ROMANIAN
JOURNAL OF INTERNATIONAL LAW

ISSN 2559 – 3846

JUS COGENS – Developments in International Law

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RJIL No. 16/2016

Pages 36-49

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***Abstract*:** *National and international courts, regional and specialized tribunals, all have used in their decisions, at first cautiously and with numerous explanations (related to Public International Law, fundamental rules of general interest or rules creating erga omnes obligations) and subsequently more boldly, the concept of peremptory rules and have come up with examples of such norms. Almost without exception, the doctrine has accepted the existence of peremptory rules (jus cogens) in International Law. The evolution of international practice, especially over the last decade, has led both to the recognition of the existence of peremptory rules and also to the clarification of numerous consequences resulting from the application of this concept in various fields of international law outside the law of treaties. Thus, in this context, the study of the developments in international law with regard to jus cogens norms it is a must.*

***Key-words**: international practice, jus cogens norms, erga omnes opposability, ICC.*

I. Introduction

As we have previously shown, the evolution of human rights norms has led to the definitive establishment of the concept of peremptory norms in international law.

In recent years, international bodies, State representatives, national and international tribunals have referred to the existence of peremptory norms in international law,[70] have come up with examples of such peremptory rules and have based their decisions on this concept and on norms that are perceived as being peremptory in nature.

As we well know, the first rules on this subject were incorporated in the 1969 Vienna Convention on the Law of Treaties, drafted by the International Law Commission (ILC), as part of its mission to codify and progressively develop international law, and subsequently adopted at the 1967 and 1969 Diplomatic Conferences held in Vienna. Peremptory norms were defined in articles 53 and 64 as rules accepted and recognized by the international community of states as a whole, from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The Convention also states that any treaty which, at the moment of its conclusion, conflicts with a peremptory rule is void, and any treaty in force which contradicts a new peremptory norm becomes void and is terminated. The Vienna Convention does not provide examples of peremptory norms, nor does it provide a list of criteria for distinguishing them from other rules of international law. In its Comments to the Draft Articles, the ILC presented as examples of peremptory norms the prohibition of using force or the threat of using force.

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[70] The first paper on this subject was written, on the basis of documents available in the 1960's, by a young Romanian PhD candidate at the Graduate Institute of International Studies in Geneva, under the direction of professors Paul Guggenheim, Michel Virally, Khristina Marek and Denise Bindchedler, it was presented in 1971 and published in Romanian in 1997, at the Romanian Academy Press. More papers followed, especially after 1990, taking into account the evolutions in international practice.

The 1969 Convention analyzes peremptory norms solely from the perspective of treaties and regulates their effects only in relation to existing or future treaties that may come into conflict with such rules. Other subsequent instruments of international law, adopted as a consequence of codification efforts undertaken by the ILC, address the effects of peremptory rules towards unilateral acts of States and the international responsibility of States and international organizations. Additionally, in many cases that have been examined by national courts, the relationship between peremptory norms and State immunity from jurisdiction has been discussed when analyzing cases concerning the civil responsibility of a State for damages caused to nationals of other States in the context of armed conflicts or outside such events.

The nullity of conventions that violate imperative rules is therefore not the only consequence of recognizing and enforcing peremptory norms. Whereas in the case of treaties contrary to such norms, the concept of *jus cogens* is mostly a preventive weapon (because in practice there are no known examples of treaties that derogate from such rules, and States are more likely to resort to unilateral acts of violation rather than treaties which would generate a strong opposition from most States), practice shows us that there are breaches of peremptory norms brought about by unilateral acts of some States, and also by illicit acts that generate international responsibility.

National and international courts, regional and specialized tribunals, all have used in their decisions, at first cautiously and with numerous explanations (related to public international law, fundamental rules of general interest or rules creating *erga omnes* obligations) and subsequently more boldly, the concept of peremptory rules and have come up with examples of such norms. The issue of jurisdictional competence was also debated, in cases concerning disputes between States on the application of rules seen as peremptory, with the aim of expanding the non-derogatory effect of peremptory rules to clauses of compulsory jurisdiction in cases involving the application of such rules.

II. On the Existence of Peremptory Norms in International Law

Almost without exception, the doctrine has accepted the existence of peremptory rules (*jus cogens*) in international law.[71] Even authors that have expressed doubts about the concept of *jus cogens* have accepted the fact that the prohibition of the use of force and the threat of the use of force is an imperative rule from which States cannot derogate in their mutual relations and that *jus cogens* applies not just to treaties but also to unilateral acts that violate such rules[72].

In decisions prior to the adoption of the 1969 Convention and also afterwards, the International Court of Justice has recognized the existence of such rules, even though some decisions used different formulations. Already in the Corfu Channel Case, the Court referred to obligations of the parties to take into account "elementary considerations of humanity, which are even more absolute in times of peace than in times of war".[73] In its Advisory Opinion on the Reservations made to the International Convention on the Prevention and Punishment of the Crime of Genocide, the Court argues that the "principles underlying the Convention … are recognized by civilized nations as binding for all States, even in the absence of any conventional

[71] Among many studies on this subject, we mention Grigore Geamănu, *Jus cogens en droit international contemporain*, published in the Revue roumaine d'etudes internationales, 1967, p. 87 and Ion Diaconu, *Normele imperative în dreptul internațional*, Academiei Press, 1977, Antonio Gomez Robledo, *Le Jus Cogens international, sa genese, sa nature, ses fonctions*, published in RCADI, 1981, volume 72; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, L. Kustannus Press, Helsinki, 1988, Maurizio Ragazzi, *The concept of international obligations Erga Omnes*, Clarendon Oxford Press, 1997; An opinion against peremptory rules, rather isolated, comes from Michael J. Glennon, *De l'absurdite du droit imperatif (jus cogens)*, published in RGDIP, 2006, no. 3.

