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# THE SECURITY COUNCIL BLOCKADE OF IRAQ: CONFLICTING OBLIGATIONS UNDER THE UNITED NATIONS CHARTER AND THE FOURTH GENEVA CONVENTION

Michael R. Sklaire\*

## INTRODUCTION

On August 2, 1990, Iraqi forces invaded Kuwait without provocation and without warning.<sup>1</sup> The United Nations Security Council led world condemnation of Iraq's actions through a series of resolutions that sought to isolate Iraq politically and economically.<sup>2</sup> The Security Council's actions showed not only renewed world support for the role of the United Nations in resolving international disputes, but also unprecedented unity among its members.<sup>3</sup> For the first time in its forty-five year history, the Security Council voted to enforce an economic embargo through the use of military force by its member-nations.<sup>4</sup>

The economic blockade against Iraq raised questions about the Security Council's obligations to civilians under the laws of armed conflict including the 1949 Geneva Conventions.<sup>5</sup> The Fourth Geneva Conven-

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1. N.Y. Times, Aug. 3, 1990, at A1.

2. S.C. Res. 660, S.C. Res. 661, S.C. Res. 662, S.C. Res. 664, S.C. Res. 665, S.C. Res. 666, S.C. Res. 667, S.C. Res. 670, S.C. Res. 674, S.C. Res. 677, S.C. Res. 678 (1990). Member nations of the current Security Council include: China, France, the United Kingdom, the United States, the Soviet Union, all having veto power, and Canada, Columbia, Cuba, Ethiopia, Finland, Ivory Coast, Malaysia, Romania, Yemen, and Zaire. 1990 Y.B. INT'L ORG. 1212 (27th ed.).

3. See Lewis, *Security Counsel Votes 13 & 0 to Block Trade with Baghdad*, N.Y. Times, Aug. 7, 1990, at A1 (noting that the Security Council's successful unity resulted from improved relations between the United States and Soviet Union, and increased confidence in the United Nations to resolve international disputes); see also *infra* notes 22-40 and accompanying text (discussing previous unified Security Council resolutions that are similar in substance to the Iraqi resolutions).

4. Goshko, *U.N. Approves Use of Force for Iraqi Embargo*, Wash. Post, Aug. 26, 1990, at A1.

5. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter

tion prohibits at all times, without political scrutiny, the blockade of food, medical supplies, and other essentials during an armed conflict to protect civilians from the effects of military action.<sup>6</sup> In establishing the blockade, however, the Security Council passed various resolutions that enabled it to determine when and how humanitarian aid would be distributed, without requiring adherence to the Conventions.

Viewing the Council's actions in terms of the United Nations Charter alone, adherence may not have been necessary.<sup>7</sup> Article 103 of the United Nations Charter provides that actions by the Security Council shall prevail over all other international obligations,<sup>8</sup> including the Geneva Conventions. Viewing the Council's actions in terms of humanitarian principles of armed conflict, the member states' obligations under the Geneva Conventions and the Security Council's authority under article 103 directly conflict.

This Comment asserts that article 103 of the United Nations Charter does not give the Security Council the power to supersede the Fourth Geneva Convention. This conclusion is based first, upon the relative generality and ambiguity of article 103, and the changing, unpredictable, political nature of the Security Council. Second, the Geneva Conventions create binding customary international law that the United Nations Charter may not supersede, as interpreted and supported by the International Court of Justice in *Nicaragua v. United States*.<sup>9</sup> Part I reviews the pre-war resolutions adopted by the Security Council to impose the economic embargo against Iraq; comparing the blockade resolutions to past Security Council actions concerning the use of force and the implementation of economic sanctions. This comparison will reveal the uniqueness of the Security Council's actions pertaining to the blockade of Iraq. Part II describes the Geneva Conven-

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Third Geneva Convention]; Convention Relative to the Protection of Civilians in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

6. Fourth Geneva Convention, *supra* note 5, art. 23.

7. See S.C. Res. 666 (1990) (determining that a Sanctions Committee of the Security Council shall monitor the humanitarian conditions in Iraq and Kuwait to determine when supplies of food and medicine will be sent); S.C. Res. 669 (1990) (reaffirming the responsibility of the Committee to make recommendations to the Council on conditions in Iraq and Kuwait).

8. U.N. Charter, art. 103 [hereinafter U.N. Charter or Charter]. 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.

*Id.*

9. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 I.C.J. 14 (Judgment of June 27).

tions, and analyzes the Fourth Geneva Convention's application to the Iraqi embargo. Part II demonstrates how these Conventions have become binding customary international law through their universal acceptance. Finally, Part III analyzes article 103 of the United Nations Charter. A review of the International Court of Justice's decision in *Nicaragua v. United States* illustrates why the Security Council may not supersede customary international law, specifically, the provisions of the Geneva Conventions protecting civilians during armed conflict.

## I. THE IRAQI BLOCKADE

### A. THE BLOCKADE RESOLUTIONS

When Iraqi forces invaded Kuwait, the international community responded immediately.<sup>10</sup> The United States led its western allies, the Soviet Union, and even Iraq's Arab neighbors in the deployment of troops to Saudi Arabia and in an embargo of Iraqi oil.<sup>11</sup> On August 6, 1990, the United Nations Security Council responded to these actions by adopting the first of twelve resolutions, which condemned Iraq's invasion, and *creating* an economic embargo of all cargo headed to and from Iraq by land, sea, and air on August 6, 1990.<sup>12</sup>

Adopted unanimously, resolution 661<sup>13</sup> defined the scope of the embargo to include all commodities and products, with the exception of medical supplies and foodstuffs for humanitarian purposes.<sup>14</sup> The Council did not elaborate on how and when to distribute humanitarian

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10. *See Baghdad's Bully*, NEWSWEEK, Aug. 13, 1990, at 18 (describing how President George Bush contacted various world leaders the night of the invasion to discuss the military and economic responses to Iraq's invasion).

11. *Id.*

12. S.C. Res. 661 (1990). This Comment will deal only with the blockade of Iraq, and not Kuwait, because the laws concerning the blockade of an occupied territory involve separate issues under the Geneva Conventions and customary international law. *See* The Fourth Geneva Convention, *supra* note 5, arts. 27-34 (detailing the Convention's application to occupied territories).

13. S.C. Res. 661 (1990).

14. *Id.* at 3(c). This provision states that the Security Council:

Decides that all states shall prevent . . . [t]he sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs to any person or body in Iraq or Kuwait . . . .

*Id.* Thirteen members voted for the resolution, none voted against it, and Cuba and Yemen abstained. *Id.*; *see* Lewis, *supra* note 3, at A1 (describing the Security Council vote and reactions to the resolution).

relief to Iraq.<sup>15</sup> Six weeks later, however, the Security Council established a committee to monitor the shipment of food and medical supplies to Iraqi civilians.<sup>16</sup>

On August 25, 1990, the Security Council voted to enforce the sea embargo through the use of the international military forces in the Persian Gulf under United States command.<sup>17</sup> Three weeks later, the Council expanded the embargo to include air shipments arriving in and leaving from Iraq and Kuwait.<sup>18</sup> These resolutions called upon the military forces to prevent the movement of supplies without explicitly authorizing the use of force.<sup>19</sup> Official statements in the United States and Iraq, however, indicated that the Security Council had referred to the blockade broadly enough so as to allow for the use of armed force against those who tried to violate the embargo.<sup>20</sup> For the first time in

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15. See Hughes, *Crisis in the Gulf: US Insists Iraq*, *The Independent*, Aug. 14, 1990, at 9 (quoting Marlin Fitzwater, President Bush's press secretary, who stated that the President did not view the resolution as requiring the passage of food and medicine, because Iraq had adequate supplies of both).

16. S.C. Res. 666 (1990). The pertinent preambulatory clauses read:

*Recognizing* that circumstances may arise in which it will be necessary for foodstuffs to be supplied . . . in order to relieve human suffering; *Emphasizing* that it is for the Security Council, alone or acting through the Committee [established by this resolution], to determine whether humanitarian circumstances have arisen. . . . *Decides* that if the Committee . . . determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such needs should be met.

*Id.* See Doyle, *Crisis in the Gulf: Anxiety over the Effect of Sanctions on Civilians*, *The Independent*, Sept. 1, 1990, at 9 (describing United States officials' concern about how to define humanitarian circumstances). The United States government sought to consider humanitarian circumstances in very limited situations; refusing the delivery of foodstuffs for at least three months because Iraq expected a bumper harvest. *Id.*

17. S.C. Res. 665 (1990). The Security Council adopted the resolution with no opposing votes, while Cuba and Yemen abstained. *Id.*; see also Barber, *Crisis in the Gulf: United Nations: Is It Free at Last or Queen for a Day?*, *The Independent*, Aug. 26, 1990, at 13 (highlighting the unanimity of the Security Council and the purposely broad language of the resolution).

18. S.C. Res. 670 (1990). The resolution provided that no aircraft could enter or leave Iraq and Kuwait without inspection by the military forces patrolling in the Persian Gulf. *Id.* The resolution passed fourteen to one. Cuba was the only country that voted against it. See Lewis, *Security Counsel Adds Air Embargo to Iraq Sanctions*, *N.Y. Times*, Sept. 26, 1990, at A1 (detailing the vote).

19. See Barber, *supra* note 17, at 13 (noting that resolution 665 did not explicitly authorize the use of force as the result of compromises among the Council members, but that all members considered the language to allow such force, if necessary). Resolution 665 used the phrase "such measures commensurate to the specific circumstances as may be necessary under the authority of Security Council" to allow for the use of force. S.C. Res. 665 (1990). Resolution 670 provided that states use "all necessary measures" to stop aircraft. S.C. Res. 670 (1990).

