Votes, Vetoes, and Vested Interests

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The International Court of Justice's (ICJ) advisory proceedings regarding the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* have featured the occasional unexpected argument. Notably, the State of Palestine and the United Arab Emirates, amongst others, have contended that the United States' repeated use of vetoes within the United Nations Security Council (UNSC) to block draft resolutions addressing the alleged genocide in the occupied Palestinian territories could itself be unlawful under international law (Written Comments of the State of Palestine, para. 2.103; Verbatim Record 2024/7, p. 47, para. 53).

Whereas the ICJ has observed the plausibility of genocide taking place in the occupied Palestinian territories in a separate proceeding, we explore the technical challenges surrounding such factual determinations later in the piece. Nevertheless, this line of argumentation raises two foundational questions that we aim to address: Firstly, whether a UNSC veto can contravene *jus cogens*? Secondly, if this assertion holds true, under what circumstances would such a violation occur?

At this juncture, we find it imperative to clarify that our intention is not to advance an unequivocal determination of these questions, either in abstract or in the Palestinian context. Instead, we lay out the scarce law on the matter, and present a practical model for assessing the legality of UNSC vetoes in connection with *jus cogens*. Additionally, we presuppose that a vote is a legal act distinctly capable of being unlawful under substantive rules of international law. This presumption stems from a litany of scholarly support as well as the various initiatives to curb excessive veto use.

UNSC Resolutions and *Jus Cogens* Limitations

The inquiry into the legality of vetoes and votes within the UNSC begins with an examination of its relationship with international law. In *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, the ICJ definitively established that the United Nations is indeed bound by principles of international law (p. 64).

Beyond any concerns of a resolution being *ultra vires* of the UN Charter on procedural grounds, the UNSC is therefore subject to *jus cogens* in two ways. Article 1(1) of the UN Charter holds that its purpose is to 'to maintain international peace and security […] in conformity with the principles of justice and international law', inherently encompassing peremptory norms. This position has been affirmed by the Court in a variety of cases. (See Jennifer Trahan, pp. 159-160). Furthermore, as the UN Charter itself constitutes a treaty establishing the mandate of the UNSC, it cannot contravene *jus cogens* as per Article 53 of the Vienna Convention on the

Laws of Treaties. Accordingly, the exercise of the UNSC's authority, including its resolutions, is contingent upon its adherence to these peremptory norms.

From Unlawful Resolutions to Unlawful Votes

In this context, the legality of particular UNSC actions violating *jus cogens* norms is well settled. The closest discussion on this point is in Judge Lauterpacht's separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. He observes :

102. Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens 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****. And that, it appears, is what has happened here. 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 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****.*

103. 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 (1991) 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****. Even so, it would be difficult to Say that they then became positively obliged to provide the Applicant with weapons and military equipment. [****emphasis ours****]*

As the emphasised portions indicate, any UNSC resolution that would make member states accessories to genocide would cease to be binding for conflicting with *jus cogens* and they would be free to disregard it. This position is also supported by Conclusion 16 of the ILC's Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law which states that, '[a] resolution, decision or other act of an international organisation that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).' Trahan analogises by stating that, 'in the same way that a Security Council resolution should not aid the commission of genocide […] veto should not aid the commission of genocide.'

Judge Lauterpacht's opinion, however, does not go as far as to imply a prohibition on such vetoes and votes. Therefore, we suggest that there are three 'leaps' one would

have to make from Lauterpacht's position to reach the conclusion that a member state's use of veto or vote would be violative of international law.

Firstly, whereas in the *Genocide* case, there existed an action *qua* UNSC resolution which effectively made member states accessories to a genocide, such a position can hardly be extended to either a veto or a negative vote for a draft resolution that the UNSC does not adopt and thereby creates no additional binding obligations under international law.

Secondly, and more crucially, whereas in the *Genocide* case Lauterpacht concludes that the resolution would be rendered invalid and non-binding, this does not extend, strictly speaking, to the member's exercise of their voting rights. Why the vote or veto itself would be unlawful is unclear. Here, Lauterpacht does not retrospectively attribute the illegality of the resolution to the member's vote. Rather, he deals with the prospective legal consequences of the resolution itself.

Whereas these two leaps are difficult, if not impractical, to make from Lauterpacht's position, a viable alternative can be found in the State of Palestine's Written Comments (para. 2.103, fn. 297) citing ILC's Conclusion 19 (para. 11 of its Commentary) which states that 'where an international organization has the discretion to act, the **obligation to cooperate imposes a duty** on the members of that international organization to act with a view to the organization exercising that discretion in a manner to **bring to an end the breach of a peremptory norm** of general international law (*jus cogens*)' [**emphasis ours**]. Similarly, Articles 40 and 41 of ARSIWA impose nearly identical obligations. Notably, these grounds may independently justify a position where a vote itself is subject to legal considerations, thereby avoiding the need to retrospectively determine the validity of a member's vote based on a resolution – especially one that does not exist because of the veto.