[72] Olivier Deleau, *La position francaise à la Conference de Vienne sur le droit des traites*, published in AFDI, 1969, p. 7-23.

[73] CIJ Recueil 1949, p. 22.

relationship".[74] We find a clearer formulation of this position in the Court's decision taken in the "*Barcelona Traction*" Case where, after distinguishing between the duties of a State towards another State and the obligations towards the international community (which the Court sees as *erga omnes* obligations), the ICJ refers to "obligations that, in contemporary international law, derive for example from the prohibition of acts of aggression and genocide, and also from the principles and rules concerning the fundamental rights of individuals, such as the protection against slavery and racial discrimination".[75]

More recently, in the "Diplomatic and consular personnel of the US Embassy in Tehran" Case, the Court invoked the "fundamental character of the inviolability of the person of the diplomatic agent and the location of a diplomatic mission".[76]

After 1990, in a context where regional and national courts were faced more and more with the task of applying or respecting rules of international law, these courts have given more attention to the concept of peremptory rules in international law, either by acknowledging its effects in their legal order or by admitting the imperative nature of some rules.

Therefore, the European Court of Human Rights (ECHR) has examined a civil action against a foreign State accused of torture. A Kuwaiti national, Al-Adsani, sent an application to the ECHR, arguing against the decision of the United Kingdom judiciary, which rejected his action for claiming damages caused by acts of torture committed by Kuwaiti agents on grounds of the jurisdictional immunity enjoyed by the State of Kuwait. The claimant argued that State immunity, which was upheld in his case, violated the prohibition of torture, which is a peremptory rule of international law. The European Court of Human Rights recognized without any ambiguity the imperative character of the prohibition of torture, as a fundamentally important rule, with the value of a jus *cogens norm,*[77] quoting decisions by the Criminal Tribunal for the Former Yugoslavia and a decision of the UK Chamber of Lords in the Pinochet case. Nevertheless, the ECHR admitted the exception of immunity, considering that it does not concern the criminal responsibility of a person for acts of torture, but only a civil action for damages caused by torture committed on the territory of Kuwait. In a 2007 case, the ECHR stated that, in accordance with article 1 of the Convention on Genocide, the parties to that convention are obliged *erga omnes* to prevent and punish genocide, whose prohibition is a part of *jus cogens*" and that "national courts, taking into account the aim of the Convention... expressed particularly by this article, should not exclude their jurisdiction for punishing the crime of genocide in States that have laws establishing the principle of extraterritoriality… but (this action) must be considered reasonable and rather convincing".[78]

Independently, the Inter-American Human Rights Court, in its Advisory Opinion no.18 of September 17, 2003 on the legal status and rights of illegal migrant workers, assessed that the rule of equality under the law, enshrined in the Civil and Political Rights Covenant, creates *erga omnes* obligations for States towards migrant workers and has the nature of a jus *cogens norm*. The Inter-American Court states that *jus cogens* is not limited to treaty law, but also encompasses all legal acts and even the fundaments of international law.[79]

According to the Court opinion, the principle of equality and non-discrimination can be seen as a peremptory rule of international law, "because it applies to all States, regardless of them being parties to a treaty or not and generates effects towards third parties, including individuals". Consequently, "States… cannot

[74] CIJ, Recueil, 1951, p. 32.
[75] CIJ Recueil 1970, p. 32.
[76] CIJ Recueil 1980, §.86 and 91.
[77] ECHR, decision of November 21st 2001, §. 26.
[78] *Jorgic Case, Decision of July* 12th 2007, §. 68.
[79] *Advisory Opinion no.* 18, September 17th 2003, §. 99.

act contrary to the principle of equality and non-discrimination in a manner that causes damage to a defined group of individuals".[80]

In several of its decisions, the International Criminal Court for the Former Yugoslavia (created by Resolution no.827/05.05.1993, by the UN Security Council) has recognized as crimes of genocide, according to the 1950 Convention and the Tribunal's own statute, acts perpetrated against ethnic groups in Bosnia or Kosovo.[81] In the Furundzija Case, a chamber of the Tribunal had to decide whether acts carried out mostly against Bosnian women (threats, violent attacks and rapes) by a §military group involving at least one person who was a civil servant or acted as a *de facto* State organ (as provided by the Tribunal's statute) were acts of torture.