20. See Pace, *Confrontation in the Gulf, UN Calls on Navies to Block Iraq's Trade*, *N.Y. Times*, Aug. 26, 1990, at A1 (quoting Thomas Pickering, the United States ambassador to the United Nations, and explaining that the Security Council

its history, the Security Council authorized the use of military action to enforce mandatory sanctions against a member state of the United Nations.<sup>21</sup>

#### B. PRIOR SECURITY COUNCIL ACTIONS

The Security Council had approved the use of force only twice previously, but never to enforce economic sanctions.<sup>22</sup> One such use of force occurred in 1950, when the United States ordered a military response to an attack by North Korean forces on South Korea.<sup>23</sup> The Security Council responded by calling upon member nations, pursuant to article 51 of the United Nations Charter,<sup>24</sup> to offer assistance to South Ko-

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drafted the resolution in broad terms to include the use of force in certain, undefined circumstances). Brent Scowcroft, the national security advisor to President George Bush, interpreted the resolution as allowing United States warships to fire upon and disable ships that tried to break through the embargo. Goshko, *supra* note 4, at A1. At the same time, Iraqi diplomats warned that the resolution's statement of force would escalate hostilities and make the United States appear as the aggressor. *Id.*

21. See Pace, *supra* note 20, at A1 (noting that the Security Council approved the use of force only twice before, during the Korean War and during the Southern Rhodesian rebellion); see also Goshko, *supra* note 4, at A1 (describing resolution 665); Watson, *War Path*, NEWSWEEK, Aug. 27, 1990, at 19 (discussing the deployment of troops and the effects of the blockade on Iraq). Other resolutions that the Security Council adopted in condemning the Iraqi invasion included resolution 662, adopted August 9, calling on member nations not to recognize the annexation of Kuwait by the Iraqi government. S.C. Res. 662 (1990). Resolution 664, adopted on August 18, requested that Iraq release all foreigners from Iraq and Kuwait. S.C. Res. 664 (1990). On September 17, the Security Council condemned the abduction of diplomatic personnel from foreign embassies in Kuwait. S.C. Res. 667 (1990). On September 24, the Council reaffirmed the authority of the Sanctions Committee established in resolution 666. S.C. Res. 669 (1990). On October 29, the Security Council asked countries to document human rights violations and economic damage that had resulted from the invasion of Kuwait, and held Iraq liable for restitution and financial damages. S.C. Res. 674 (1990). Resolution 677, passed November 28, condemned Iraq's destruction of Kuwaiti records and the movement of Kuwaiti citizens. S.C. Res. 677 (1990). Finally, on November 29, 1990, the Security Council authorized the use of force by member nations to dislodge Iraqi forces from Kuwait if they did not withdraw by January 15, 1991. S.C. Res. 678 (1990). See Hoffman, *Bush Policy Requires Global Tradeoffs*, Wash. Post, Nov. 29, 1990, at A1, A23 (describing the unprecedented Security Council vote and summarizing prior resolutions).

22. See Pace, *supra* note 20, at A1 (comparing the Persian Gulf War to the Korean conflict and to the rebellion in Southern Rhodesia).

23. See *Review of the United Nations Charter, Hearing Before the Subcomm. on the United Nations Charter of the Senate Comm. on Foreign Rel.*, 83d Cong., 1st Sess. 837-39 (1954) (describing the United States view of United Nations actions in Korea); see also *infra* note 26 (noting the differences between the Security Council actions in the Korean conflict and the Iraqi blockade).

24. U.N. Charter, art. 51. The article describes the right of collective self defense against breaches of international security and peace. *Id.*

rea.<sup>25</sup> The Council also recommended that all member nations provide military supplies and personnel for an international security force under the command of the United Nations.<sup>26</sup>

In 1965, the Security Council voted to take military action against the Southern Rhodesian independence movement.<sup>27</sup> Security Council resolution 202 did not explicitly authorize the use of force.<sup>28</sup> The General Assembly, however, interpreted resolution 202 as explicitly requesting the United Kingdom to end the rebellion through the use of force if necessary.<sup>29</sup> The General Assembly resolution further required the Security Council to act under Chapter VII of the United Nations Charter, regarding threats to international peace and security, to guarantee enforcement of the resolution.<sup>30</sup>

Subsequent resolutions concerning the Southern Rhodesian rebellion favored sanctions over force to resolve conflicts.<sup>31</sup> Acting again under Chapter VII of the Charter, the Security Council, in 1966, imposed

25. S.C. Res. 82, 5 U.N. SCOR (473d mtg.) at 4, U.N. Doc. S/1501 (1950) reprinted in K. Wellens, RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1989)-A THEMATIC GUIDE 252 (1990); see H. Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF FUNDAMENTAL PROBLEMS 927 (1951) (citing the Korean resolution as the first substantive test of Security Council influence).

26. S.C. Res. 84, 5 U.N. SCOR (474th mtg.) at 5, U.N. Doc. S/1588 (1950). Because the Soviet Union, a veto power member, was absent from the Council proceedings, the successful passage of resolution 84 was possible. See K. Wellens, *supra* note 25, at 254 (describing the circumstances surrounding the vote on the Korean situation). The action in Korea differed from the Iraqi situation in that the Security Council authorized the use of force under the United Nations command in Korea, while in the Iraqi blockade, the Security Council authorized the use of force both individually and collectively, but not under a United Nations flag. H. Kelsen, *supra* note 25, at 935.

27. S.C. Res. 202, 20 U.N. SCOR (1202d mtg.) at 7, U.N. Doc. S/INF/20/Rev.1 (1965). In August 1964, the white minority regime of Ian Smith indicated that it could unilaterally declare its independence from the United Kingdom. R. Zacklin, THE UNITED NATIONS AND RHODESIA: A STUDY IN INTERNATIONAL LAW 32 (1974) (documenting the history of the Rhodesian independence movement and the subsequent United Nations actions).

28. See S.C. Res. 202, 20 U.N. SCOR (1202d mtg.) at 7, U.N. Doc. S/INF/20/Rev.1 (1965) (requesting that the United Kingdom take all necessary action to prevent the Southern Rhodesian leaders from declaring independence).

29. G.A. Res. 2022, 20 U.N. GAOR Supp., U.N. Doc. A/6041/Add.1 (1965).

30. *Id.* The Security Council acted under Chapter VII of the United Nations Charter, allowing the Security Council to determine the measures necessary for controlling acts of aggression and maintaining world peace. U.N. Charter, art. 39. See generally R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 167-231 (1963) (detailing the United Nations practices implicating the use of force).

31. See S.C. Res. 217, 20 U.N. SCOR (1265th mtg.) at 8-9, U.N. Doc. S/INF/20/Rev.1 (1965) (requesting that all member-nations terminate economic relations with Southern Rhodesia, specifically the sale of military equipment to, and the purchase of oil from Southern Rhodesia).

mandatory economic sanctions against a nation for the first time.<sup>32</sup> While the sanctions prohibited the export of Rhodesian resources, such as iron and chrome, and prohibited the import of military equipment, they failed to effectively curtail the Rhodesian rebellion.<sup>33</sup> In response, the Security Council unanimously adopted more extensive sanctions in 1968.<sup>34</sup> The new resolutions prohibited the movement of any products to and from Southern Rhodesia, except for foodstuffs and medical supplies in humanitarian circumstances.<sup>35</sup>

Similarly in 1977, the Security Council attempted to use mandatory sanctions, and not military force, to abolish repression under a white minority government—this time in South Africa.<sup>36</sup> Resolution 418, adopted unanimously, called upon all nations to cease the supply of military equipment to South Africa.<sup>37</sup> As with Southern Rhodesia, the sanctions failed to result in immediate change.<sup>38</sup> Within ten years, however, other nations individually followed the Security Council's lead and imposed their own sanctions on additional commodities.<sup>39</sup> In Southern Rhodesia and South Africa, the Security Council approved

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32. S.C. Res 232, 21 U.N. SCOR (1340th mtg.) at 7-9, U.N. Doc. S/INF/21/Rev.1 (1966). The Security Council implemented mandatory economic sanctions because voluntary sanctions had not affected the control of the white minority regime. R. Zacklin, *supra* note 27, at 48. The Council also noted that the failure of nations to implement the mandatory sanctions would violate article 25 of the Charter which provided that members agreed to accept and carry out decisions of the Security Council. *Id.* at 50; *see also* Diggs v. Schultz, 470 F.2d 461, 463 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (recognizing resolution 232 in the context of an Executive Order that established criminal sanctions for violating the embargo against Southern Rhodesia).

33. *See* R. Zacklin, *supra* note 27, at 51 (noting that the United Nations Special Committee on Decolonization condemned South Africa and Portugal for defying the resolution and recommended stronger sanctions).

34. S.C. Res. 253, 23 U.N. SCOR (1428th mtg.) at 5-7, U.N. Doc. S/INF/23/Rev.1 (1968); *see* R. Zacklin, *supra* note 27, at 51 (detailing the events that preceded the Security Council's vote on resolution 253).

35. *See* R. Zacklin, *supra* note 27, at 52 (noting that the Security Council could do little more than reaffirm the importance of sanctions and attempt to elicit member nations' compliance). Other African countries, such as South Africa, failed to adhere to the sanctions, and the Security Council could not succeed in defeating the white minority regime that created a racially separatist government in 1969. *Id.*

36. 1977 U.N.Y.B. 133, U.N. Sales No. E.79.I.1.