Finally, even if these leaps are satisfied, to hold that a vote or veto is unlawful and to hold that the voting member in question has acted as an accessory to the *jus cogens* violation is quite another thing. This is because while an organisation's resolution, decision, or even a treaty may 'conflict' with *jus cogens,* it would only lose its legal effect, but would not be termed a 'violation' of the norm itself (*See* Article 53 of VCLT). Some principal equivalence would have to be drawn between the two before considering the threshold (which we deal with below) at which a 'violation' of *jus cogens* can be established.

Thus, assuming that these leaps are made, it could be concluded that a member state's exercise of the veto would be capable of *jus cogens* violations. Consequently, the inquiry would then extend into the question of what conditions would be necessary for such a veto or vote to be held unlawful for breach of *jus cogens*.

Towards a Threefold Test

Lauterpacht, while considering the possibility of UNSC resolutions conflicting with *jus cogens*, subsequently observes that :

*104. There is, however, another possibility that is, perhaps, more in accord with the realities of the situation. It must be recognized that the chain of hypotheses in the analysis just made involves some debatable links – **elements of fact**, such as that the arms embargo has led to the imbalance in the possession of arms by the two sides and that that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing; and **elements of law**, such as that genocide is jus cogens and that a resolution which becomes violative of jus cogens must then become void and legally ineffective. [**emphasis ours**]*

Within this context, we assert that any framework that attempts to adjudicate on the legality of a veto or vote would have to account for three criteria.

Firstly, the determination of a *jus cogens* violation. In line with Lauterpacht's characterizations concerning factual and legal components, it is imperative to acknowledge the differing perspectives among states in regards to the very existence of such a violation, particularly in contentious scenarios like the Israel-Palestine conflict. Consequently, we emphasise the significance of respecting a state's autonomy in establishing its own factual determinations, akin to the approach regarding countermeasures within the laws of state responsibility (See Paragraph 3 of Commentary to Article 49). Thus, the final determination of whether a violation of a peremptory norm has actually transpired remains within the purview of future adjudicatory bodies (such as the ICJ) or states, irrespective of the individual determinations made during the voting process for resolutions.

Secondly, the factual and legal circumstances surrounding the UNSC resolutions, including its preambulatory and operative clauses, and their potential impact in combating the *jus cogens* violation. Notably, in addition to the numerous preambulatory clauses articulating the resolution's broader aspirations, states may raise objections to specific operative clauses for a variety of reasons. How, then, should courts determine the responsibility of a veto if it was directed solely at a specific clause unrelated to the alleged *jus cogens* violation?

For instance, Draft Resolution S/2023/970, which was vetoed by the United States, presents a scenario where operative paragraphs encompass both a ceasefire as well as an 'unconditional' release of hostages. While the former might plausibly contribute to the cessation of the alleged genocide occurring in the occupied Palestinian territories, the imposition of conditions related to hostage releases serve as additional humanitarian (or political) objectives, therefore conjoining differing legal obligations in the same resolution. Therefore, we contend that factual background surrounding a resolution becomes exceedingly relevant in identifying the rationale behind a state's behaviour—a perspective echoed by Trahan, who observes that repeated vetoes ostensibly aimed at shielding regimes implicated in crimes such as genocide can cumulatively undermine the overall effectiveness of a rules-based international legal order (p. 171).

Similarly, inadequately formulated or excessively broad obligations within operative paragraphs could also conceivably serve as justifiable grounds for the use of veto. In certain instances, member states may also veto or cast negative votes on a resolution that fails to adequately address a violation of *jus cogens*.

Finally, while peremptory norms serve as foundational principles, they often exhibit unique legal characteristics. Of particular relevance are the specific legal elements of the *jus cogens* in consideration. For instance, considering the prevention of genocide as *jus cogens* (See Ventura and Heieck for contrasting views) would entail limitations on the act of voting, signifying a breach of the obligation to prevent genocide as opposed to actually aiding its commission. This distinction is crucial, as the concept of 'abetting' the commission of genocide is fundamentally different from the general obligation to prevent it.

Such broad ranging obligations (either on prevention or abetment), however, may not automatically extend to other peremptory norms, such as the prohibition of crimes against humanity. In such instances, specific chapeau requirements and other rules must be considered to determine whether particular acts of vetoing or voting have indeed led to a violation of international law (See Cox on the myriad challenges surrounding the assessment of LOAC violations).

In light of this discussion, the State of Palestine's arguments against the United States' use of the veto can be sourced from the obligation to cooperate to bring to an end a breach of *jus cogens*. (See Article 41 of ARSIWA, and Paragraph 11 of its Commentary to Conclusion 19). Subsequently, the evaluation of the alleged breach would have to account for the three aforementioned criteria.

Therefore, in summary, we advance a practical standard of adjudicating the validity of vetoes and votes against *jus cogens*. This takes into account not only the elements of fact and law persisting on ground, but a thorough examination of the UNSC resolution's paragraphs, coupled with the substantive legal content of the *jus cogens*. The specific legal consequences of such a framework, however, still remains to be seen. Perhaps in this regard, Trahan's nudge towards an advisory opinion to the ICJ on the matter shall be our strongest hope, as well as our first vote.