Establishing the existence of elements that constitute the crime of torture, just as in the Tadic and Celebic cases, the Tribunal condemned the accused for acts of torture and violations of dignity, including rape, as breaches of the laws and customs of war. In its motivation, the Court stated that the prohibition of torture imposes an *erga omnes* obligation on States and has gained the status of a peremptory rule of international law (*jus cogens*).[82]

In a similar fashion, the International Criminal Tribunal for Rwanda has tried crimes of violence, including sexual acts against women belonging to the Tutsi population (perceived as forming a distinct, stable and permanent ethnic group, despite sharing the same language and culture as the majority of the Rwandan population), and qualified such acts as genocide.

The Tribunal for Rwanda convicted Akayesu for genocide, including sexual violence, as part of a process of destroying the Tutsi ethnic group. The Court also acknowledged the fact that rape and other forms of sexual violence are themselves crimes against humanity[83] and that many of these acts are in fact acts of torture, using intimidation, degradation, humiliation, punishment, control and the destruction of a person.[84]

In a decision adopted on September 21, 2005, the General Court of the European Union (former Court of First Instance) had to determine the legality of an EU Council Regulation adopted in the implementation of a UN Security Council Resolution which asked States to take measures in order to freeze the assets and funds of individuals and organizations linked to Al-Qaeda and the Taliban Movement. The claimants, Kadi and the Al Barakaat International Foundation, affirmed that their fundamental human rights, and particularly their procedural rights to recourse and the right of ownership, had been breached by the EU. Although it declined its competence to control the legality of the regulation from the point of view of the general principles of EU law pertaining to human rights, the General Court nevertheless admitted that it was authorized to "incidentally control the legality of Security Council Resolutions from the perspective of *jus cogens*, seen as an international public order which is imposed on all subjects of international law, including UN organs, and from which no derogation is possible".[85]

The General Court exerted its control on the matter of respecting the prohibition of inhumane and degrading treatments and of the respect of the right of ownership and concluded that no fundamental *jus cogens* rights were breached.

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[80] Ibid, §. 100. We mentioned this advisory opinion because of the position taken in relation to the existence of peremptory norms in principle, without sharing the Inter-American Court's opinion on any of the rules it sees as being peremptory in its opinion.

[81] *Krstic Case* (Srebrenica), Decision of April 19, 2004.

[82] *Furundzija Case*, Decision of December 10th 1998, §. 151, 153; more information on the jurisprudence of the International Tribunal for the Former Yugoslavia can be found in: Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, published in AJIL, 1999, vol. 93, p. 57-97.

[83] *Akayesu*, ICTR No. 96/4, Decision of February 13, 1996, §. 733-736.

[84] .Ibid., §. 689; More information can be found in: Diane Marie Amman, *International decisions*, published in AJIL, vol. 93, 1999, p. 195-199. 5/3.Petitions no.T-306/01 and T-315/01, Decision of September 21, 2005, §. 277.

[85] Decisions no. 306/1, §. 277, 320, 339 and 344 and T 315/01, §. 226, 274, 284 and 289, restated in the *Decision concerning Ayadi and Hassan* of April 12, 2006, no. T 253/02 and T 49/04.

Nevertheless, the Court stated that, in relation to the UN Charter provisions, "the international law allows us to consider that there is a limit to the principle of compulsory effect of UN Security Council Resolutions; these acts have to respect the fundamental peremptory norms of *jus cogens*. Otherwise, as unlikely as it would seem, such acts would not be binding for the UN member States and for the European Community".[86] In its considerations, the Court formulates, just like the Inter-American Court of Human Rights (in the Caesar v. Trinidad and Tobago Case), the concept that the prohibition of inhumane and degrading treatments is a peremptory rule, and goes even further than the ECHR, which only considered the prohibition of torture as an imperative rule (the Al-Adsani Case).

Although the General Court's decision was overturned by the European Court of Justice after an appeal, which led to the repeal of the Council regulation as being in breach of fundamental human rights recognized by the EU (without exerting a direct control on the UN Security Council Resolutions and without making reference to peremptory norms), this decision is a clear statement on the existence of peremptory rules and, together with decisions by other regional tribunals, opened the way for judiciary control over the acts of States and other political organs, on the basis of rules seen as peremptory.

With regards to national courts, we note the fact that, in 1998, when judging the extradition of Augusto Pinochet, a panel of the House of Lords in the United Kingdom affirmed that the prohibition of the international crime of torture is a *jus cogens* rule of international law, subjected to universal jurisdiction. The existence of peremptory norms has been invoked in numerous situations, in order to reject claims of State immunity in cases where individuals have asked for damages from States in civil actions. Thus, the Italian Court of Cassation, in a number of cases (particularly the Ferrini Case of March 11, 2004) where damages from the German State were sought in relation to crimes committed by the German army at the end of World War II against Italian nationals, has rejected the exception of jurisdictional immunity of a State on the grounds of its inapplicability in the case of crimes against humanity, due to the preeminence of rules belonging to *jus cogens*, deemed to be superior.[87]

Greek courts have followed a similar judgment in cases such as the Voiotia Prefecture v Germany or the Distomo Prefecture v Germany,[88] where the *jus cogens* nature of the rules annexed to the Fourth Geneva Convention on the protection of victims of armed conflict was invoked. The New Zealand Supreme Court, while accepting the imperative character of the prohibition of torture, nevertheless refused to include among its constituting elements the prohibition of non-refoulement.[89]