37. S.C. Res. 418, 31 U.N. SCOR (2046th mtg.) at 4-6, U.N. Doc. S/INF/33 (1977). This resolution prohibited the sale of all military equipment and spare parts used for military purposes. *Id.*

38. *See* 1978 U.N.Y.B. 184, U.N. Sales No. E.80.I.1 (describing the Security Council's condemnation of South Africa's refusal to comply with the previous year's resolution).

39. *See* Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1162, 1176 (1987) (opining that American sanctions against South Africa were a necessary supplement to the United Nations sanctions).



sanctions, but did not enforce them using the military as it did a decade later when Iraq invaded Kuwait.<sup>40</sup>

## II. THE GENEVA CONVENTION

When United States officials first mentioned the use of economic sanctions following Iraq's invasion of Kuwait, they made their public statements carefully, choosing the words "interdiction" and "embargo" rather than "blockade."<sup>41</sup> These cautious statements reflected not only a concern for public opinion, but also an awareness of the legal effect of using the military to enforce Security Council resolutions.<sup>42</sup> Calling the action a military "blockade" could invoke claims that the situation had become an armed conflict, requiring adherence to the laws of warfare and restricting the extent of the embargo's scope to protect civilians.<sup>43</sup> Subsequently, the Security Council passed resolution 665, authorizing the use of military force to enforce economic sanctions, which ended the need for such cautious statements.<sup>44</sup> Immediately following the vote, officials acknowledged that the embargo had become a blockade;<sup>45</sup> a military operation requiring adherence to the laws of armed

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40. See Goshko, *supra* note 4, at A1 (describing the unprecedented nature of the Security Council's actions); Shannon & Eaton, *U.N. Retaliates with Embargo on Oil, Arms*, L.A. Times, Aug. 7, 1990, at A1 (noting the historical setting for the Security Council's action in the embargo of Iraq and Kuwait).

41. See Brenner, *Why the Word "Blockade" Won't Pass U.S. Lips*, Boston Globe, Aug. 14, 1990, at 3 (citing the Bush Administration's acknowledgement of the significance of referring to its actions as a blockade).

42. See *id.* (commenting that officials neither wanted the country to view the actions as a use of force, nor viewed the actions in a manner that would require adherence to the laws of warfare).

43. See Hughes, *supra* note 15, at 9 (noting that Secretary of State James Baker avoided using the term blockade because he recognized that it implied activities carried out only in wartime).

44. S.C. Res. 665 (1990).

45. See Miller, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 7-34 (1989) (defining a blockade as a belligerent activity that prevented all ships and aircraft from entering the enemy nation for the purpose of supplying contraband (citing THE LAW OF NAVAL WARFARE (U), art. 632(a), NWIP 10-2, Department of the Navy (1955)); Jones, *The International Law of Maritime Blockade—A Measure of Naval Economic Interdiction*, 26 HOW. L.J. 759, 760 (1983) (outlining the development of the law of naval blockade); see also THE LONDON DECLARATION CONCERNING THE LAWS OF NAVAL WARFARE, S. DOC. NO. 563, 63d Cong., 2d Sess. 26-34 (1914) (describing the foundation of modern laws regarding naval blockade).

conflict,<sup>46</sup> including the 1949 Geneva Conventions<sup>47</sup> and the Protocols of 1977.<sup>48</sup>

#### A. 1949 CONVENTIONS

The 1949 Geneva Conventions resulted from concern by the International Committee of the Red Cross over the devastating treatment of combatants and civilians in World War II.<sup>49</sup> Sixty-three nations participated in revising and codifying the humanitarian law<sup>50</sup> of armed conflict.<sup>51</sup> The resulting Conventions became universally accepted law affecting the treatment of prisoners of war, the sick and wounded, and civilians during wartime.<sup>52</sup>

The Fourth Geneva Convention included laws concerning the use of blockade and its effect upon the civilian population.<sup>53</sup> The drafters of

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46. The Geneva Conventions of 12 August 1949: Commentary on Geneva Convention Relative to the Protection of Civilian Persons in Time of War 20 (J. Pictet ed. 1958) [hereinafter COMMENTARY ON THE GENEVA CONVENTIONS]. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War defined an armed conflict as any conflict which resulted in the use of the military. *Id.*

47. See *supra* note 5 (citing the four Geneva Conventions).

48. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts, U.N. Doc. A/32/144, *reprinted in*, 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Victims of Non-International Armed Conflicts, U.N. Doc. A/32/144, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

49. See generally Commentary on the Geneva Conventions, *supra* note 46, at 3 (describing the historical setting of the Geneva Conventions, and noting that previous Conventions had failed to sufficiently protect civilians from starvation and suffering during the Second World War).

50. See Solf, *Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I*, 1 Am. U.J. Int'l L. & Pol'y 117, 117 (1986) (noting that humanitarian law developed over centuries of warfare from the recognition that suffering by the civilian population reduces the intended effects of military actions).

51. International Comm. on the Red Cross, The Geneva Conventions of August 12, 1949 2-5 (1986) [hereinafter INT'L COMM. ON THE RED CROSS]. The 1949 Geneva Conventions revised the Geneva Conventions of 1929, and the Hague Conventions on Naval Warfare of 1899 and 1907. *Id.*; see E. ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT-SOME ASPECTS OF THE PRINCIPLE OF DISTINCTION AND RELATED PROBLEMS 43-45 (1977) (citing the English translation of the Hague Conventions in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 42 (1915)).

52. See Int'l Comm. on the Red Cross, *supra* note 51, at 7-22 (describing the creation of the Four Geneva Conventions, and summarizing the major portions of each). As of 1990, 166 nations have become parties to the 1949 Geneva Conventions. Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territory since 1967*, 84 AM. J. INT'L L. 44, 53 (1990).

53. Fourth Geneva Convention, *supra* note 5, art. 23. See Jones, *supra* note 45, at 777-78 (interpreting article 23 in terms of the history of naval blockade and noting that article 23 created greater protections for the civilian population during a blockade).

the Fourth Convention relied upon the historical effectiveness of a blockade.<sup>54</sup> Historically, blockade warfare succeeded by cutting off all supplies and suppressing the opposing military's operations.<sup>55</sup> A blockade had equally adverse effects upon the civilian population.<sup>56</sup> Blockading forces quarantined products intended for civilians out of fear that the opposing military forces would take control of those products and thus, reduce the blockade's effectiveness.<sup>57</sup>

In response to this historical analysis, the Geneva delegates enacted article 23. Article 23 prohibited belligerent parties from impeding the free passage of relief consignments to civilians during an economic blockade.<sup>58</sup> Under this article, a party that wanted to impose a blockade had to meet three conditions: (1) that the military would not divert materials; (2) that the blockading party would effectively control distribution; and (3) that the materials would not give the military an unfair advantage.<sup>59</sup> Delegates worried that the provisions ignored a large portion of the civilian population because they applied only to young children and expectant mothers.<sup>60</sup> Delegates also worried that article 23 gave the blockading party overly broad discretion in determining when relief supplies could pass freely.<sup>61</sup> During the 1960s and 1970s, these

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54. See Jones, *supra* note 45, at 765-75 (describing the modern history of the use of a naval blockade); Rosenblad, *supra* note 51, at 110 (explaining that military forces have used the blockade effectively since the late 1500s, when Dutch forces prevented Spanish navigation of the ports of Flanders); COMMENTARY ON THE GENEVA CONVENTIONS, *supra* note 46, at 178 (noting that the use of blockade as a military option has increased with the rise of economic interdependence).

55. See Rosenblad, *supra* note 51, at 110-14 (noting the effectiveness of blockade as a means of warfare).

56. See COMMENTARY ON THE GENEVA CONVENTIONS, *supra* note 46, at 178 (noting how quickly the civilian population feels the adverse effects of a blockade); see also ROSENBLAD, *supra* note 51, at 118 (describing the effects of a blockade).

57. See Mudge, *Starvation as a Means of Warfare*, 4 Int'l Law. 228, 229 (1970) (describing the blockade of Biafra, where more than 10,000 people died daily of starvation).

58. Fourth Geneva Convention, *supra* note 5, art. 23. Article 23 provides that the blockading party shall allow the free passage of all religious objects, medical supplies, and foodstuffs intended for children and expectant mothers. *Id.* at para. 1.

59. *Id.* at para. 2. See Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 392-96 (1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS] (defining military necessity in the context of article 35, regarding limitations on the right of belligerent parties to choose their means of warfare); see also Mudge, *supra* note 57, at 238-44 (discussing the theory of military necessity using the examples of the Paris blockade in 1870, the Southern blockades during the American Civil War, and the German blockade in World War II).

60. See Rosenblad, *supra* note 51, at 114 (noting that at the Convention, the Soviet delegate, representing the concerns of other nations, argued that article 23 did not reach far enough to secure free passage of relief supplies without any restrictions).

61. *Id.*

two concerns culminated in controversy over the scope of article 23 as an internationally binding obligation to protect civilians from the effect of blockade.<sup>62</sup>

## B. 1977 PROTOCOLS

These arguments led to the creation of articles 54 and 70 in the 1977 Additional Protocol I to the Geneva Conventions.<sup>63</sup> The Protocols had two primary goals. First, they tried to affirm the importance of the principles of the Fourth Geneva Convention. Second, they attempted to clarify and supplement specific provisions of the original Convention, such as the law of blockade.<sup>64</sup> Specifically, article 54 of Protocol I prohibited the use of starvation as a type of warfare.<sup>65</sup> In addition, the new protocol regulated the effects of blockade on all civilians, instead of only protecting children and the most needy.<sup>66</sup>

Article 70 of Protocol I further required that the blockading powers provide relief to all civilians who did not have sufficient food and medical supplies because of military actions.<sup>67</sup> Following article 54, article

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62. Protocol I, Protocol II, *supra* note 48; *see* Mudge, *supra* note 57, at 253 (arguing that article 23 did not create a binding obligation as it left too much discretion to the blockading party).

