

## A BRIEF NOTE ON THE LEGAL EFFECTS OF *JUS COGENS* IN INTERNATIONAL LAW\*

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### I. Introduction

The notion of *jus cogens*, although it has its origin in municipal legal systems,<sup>1</sup> was definitively introduced in the realm of international law by Article 53 of the Vienna Convention on the Law of Treaties in 1969.<sup>2</sup>

Treaties conflicting with a peremptory norm of general international law ("*jus cogens*")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be

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<sup>1</sup> In municipal law, based upon the concept of respect for the free will of the parties, a major part of civil and commercial law rules constitute *jus dispositivum* from which one can derogate by an agreement between the parties. However, there also exists *jus cogens*. "In modern municipal legal systems the term "*jus cogens*" applies to such norms from which no derogation is permitted by the will of the contracting parties, under pain of void of the contract derogating from such a norm." It must also be added that, although the concept of *jus cogens* is as old as ancient Roman Law, the term *jus cogens* as such appears only from the 19<sup>th</sup> century in the works of German scholars engaged in the study of pandects. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, 1976, p.6. See also, Kolb, *Théorie du ius cogens international*, 2001, pp.188-208.

<sup>2</sup> For literature contributing to the elucidation of the complex problems surrounding *jus cogens*, see Minagawa, *Jus Cogens in Public International Law*, *Hitotsubashi Journal of Law and Politics*, vol.6, 1968, pp.16-28. Minagawa, *Essentiality and Reality of International Jus Cogens*, *Hitotsubashi Journal of Law and Politics*, vol.12, 1984, pp.1-15.

modified only by a subsequent norm of general international law having the same character.<sup>3</sup>

Almost forty years have passed since the enactment of Article 53, and far exceeding the original idea of it as a cause of “nullity” of a “treaty” “between States,” *jus cogens* is now being employed elsewhere by a variety of actors, not only States, but also NGOs and individuals. First, in addition to treaties, other formal sources of international law, including customary law, unilateral acts of States and binding resolutions of International Organizations, are also said to be null and void if they are contrary to peremptory international norms. Secondly, legal effects or consequences other than the nullity of a treaty come to be attached to the violation of *jus cogens* rules. Thirdly, beyond interstate relations, NGOs and individuals have increasingly been claiming the violation of *jus cogens* by States before domestic courts as well as competent international organs.

Cassese, in his textbooks on international law, after admitting the first development regarding the sources of international law, and turning to the second and third points, goes on to give us a panorama of the (alleged) legal effects of *jus cogens* other than the nullity of a treaty. First, States should not recognize the entity that has emerged as a result of aggression or that is based on systematic denial of the rights of minorities or of human rights. Second, if a reservation over a multilateral treaty is inconsistent with a peremptory norm, it becomes inadmissible. Third, the possible violation of a peremptory norm, for instance those against torture, would authorize a State not to comply with an extradition treaty under which it would otherwise be obliged to extradite an individual. Fourth, peremptory norms may de-legitimize internal legislative or administrative acts authorizing the prohibited conduct. Fifth, various domestic courts assert that the violation of *jus cogens* by an individual may permit States’ criminal courts to exercise universal jurisdiction upon said individual.<sup>4</sup>

The above list of the (alleged) legal effects of *jus cogens*, however, raises two questions. First, is this a conclusive list? Secondly, should they all really be considered as legal effects of *jus cogens*? To the first question, the answer must be no. By way of example, Article 26 of the draft articles on State responsibility indicates that the wrongfulness of any act of a State that is not in conformity with an obligation under a peremptory norm will not be precluded.<sup>5</sup> The second question is more fundamental.

On the one hand, it is indisputable that every State or NGO or individual may freely employ *jus cogens* in order to support or justify his arguments against some other State or person in certain fora. I also understand that the notion of *jus cogens* has a strong appealing force among people. And, last but not least, I am on the side of the international justice that will be achieved through, among others, the promotion of human rights. However, by contrast, the now extensive list of the legal effects alleged to be attributed to *jus cogens* makes me feel ill at ease. In summary, they seem to proliferate without borders and without order<sup>6</sup> and the

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<sup>3</sup> United Nations Treaty Series, Vol. 1155, p.344. In this paper I will use “peremptory norm” and “*jus cogens*” interchangeably.

<sup>4</sup> Cassese, *International Law*, Second Edition, 2005, pp.205-208. See also, Cassese, *Diritto internazionale: I. I Lineamenti*, 2003, pp.241-244.

<sup>5</sup> Cassese, of course, does not fail to mention it in other parts of his book. Cassese, *International Law*, *cit.*, p. 257.

<sup>6</sup> Tomuschat expresses the view according to which *jus cogens* cannot be understood as a bulldozer suited to flatten the entire edifice of traditional international law, Tomuschat, *Human Rights: Between Idealism and Realism*, 2003, p.316.

entropy surrounding this notion appears to be increasing.<sup>7</sup>

In this paper, I will try to put into perspective the development or proliferation of the notion of *jus cogens* as described above. In so doing, I will try not so much to categorically deny the said legal consequences as to provide alternative explanations that will eventually lead to the same or similar consequences.

## II. *Original Consequence: Nullity of a Treaty Conflicting with a Peremptory Norm*

A peremptory norm under Article 53 has at least three characteristics or component elements. First, it is a norm of “general international law.” Secondly, it is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” And thirdly, any treaty conflicting with it becomes “void.”<sup>8</sup>

With regard to the first point, if the expression of “general international law” means something that is “binding upon all the States,” it only refers to the scope of the addressees of an international law rule. In other words, it does not mention any specific sources of international law. In this respect, it must be said in the first place that a treaty is not worth producing a rule of general international law for in as much as it may only produce a rule binding upon the contracting parties.<sup>9</sup> Secondly, general principles of law under Article 38 of the Statute of the International Court of Justice,<sup>10</sup> while admittedly not intrinsically limited in terms of the addressee as in the case of a treaty, do not seem to create a rule of general international law with a peremptory nature because of their supplementary and technical

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<sup>7</sup> The proliferation of *jus cogens* reminds me of the concept of “meme.” This concept is the invention of the zoologist or biologist, Richard Dawkins, and first appeared in his controversial book, “The Selfish Gene” (Second edition 1989). First, according to him, even though we naturally think that we are the masters of our lives and we are able to decide freely what we should do, this is more apparent than real. In reality, it is our genes that control us. We animals exist for their preservation and are nothing more than their survival machines. Secondly, quite interestingly, he extended this idea to our social conduct suggesting that there also exist in our human society cultural or social genes that live in our minds. They move from one person to another with multiple mutations. Now, is it then safe to say that, even though we are supposed to employ *jus cogens* of our own free will, in reality, it is *jus cogens* that is using us moving from one person to another with multiple mutations?