Answering this evolution in the "Armed Activities on the Territory of the Congo" Case (D.R. of Congo v Rwanda), where the Congo tried to convince the Court that it is legally competent to apply the Convention (in order to reject the reservation of Rwanda to the article of the Convention that provided for the jurisdiction of the ICJ on disputes related to its applications), the International Court of Justice made a distinction between the peremptory rules of international law in general (*jus cogens*) and rules pertaining to its competence. The Court affirmed that the prohibition of genocide clearly has the character of an imperative rule, an aspect agreed upon by both parties, whereas its jurisdictional competence is based on the consent of the parties, which did not exist due to the reservation made by Rwanda[90]. This is the moment when it is considered that the ICJ explicitly and definitively recognized the existence of peremptory norms in international law.[91]

In other cases, the Court upheld the *erga omnes* opposability of the right of people to self-determination, remembering the fact that this principle is enshrined in

[86] Ibid, §. 281.
[87] Analysis by Carlo Focarelli in *Immunite des Etats et Jus Cogens*, published in RGDIP, 2008, no. 4, p.761-793.
[88] Described in AJIL, vol. 95, 2001, p. 198-201.
[89] Ibid, p. 779.
[90] .CIJ Recueil, 2006, §. 64.
[91] Phillippe Weckel, Guillaume Areou, *Chronique de jurisprudence internationale, Cour Internationale de Justice*, published in RGDIP no. 3/2006, p. 487-494.

the UN Charter and in the International Covenant on Civil and Political Rights from 1966.[92]

In the Advisory Opinion on "The Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory", the Court further stated that "this construction, which adds to measures previously taken, raises … a grave obstacle for the exercise by the Palestinian people of its right to self-determination and thus breaches Israel's obligation to respect this right".[93] Determining that the construction of the wall also violates human rights enshrined in the 1966 Covenant, the Court highlighted the fact that "Israel must abide by its obligation to respect the right to self-determination of the Palestinian people and its obligations under international humanitarian law and international human rights law".[94]

It is generally accepted nowadays that there are peremptory rules in international law, although there is no consensus on the norms that have such a nature, on the criteria for determining them or on the effects of such rules in various fields and institutions of international law.

As we have seen so far, international and national courts recognize the existence of *jus cogens* norms and provide several examples – such as, most frequently, the prohibition of genocide, torture or, less often, slavery and racial discrimination, the prohibition of the use of force or the threat of using force and the right of people to self-determination or violations of the norms of international humanitarian law – without justifying their choices and, sometimes incidentally, without establishing the consequences of these norms or arriving at different conclusions on the subject of these consequences.

In the context of analyzing the methods that could be used for distinguishing peremptory norms and their effects, one author addresses the deductive approach (without basing it on international practice), the semi-deductive approach (where some aspects of *jus cogens* are proven on the basis of international practice whereas other are deduced logically) and the inductive, empirical method, founded on the analysis of international practice. The author chooses the inductive approach, considering that the imperative character of a norm must be established on the basis of international practice and its recognition and acceptance by States, organs and international institutions as a rule from which States cannot derogate in their mutual relationships.[95]

He expands this method to the consequences of peremptory norms in various fields of international law.[96] By using this method, the author reaches the conclusion that peremptory norms are indistinguishable from customary rules, which are also established by examining international practice. In our opinion, the use of the same methods for determining the existence, content and effects of peremptory norms, based on evaluating international practice, is not an argument that should lead to the abovementioned conclusion, because the issue here is essentially to establish the imperative character of a rule that is already customary and/or conventional.

According to the definition found in article 53 of the Vienna Convention on the Law of Treaties, such a norm must be accepted and recognized by the international community as a whole as a rule from which States cannot derogate; the acceptance and recognition lead us directly towards international practice on the imperative nature of the norm, from which no derogation is possible and thus towards the inductive, empirical method. This does not mean that peremptory rules cannot be distinguished

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[92] *Advisory Opinion on the Namibia and Western Sahara*; the decision in the *Case of Western Timor, between Portugal and Australi*a, Recueil CIJ, 1995, §. 88.

[93] CIJ, Recueil 2004, §. 122; More details are provided by Phillippe Weckel, *Chronique de jurisprudence internationale*, published in RGDIP, no. 4/2004, p. 1017-1036.

[94] Ibid, §. 149.

[95] This method was proposed in 1971, in a PhD thesis presented before the Graduate Institute of International Studies in Geneva, and then reiterated by Ion Diaconu in his work, *Peremptory Norms in International Law*, which examines, as examples of such norms on the basis of international practice, the prohibition of the use of force and the threat of using force and the prohibition of slavery.

[96] Carlo Focarelli, in an article quoted above, p.780-785.

from other customary norms, from which States can derogate in their relationships with each other.

III. Jus Cogens and the Issue of Treaty Reservations

The concept of peremptory norms has been established in the process of codifying treaty law, which culminated with the adoption of the 1969 Vienna Convention on the Law of Treaties. This concept is defined by the Vienna Convention in relation to treaties that may derogate from peremptory norms, meaning that treaties contrary to imperative rules are void or cease their applicability once a new peremptory norm contrary to their provisions appears.