63. *See* Commentary on the Additional Protocols, *supra* note 59, at 20 (noting that the purpose of creating the Protocols was to supplement, not replace, the 1949 Geneva Conventions).

64. *Id.* *see* Solf, *supra* note 50, at 129-35 (noting that Protocol I attempted to: (1) strengthen the distinction between military and civilian objects; (2) clarify the regulations prohibiting attack on the civilian population; (3) emphasize precautions taken to protect civilians from attack; and (4) provide more specific legal protection to civilians); *see also* Gasser, *Agora: Protocol I to the Geneva Conventions; An Appeal for Ratification by the United States*, 81 Am. J. Int'l L. 912, 924 (1987) (noting that Protocol I resulted from nations recognizing the need to update the Geneva Conventions following wars in the 1960s in Vietnam, the Middle East, and in Africa).

65. Protocol I, *supra* note 47, art. 54(1). The other pertinent sections of article 54 provide for a prohibition of the destruction or removal of foodstuffs, crops, livestock, and drinking water with the specific goal of starving the civilian population. *Id.* art. 54(2); *see* Allen, *Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law*, 19 Ga. J. Int'l & Comp. L. 1, 59-68 (1989) (analyzing the significance of article 54 in protecting civilians from starvation).

66. *See* 3 H. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 227-57 (1980) (noting how the protocol added protections for all civilians, as documented by the legislative history of article 54 and the many draft proposals that the delegation to the Convention submitted); Commentary on the Additional Protocols, *supra* note 59, at 652 (noting that while blockades aim to deprive armies, and not civilians, history has shown that civilians suffer most from the effects of a blockade). *See also* M. BOTHE, K. PARTSCHE & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICT 336-42 (1982) (describing the evolution of article 54 and its necessity in modern rules of warfare).

67. Protocol I, *supra* note 48, art. 70. Article 70 states that the distribution of supplies and personnel actions should depend upon a showing of humanitarian purposes and impartiality. *Id.*; *see* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note

70 shifted the military emphasis of the 1949 principles to civilian necessities.<sup>68</sup> Shipments of essential supplies now depended upon the extent of the civilian population's suffering, instead of upon the risk involved in giving the military an unfair advantage.<sup>69</sup> The principles found in articles 54 and 70 represented a new view of blockade in terms of its non-military effect, as well as a codification of customary principles acknowledged by all nations.<sup>70</sup>

### C. GENEVA CONVENTIONS AS CUSTOMARY INTERNATIONAL LAW

At the commencement of the Iraqi blockade in August 1990, only sixty-eight countries had ratified Protocol I.<sup>71</sup> Neither the United States nor the Soviet Union, the two countries leading the Security Council blockade against Iraq, had adopted the Protocol.<sup>72</sup> The Protocol, therefore, would not limit the scope of the embargo,<sup>73</sup> unless that the laws of blockade in the Fourth Geneva Convention and Protocol I had become principles of customary international law, requiring the adherence of all nations.<sup>74</sup>

Customary international law results from the general and consistent observance of nations, exhibiting a sense of legal obligation (*opinio*

59, at 817-18 (stating that humanitarian circumstances and impartiality must be assessed on a case-by-case basis to prevent deception).

68. See Commentary on the Additional Protocols, *supra* note 59, at 817-22 (emphasizing the need for civilian protection to govern the distribution of relief supplies).

69. Protocol I, *supra* note 48, art. 70. While still acknowledging that the blockading nation can prevent shipments that would give the opposing military an unfair advantage, article 70 states that such situations depend on the need of the civilian population, and the urgency of providing food and supplies in the specific situations. Commentary on the Additional Protocols, *supra* note 59, at 817-18; see Allen, *supra* note 65, at 16 (noting that military necessity and humanitarian values can exist in mutual consistency).

70. See Solf, *supra* note 50, at 135 (noting that Protocol I represented the reaffirmation of humanitarian laws of warfare).

71. See Gasser, *supra* note 64, at 915 (refuting the reason the United States gave for refusing to ratify the Protocols, which was that ratification would give legitimacy and legal protection to terrorist organizations).

72. See *id.* at 915 (commenting that while several "western" nations signed onto the Protocols, neither the United States nor the Soviet bloc countries had become parties to the Protocols). See also Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*, 82 Am. J. Int'l L. 784 (1987) (explaining that from a military, political and humanitarian standpoint, the United States could not ratify Protocol I).

73. See H. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 622, 630-31 (1972) (noting that traditionally, states retain the right to abstain from obligations under treaties that they have not ratified).

74. See Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 201, 203 (1984) (noting that a treaty binds nonparties only through principles of customary international law).

*juris*) to binding principles.<sup>76</sup> Treaties provide evidence of customary international law,<sup>76</sup> yet customary international law binds nonparties as well as parties to a treaty.<sup>77</sup> Following these principles in *North Sea Continental Shelf*, the International Court of Justice established the necessary criteria for a law to become a principle of customary international law.<sup>78</sup> The court wrote that: (1) the law must exhibit characteristics regarded as fundamental norms of international law, taking into account the subject matter and nature of the obligations;<sup>79</sup> and (2) extensive and uniform state practice must exist, acknowledging an understanding of the binding international legal obligation.<sup>80</sup>

The provisions of the Geneva Conventions relating to the use of blockade exhibit characteristics of customary international law, and therefore, bind the United States and other blockading countries.<sup>81</sup> The universal acceptance of the 1949 Geneva Conventions, like the universal acceptance of the laws of human rights, creates peremptory norms (*jus cogens*)<sup>82</sup> regarding the principles of blockade.<sup>83</sup> Three factors illustrate the international community's universal acceptance of the Geneva Conventions. First, 164 nations ratified the treaty, and over 120

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75. See Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987) [hereinafter RESTATEMENT] (defining customary international law); see also Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 975 (1986) (analyzing the effects of multinational agreements on the Restatement's definition of customary international law).

76. Restatement, *supra* note 75, § 102 comment i.

77. See Charney, *supra* note 75, at 973 (stating the proposition that customary international law may bind nonparties (citing Restatement, *supra* note 75, § 102 comment f)).

78. *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 41 (Feb. 20).

79. See Penna, *supra* note 74, at 204 (noting that the court in *North Sea* never explicitly stated how to determine the nature of the obligations, except through explicit state acceptance of a treaty or state practice sufficient to show adherence to the norms).

80. *North Sea Continental Shelf Cases*, 1969 I.C.J. at 42. Rules become customary international law on the basis of subsequent impact and state practice. *Id.*; see Comment, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U.L. REV. 773, 788 (1988) [hereinafter Comment, *Interdiction*] (using the *North Sea* criteria in determining binding customary international law); see also Charney, *supra* note 75, at 983 (noting that determinations of customary international law must account for the nature of the subject matter, the nature of the negotiations, the nature of the obligation, and the nature of the rule).

81. See Allen, *supra* note 65, at 44 (discussing how the Geneva Conventions have become customary international law through the universal strength of the humanitarian principles therein).

82. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, art. 54., U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 Am. J. Int'l. L. 875 (1969). Article 53 provides that a treaty cannot conflict with a peremptory norm of international law, which is a universally accepted principle from which states may not derogate. *Id.* art. 53.

convened to draft the Protocols.<sup>84</sup> Second, the Conventions and certain provisions in the Protocols "crystallized" universally recognized rules of warfare that were not previously codified in treaty form.<sup>85</sup> For example, in 1970, the United Nations General Assembly voted unanimously to provide relief to civilians in wartime.<sup>86</sup> In 1977, article 70 of Protocol I codified this concept, when it required that belligerent nations allow opposing forces to provide relief supplies to civilians.<sup>87</sup>

Third, nations that were not parties to the Convention, such as the United States, have acknowledged the prohibition of specific human rights violations as customary international law.<sup>88</sup> Prohibitions against genocide, torture, and slavery have attained *jus cogens* status, thereby prohibiting any derogation by treaty or act.<sup>89</sup> For example, United States officials, while refusing to ratify the Protocols, have clearly stated that violations of human rights, such as the starvation of the civilian population, have achieved the status of customary international law.<sup>90</sup>

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83. See Allen, *supra* note 65, at 44 (noting that the international community's expectation that states will adhere to the Geneva Conventions and the *Nicaragua* decision strengthen the status of the Conventions as customary international law).

84. See Meron, *Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348 n.2 (1987) (stating that the Geneva Conventions have 159 members, five more than are member-states of the United Nations); see also Solf, *supra* note 50, at 124 (noting that the general principles of the Geneva Conventions have become customary law because of their universal acceptance).

85. See Penna, *supra* note 74, at 202-24 (discussing how certain provisions of Protocol I, specifically articles 48, 51, 54, and 70 have crystallized into customary international law); *North Sea Continental Shelf Cases*, 1969 I.C.J. at 42 (stating generally how treaties create customary international law through the codification of universally recognized principles). This Comment does not attempt to analyze whether all of the Additional Protocols have achieved the status of customary international law. The provisions relating to blockade, specifically articles 54 and 70, have met the *North Sea* criteria, and can be considered extensions of the customary law provisions of the 1949 Conventions. See Solf, *supra* note 50, at 129 (noting that Protocol I reinforces the customary international law principles found in the 1949 Conventions).