<sup>8</sup> We will return to the fourth point, that is, the possibility of the modification only by a subsequent norm of general international law having the same character, in the next Section.

<sup>9</sup> In this context, according to the ILC, it would not be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted. The ILC commentary to the original Article 50 is reproduced in Wetzel (compiled by), *The Vienna Convention on the Law of Treaties: Travaux Préparatoires*, 1978, p.377. For the relationship between non-derogable rights found in human rights treaties, including the right to life, prohibition of torture, prohibition of slavery and non-retroactivity of penal law, and *jus cogens*, see Teraya, Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights, *European Journal of International Law*, vol.12, 2001, pp. 927-931. For the three different meanings of the notion of “derogation”, i.e. exception, deviation and immunity, see Leben, Impérative juridique, dérogation et dispense: Quelques observations, *Droits*, N° 25 «Dispense», 1997, pp. 38-42.

<sup>10</sup> The extensive analysis on the sources of international law is out of the scope of this paper. For critical remarks on the reliance on Article 38 of the ICJ Statute in this context, see Onuma, The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law, *Liber Amicorum Judge Shigeru Oda*, Volume 1, 2002, pp.195-199.

nature.<sup>11</sup> Against this background, customary international law is the only remaining candidate able to create general international law rules with a peremptory character.<sup>12</sup>

The second element is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Under the ordinary understanding of customary international law, this is a practice of States accompanied by the conscience of legally compulsoriness, i.e. *opinio juris*. With the employment of the expression of the International Court of Justice in the *North Sea Continental Shelf* cases in 1969, one can also say that State practice should be both extensive and uniform and should moreover occur in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>13</sup> Starting from the aforementioned confirmation that a peremptory norm is a customary law in terms of sources of international law, it can be further maintained that, in the case of a peremptory norm, it is accompanied not only by the ordinary *opinio juris*, I will call this *opinio juris* No.1, but also another *opinio juris* (No.2) on the prohibition of derogation from it by an agreement.<sup>14</sup>

The third element relates to the legal effect of *jus cogens*: A treaty is void if it conflicts with a peremptory norm of general international law. Generally speaking, there are two different considerations that lead to the invalidity of a treaty. First, in the case of error or corruption envisaged in Articles 48 and 50 of the Vienna Convention, one can invoke them as invalidating its consent to be bound by the treaty. So in this case one can insist that the consent was not true. This relates to the formal source aspect of the treaty because the agreement was defective due to the invalidity of the consent of one of the contracting parties. In addition, this kind of invalidity of a treaty may be resolved afterward by acquiescence. On the other hand, in the case of peremptory norms, here it does not matter whether or not the consent given by a party was true or not. It was true. So it must be said that the treaty that might conflict with a peremptory norm is perfectly constructed in terms of its form. Rather, the problem resides in the content of the treaty, i.e. the normative statement contained within it. What is conflicting with the peremptory norm is not the treaty itself as a form, but the content of the treaty. Moreover, in contrast to the first type of invalidity, the treaty conflicting with a peremptory norm will be absolutely null and void and may not be resolved by acquiescence.

It is true that some international law scholars still cast serious doubt on the viability of the notion of *jus cogens* in international legal order,<sup>15</sup> and others try to apply some alternative legal effects to the notion of *jus cogens* in international law.<sup>16</sup> It must also be recognized that

<sup>11</sup> For a contrary view, see Arbitration Tribunal for the Delimitation of the Maritime Boundary (Guinea-Bissau v. Senegal), 31 July 1989 in *International Law Reports*, vol.83, p.26 (para.44).

<sup>12</sup> Some domestic courts have admitted the customary law nature of peremptory norms of general international law. For the prohibition of torture, see *Sidermann de Black and others v. The Republic of Argentina and Others*, United States Court of Appeals, Ninth Circuit, 22 May 1992 (Fletcher, Canby and Boochever, Circuit Judges), *International Law Reports*, vol.103, p.473. For crimes against humanity, see *Re Pinochet, Belgium*, Court of First Instance of Brussels, 6 November 1998, *International Law Reports*, vol.119, p.355.

<sup>13</sup> *ICJ Reports 1969*, p.43 (para.74).

<sup>14</sup> Czaplinski calls it *opinio iuris cogentis*. See Czaplinski, *Jus Cogens and the Law of Treaties*, in Tomuschat and Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, 2006, p.91.

<sup>15</sup> For various arguments against the introduction of *jus cogens* in international law, see Kolb, *op.cit.*, pp.33-58.

<sup>16</sup> By way of example, Conforti insists that the legal effect of *jus cogens* is not the invalidity of a treaty but the superiority of the *jus cogens* obligation over the obligation under the treaty as envisaged in Article 103 of the United Nations Charter. Conforti, *Diritto internazionale*, 2002, p.187. According to Barile, because of the fact that

their arguments merit serious reflection. Having said this, for the purpose of this paper, I will maintain the definition of *jus cogens* embodied in Article 53 of the Vienna Convention on the Law of Treaties as a whole. This is not only due to the constraints of time and ability on the part of this writer to scrutinize what is being said, but also because the notion of *jus cogens* itself, in its meaning in Article 53, now seems to be “accepted and recognized by the international community of States as a whole”.<sup>17</sup> Starting from this, in the following sections, I will examine whether or not the said legal effects of *jus cogens* are logically deduced from the definition in Article 53. If we obtain a negative result, then I will try to offer some other explanations on the said effect without relying on *jus cogens*.

### III. *Derivative Consequence: Nullity of International Legal Acts other than Treaty*

In this section, we will examine whether or not we can extend the above argument on the legal effect of nullity of a treaty or non-derogability by an agreement to other sources of international law, including customary international law, unilateral acts of States and binding decisions of international organizations.