The convention does not discuss the relationship between reservations to multilateral treaties and peremptory rules. A treaty reservation is a unilateral declaration through which a State becoming party to an agreement aims to exclude or to modify in relation to itself the legal effects of certain treaty provisions. With regards to the institution of reservations, the 1969 Convention states that (in the case of treaties where reservations are not explicitly or implicitly prohibited) a reservation must not contradict the object and purpose of a treaty; in addition, it is provided that other States can accept a reservation or they can object to it (articles 20 and 21); if a State objects to a reservation, the clauses that form the object of the reservation and the change it creates shall not apply between the State that made the reservation and the one that objected; the objecting State can declare that the treaty shall not apply in its relations with the State that made a reservation. If all the States parties to a treaty object to a reservation, the State that made it shall not become party to that treaty.

From the point of view of peremptory norms, keeping in mind their importance and the fact that they are accepted and recognized as such by the international community, it is difficult to envisage that they could fall outside the object and purpose of a treaty. A reservation concerning a provision in a multilateral treaty expressing a peremptory norm would therefore be incompatible with the aim and purpose of a treaty, according to the fundamental norm. Thus, the Human Rights Committee affirms in its General Comment no.24, of 1994, that "the provisions of the Covenant that represent customary international law (and even more so the provisions that are imperative) cannot form the object of reservations.[97]

This conclusion is obvious due to the fact that, in itself, the formulation of a reservation aims to limit or exclude the application of a norm in relationships between States party to a treaty, and the acceptance of a reservation or the absence of an objection would mean the creation of a bilateral relationship contrary to peremptory norms between the State that made the reservation and the State or States that accepted or did not object to the reservation.[98]

Difficulties appeared because in various treaties and in international law in general there are no accepted procedures for establishing in an authoritative manner which reservations contradict the object and purpose of a treaty. The method of relying on objections does not solve this problem, as we have seen. The most important difficulties were encountered in the case of treaties concerning human rights, because the principle of the universality of human rights and freedoms is opposed to reservations that restrict the benefit of certain rights and liberties due to a unilateral decision adopted by a State. The central concern was, and still is, that more and more States need to respect these rights and liberties; therefore, the objections to reservations, very numerous in this field, do not aim to exclude the applicability of treaties in relation to States that make reservations, but to determine these States to reexamine and withdraw their reservations.

The Human Rights Committee affirms, in its general Observations, that a State cannot reserve the right to practice slavery or torture, or the right to subject people to

[97] Human Rights Committee, General Comment no. 24/1994, doc. HRI/GEN/1/Rev. 9(vol. I), p.249.
[98] See also Su Wei, *Reservations to treaties and some practical issues*, published in the Asian Yearbook of International Law, vol. 7, 1999, p. 133.

treatments or punishments that are cruel, inhumane or degrading, cannot arbitrarily deprive people of their right to life, nor can it arrest or detain them in an arbitrary manner, cannot deny their freedom of thought, conscience or religion and so on. The Committee recognizes nevertheless that not all of these rights (not even all the rights listed in article 4 of the Covenant) can be excluded from derogations, and that there is no automatic correlation between reservations that can affect the object and purpose of a treaty and reservations related to norms from which States cannot derogate, which are peremptory, and expressly adds that the prohibition of torture and the arbitrary violations of the right to life are peremptory norms.[99] Thus, it is not possible to confuse customary rules, as a whole, with *jus cogens* norms, far less numerous according to the definition given by the 1969 Vienna Convention and international practice.

Some regional courts (such as the ECHR), have the competence to appreciate the validity of reservations to treaties whose application they monitor, and can reject those reservations they deem unacceptable. Such competences are not recognized by other international treaties in this domain. Several committees created in order to supervise the application of treaties (the Human Rights Committee for the Covenant on Civil and Political Rights, for example, followed by other similar committees) have considered that their attributions to examine the application of treaties by States also include the evaluation of the validity of reservations made in relation to these treaties, and have ignored some reservations, considering the States that formulated them as being bound by all the provisions of the agreements concerned.

This conception has not been accepted by some State parties and by the International Law Commission. In a series of reports,[100] the ILC affirmed that a treaty reservation is an integral part of the ratification by the State making the reservation; an organ created for enforcing the application of human rights, created by that treaty, can assess if a reservation respects the object and purpose of the treaty, but its opinion on the matter has the same value as its conclusions on the respect of the treaty by the said State. Therefore, if that organ is competent to adopt binding decisions on the violation of the treaty by a State, then it also has the competence to declare as void a reservation and to ignore it (the case of the ECHR); if such an organ can only adopt opinions or recommendations concerning the respect of the treaty, then its conclusions on reservations will have the same legal value.

In 2011, the Commission adopted a Guide to Practice on Reservations to Treaties, which was presented in front of the UN General Assembly,[101] where it maintains its position expressed in the Preliminary Report. After stating the general rule of the inadmissibility of reservations that are incompatible with the object and purpose of a treaty, or that impact on an essential element of the treaty that is necessary for its proper functioning, thus affecting its *raison d'être*, the Guide affirms that a reservation to a provision that reflects an imperative rule of international law (*jus cogens*) will not affect the binding character of that rule, which will continue to apply between the State or organization that made the reservation and other States or international organizations.