86. G.A. Res. 2677, 25 U.N. GAOR Supp. (No. 28) at 77, U.N. Doc. A/8028 (1970).

87. Protocol I, *supra* note 48, art. 70.

88. See Meron, *supra* note 84, at 361 (noting that countries recognize most humanitarian principles as customary international law because of the offensive nature of human rights violations).

89. See Restatement, *supra* note 75, § 702 (providing examples of violations considered by the United States as *jus cogens*).

90. M. Matheson, Remarks at the Symposium on International Humanitarian Law at the Washington College of Law, American University (Jan. 22, 1987), *reprinted in* Allen, *supra* note 65, at 84. Mr. Matheson, deputy legal adviser for the United States Department of State, said that the Reagan Administration's support of the prohibition against civilian starvation during wartime, found in articles 54 and 70 of the Geneva Council, is based upon the general offensiveness and the universal condemnation of such acts. *Id.*

Furthermore, the Geneva Conventions also met the second criterion under *North Sea* by requiring that state practice conform to the observance of fundamental norms.<sup>91</sup> The actions of the United Nations and holdings of the International Court of Justice indicate the acceptance of the Geneva Conventions and related provisions of the 1977 Additional Protocols as customary international law.<sup>92</sup> In 1971, two General Assembly resolutions recognized the international acceptance of the Geneva Conventions, and called upon all nations, including those that were not parties to the Conventions, to observe the principles of the Conventions during armed conflict.<sup>93</sup> In 1986, the International Court of Justice recognized the Geneva Conventions as binding customary international law in the case of *Nicaragua v. United States*.<sup>94</sup> Finally, in 1990, the Security Council adopted resolutions 666 and 670, emphasizing the binding requirements of the Geneva Conventions that applied to the protection of foreigners held against their will in Kuwait.<sup>95</sup>

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91. *North Sea Continental Shelf Cases*, 1969 I.C.J. at 42; see also Comment, *Legality of Economic Sanctions under International Law: The Case of Nicaragua*, 43 Wash. & Lee L. Rev. 167, 173-74 (1986) (arguing that a state may not always follow customary law out of a sense of legal obligation, but instead because of political expediency).

92. See R. Higgins, *supra* note 30, at 2 (viewing at the United Nations resolutions as indicators of the development of customary law); see also Comment, *Interdiction*, *supra* note 80, at 790 (noting that correspondence, press releases, judicial decisions, treaties, and United Nations resolutions provide examples of state practice); Allen, *supra* note 65, at 45 (noting that the concept of state practice has extended to United Nations resolutions and International Court of Justice decisions). But see D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 102 (1987) (noting the traditional view that state practice does not necessarily include United Nations resolutions or international tribunal decisions).

93. G.A. Res. 2852, 26 U.N. GAOR Supp. (No. 29) at 90, U.N. Doc. A/8429 (1971); G.A. Res. 2853, 26 U.N. GAOR Supp. (NO. 29) at 91, UN Doc. A/8429 (1971). Both of these resolutions emphasize the protection of human rights and call upon all nations to adhere to humanitarian laws of armed conflict, specifically the 1949 Geneva Conventions. *Id.*

94. *Nicaragua v. United States*, 1986 I.C.J. at 113. The court stated that article 3, common to all four Geneva Conventions, expressed previous humanitarian principles and developed new ones. *Id.* at 114. The court also cited the two General Assembly resolutions in determining that the Geneva Conventions had evolved into customary international law. *Id.* at 99-100; see *supra* note 97 (describing the resolutions).

95. S.C. Res. 666 (1990); S.C. Res. 670 (1990). The operative clause 2 of resolution 666 reads:

*Expects* Iraq to comply with its obligations under Security Council resolution 664 (1990) in respect of third State nationals and reaffirms that Iraq remains fully responsible for their safety and well-being in accordance with international humanitarian law including, where applicable, the Fourth Geneva Convention.

S.C. Res. 666 (1990).



#### D. THE EFFECT OF THE GENEVA CONVENTIONS ON THE IRAQI BLOCKADE

Curiously, while the Security Council recognized the binding nature of the Geneva Conventions as they applied to Iraq's treatment of detained foreigners,<sup>96</sup> the Council never mentioned the Conventions with regard to its own actions relating to the blockade.<sup>97</sup> Resolution 666, which required the monitoring of humanitarian conditions in Iraq and Kuwait, parallels many of the provisions in the Geneva Conventions that address this same issue.<sup>98</sup> The Security Council, however, chose to determine the conditions necessitating relief through the recommendations of a sanctions committee, instead of utilizing the binding requirements of the Geneva Conventions.<sup>99</sup>

### III. THE HIERARCHY OF OBLIGATIONS: ARTICLE 103 AND CUSTOMARY INTERNATIONAL LAW

#### A. ARTICLE 103

Whether the Security Council may supersede the Geneva Conventions depends first upon an interpretation of article 103 of the United Nations Charter.<sup>100</sup> Article 103 states that obligations to the United Nations take precedent over all other international obligations of member-nations.<sup>101</sup> The Security Council originally drafted this article to address three potential conflicts that arose between United Nations treaties and other international obligations: (1) conflicts between the

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96. S.C. Res. 666 (1990); S.C. Res. 670 (1990); *see supra* note 95 (citing the relevant provisions of resolution 666).

97. *See* Roth, *If Iraq Went to Court*, Wash. Post, Sept. 29, 1990, at A23 (noting that the blockading powers could challenge Iraqi President Saddam Hussein's violations of the Geneva Conventions in a courtroom as long as the blockading powers themselves adhered to the Conventions).

98. *Compare* S.C. Res. 666 (1990) (requiring the Committee to monitor children, expectant mother, the sick, and the elderly) with Fourth Geneva Convention, *supra* note 5, art. 23, para. 1 (providing for the supply of foodstuffs to children, expectant mothers, and maternity cases). *See supra* note 16 and accompanying text (describing resolution 666 and the actions taken by the Security Council to determine when to send humanitarian relief).

99. S.C. Res. 666 (1990); *see* Middle East Watch, Press Release 3 (Aug. 29, 1990), (noting that in the situation of armed conflict, the Geneva Conventions would require the blockading powers to allow relief shipments to reach the Iraqi people).

100. U.N. Charter, art. 103; *see supra* note 8 (citing article 103 from the proposition that Security Council obligations take precedent over other treaty obligations).

101. *Id.* *See generally* Flory, *Article 103*, in *LA CHARTE DES NATIONS UNIS 1373* (Cot and Pellet eds. 1985) (providing an interpretation of article 103 and a brief history of United Nations debate concerning article 103).

United Nations Charter and treaties entered into before the drafting of the Charter; (2) conflicts between the Charter and treaties entered into after the Charter's creation; and (3) conflicts between the Charter and treaties with parties that are not members of the United Nations.<sup>102</sup> Article 103 does not explicitly state whether customary international law encompasses these conflicts.<sup>103</sup> Furthermore, the United Nations and other international bodies have applied article 103 only to cases in which specific treaties have conflicted with United Nations obligations.<sup>104</sup> While article 103 established the international supremacy of the United Nations, interpretations of the article fail to resolve the conflicts between the United Nations Charter and other international obligations.<sup>105</sup>

### 1. *Drafting of the United Nations Charter*

The drafters of the Charter sought to create a hierarchy of international law through article 103, but never clearly resolved the conflict of obligations.<sup>106</sup> Article 103 is the product of traditional theories of treaty interpretation and preceding treaties regarding the structure of the United Nations.<sup>107</sup> While broadening the traditional norm that a prior treaty takes precedence over a later conflicting treaty,<sup>108</sup> article 103 limited the ability of the United Nations to abrogate inconsistent obligations.<sup>109</sup> Article 103 stated that the Charter would supersede, not revoke, other treaties, thus allowing conflicting treaties to remain in

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102. See L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 614 (1969) (noting that the drafters recognized the possibility of conflict and sought to reaffirm the superiority of the United Nations); see also Flory, *supra* note 101, at 1373 (stating that the conflicts arise in the three categories based on the exact significance of the hierarchy and the judicial effects of having incompatible treaties).

103. Flory, *supra* note 101, at 1373.

104. *Id.* at 1378.

105. *Id.* Flory notes that the drafters' intentions and the history of debate on article 103 show the required hierarchy of obligations. *Id.*

106. *Id.*

107. *Id.* at 1373.

108. See R. Higgins, *supra* note 30, at 274-75 (explaining the traditional norms regarding treaty priorities and noting that the Charter required precedence over any treaties made before and after the ratification of the Charter).

109. See Covenant of the League of Nations, art. 20 (providing the original proposition that all member-nations will not enter into agreements inconsistent with the terms of the Covenant of the League of Nations); see also KELSEY, *supra* note 25, at 111 (comparing the provisions of article 20 of the Covenant to article 103 of the Charter).

force.<sup>110</sup> Only explicit conflicts with obligations under the United Nations Charter would challenge the legitimacy of prior treaties.<sup>111</sup>

Article 103 thus created a hierarchy of international law giving the United Nations limited superiority through its Charter obligations over states and regional organizations.<sup>112</sup> This primacy depended not upon the creation of any specific fundamental norms in article 103, but rather, upon the universal acceptance of the United Nations as an international arbiter.<sup>113</sup> In general, article 103 announced in broad terms the significance of the United Nations, while remaining ambiguous as to the resolution of treaty conflicts and the extent to which the Charter should prevail over the obligations of non-members.<sup>114</sup> This result placed United Nations law in higher standing than other treaties, but left its scope undefined.<sup>115</sup>

110. U.N. Charter, art. 103; see Kelsen, *supra* note 25, at 112-13 (interpreting article 103 as not automatically revoking conflicting treaties and other international obligations).

