security Council resolutions that purport to apply and maintain an arms embargo against Bosnia have fettered Bosnia’s right to self-defense in a manner ultra vires the Security Council’s powers under the U.N. Charter;

3. That Security Council resolutions that purport to apply and maintain an arms embargo against Bosnia are, as a matter of both general international law and the law of the U.N. Charter, of no legal force and effect to the extent of their conflict with jus cogens norms related to the prohibition of genocide;

4. That it is within the authority of the Court to treat Security Council resolutions that are ultra vires the Charter or which produce conflicts with jus cogens norms as being invalid, inoperative, or inapplicable within the jurisdictional order of the Court.

5. That the Court is under a duty not to recognize or otherwise give legal effect within its jurisdictional order to obligations flowing from Security Council resolutions that are ultra vires the Charter or produce conflicts with jus cogens norms and, to that extent, the existence of such obligations would not constitute a legally effective circumstance precluding wrongfulness in a contentious case validly brought under the Genocide Convention.

6. That, assuming their applicability to Bosnia, Security Council resolutions seeking to impose an arms embargo are neither inherently in conflict with jus cogens norms related to genocide nor inherently ultra vires the jurisdiction of the Security Council to impair the right of self-defense, and, if accompanied by effective measures to protect Bosnians from both genocide and genocidal aggression, such resolutions and the obligations flowing from them would be recognized as having legal force and effect within the jurisdictional order of the Court.

July 15, 1994