With regard to customary international law rules that might conflict with peremptory norms, there seems to be two fundamental difficulties in envisaging such a situation in so far as peremptory norms are customary international law in terms of sources of law. First, it is difficult for me to understand why we can talk about “null and void” of a customary rule. Customary law rules are made through the factual process of accumulation of State practice accompanied by the collective consciousness of obligation. As such, they must be considered quite different from a “legal act,” i.e. expression of the will of an entity intending to create right, obligation or some other legal situation between it and other persons, susceptible to nullification. In sum, with respect to customary law, it seems that we can only talk about its existence or non-existence. Secondly, starting from this, there seems to remain only two options. If one can without any doubt confirm the existence of a customary law rule conflicting with a pre-existing *jus cogens*, the latter would cease to exist because of the disappearance of the relevant state practice accompanied by the legal belief to follow it.<sup>18</sup> But the possibility of this happening is thin because peremptory norms seem to have a resistance to desuetude.<sup>19</sup> Another option, which is more likely, is conversely that the alleged customary law rule conflicting with a pre-existing *jus cogens* does not exist in reality. In any event, there always exists only one international law rule, the newly emerged customary law or the pre-existing *jus cogens*. It follows that there is no conflict between two existing rules here.

Having said this, one might say that there is a conflict, for example, between a peremptory

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there is no supranational authority that can effectively overrule a treaty rule conflicting with a peremptory norm, international *jus cogens* has only such inter-subjective legal effect in terms of State responsibility as the wrongfulness *erga omnes*. Barile, *Lezioni di diritto internazionale*, 1983, pp.139-140.

<sup>17</sup> After examining the relevant State practice, Ronzitti concludes that the existence itself of a peremptory norm in international order has not been contested. *Trattati contrari a norme imperative del diritto internazionale? in Studi in onore di Giuseppe Sperduti*, 1984, p.264.

<sup>18</sup> On the possibility of desuetude of *jus cogens* rules, see Tavernier, *L'identification des règles fondamentales, un problème résolu?* in Tomuschat and Thouvenin (eds.), *op.cit.*, p.15. See also Pellet, *Conclusions*, in Tomuschat and Thouvenin (eds.), *op.cit.*, p.421.

<sup>19</sup> Abi-Saab, in *Société française pour le droit international, La pratique et le droit international*, 2003, p.120.

norm prohibiting torture and customary international law rules concerning State immunity that might eventually prevent a victim of torture from receiving a sentence of reparation before a foreign civil court. We will discuss this issue in detail in Section V. It is suffice here to say, for the purpose of this section, that the customary rules on State immunity never permit torture and do not, as such, conflict with the norm on the prohibition of torture.

Turning to unilateral acts of a State, we are here concerned with the unilateral act of a State “as a legal act,” i.e. the expression of the will of the State to create certain legal effects including rights and obligations. In contrast, a unilateral State act “as a legal fact,” i.e. actual conduct to be attributed to the State and to be evaluated in light of the relevant international law rules in the context of the law of State responsibility, is not our concern in this section.<sup>20</sup>

The International Court of Justice recognized, in its judgments on *Nuclear Test* cases in 1974, that declarations made by way of a unilateral act, concerning legal or factual situations, may have the effect of creating legal obligations.<sup>21</sup> This statement of the ICJ only relates to the declarations by States intending to assume legal obligations. For the purpose of this section, it will be pertinent to redefine the unilateral act of a State as follows, on the model of the definition of reservation in Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties:<sup>22</sup>

A declaration made by a State for the purpose of excluding or modifying the legal effect of a peremptory norm of general international law in its application to that State.

It seems safe to say that such a declaration will be void because it conflicts with the peremptory norm of general international law, especially in the case of exclusion or bad modification of the legal effect. But before jumping to conclusions, one may pose the following question: Does the same hold true for the declaration aiming at excluding or modifying the legal effect of an “ordinary” customary international law rule not having a peremptory nature? In this context, paragraph 63 of the ICJ judgment in the *North Sea Continental Shelf* cases is extremely pertinent.

[G]eneral or customary law rules and obligations ..., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of unilateral exclusion exercisable at will by any one of them in its own favor.<sup>23</sup>

It would follow from this that a unilateral declaration conflicting with a customary international law is not admissible *irrespective of whether or not the customary rule has a peremptory character*.<sup>24</sup> It must be added that if the unilateral declaration is accompanied by a subsequent acceptance by another State, the declaration together with the acceptance will

<sup>20</sup> In this context, assertions such as “an act of aggression is contrary to *jus cogens* and accordingly null and void” is not tenable because the act of aggression is not so much a legal act, susceptible to nullification and voidance, as an [il]legal fact to be evaluated in terms of State responsibility.

<sup>21</sup> *ICJ Reports 1974*, p.267 (para.43).

<sup>22</sup> According to Article 1 (d) of the Vienna Convention on the Law of Treaties, reservation means a unilateral statement made by a State for the purpose of excluding or modifying the legal effect of certain provisions of the treaty in their application to that State. *United Nations Treaty Series*, Vol. 1155, p.333.

<sup>23</sup> *ICJ Reports 1969*, pp.38-39.

<sup>24</sup> In this sense, I completely agree with the insightful observation of Verhoeven, according to which “[a]ucun actes unilateral ne pouvant normalement déroger à une coutume, il est sans importance que celle-ci soit ou non d’ordre public.” Verhoeven, *Droit international public*, 2000, p.343.

constitute an agreement between the States concerned to which Article 53 of the Vienna Convention will be applied as a matter of the law of treaties.

Reservation to a multilateral treaty is also a unilateral act of States and, as such, is worthy of discussion. General Comment 24 of the Human Rights Committee in 1994, in its paragraph 8, refers to the case where reservations might conflict with *jus cogens*.

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant [on civil and political rights of 1966]. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations.<sup>25</sup>

With respect though, this statement does not seem to be free from difficulties, at least for the purpose of this paper.<sup>26</sup> The second sentence refers to the reservation that enables States to apply between them the rules of general international law. But what is at issue here, rather, is the reservation trying *not* to apply the rules of general international law. The same sentence sheds lights on the special nature of human rights treaties. But, for example, a reservation, which enables the reserving State to exercise torture, will be prohibited even where it was made against certain provisions of any treaties other than human rights treaties. Moreover, the last sentence remains unclear in terms of the reason why reservations over certain provisions in the Covenant are not permissible: Is it because the provisions represent customary international law or because they represent peremptory norms of general international law?

In my opinion, the same consideration as in the case of unilateral acts as mentioned above will be valid, with necessary modification, for reservation to a treaty. First, a reservation, which is conflicting with a customary international law and moreover not supported by any contracting party, will not be admissible irrespective of the fact that the customary rule is considered as a peremptory norm. However, under the reservation regime of the Vienna Convention on the Law of Treaties, it is unlikely to occur because “a reservation is considered to have been accepted by a State if it has raised no objection to it by the end of a period of twelve months” (Article 20, paragraph 5).<sup>27</sup> Secondly, if the reservation is accompanied by a

<sup>25</sup> Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

<sup>26</sup> According to Klein, the reasoning given for the statements contained in paragraph 8 of the general comment is not convincing. Klein, A Comment on the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law, in Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, 2004, p.64. See also, Gaja, Le reserve al Patto sui diritti civili e politici e il diritto consuetudinario, *Rivista di diritto internazionale*, 1996, pp.450-452.