111. See R. Russell, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-45*, at 921 (1958) (noting that the drafters of the Charter questioned the automatic abrogation of inconsistent treaties and believed that article 20 went too far in forcing states to question the validity of past treaties); see also GOODRICH, *CHARTER OF THE UNITED NATIONS*, *supra* note 102, at 615 (noting that the drafters preferred that the United Nations did not have automatic power under the Charter to abrogate inconsistent obligations).

112. See R. RUSSELL, *supra* note 111, at 922 (noting that article 103 was eventually drafted to give the Charter superiority if conflict should arise, but was not meant to automatically supersede every new agreement); see also MacDonald, *The Charter of the United Nations and the Development of Fundamental Principles of International Law*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARTZENBERGER* 196, 204-05 (1989) (noting that Article 103 established United Nations law as hierarchically superior to other laws as the direct result of article 20 of the Covenant).

113. See *Report on the Law of Treaties*, [1977] 2 Y.B. Int'l L. Comm'n 37 U.N. Doc. A/CN.4/Ser.A/1977 (noting that the large number of states represented in the United Nations has rendered debate about the application of article 103 unnecessary); MacDonald, *Fundamental Norms in Contemporary International Law*, 1987 CANAD. Y.B. INT'L L. 115, 122 (1987) (describing article 103 and the United Nations Charter as deriving their status from the role of the United Nations as a promoter of peace and security in international law).

114. See Report of the Rapporteur of Committee, U.N. C.I.O. Doc. 933, IV/2/42(2), at 5, *reprinted in* H. Kelsen, *supra* note 25, at 188 n.81 (noting the relative unimportance of the manner in which a conflict arises from obligations under the Charter). The report concentrates, instead, on the conflict itself, specifically using the example of economic sanctions. *Id.*; see also *supra* note 102, at 615 (stating that article 103 failed to define conflicts); Flory, *supra* note 101, at 1374 (noting that article 103 neither defines conflict, nor mentions who shall determine when a conflict exists).

115. See MacDonald, *supra* note 113, at 126 (commenting on the uniqueness of article 103, but noting that neither the United Nations nor international courts have determined the extent of the article's application in the hierarchy of treaties and customary law).

## 2. Subsequent Use of Article 103

Later treaties that mentioned article 103 did not clarify this ambiguity.<sup>116</sup> Article 30 of the Vienna Convention on the Law of Treaties,<sup>117</sup> which codified traditional rules of treaty-making, provided that the obligations of parties to successive treaties must fall within the provisions of article 103 of the United Nations Charter.<sup>118</sup> By citing article 103, the drafters of the Vienna Convention explicitly recognized the importance of the United Nations and the significance of the Charter as it related to international treaty obligations.<sup>119</sup> The Vienna Convention, however, did not directly address the issue of conflicts that arose between treaties and the Charter.<sup>120</sup> Furthermore, the Vienna Convention did not elaborate on the meaning of article 103 or deviate from the article's broad acceptance of specific situations in which the Charter would take precedence over customary international law.<sup>121</sup>

Regional charters present similar ambiguities concerning conflicting obligations.<sup>122</sup> The Charter of the Organization of American States (OAS)<sup>123</sup> and the Charter of the European Economic Community

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116. *Id.* at 125.

117. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am. J. Int'l. L. 875 (1969).

118. *Id.* Article 30 provides that rights and obligations under the Vienna Convention shall be determined in accordance with article 103 of the United Nations Charter. *Id.* art. 30. The Vienna Convention opened for signature in May 1969, and entered into force in 1980. *Id.* As of 1986, fifty-two states had ratified the Convention. *Id.* The United States has not become a party to the Convention. J. SWEENEY, C. OLIVER, & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 993-94 (3d ed. 1988). The United States Department of State regards the Vienna Convention as authoritative because the Convention codifies both customary international law and United States foreign relations law. RESTATEMENT, *supra* note 75, § 3 (intro. note) (1987).

119. See Lauwaars, *The Interrelationship between United Nations Law and the Law of Other International Organizations*, 82 Mich. L. Rev. 1604, 1605-06 (1984) (noting that article 30 of the Vienna Convention reaffirmed the superiority of the Charter created in article 103).

120. See MacDonald, *supra* note 113, at 125 (discussing how the drafters of the Vienna Conventions deliberately left open questions regarding the applicability of article 103).

121. *Id.*

122. See Acevedo, *The Right of Members of the Organization of American States to Refer Their "Local" Disputes Directly to the United Nations Security Council*, 4 Am. U.J. Int'l L. & Pol'y 25, 26 (1989) (indicating that the organizations and the courts have not completely resolved the conflicts between the OAS Charter and the United Nations Charter); see also Lauwaars, *supra* note 119, at 1609-10 (stating the legal obligations under the United Nations Charter of members of the European Economic Community).

123. Charter of the Organization of American States, Apr. 30, 1948, art. 1372 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3. [hereinafter OAS Charter].

(EEC)<sup>124</sup> both refer to article 103, recognizing members' obligations to the United Nations over the obligations to the regional organizations.<sup>125</sup> Article 23 of the OAS Charter, however, provides that the OAS shall have priority over the Security Council to hear the claims of member-nations.<sup>126</sup> This article directly challenges the authority of the Security Council under article 24, and the superiority of the United Nations Charter under article 103.<sup>127</sup> Neither the OAS nor the United Nations has ever definitively resolved this conflict.<sup>128</sup>

### 3. *United Nations Resolutions*

United Nations debates have most often addressed article 103 in the context of conflicts with regional organization treaties.<sup>129</sup> In 1954, Guatemala argued that a conflict existed between obligations under the OAS and those under the United Nations Charter.<sup>130</sup> Similarly, in 1960, Cuba cited article 103 in an attempt to prevent the OAS from hearing its complaint against the United States.<sup>131</sup> Along with later

124. Treaty Establishing the European Community, Mar. 25, 1957, art. 224, 298 U.N.T.S. 11 (1958).

125. See Lauwaars, *supra* note 119, at 1611 (recognizing that the General Agreement on Tariffs and Trade (GATT) contains an express provision recognizing the obligations under United Nations law). Unlike the GATT, the treaty creating the Benelux Economic Union contains no such provision. Treaty Instituting the Benelux Economic Union, Feb. 3, 1958, art. 9, Belgium-Luxembourg-Netherlands, 381 U.N.T.S. 165 (1960).

126. OAS Charter, art. 23. See Acevedo, *supra* note 122, at 28 (stating that article 23 initiated the debate over the priority of OAS jurisdiction in relation to Security Council jurisdiction). The International Court of Justice addressed the exercise of regional jurisdiction by the OAS in the *Nicaragua* case. *Id.* at 27; see *infra* notes 138-56 and accompanying text (detailing the *Nicaragua* decision).

127. See Acevedo, *supra* note 122, at 28 (describing how article 23 of the OAS Charter, as originally drafted in 1948, conflicted with the hierarchy of obligations created by articles 24, 34, 35, and 103 of the United Nations Charter).

128. See *id.* at 26 (noting that many debates on the conflict reflect political decisions rather than attempts to define the hierarchy of obligations); see also *infra* notes 129-37 and accompanying text (describing United Nations resolutions interpreting article 103).

129. GOODRICH, *supra* note 102, at 616; see Flory, *supra* note 101, at 1376 (explaining that few of these debates refer to article 103 explicitly, but rather, they refer to the superiority of the United Nations as the governing body).

130. 9 U.N. SCOR (675th mtg.) at 15, U.N. Doc. S/3907 (1954); see Acevedo, *supra* note 122, at 34-35 (describing the Guatemalan situation).

131. 15 U.N. SCOR (875th mtg.) at 1, U.N. Doc. S/4395 (1960); 15 U.N. GAOR (909th mtg.) at 787, U.N. Doc. A/PV 909 (1960); 15 U.N. GAOR (910th mtg.) at 801, U.N. Doc. A/PV 910 (1960); see Acevedo, *supra* note 122, at 38-39 (detailing the Cuban request to have the Security Council, and not the OAS, address its complaints against the United States). The Security Council agreed to address Cuban allegations of United States aggression and reprisal in early 1961. *Id.* Cuba failed to obtain the necessary support, and the complaint remained tabled until April 15, 1961, when the United States commenced the Bay of Pigs invasion. *Id.*

cases involving the dispute in Southern Rhodesia<sup>132</sup> and the use of force by Turkey against Cyprus in 1963,<sup>133</sup> the Security Council raised the issue of article 103 superiority, and then either tabled or simply ignored the debate.<sup>134</sup>

The United Nations' infrequent reference to article 103 reflects a reluctance to confront the issue of under what circumstances article 103 should grant supremacy to the Security Council or other governing bodies.<sup>135</sup> Furthermore, the United Nations members appear to view article 103 as a reaffirmation of the superiority of the United Nations as an international governing body, rather than as a tool to resolve the conflicts that arise between allegiance to the United Nations and other international obligations.<sup>136</sup> These actions by the United Nations reinforce the ambiguity and generality of article 103 that make determination of where customary international law fits into the United Nations scheme a difficult task.<sup>137</sup>

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132. 17 U.N. GAOR C.4 (1355th mtg.) at PP. 56-57, U.N. Doc. A/C.4/SR.1355 (1963); 17 U.N. GAOR C.4 (1434th mtg.) at PP. 7-11, U.N. Doc. A/C.4/SR.1434 (1963), cited in 5 *Repertory of United Nations Practice* 207 (Supp. II 1966); see *supra* notes 27-35 and accompanying text (describing the Southern Rhodesia rebellion).