Furthermore, a reservation cannot eliminate or modify the legal effects of a treaty in a way that contradicts an imperative norm. Although reservations to customary rules included in treaties are allowed, it is not possible to make reservations to provisions concerning rights from which no derogation is possible under any circumstance, except for the case when a reservation is compatible with the essential rights and obligations that result from the treaty.

A reservation that does not fulfill the conditions of form and admissibility is void and lacks any effects. Without questioning the place of peremptory norms in the

[99] General Comment 24/1994, doc. HRI/GEN/1/Rev. 9, vol. I, p. 250.

[100] The first such report was *Preliminary Conclusions on Reservations to Multilateral Normative Treaties, Including those concerning Human Rights*, Ass. Gen. Doc. Fifty-second session, Suppl. No. 10(A/52/10); the most recent was doc. A/CN.4/647 of May 26th 2011, presented in front of the UN General Assembly under Suppl. 10(A/66/10).

[101] Commission Report, presented in front of the UN General Assembly (doc. Suppl. 10(A/66/10)).

context of treaty reservations, the Guide clearly states that provisions containing peremptory norms cannot form the object of an admissible reservation.

On the subject of admissibility with regards to treaty reservations, the Guide envisages that treaty monitoring organs, in the exercise of their attributions, can carry out such an evaluation, but its value is that of the act that embodies the evaluation (that is, if the evaluation of the validity takes the form of a recommendation, then it will have the value of a recommendation). It provides that States which formulate reservations must pay attention to these evaluations. The Commission thus maintained its previous opinion that organs charged with surveying the application of treaties concerning human rights are not competent to repeal a reservation, if the documents that they can adopt have only the value of recommendations.

Both court decisions and the doctrine have intensely debated the validity of reservations to rules that provide for the compulsory jurisdiction of the ICJ or for the competence of other organs to receive and solve certain individual complaints concerning violations of human rights, particularly when there are also allegations of breaching peremptory rules.[102]

From a European perspective, in the Belios Case, the ECHR has established, in the name of European public order, the lack of validity of the Swiss reservation, seen as contrary to the 1950 Convention, and in 1995, in the Loisidou Case, the ECHR also repealed the *ratione loci* and *ratione materiae* restrictions adopted by Turkey with regards to the application of the Convention on the Northern Cyprus.[103]

The Human Rights Committee examined the Kennedy v Trinidad and Tobago Case, where the State formulated a reservation to Protocol no.1 of the International Covenant on Civil and Political Rights and rejected the right of the Committee to examine complaints originating from detainees sentenced to death. The Committee declared that this reservation was incompatible with the object and purpose of the Protocol and se§ted it from the ratification act, and then proceeded to examine the substance of the complaint.[104]

In the same general direction, the Inter-American Human Rights Court, in the Ivcher Bronstein Case, refused to approve the withdrawal of the acceptance of the optional clause concerning the jurisdiction of the Court, based on the authority of treaties on human rights, which imply the adhesion of States to common and superior values that would entail a special regime for clauses on jurisdiction, clauses that cannot be subsequently affected by unilateral acts of States.[105]

A different solution was given by the ICJ in the "Armed Activities on the territory of the Congo" Case, where Rwanda invoked its reservation concerning the clause imposing the compulsory jurisdiction of ICJ for disputes related to the Genocide Convention, and the Congo rejected this reservation, claiming it was contrary to *jus cogens* norms. The Court maintained its position in the 1951 Advisory Opinion on the reservations to the Genocide Convention, which was that these reservations are not incompatible with the object and purpose of treaties, and therefore has not addressed the relationship between compulsory jurisdiction and the application of peremptory norms incorporated in treaties.[106]

On this matter, the Guide o Practice to Reservations on Treaties, adopted by the International Law Commission, establishes that reservations on provisions that establish mechanisms of dispute settlement or for monitoring treaty application are not automatically incompatible with the object and purpose of a treaty, except for cases when these exceptions aim to exclude and modify the legal effects of an essential

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[102] More details on this subject can be found in Gerard Cohen-Jonathan, *Les réserves dans les traites institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux*, published in RGDIP, 1996, no. 4, p. 915-948.

[103] The *Belios Case*, Decision of April 29th 1988, presented by Vincent Berger, ECHR Case Law,4th edition, 2002, IRDO, p. 182-185; the *Loisidou Case,* Decision of March 23, 1995, A series, no. 310.

[104] Communication no. 845/1999, CCPR/C67/D/845/1999-31-12-1999

[105] Decision of September 24th 1999 on competence; C series, no. 54.

[106] On this subject: Ph. Weckel and G. Areou, *Chronique de jurisprudence internationale*, published in RGDIP, 2006, no. 3, p. 487-497.

provision for a treaty's *raison d'être*, or aim to eliminate the application of a settlement or surveillance mechanism that is the objet itself of a treaty.

IV. The Relationship between Unilateral Acts and Peremptory Norms

The problem of unilateral acts was addressed by the activities of the ILC in 1996.