<sup>27</sup> In contrast, if all the contracting parties of the treaty explicitly reject entering into a treaty relationship with the reserving State, that State cannot become a party of the treaty. In that case, however, the problem itself of the admissibility of the reservation will disappear because it is not a contracting party of the treaty. Article 20, paragraph 1, of the Vienna Convention provides us with another possibility. According to Article 20, a reservation expressly authorized by a treaty does not require any subsequent acceptance by other contracting States. In that case, one can derogate from a customary rule by a reservation if the treaty so authorizes. If the customary rule constitutes *jus cogens*, a reservation contrary to it will not be admissible. But the problem here is not the reservation but the authorizing treaty.

subsequent acceptance by another State, the reservation together with the acceptance will be tantamount to being an agreement to modify the original treaty between the States concerned. To this modification agreement, Article 53 of the Vienna Convention can be applied. It would follow from the foregoing observation that peremptory norms are not concerned with the unilateral act of a State as such. Rather they are always concerned with agreements between States.<sup>28</sup>

Before concluding this section, we must refer to binding resolutions of international organizations, including the Security Council's resolutions. Contrary to the case of customary international law, we can here talk about the validity or invalidity of resolutions of international organizations because they constitute international legal acts and they are required to fulfill certain formal and substantial conditions for the purpose of being duly adopted. And among these requirements, one can find those of peremptory norms of general international law.<sup>29</sup> We can also explain the applicability of *jus cogens* to the resolutions of international organizations by the fact that they are a "secondary source" of obligation, if not law, whose legitimacy is based on the relevant constitutional treaties of the international organizations. If the constitutional treaties are subject to the *jus cogens* limitation, there is no reason why the same would not be true for the resolutions based on them.<sup>30</sup>

Judge *ad hoc* Lauterpacht, in his separate opinion in the case of *Application of the Genocide Convention* in 1993, indicated that the Security Council resolution on armed embargo against former Yugoslavian countries could be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become to some degree supporters of the genocidal activity of the Serbs and in this manner and to the extent of acting contrary to a rule of *jus cogens*, i.e. the prohibition of genocide. He went on to say that, as one possible legal consequence arising from this analysis, the resolution ceased to be valid and binding in its operation against Bosnia-Herzegovina and that Members of the United Nations became free to disregard it.<sup>31</sup>

With respect, this would not be a case of a Security Council resolution conflicting directly with a peremptory norm of general international law because it, as such, did not purport to admit genocide. According to my observation, this is *not a question of non-derogability* of the

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<sup>28</sup> Linderfalk concludes that if a reservation in conflict with a norm of *jus cogens* is to be considered a nullity, this is not because of [the object and purpose criteria enshrined in] Article 19 of the Vienna Convention, but because of some other rule of international law. Linderfalk, *Reservation to Treaties and Norms of Jus Cogens — A Comment on Human Rights Committee General Comment NO. 24*, in Ziemele (ed.), *op.cit.*, p.234. I agree with this conclusion and I would suggest that "some other rule of international law" would be nothing more than Article 53 of the Vienna Convention on the Law of Treaties. The ILC, in its fifty-seventh session of 2005, discussed the draft guideline 3.1.9 entitled "Reservations to provisions setting forth a rule of *jus cogens*" introduced by the Special Rapporteur, Alain Pellet. The draft guideline 3.1.9 states that "[a] State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law." A/60/10, 2005, pp.152-3 and p.159.

<sup>29</sup> One can also pose the following question: Would this argument be valid also for non-binding resolutions? The answer might be yes if, as indicated by Conforti, the non-binding resolutions, generally called as recommendations, have the effect of legalizing the conducts of the States complying with them. Conforti, *Diritto internazionale*, 2002, p.181.

<sup>30</sup> For more detailed analysis on this subject, see Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, *European Journal of International Law*, 2005, pp.59-88.

<sup>31</sup> *ICJ Reports 1993*, pp.440-441 (paras.102-104).



prohibition of *jus cogens*, but a question of derogability of a Security Council binding resolution as shown by the legal consequence suggested by Judge Lauterpacht: Members of the United Nations became free to disregard it. In order to reach the same legal consequence, one can rely on the notion of “necessity” as one of the circumstances precluding wrongfulness. Article 25 of the draft articles on State responsibility adopted by the ILC in 2001 indicates the possibility for a State to invoke necessity in order to safeguard an essential interest against a grave and imminent peril. It is true that this expression of the article seems odd because there is no mention about whose essential interest is at stake. In this regard, one can find the expression of “an essential interest of the State” in the early version of the article. But, in the latest stage of the drafting history of the article, “of the State” was deleted in order to accommodate an essential interest “of the international community as a whole.”<sup>32</sup> It would follow that, to the extent that the situations at that time in Bosnia-Herzegovina were relevant to the essential interest of the international community as a whole, member States of the United Nations could invoke necessity as a circumstance precluding wrongfulness, and to that extent, could disregard the Security Council resolution.<sup>33</sup>

#### IV. *False Friend Consequences Including those Arising from the Violation of Obligations Erga Omnes*

Article 26 (Compliance with a peremptory norm) of the draft articles on State responsibility stipulates that:

Nothing in this chapter precludes the wrongfulness of any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law.<sup>34</sup>

Chapter V of Part One of the draft articles on State responsibility deals with circumstances precluding wrongfulness. It sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned: consent, self-defence, countermeasures, *force majeure*, distress and necessity (Articles 20 to 25). The commentary on Article 26 indicates that this article was inserted in order to “make it clear that the circumstances precluding wrongfulness in Chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law.” The term of “(no) derogation” employed in this explanation necessarily reminds us of the same expression in Article 53 of the Vienna Convention on the Law of Treaties. Moreover, this statement is followed by some examples: “a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide. The plea of necessity likewise cannot excuse the breach of a peremptory norm.”<sup>35</sup> Similarity of

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<sup>32</sup> A/56/10, 2001, p.195 (para.2).

<sup>33</sup> Article 103 of the United Nations Charter is irrelevant in this context because it only relates to treaty obligations.