133. 18 U.N. SCOR (1085th mtg.) at para. 61-65, 38-43, U.N. Doc. S/PV.1085 (1963). The conflict between Cyprus and Turkey arose from the Treaty of Guarantee, that addressed the establishment of Cyprus as an independent state. *Id.* The Turkish representative argued in the United Nations that the treaty provided for the use of force in Cyprus. *Id.* at para. 67. The Cypriot representative argued that the treaty could not supersede the article 103 obligations to observe United Nations resolutions, that, in this case, guaranteed the right of Cyprus to prevent the use of force by Turkey. *Id.*; see 19 U.N. SCOR (1095th mtg.) at PP. 36-40, U.N. Doc. S/PV.1095 (1964); 20 U.N. SCOR (1234th mtg.) at PP. 123-126, 132-137, U.N. Doc. S/PV.1234 (1965), cited in 5 *REPERTORY OF UNITED NATIONS PRACTICE* at 211 (Supp. II 1966) (detailing the Cyprus conflict).

134. See GOODRICH, *supra* note 102, at 616 (noting that, especially with regard to the OAS Charter, the members of the Security Council have avoided discussion of article 103); see also 5 *REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS* 315-20 (1955); *Id.* at 507 (Supp. I 1959); *Id.* at 201-15 (Supp. II 1966); *Id.* at 366-71 (Supp. III 1969); *id.* at 168-72 (Supp. IV 1978) (citing the debates in each of the United Nations bodies which mentioned article 103).

135. See GOODRICH, *supra* note 102, at 616 (noting the reluctance of the United Nations to deal with the issue of conflicts arising under article 103).

136. 22 U.N. GAOR C.6 (993d mtg.), at P. 31, U.N. Doc. A/C.6/SR.993 (1967). In a 1967 debate in the Sixth Committee regarding the relationships of states under the United Nations Charter, the delegate to the United States commented that article 20 of the 1969 Vienna Convention on the Law of Treaties reaffirmed the importance of maintaining obligations to the United Nations Charter above all other obligations, specifically concerning the use of force. *Id.*

137. See Flory, *supra* note 101, at 1378 (commenting that the infrequent application of article 103 by the United Nations does not answer questions regarding its application, but reaffirms the important status of the Charter in international law).

## B. NICARAGUA V. UNITED STATES

The International Court of Justice addressed the issues raised by the Security Council debates in *Nicaragua v. United States*.<sup>138</sup> The court resolved the conflict between customary and Charter law in favor of customary international law.<sup>139</sup> The majority held that the principles under the United Nations Charter may not supersede customary international law regarding the use of force in international conflict.<sup>140</sup> The United States argued that only article 2(4) of the United Nations Charter governed their actions,<sup>141</sup> and, because of a multilateral treaty reservation made by the United States in ratifying the Charter, the court had no jurisdiction to decide the case.<sup>142</sup> The majority held that customary international law retained a separate identity from the Charter concerning the use of force.<sup>143</sup> The court, therefore, had jurisdiction to hear the dispute regarding the violations of customary rules on the use of force.<sup>144</sup>

In its analysis, the *Nicaragua* court also acknowledged that the Geneva Conventions applied as customary international law.<sup>145</sup> Although Nicaragua, which had brought the action trying to supersede the United States reservation, chose not to argue the application of the Geneva Conventions, the court itself raised their applicability,<sup>146</sup> citing article 3, a provision defining the rules of armed conflict in non-international conflict, as constituting principles of customary law even in cases

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138. *Nicaragua v. United States*, 1986 I.C.J. at 14.

139. *Id.*; see Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93, 96 (1987) (noting that the law in the United Nations Charter closely resembled that of customary international law, and the court chose to strengthen the application of customary law).

140. *Nicaragua v. United States*, 1986 I.C.J. at 94. The majority noted that customary international law exists and applies separately from the United Nations Charter with regard to the use of force, as the Charter does not explicitly address every issue in this area. *Id.* at 94-96.

141. *Id.* at 82; see U.N. CHARTER, art. 2(4) (prohibiting the threat or use of force by any member, as such actions undermine the United Nations purposes).

142. *Id.*; see Christenson, *supra* note 139, at 94 (noting that the United States contended that the Vandenberg reservation applied). The United States raised the issue of a conflict between the effects of a treaty reservation and customary international law. *Id.*

143. *Nicaragua v. United States*, 1986 I.C.J. at 95.

144. *Id.*

145. *Id.* at 114. See *supra* notes 71-95 and accompanying text (describing the recognition of the Geneva Conventions as customary law).

146. See Meron, *supra* note 84, at 351 (noting that Nicaragua did not invoke the Geneva Conventions in its pleading either because it did not want the court to view the situation as an internal armed conflict, or because Nicaragua did not want its own actions scrutinized under the terms of the Geneva Conventions).

of international conflicts.<sup>147</sup> While one of the judges questioned the unilateral initiative of the court, in a concurring opinion,<sup>148</sup> the fact that the majority of the *Nicaragua* court regarded the provisions as customary international law emphasized the international community's recognition of the Geneva Conventions as binding principles of humanitarian law.<sup>149</sup>

The application of customary law as interpreted in the *Nicaragua* decision applies similarly to the Security Council's implementation of the Iraqi embargo.<sup>150</sup> While noting the significance of the Charter in international affairs,<sup>151</sup> the court in *Nicaragua* held that the Charter does not cover the entire area of the use of force, and therefore could not unilaterally apply over customary norms.<sup>152</sup> Likewise in the present case, Chapter VII of the Charter<sup>153</sup> emphasizes the Security Council's responsibility to assure international peace and security.<sup>154</sup> Chapter VII does not, however, extend as far as the Geneva Conventions in protecting civilians from the results of blockade warfare.<sup>155</sup> While it does not minimize the importance of Charter obligations as defined by article 103, the *Nicaragua* decision restricts the ability of the Security Council to ignore the application of the Geneva Conventions to the Iraqi blockade.<sup>156</sup>

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147. *Nicaragua v. United States*, 1986 I.C.J. at 114. The majority addressed the Geneva Conventions as the basis of humanitarian rules applied to any armed conflict, whether international or internal. *Id.*

148. *Id.* at 184. The separate opinion of Judge Ago expressed the judge's reluctance to apply the Geneva Conventions as customary international law. *Id.*

149. See Allen, *supra* note 65, at 44 (noting that the mention of article 3 by the court underscored the strength of the Geneva Conventions); but see Meron, *supra* note 84, at 358 (noting that while the court's mention of the Geneva Conventions contributed to the consideration of the Geneva Conventions as customary law, the court did not clarify their status as such).

150. See *supra* notes 71-95 and accompanying text (discussing the Geneva Conventions as customary international law).

151. *Nicaragua v. United States*, 1986 I.C.J. at 96-97. The court noted that, in determining customary international law, the judges must acknowledge the existence and role of the Charter. *Id.*

152. *Id.* at 96.

153. U.N. CHARTER, arts. 39-51; see *supra* notes 27-35 and accompanying text (noting the use of Chapter VII in the case of Southern Rhodesia).

154. U.N. CHARTER, art. 51.

155. See Allen, *supra* note 65, at 48-54 (examining the accomplishments of the United Nations in the area of humanitarian laws of warfare but also recognizing that the 1977 Protocols regarding the treatment of civilians attempted to provide better protection than previous laws).

156. See *Nicaragua v. United States*, 1986 I.C.J. at 95-96 (commenting that even if a treaty and customary international law address the same issue, each must apply separately).



## C. HIERARCHY OF HUMANITARIAN LAW

Following the *Nicaragua* decision, some commentators argued that because the Charter already contained all existing principles of *jus cogens*, the court did not need to conclude that customary norms exist separately from the Charter.<sup>157</sup> Commentators stated that because the Charter existed as a comprehensive and universally-binding treaty, it implicitly and explicitly included all fundamental norms of international law.<sup>158</sup> This view of an all-encompassing Charter ignored the fact that the Charter was created years before the drafting of the Geneva Conventions and the emergence of human rights law.<sup>159</sup>

In 1945, the drafters created the Charter as an outline for establishing a post-war international legal system.<sup>160</sup> The Charter purposely contained broad and general principles.<sup>161</sup> For example, while article 55 of the Charter provided for the universal observance of human rights,<sup>162</sup> the Charter did not provide for the specific protection of the civilian population acknowledged in the later Geneva Conventions, the International Covenant on Civil and Political Rights,<sup>163</sup> and the Genocide Conventions.<sup>164</sup> Although the Charter may provide an underlying basis for these specific developments, its provisions in the area of human rights do not compare to the protection provided in these later treaties.<sup>165</sup> As Judge Azevedo of the International Court of Justice

157. See Flory, *supra* note 101, at 1377 (stating the view that the Charter contained all *jus cogens* principles regarding the use of force).

158. See MacDonald, *supra* note 112, at 202 (acknowledging the argument that the broad range of subjects covered by the Charter suggests the explicit or implicit inclusion of all principles of *jus cogens*); see also RESTATEMENT, *supra* note 75, § 102 (noting that the Charter's principles regarding the use of force have become *jus cogens*); Christenson, *supra* note 139, at 98 (commenting that consensus existed before the *Nicaragua* decision).

159. See MacDonald, *supra* note 112, at 202 (commenting that human rights laws have appeared mostly after the creation of the 1945 Charter).