The result was that in international law, there are clearly numerous unilateral acts that intervene in the process of concluding, applying, suspending or terminating a treaty (or, for example, in the process of establishing the extent of the territorial sea, up to a distance of 12 nautical miles); these acts are analyzed in the context of the law of treaties, as provided by the 1969 Vienna Convention. Naturally, reservations made in relation to multilateral treaties are still unilateral acts, but we approached to them from the standpoint of their relationship with imperative norms.

The breaches of peremptory rules by actions or omissions of States or international organizations (as a manifestation of their behavior) can also be classified in the general concept of unilateral acts, but the relationship between them, as illicit acts, and peremptory rules is treated as an aspect pertaining to the issue of international responsibility. Other unilateral acts are the public declarations by which States (as a manifestation of their will), express their obligations that can be in contradiction with peremptory norms.

Taking into account the different views and the complexity of this subject, the ILC decided in 2004 to prioritize the study of unilateral acts taking the form of public declarations as an expression of the will to assume obligations in accordance with international law. Consequently, the Commission adopted in 2006 the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which were presented in 2007 before the UN General Assembly. The adopted document states from the beginning that public declarations through which a State manifests its will to be bound by an obligation have the effect of creating a legal obligation.[107] After a brief presentation of the formal conditions for a unilateral act, the Guiding Principles affirm that a unilateral declaration which comes into conflict with an imperative norm of international law is void. In the "Armed Activities on the Territory of the Congo" Case, the ICJ did not exclude the possibility that a unilateral declaration by Rwanda could be invalidated because it violated a peremptory norm, but it appreciated that it was not the case.[108]

V. Peremptory Norms and the State's Immunity from jurisdiction

Several national and international jurisdictions have been faced with solving cases where peremptory or customary international law rules were violated, in order to obtain civil re§tions for damages suffered by individuals. The accused States invoked their immunity from jurisdiction. Some courts gave rejected this exception, as being contrary to the peremptory norm invoked by the claimants; others have accepted it, and limited themselves to discussions on procedural admissibility, without entering the substance of the case.

Greek courts were the first to adopt a restrictive view on immunity, denying Germany its immunity for acts committed by the German army during World War II. Thus, in the Voiotia Prefecture v Germany Case of 2000,[109] the Greek Supreme Court

[107] The Commission started from the ICJ's *obiter dictum* in the *Nuclear Tests Case of 1974*, where it retained the official declaration of the French President on the cessation of atmospheric nuclear tests, and also the Egyptian declaration on the Suez Canal, from 1957.

[108] *R.D. Congo c. Rwanda*, Jurisdiction and Admissibility, Recueil 2002, §. 69.

[109] *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 11/2000, decision of May 4, 2000, presented in International Decisions, AJIL, vol. 93, 2001, p. 198-204; A critical approach by Carlo Focarelli can be found in an article previously quoted, p. 766-780 and in Christian Tomuschat,

judged a petition by the German State against a decision adopted by the Livadia district court, which granted monetary compensation for the atrocities committed by German occupying forces in the village of Distomo in June 1944. The Supreme Court invoked the European Convention on State Immunity of 1972, according to which a State cannot pretend immunity for acts that cause damage to the physical integrity of individuals or private property, and referred to decisions of US courts on the basis of a 1996 amendment to the 1976 Foreign Sovereign Immunities Act, which denied immunity for States in cases when an individual tried to obtain monetary compensation for damages provoked by torture (the *Letelier v. Chile* and *Liu v. the People's Republic of China* cases).[110]

The Greek court considered that the acts perpetrated by Germany amounted to crimes against humanity and were in breach of peremptory norms of international law, and therefore could not be covered by State immunity. Furthermore, the Italian Court of Cassation reaffirmed in 2008 the conclusion it reached in a preliminary decision back in 2004 in the Ferrini Case (a complaint of an Italian national deported to Germany during World War II and forced to work in a weapons factory while being subjected to inhumane treatment), that a State which has committed an international crime does not have the right to immunity from jurisdiction, and affirms the preeminence of peremptory norms over other norms of international law.[111]

On the contrary, in the *Al-Adsani v. the United Kingdom* Case, after British courts rejected a request by a Kuwaiti national to receive compensation for acts of torture he endured in Kuwait for reasons of State immunity, the ECHR recognized the imperative character of the prohibition of torture, but refused to remove the immunity from jurisdiction of a State in the case of a civil action in front of a court of a State other than the one where the crimes took place. The Court considered that there is no rule of international law on the waiver of State immunity in the case of civil actions.[112] Furthermore, in the *Jones* Case, the House of Lords (the Supreme Court in the United Kingdom) excluded the waiver of immunity of the plaintiff State as an effect of the imperative character of the prohibition of torture.[113]

In the Yerodia Case ("*Arrest Warrant Case* of April 11, 2000, *D.R. of Congo v. Belgium*), where Belgium invoked the involvement of the Congolese foreign affairs minister in the perpetration of war crimes and crimes against humanity, in violation of peremptory norms and the Democratic Republic of Congo relied upon the immunity of jurisdiction of its minister, the International Court of Justice accepted the existence of a full immunity from jurisdiction for the minister of foreign affairs, resulting from his mission as a representative of the State. In their opinions, some judges rejected this thesis and claimed that the minister's immunity from jurisdiction is not an imperative rule.[114]

VI. Peremptory Norms and International Responsibility

As a result of accepting and recognizing peremptory norms as rules from which States cannot derogate in their relations with one another, these rules have different effects in the context of State responsibility for illicit acts.