<sup>34</sup> The text of Article 26 and accompanying commentary by the ILC, see A/56/10, 2001, pp.206-209. For a brief survey on the drafting history of Article 26 and its implication for the interpretation of the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons* in 1996, see Kawasaki, Draft Articles on State Responsibility Adopted by the International Law Commission in 2001: A Brief Overview, *Hitotsubashi Journal of Law and Politics*, Vol.30, 2002, pp.42-44.

<sup>35</sup> A/56/10, 2001, pp.207-8.

the expression coupled with the uncontested examples might lead us to the conclusion that the legal consequence of “non-preclusion of the wrongfulness” is directly deduced from the original legal effect of *jus cogens* as envisaged in Article 53 of the Vienna Convention on the Law of Treaties. But before jumping to this conclusion, it is necessary to examine its correctness for all six circumstances consecutively.

For the purpose of the examination, a fundamental distinction must be made between consent and the other five circumstances. This is because consent may constitute a legal act, i.e. expression of the will on the part of the author State to produce right, obligation or other legal situations in its relation with other States. In contrast, the other five circumstances, self-defence, countermeasures, *force majeure*, distress and necessity, only relate to a factual action taken by a State (organ) against an illegal conduct by another State or in some inevitable situations.

#### Article 20 (Consent)

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that act.<sup>36</sup>

For our purpose here, it must be recalled that the commentary of the ILC on the original Article 29 of the first reading text emphasized the agreement nature of these circumstances precluding wrongfulness: “[t]he case covered by the article therefore comprises, first, the request of a State to be permitted to act in a specific case in a manner not in conformity with the obligation and, secondly, the expression of consent, by the State benefiting from the obligation, to such conduct by the first State. It is the combined effect of these two elements which results in an agreement that, in the case in point, precludes the wrongfulness of the act.”<sup>37</sup> If this interpretation is correct, it must be said that consent would no longer be considered as a circumstance precluding wrongfulness because, under this construction, the reason why the act of a concerned State is not wrongful is not because the wrongfulness of the act was precluded in terms of State responsibility, but because, as a matter of the law of treaties, the agreement, as a special rule, took precedent over the conflicting general rule. It would follow that, as we are now in the realm of the law of treaties, Article 53 of the Vienna Convention is perfectly applicable to the situation in which consent as circumstances precluding wrongfulness is at issue.<sup>38</sup>

Self-defence and countermeasures have a common feature in that, in both cases, the

<sup>36</sup> For the text of Article 20 and accompanying commentary by the ILC, see A/56/10, 2001, pp.173-177.

<sup>37</sup> *Yearbook of the ILC*, 1979, II-2, pp.109-110 (para.3).

<sup>38</sup> Of course, as appositely pointed out by Gaja, one could question the correctness of such a view because consent could also operate as a unilateral act. He goes on to suggest that the rules concerning the validity of unilateral acts may have to be drawn by analogy from the norms regarding the validity of treaties. Gaja, *Jus cogens* beyond the Vienna Convention, *Recueil des Cours*, 1981-III, tome 172, p.295. One must, however, admit that this suggestion does not reconcile with our understanding on the unilateral act of States in Section III. It must be noted, nevertheless, that, in this case, a consent is given by a State for the purpose of excluding or modifying the legal effect of a peremptory norm of general international law in its application “to the requesting State” as opposed to the consenting State. From this perspective, an analogy might rather be made with binding or non-binding resolutions of international organizations in terms of the common effect of authorization. Conforti considers consent given by a State in the context of State responsibility as authorization. Conforti, *Diritto internazionale*, 2002, pp.359-360.

claiming State is trying to take counteraction against the preceding wrongful act of another State involving or not involving the use of force. Starting from this, there are two basic confirmations with respect to the employment of self-defence and countermeasures. First, the wrongfulness is precluded *only against the author State of the preceding wrongful act*.<sup>39</sup> It follows that the wrongfulness of acts of the claiming State will not be precluded if they constitute illegal acts against third State(s). Second, the legal consequence of the non-preclusion of the wrongfulness will be *the persistent illegality of the acts of the claiming States*, which almost inevitably incurs the responsibility of that State to cease the illegal acts and make reparation for the damages caused by them. In other words, the legal consequence at stake here is not null and void for certain international legal acts. We cannot talk about null and void of the factual action of self-defence or countermeasures by a State.<sup>40</sup>

The most adequate notion that may cover, neither too much nor too little, the abovementioned confirmations would be, according to my opinion, not so much *jus cogens* as obligations *erga omnes* of general international law.<sup>41</sup> In this context, let us focus again on the example raised by the ILC in its commentary on Article 26: “Genocide cannot justify counter-genocide.” According to our argument, counter-genocide is not permitted because it constitutes a violation of the general international law obligation *erga omnes* prohibiting genocide. Because of the fact that the obligation is owed not so much to a particular State as to the

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<sup>39</sup> The ILC commentary on Article 21 (Self-defence) mentions that the essential effect of Article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis an attacking State. Article 49, paragraph 2, of the draft articles on State responsibility, on its part, specifies that countermeasures are limited to the non-performance of international obligations of the State taking the measures towards the responsible State. A/56/10, 2001, p.179 and p.328.

<sup>40</sup> One perplexing problem resides in the implication of the prohibition of the use of force in the context of circumstances precluding wrongfulness. On the one hand, the prohibition of the use of force is commonly considered as a typical example of *jus cogens*. On the other hand, according to Article 26, the wrongfulness of an act of a State contrary to a *jus cogens* obligation is not precluded by any circumstance. It would first follow that the wrongfulness of the use of force will not be precluded by self-defence. Against this background, Cassese suggests that the limitation under Article 26 does not apply to self-defence (Cassese, *International Law, cit.*, p.257.). But this is not an elegant solution to the problem. Secondly, it would also follow that a military operation by State A on the territory of State B remains wrongful in spite of the consent by the latter to do so. This logical consequence, however, is evidently contrary to the experience of States, to which the ILC, without proposing a solution, made the following comment: “[I]n applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose” (A/56/10, 2001, p.209). Scholarly works suggest two options for the solution of the problem. According to one view, while the prohibition of aggression is of a peremptory norm, the prohibition of the use of force itself does not in reality constitute *jus cogens* obligation (Ronzitti, *op.cit.*, p.221). The other view suggests, by contrast, that military interventions engaged under the consent of the territorial States are not, from the outset, contrary to the prohibition of the use of force in Article 2, paragraph 4, of the United Nations Charter (Abass, *Consent Precluding State Responsibility: A Critical Analysis, International and Comparative Law Quarterly*, 2004, p.224; Christakis/Bannelier, *Volenti non fit injuria?: Les effets du consentement à l’intervention militaire, Annuaire français de droit international*, 2004, pp.109-111.). I am inclined to make a new proposition, according to which, in addition to the two confirmations in the first view, there exists an *ad hoc* peremptory norm that prohibits to conclude a treaty among States purporting to use force *against a third State*.