160. Ciobanu, *Impact of the Characteristics of the Charter upon its Interpretation*, in CURRENT PROBLEMS OF INTERNATIONAL LAW 17 (1975).

161. *Id.*; see also Riggs, *The United Nations and the Development of International Law*, 1985 B.Y.U.L. REV. 411, 425 (1985) (emphasizing the expansive commitment required by the Charter that results in its minimal impact upon the actions of a state).

162. U.N. CHARTER, art. 55; see D'Amato, *Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1128 (1982) (recognizing the existence of human rights law in treaties such as the United Nations Charter).

163. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res 2200, 21 GA-R Supp. (NO. 16) at 52, U.N. Doc. A/6316 (1966).

164. Convention on the Prevention and Punishment of the Crime of Genocide of Dec. 9, 1948, 78 U.N.T.S. 277.

165. See Ciobanu, *supra* note 160, at 37 (maintaining that the drafters intended that the Charter create a framework which could adapt to changing societal conditions); see also MacDonald, *supra* note 112, at 202 (noting that certain principles con-

noted in 1950, one should view the Charter as a means and not as an end, in relation to changing societal concerns about the protection of basic individual rights.<sup>166</sup>

Consequently, the human rights treaties enacted since 1945 have created a new hierarchy of international norms, with established principles of humanitarian law taking precedence over the United Nations Charter, despite article 103.<sup>167</sup> In 1970, the International Court of Justice recognized this hierarchy in the *Barcelona Traction* case.<sup>168</sup> The court wrote that certain human rights create binding obligations above all other duties of states.<sup>169</sup> These fundamental rights, such as the right against slavery and genocide, would prevail over treaty law, including treaties such as the Charter, which have binding characteristics of their own.<sup>170</sup>

#### D. POLITICS AND THE SECURITY COUNCIL

Beyond interpreting the Charter and its relation to customary law, a determination of the effect of the Geneva Conventions on the Iraqi blockade must also account for the political role of the Security Council.<sup>171</sup> In the *Nicaragua* case, the dissent viewed the Security Council as a political organization rather than as a judicial body.<sup>172</sup> Resolutions depended upon political choices rather than legal reasoning.<sup>173</sup> The Security Council's current process for creating resolutions confirms the

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tained in the Charter have become more fully articulated since 1945, especially in the areas of human rights and outer space law); Flory, *supra* note 101, at 1377 (insisting that the Charter does not contain all the principles of *jus cogens*).

166. See Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 23-24 (Judgment of Mar. 3) (Azevedo, J. dissenting) (recommending that the court should not interpret the United Nations Charter as a rigid, uncompromising document, but should recognize that interpretations of the Charter evolve in association with the growing acceptance of individual freedom and international co-existence).

167. See T. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 173-202 (1986) (analyzing the creation of a hierarchy of human rights norms).

168. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment of Feb. 5).

169. *Id.* at 32; see MERON, *supra* note 167, at 173-74 (stating that the creation of a hierarchy resulted from dicta in the *Barcelona* decision which led to the International Law Commission's adoption of specific prohibitions against slavery, genocide, and apartheid).

170. See MERON, *supra* note 167, at 201 (noting that the creation of a hierarchy of terms signifies the importance of human rights laws to the international community).

171. See generally R. HIGGINS, *supra* note 30, at 1-10 (noting that the political bodies of the United Nations, such as the General Assembly and the Security Council, may consider legal questions, but often do not make resolutions based upon those questions).

172. *Nicaragua v. United States*, 1986 I.C.J. at 290 (Schwebel, J. dissenting).

173. *Id.*

dissent's conclusion.<sup>174</sup> Although the Charter empowers the Security Council to maintain international peace and security,<sup>175</sup> the Council's decisions result from consensus and the avoidance of a veto by one of the five permanent members.<sup>176</sup> Security Council resolutions result from political expediency rather than from any legal foundation.<sup>177</sup>

By allowing the Security Council to supersede the Geneva Conventions, politics will govern the distribution of essential foodstuffs to civilian populations.<sup>178</sup> History has shown that politics can adversely affect the individuals the Security Council seeks to protect.<sup>179</sup> In 1950, the Security Council followed its unanimous approval of the use of force with a resolution providing relief supplies to the Korean people.<sup>180</sup> Political maneuvering resulted in a one-month delay between the vote on the relief resolution and the first resolution.<sup>181</sup> By the time the Council voted and supplies reached Korea, the lack of food and medical supplies had already adversely affected over 100,000 civilians.<sup>182</sup>

The Security Council's embargo of Iraq differs from the Korean conflict only in the strength of the political alliance between the Soviet Union and the United States within the Security Council.<sup>183</sup> The threat of veto from one of the superpowers is not presently a factor in creating

174. See Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 3 (1970) (stating that the members of the Security Council use the law as a tactical weapon to further their own country's agenda).

175. U.N. CHARTER, art. 39.

176. See Higgins, *supra* note 174, at 5-6 (discussing the authority of the Security Council in terms of majoritarian decision-making).

177. See Acevedo, *supra* note 122, at 64 (noting that the conflict between regional organizations such as the OAS and the Security Council result from political differences, rather than from an analysis of the United Nations Charter or regional charters).

178. See Allen, *supra* note 65, at 8 (noting the repercussions of political solutions felt by the civilian population).

179. See Mudge, *supra* note 57, at 230-31 (describing how the opposing forces in Biafra used the starvation of thousands of civilians as a political bargaining chip); see also Sohn, *The Security Council's Role in the Settlement of International Disputes*, 78 AM. J. INT'L L. 402, 403 (1984) (noting that the procedures and political posturing involved in bringing a dispute before the Security Council force the dismissal of more controversial issues from the Council's agenda).

180. *Review of the United Nations Charter: Hearing Before the Subcomm. on the United Nations Charter of the Senate Comm. on Foreign Rel.*, 83d Cong., 1st Sess. 837-39 (1954).

181. See *id.* (describing how the delay in passage of the relief resolution resulted from the Soviet delegation rejoining the debate and attempting to block any resolutions that would give the United Nations forces an advantage in the conflict).

182. *Id.*

183. See *supra* notes 23-26 and accompanying text (noting that the Security Council passed unanimous resolutions on the Korean conflict only because the Soviet Union had walked out of the meetings).

resolutions, as it once may have been.<sup>184</sup> Currently, the Security Council members, working in consensus as they have done in the embargo resolutions, would try to prevent the tragedies that occurred after the Korean blockade.<sup>185</sup> No guarantee exists that another alliance among the veto powers will have such an effect in the future.<sup>186</sup> Although the superpowers were able to create an immediate alliance against Iraq, new situations could alter this alliance.<sup>187</sup> Countries such as China, France, and the United Kingdom could disagree and choose to block any resolution supporting relief efforts.<sup>188</sup> If decisions about the treatment of civilians are based on the political alignment of the Security Council, civilians will become political pawns in the conflict,<sup>189</sup> rather than innocent bystanders—a situation that the nations of the world sought to prevent by creating the Fourth Geneva Convention and the Additional Protocols.<sup>190</sup>

### CONCLUSION

When the Security Council created a committee to monitor conditions in Iraq and Kuwait, it chose to implement relief efforts through negotiation, consensus and political expediency, rather than through the binding principles of the Geneva Conventions. While such negotiations may, in the future, result in the effective relief efforts required by

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184. See *supra* notes 11-20 and accompanying text (noting the agreement of the Soviet Union and the United States on all nine resolutions, as only Cuba and Yemen chose to either vote against resolutions or abstain from voting entirely).

185. See Goshko, *Food Concerns Test Resolve on Sanctions*, Wash. Post, Sept. 8, 1990, at A13, A14 (quoting a United States official who stated that the Security Council has no intention of starving the Iraqi people).

186. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, 289 (Judgment of June 27) (Schwebel, J. dissenting) (noting that in one setting the United States adhered to the Security Council's definition of aggression, while, in other circumstances, the United States chose to veto the same Security Council definition).

187. See Baker, *supra* note 17, at 13 (noting that the harmony which exists between the superpowers on the Iraqi resolutions could easily disappear if, for example, the Security Council addressed the conflicts in Pakistan or Lebanon).

188. See, e.g., Wash. Post, Sept. 8, 1990, at A13, A14 (noting that the Security Council sanctions committee could not agree on how to determine when food shipments would be allowed into Iraq and Kuwait); Baker, *supra* note 17, at 13 (noting that while the Security Council acted effectively in confronting the Iraqi invasion, the Security Council did nothing to resolve the Liberian conflict, in which over 5,000 people were killed, or the conflict in Sri Lanka, in which over 14,000 people were killed).

189. See *supra* note 57 (discussing how the starvation of the civilian population in Biafra resulted from the political manipulation of relief efforts).

190. See Allen, *supra* note 65, at 22-23 (noting that the Geneva Conventions led to the implementation of stricter distinctions between the civilian and military population); see also Solf, *supra* note 50, at 130 (discussing how Protocol I creates customary international law by furthering the principles of civilian immunity and distinction).

the Geneva Conventions, the Security Council's actions determined that the Geneva Conventions could be superseded in favor of the determinations of a political body.

From a legal perspective, the choice to supersede customary international law contradicts the history of article 103 interpretation and the recognition of the separate existence of customary international law in the *Nicaragua* case. From a historical perspective, the Korean conflict demonstrated that this reliance upon the political negotiations of the Security Council to implement relief efforts could have adverse consequences. As the Security Council enters a new era of international support and cooperation, it must not lose sight of binding customary humanitarian principles, such as the Geneva Conventions, which protect civilians, not only from military actions, but also from the changing political alignment of the United Nations Security Council.