We are also referring to the responsibility of international organizations, as subjects of international law, when they commit illicit acts. Of course, the illicit act is

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L'immunite des Etats en cas de violation grave des droits de l'homme, published in RGDIP, 2005/1, p. 51-73.

[110] Quoted in AJIL, vol. 93, 2001, p. 199.

[111] Presented by Carlo Focarelli, in the article previously quoted. p. 765-773.

[112] Decision of November 21st 2001, detailed and criticized in *Chronique de jurisprudence internatinale*, published in RGDIP, 2002, p. 178-182; Judges supporting the minority opinion claimed that peremptory rules eliminate the application of rules on jurisdictional immunity, voiding it of legal effects.

[113] *Jones c. Ministry of Interior of the Kingdom of Saudi Arabia*, presented in AJIL, vol. 100, 2006, p. 910-908.

[114] Presented in AJIL vol. 96/2002, p. 677-684.

defined in the same manner when it comes to the violation of a prescriptive rule or in the case of a peremptory rule, that is the act must constitute a behavior attributable to a State (or international organization) in accordance with international law and it must represent a breach of an international obligation assumed by the said subject. The codification of rules on international responsibility carried out by the ILC[115] has led to the conclusion that the consequences of an illicit act are different when a peremptory norm is breached, due to the importance of these rules as provisions from which no derogation is allowed.

Therefore, if an act is in contradiction with an imperative rule of international law, its illicit character cannot be eliminated through the consent of the victim State, by invoking self defense, by describing the act as a countermeasure towards an illicit act carried out by another State, by invoking *force majeure*, a calamity or a state of necessity. It is obvious that, by invoking such causes, it would be possible to derogate from peremptory rules, which contradicts their very nature.

The rules drafted by the ILC as a result of its codifying and progressive development efforts in the field of international law include a chapter on grave breaches of peremptory norms, which presents the special consequences brought about by such illicit acts. These grave breaches are described as flagrant or systematic failures of States to fulfill their obligations.

Special consequences result from such violations:

- The obligation of States to cooperate in order to put an end through legal means to any such grave breach.
- The obligation of States not to recognize as legal a situation created by a grave violation, nor to help or assist the perpetuation of such a situation.

Additionally, the responsibility of a State can be invoked by any other State for breaching an obligation towards the international community as a whole in the case of a peremptory norm.

Rules of responsibility for international organizations are not different from those described above, but are formulated in more concise terms, by taking into account their specificity as derived subjects of international law.

With regards to countermeasures as actions in reaction to an illicit act, existing norms provide that these countermeasures cannot affect: the obligation of States to refrain from resorting to the use of force, the obligations concerning the protection of fundamental human rights, the humanitarian obligations that prohibit reprisals and other duties derived from peremptory international law rules. Without mentioning the obligations pertaining to the protection of human rights or the humanitarian law obligations that prohibit reprisals, the adopted rules do not exclude countermeasures that breach such rules as a consequence of peremptory norms, but do not limit the sphere of these rules to the ones stated previously. Therefore, even if an illicit act represents a violation of peremptory rules, countermeasures that derogate from peremptory rules themselves are not allowed.

VII. Conclusions

The evolution of international practice, especially over the last decade, has led both to the recognition of the existence of peremptory rules and also to the clarification of numerous consequences resulting from the application of this concept in various fields of international law outside the law of treaties. Of course, not all aspects derived from various documents and decisions meet the necessary degree of consensus or are uncontested, but this is the road towards the crystallization of an international practice and the adoption of international law rules.

[115] ILC Report on the responsibility of states, doc. Suppl. No. 10(A/56/10), rules adopted through Resolution no.56/83 of the UN General Assembly of December 12th 2001; Report on the international responsibility of international organizations, doc. Suppl. No. 10(A/66/10), adopted by the UN General Assembly through Resolution no. 66/10 of December 9, 2011.

The nullity of international treaties contrary to peremptory norms is generally acknowledged; a number of rules have been recognized as peremptory; for other norms cited in this study, opinion is divided and international practice is not uniform. In addition, international practice varies on the consequences of peremptory rules, usually not in relation to their effects on contrary norms, concerning their content, but mostly in the relationship between imperative norms and other rules with which they may compete, such as rules on the competence of international tribunals with compulsory jurisdiction or treaty monitoring organs, and also rules on State immunity from jurisdiction in the case of States committing breaches of norms considered to be peremptory in nature.

Clearer are the consequences of peremptory rules regarding unilateral acts, as manifestations of intention through which States assume certain international obligations, which are void if they breach imperative rules, and also regarding the international responsibility of States, where a State's responsibility cannot be exonerated for violations of peremptory rules and countermeasures cannot be applied when they represent a violation of imperative rules. Procedurally, any State can invoke international responsibility and the obligation to cooperate for eliminating the consequences of breaching a peremptory norm, and there is also an obligation of abstaining from recognizing as legal the consequences of such a breach.

Also these domains contain rules that have been created in the context of the recent codification of international law, and these rules have yet to pass the test of international practice.

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