<sup>41</sup> According to the resolution on “Obligations *erga omnes* in international law” adopted by the Institut de droit international at Krakow Session on August 27, 2005, obligation *erga omnes* of general international law means an obligation that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action. The resolution will be found in the following site: <http://www.idi-iil.org/index.html>

international community, the wrongfulness of the counter-genocide will not be precluded.<sup>42</sup>

Turning to necessity, as we have seen above, the ILC categorically states that the plea of necessity cannot excuse the breach of a peremptory norm. I agree with this statement. However, this consequence does not seem to stem directly from the original effect of a peremptory norm because, as in the case of other circumstances except consent, no legal act is involved here, and moreover, the legal consequence of the non-preclusion of the wrongfulness is the continuing illegality of the acts of that State, as opposed to nullity. In this context, we must recall the stipulation of Article 25, paragraph 1 (b), of the draft articles on State responsibility, according to which necessity may not be invoked when the act in question seriously impairs an essential interest of the State or States toward which the obligation exists, or of the international community as such.<sup>43</sup> Given the fact that most of the peremptory norms of general international law appear to protect essential interests of the international community, the reason why the plea of necessity cannot excuse the breach of a peremptory norm seems not to be because the peremptory character of the norm is at work but because, simply, Article 25, paragraph 1 (b), is applied in such a case. The same consideration on the interest at stake holds true with regard to distress, i.e. the situation in which the author of the act in question has no other reasonable way of saving the author's life or the lives of other persons entrusted to the author's care (Article 24, paragraph 1). Paragraph 2 (b) of the article goes on to state that the wrongfulness is not precluded if the act in question is likely to create a comparable or greater peril. The ILC commentary thereto clarifies that distress can only preclude wrongfulness where the interests sought to be protected clearly outweigh the other interests at stake in the circumstances.<sup>44</sup>

The last circumstance precluding wrongfulness is *force majeure*, i.e. the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.<sup>45</sup> Compared to the other five circumstances, *force majeure* is characterized by the material impossibility to perform the relevant obligation. It is certainly difficult to imagine the case in which it is materially impossible for a State to obey obligations arising from peremptory norms of general international law. But, here too, this does not seem to be logically deduced from the original consequence of *jus cogens*. Although I must confess that I have no clear picture on this point, I guess that the reason why a State cannot invoke *force majeure* to excuse the violation of a

<sup>42</sup> With regard to countermeasures, Article 50, subparagraph 1 (d), of the draft articles on State responsibility also refers to the notion of *jus cogens*. According to this subparagraph, countermeasures shall not affect obligations under peremptory norms of general international law. It must be noted that Subparagraph 1 (d) is preceded by three subparagraphs that refer to the obligation to refrain from the use of force, obligations for the protection of fundamental human rights and obligations of a humanitarian character prohibiting reprisals. The ILC commentary makes it clear that the prohibition of countermeasures making use of those obligations stands on their own and "Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State." A/56/10, 2001, p.337. In light of this, Subparagraph 1 (d) of Article 50 rather relates to the accelerating effect of *jus cogens*, that we will soon discuss in the next section, leading to the creation of a separate customary rule on non-derogation by countermeasures. Focarelli convincingly argues that it will be impossible to automatically extend the notion of *jus cogens* accepted in other sectors of international law to the regime of countermeasures. Focarelli, *Le contromisure nel diritto internazionale*, 1994, pp. 478-488.

<sup>43</sup> A/56/10, 2001, p.194.

<sup>44</sup> A/56/10, 2001, p.194 (para.10).

<sup>45</sup> Article 23 of the draft articles on State responsibility, A/56/10, 2001, p.183.

peremptory obligation resides in the fact that many of them constitute “composite obligation.” According to the ILC, composite obligation implies that the responsible State will have adopted a systematic policy or practice. It is defined in terms of the cumulative character of the conduct and the cumulative conduct constitutes the essence of the wrongful act.<sup>46</sup> No State could successfully defend its systematic policy or practice to violate this kind of obligation in employing *force majeure*.

### V. *Accelerating Effect on Emerging Derogative Rules from Certain Customary International Law Norms*

There has been over the last decade a growing tendency of employing the peremptory nature of certain international law rules, including the prohibition of torture, in order to justify a variety of legal consequences alleged to be those of *jus cogens*. After a short survey on the relevant cases, we will examine the exact nature of these allegations.

With respect to the admissibility of exercising universal jurisdiction for the offence of torture, in the *Pinochet* case in 1999, Lord Browne-Wilkinson of the House of Lords maintained that the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed. By the same opinion, he went on to say that the implementation of torture cannot be a State function and reached the conclusion that Senator Pinochet was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law. This seems to suggest that a person who committed torture will not be able to enjoy personal immunity before foreign domestic penal courts.<sup>47</sup>

On the other hand, in the *Al-Adsani* case in 2001, the European Court of Human Rights concluded that, while accepting that the prohibition of torture has achieved the status of a peremptory norm in international law, it is unable to discern any firm basis for concluding that a State no longer enjoys immunity from a civil suit in the courts of another State where acts of torture are alleged.<sup>48</sup>

In the *Suresh* case of 2002, the Canadian Supreme Court indicated, in the context of the possibility of the deportation of a person to a country where he faces the risk of being tortured, that the prohibition of torture came to be an emerging, if not established, peremptory norm and, as such, it cannot be easily derogated from.<sup>49</sup>

First, if the basic feature of peremptory norms is *non-derogation* from them, as indicated in Article 53 of the Vienna Convention on the Law of Treaties, what we are seeing in these cases is rather *derogation* from the relevant international law rules. Generally speaking, exercising penal jurisdiction against a foreign person for his illegal conduct in a foreign

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<sup>46</sup> A/56/10, 2001, pp.147-148. The ILC focuses on the prohibition of apartheid and genocide as well as crimes against humanity as examples of composite obligations, all of which are considered obligations of peremptory norms. See also, A/56/10, 2001, p.208.

<sup>47</sup> R v Bow Street Magistrates Ex P Pinochet [2000] 1 A.C. 147. House of Lords, reproduced in *International Law Reports*, vol.119, p.149 and p.157.

<sup>48</sup> *Al-Adsani v United Kingdom*, European Court of Human Rights (2001) 34 E.H.R.R. 273, reproduced in *International Law Reports*, vol.123, p.42 (para.61).

<sup>49</sup> *Suresh v Canada (Minister of Citizenship and Immigration and Others)*, Canada, Supreme Court, 11 January 2002, *International Law Reports*, vol.124, p.365 (para.65).

territory is not permitted under international law. Only in exceptional circumstances, such exercise is recognized under the name of protective principle or universal principle. So the claiming of universal jurisdiction on the case of torture is a derogative assertion to the basic prohibition of exercising jurisdictions against a foreign person for his illegal conduct in a foreign territory. The same would hold true with respect to the alleged denial of personal immunity and State immunity.<sup>50</sup> In the case of non-deportation or non-extradition for fear of torture in the receiving State, if there exists an obligation to hand over a suspected person under an extradition treaty, here too, what is at issue is whether the extraditing State may derogate from the obligation in question. Ultimately, a variety of legal effects claimed in these cases do not seem to have a direct or logical connection with the original effect of *jus cogens* as embodied in Article 53 of the Vienna Convention on the Law of Treaties.

Having said that, these allegations based on peremptory norms are not necessarily deprived of legal significance. In my opinion, these practices should be evaluated as an expression of *the first opinio juris*, rather than the second,<sup>51</sup> to the effect that there may exist a derogatory rule in the case of torture from, for example, the general rule of State immunity.<sup>52</sup> In other words, these practices will contribute to the establishment of *each specific customary derogatory rule* from principal rules on exercising jurisdiction or on State and personal immunity.<sup>53</sup>

<sup>50</sup> Giegerich appositely remarks that a State invoking a special rule of customary international law which deviates from the well-established general rule will have to prove a pertinent universal practice accepted as law, otherwise the general rule will apply and this holds true with regard to *jus cogens* norms. Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?* in Tomuschat and Thouvenin (eds.), *op.cit.*, p.211. Zimmermann makes similar arguments on the exercise of universal jurisdiction, Zimmermann, *Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters*, in Tomuschat and Thouvenin (eds.), *op.cit.*, pp.337-339.

<sup>51</sup> For *opinio juris* No.1 and No.2, see our argument in Section II above.

<sup>52</sup> Shin appositely remarks that the crystallization of jurisprudence on the proper balance between the need to afford remedies to victims of human rights violations and the principle of sovereign immunity will take place gradually through the future development of international law. Shin, *Law and Justice in Remedies for Victims of Violations of International Humanitarian Law: Doctrinal Trends and Prospects*, in Shin/Takagi/Nagano (eds.), *Postwar Reparations and International Humanitarian Law: The Questions of Individual Claims for Compensation*, 2005, p.26.

<sup>53</sup> It is true that, for the purpose of customary international law, *opinio juris* must be that of the State. In light of this, mere employment of *jus cogens* by (private) parties before domestic courts might not appear to be relevant. However, as I pointed out, the appealing force of *jus cogens* is significant. First, as the notion of peremptory norm has its origin in domestic legal orders, domestic judges will immediately understand its implication without difficulty. Secondly, *jus cogens* plays a pivotal role of internationally connecting similar cases across State borders, and thus, contributes to the accumulation of judicial State practices leading to possible derogative customary international law rules. Cosnard also points out, in the context of universal jurisdiction, that “[l]e caractère fondamental d’une norme, dont *jus cogens* est le degré ultime, n’aurait donc d’autre fonction que d’en quelque sorte ‘doper’ la justification de l’établissement d’une compétence universelle.” Cosnard, *La compétence universelle en matière pénale*, in Tomuschat and Thouvenin (eds.), *op.cit.*, p.361. Delmas-Marty pointed out, in her lectures on the globalization of the law at the Collège de France, that, although cross-references among different municipal legal systems are still fluid and lack of consistency, the notion of *jus cogens* may play a role of stabilization for establishing the achievements of the globalization. Milleille Delmas-Marty, *Leçon du 6 février 2005 — Les processus de mise en ordre: entrecroisement. «Les forces imaginantes du droit — II: Le pluralisme ordonné»*.

## VI. *Substitute Effect for the Impossible Nullification of Municipal Law Rules*

According to Articles 40 and 41 of the draft articles on State responsibility, in the case of a serious breach of an obligation under a peremptory norm of general international law, States, among others, should not recognize as lawful a situation created by a serious breach nor render aid or assistance in maintaining that situation.<sup>54</sup>

First, these articles relate to a legal fact, as opposed to a legal act, arising from a serious breach of an international obligation. In this sense, these are in the same vein as Article 26, which I discussed in Section IV. Secondly, however, in contrast to Article 26, the proposed legal consequence here is a new obligation incumbent upon all States other than the responsible State for the serious breach. Thirdly, paragraph 2 of Article 40 indicates that a serious breach of an obligation means a gross and systematic failure by the responsible State to fulfill the obligation. This inevitably reminds us of the notion of “composite act” as defined in Article 15 of the draft articles.<sup>55</sup>

With respect to the obligation of non-recognition, Cassese argues that, referring to Security Council Resolution 662 (1990) of 9 August 1990, although it did not use the term *jus cogens*, it substantially relied upon this notion, for it clearly articulated the idea that the illegality of Iraqi occupation rendered the occupation legally invalid and all other States were bound not to recognize the annexation. With respect, Cassese’s argument is not without difficulty. First, the occupation, as such, was an internationally wrongful act and to that extent one could not talk about its validity or invalidity. Second, one could, on the contrary, talk about the invalidity of the internal order of the occupation probably made and signed by the then president, Saddam Hussein. But, generally speaking, international law is unable to render it directly invalid. The only thing international law can do is to compel the responsible State to render it invalid. Third, if, for the sake of argument, the Security Council could give, with its authority, plain effect to the declaration of null and void of the annexation, one cannot see why it is necessary to demand that all other States do not recognize the illegal situation. The bottom line is thus that the Security Council was unable, even with the binding effect of the resolution, to invalidate the order of Saddam Hussein in spite of its declaration of null and void. That is why the Security Council, in its Resolution 662, following the declaration of null and void of the annexation, needed, or was obliged, to call upon all States not to recognize the annexation and to demand Iraq rescind its actions purporting to annex Kuwait.<sup>56</sup>

From this perspective, one could consider, in my opinion, the legal consequences proposed

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<sup>54</sup> For texts of Articles 40 and 41 and the commentaries thereto, see A/56/10, 2001, pp.277-292. On the drafting history of the articles, see Buffard, Was wurde aus den internationalen Verbrechen?: “Serious Breaches of Obligations under Peremptory Norms of General International Law” als Erzatz für “International Crimes” im endgültigen Entwurf der ILC über die Staatenverantwortlichkeit, in Marboe/Reinisch/Wittich (Hrsg.) Österreichischer Völkerrechtstag 2001, *Favorita Papers 02/2002*, SS.144-166.

<sup>55</sup> See our argument on “composite obligation” in Section IV.

<sup>56</sup> In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case of 2004, the ICJ finds, in paragraph 163, that Israel is under an obligation to repeal or render ineffective forthwith all legislative and regulatory acts relating to the construction of the wall and that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction.

by the ILC in the case of a serious breach of a *jus cogens* obligation as a *substitute effect* for the non-applicability of international *jus cogens* to the internal legal acts including laws and orders. In other words, States are demanded not to recognize the illegal situation, not because *jus cogens* is applied, in its entirety, to internal legal acts, but precisely because it is not applied to them. The obligation of non-recognition on the part of all other States appears intent on preventing the illegal effect from spreading outside of the territory of the responsible State.<sup>57</sup> Within the territory, as we have seen above, the responsible State is requested, among others, to terminate or invalidate the laws or regulations in question.

## VII. *Conclusions*

We examined a variety of arguments on the legal effect of peremptory international rules beyond the original effect of “nullity” of a “treaty” “between States.”

First, with respect to international legal acts other than a treaty, a binding resolution of an organ of an international organization will be void, if it conflicts with a peremptory norm. A State cannot contract out from a customary obligation, even if it is not under a peremptory norm, by expressing unilaterally its will to derogate there from. If the unilateral declaration is followed by the acceptance of another State, an agreement between them emerges. If this agreement conflicts with a peremptory norm, it becomes void. Consent given by a State to the commission of a given act by another State, if it is construed as acceptance of a request by the latter, creates an agreement between them, by which they cannot derogate peremptory norms.

Secondly, with regard to the factual circumstances precluding wrongfulness in the field of State responsibility, it is safe to say that the wrongfulness of a State act is not precluded if it is not in conformity with a *jus cogens* obligation. However, according to my observation, this is not because the obligation in question has a peremptory nature, i.e. prohibition of contract out by an agreement, but because several other considerations, including the *erga omnes* nature of the obligation, essential nature of the interest to be protected by the obligation and composite type of the obligation eventually lead to the same conclusion.

Thirdly, as for the cases concerning universal jurisdiction, State or personal immunity and extradition or deportation before domestic courts and international courts, all matters at issue are not so much those of non-derogation from peremptory norms as those of derogation from relevant customary rules. Increasing reliance on *jus cogens* before domestic courts may accelerate the establishment of specific customary derogatory rules from principal rules on

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<sup>57</sup> Talmon indicates, in his interesting study on this subject, that non-recognition can operate only in cases of a factual situation that also takes the form of a legal claim (to statehood, territorial sovereignty, governmental capacity, etc.) intended to have *erga omnes* effect. In contrast, according to his observation, with regard to situations created by genocide, torture, crimes against humanity and other serious breaches of a *jus cogens* norm there is no practice of non-recognition because these situations do not automatically give rise to any legal consequences which are capable of being denied by other States. Talmon, *The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?* in Tomuschat and Thouvenin (eds.), *op.cit.*, p.120 and p.125. Christakis refers to the obligation on the part of all States to refuse recognition of all legal effects arising from internal laws and orders causing *jus cogens* violations. Christakis, *L’obligation de non-reconnaissance des situations créés par le recours illicite à la force ou d’autres actes enfreignant des règles fondamentales*, in Tomuschat and Thouvenin (eds.), *op.cit.*, pp.158-160.



exercising jurisdiction or on State and personal immunity.

Fourthly, it is said that, in the case of a serious breach of a peremptory obligation by a State, all other States are under an obligation not to recognize as lawful the situation created by that breach. The Security Council has issued resolutions with this effect more than once. However, in my opinion, to demand that all other States do not recognize the situation as lawful is nothing but the expression of the incapacity on the part of the international community to directly invalidate the laws and orders of the responsible State. It follows that the scope of the obligation remains a modest one to the effect that it attempts to prevent the illegal situation from spreading out from the territory of the responsible State.

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In this paper, I have adhered to the notion of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties because, I believe, the second *opinio juris*, i.e. *opinio juris cogentis*, presupposes that only one single legal effect is to be attached to the norm at issue as in the case of ordinary customary law rules. In the latter case it is the obligatory effect and in the case of *jus cogens* the nullification effect.<sup>58</sup> Having said this, I am not willing to deny the emerging concept of international public order<sup>59</sup> that is not (necessarily) based on the acknowledgement of limitations on the contractual autonomy of States but on the affirmation of several values essential to the peaceful coexistence of States or peoples in the international community.<sup>60</sup> Rather, I only hesitate in calling it *jus cogens*.

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<sup>58</sup> For most commentators, it is a matter of regret that the ICJ has been excessively cautious refraining from mentioning *jus cogens* in its jurisprudence. From my perspective, however, this is understandable because the Court have never been asked to solve a dispute directly involving the problem of the nullity of a treaty conflicting with a peremptory norm. For recent analysis of the ICJ jurisprudence, see Maia, *L'appel au droit impérative: Le jus cogens dans la jurisprudence de la Cour internationale de Justice*, in Apostolidis (Textes rassemblés par), *Les arrêts de la Cour internationale de Justice*, 2005, pp.123-138.

<sup>59</sup> It must be admitted that the concept of international public order itself is also not free from controversy. See Dupuy (René-Jean), *L'ordre public en droit international*, in Polin (sous la direction de), *L'ordre public*, 1996, pp. 103-116; Ruiz-Fabri, *L'ordre public en droit international*, in Redor (dir.), *L'ordre public: Ordre public ou ordres public: Ordre public et droits fondamentaux*, 2001, pp.85-108.

<sup>60</sup> Iovane, *La tutela dei valori fondamentali nel diritto internazionale*, 2000, p.59. In contrast, according to Kolb, the scope of *jus cogens* is much wider than that of fundamental norms in the sense that *jus cogens* is a legal technique aimed at maintaining the unity and integrity of certain legal regimes, that are found elsewhere in international law, including the institution of the ICJ that is based on the Statute of the Court. Kolb, *op.cit.*, passim.