The Intervention in The Light of the Provisions of Serious Breach of Jus Cogens

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Abstract

The first-reading approval by the International Law Commission of the draft conclusions on 'Peremptory Norms of General International Law' re-proposes the debate on serious breaches under Arts 40 and 41 of the draft Arts on responsibility of the States in 2001.

The aim of the analysis is a careful investigation to identify repercussions in the international legal system and, in particular, the progressive development of a norm that allows the international community to take action in order to put an end to a serious breach.

I. Introduction

The first-reading approval by the International Law Commission (hereafter, ILC) of the draft conclusions on 'Peremptory Norms of General International Law'[1] has raised the interest of the UN General Assembly which, in its recent resolution of 15 December 2020, urged States to respect the approaching deadline of 30 June 2021 for the purpose of delivering comments and observations.[2]

Received from various States, the aforementioned observations were then analyzed in the fifth report of the ILC approved in the 73rd session of 2022.[3]

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[1] See the draft of conclusions on 'Peremptory norms of general international law (jus cogens)' (A/CN.4/L.936) approved in first reading in the 71st session of the International Law Commission (Geneva, 29 April - 7 June and 8 July - 9 August 2019).

[2] See Resolution 75/135 adopted by the General Assembly on 15 December 2020, Report of the International Law Commission on the work of its seventy-second session, A/RES/75/135. Due to the difficult situation arising from the ongoing pandemic, the deadline given has been respected only by the Dutch government. As evidence of the significant interest of the States in the matter, comments were received from Australia, Austria, Belgium, Colombia, Cyprus, Czech Republic, Denmark, El Salvador, France, Germany, Israel, Italy, Japan, Poland, Portugal, Russian Federation, Singapore, Slovenia, South Africa, Spain, Switzerland, United Kingdom and United States of America.

[3] See Fifth report on peremptory norms of general international law (jus cogens) by D. Tladi, 'Special Rapporteur approved by the International Law Commission in the 73rd session' (Geneva, 18 April - 3 June and 4 July - 5 August 2022), available at https://legal.un.org/docs/?symbol=A/CN.4/747 (last visited 1 May 2022)

Such insistent action by the United Nations provides the basis for resuming the discussion of the differentiation between particular cases prohibited by the international system and the possible lawfulness of the International Community's reactions, in particular in cases where they are the consequence of a serious violation of the *ius cogens*.

This instrument, which found its first definition in Arts 40 and 41 of the draft Arts on responsibility of the States in 2001, is re-proposed in conclusion 19.

The aim of the analysis is a careful investigation to identify repercussions in the international legal system and, in particular, the progressive development of a norm that allows the international community to take action in order to put an end to a serious breach.

II. From International Crimes to Serious Breaches of Peremptory Norms

The ILC first took up the issue in the 1950s when, in undertaking the responsibility study, it focused its attention on developing a text that would provide for the institution of international crimes, constructed as a category of infraction more serious than simple *delicts*.[4] To this end, in 1976 Special Rapporteur Ago presented the text of Art 18 that regulated crimes as distinct cases of international violations.[5]

[4] Thus, Special Rapporteur Ago, in the fifth report, observed that: '*l'opération à laquelle il s'agit de procéder maintenant nous amène inévitablement à prendre en considération le contenu des obligations primaires du droit international … Il ne saurait en être autrement puisque c'est fonction du contenu desdites obligations qu'il s'agit d'établir les différentes catégories d'infractions*' (*Annuaires de la Commission du droit international*, 1976, II, 1, 3).

[5] Pursuant to Art 18 of the draft presented by Special Rapporteur Ago (*Yearbook of the International Law Commission*, 1976, II, 1, 3):

La violation par un État d'une obligation internationale existant à sa charge est un fait internationalement illicite quel que soit le contenu de l'obligation violée.

La violation par un Etat d'une obligation internationale étaible aux fins du maintien de la paix et de la sécurité internationales, et notamment la violation par un Etat de l'interdiction de recourir à la menace ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique d'un autre Etat, est un 'crime international'.

Est également un crime international la violation grave par un Etat d'une obligation internationale établie par une norme de droit international général acceptée et reconnue comme essentielle par la communauté internationale dans son ensemble et ayant pour objet:

le respect du principe de l'égalité de droit de peuples et de leur droit à disposer d'eux-mêmes ; ou

le respect des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion; ou

la conservation et la libre jouissance pour tous d'un bien commun de l'Humanité.

On the different positions between Anzilotti and Ago, cf G. Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' 13 *European Journal of International Law*, 1083 (2002), which explains that: 'Conceptually, Anzilotti's and Ago's positions seem to be diametrically opposed: while Anzilotti does not grade violations of international law

In fact, the definition 'crime' and the configuration of the figures in which it took concrete form immediately sparked a quite lively doctrinal debate concerning the possibility, in international law, of envisaging the criminal responsibility of States.[6] Some authors argued that international law did not differ from its domestic counterparts aside from being less developed. They furthermore claimed that, even in such a system there should be, in addition to a liability that we might define as civil, also a criminal liability.[7] The clear inclination of followers of such an orientation toward the affirmation of two different profiles of responsibility, modeled on national law systems, led some scholars to identify the commission of a crime as a violation of the international order, rather than against one or more parties.

Despite the opinions to which we have just alluded, the ILC adopted a collection of measures (Art 18 of the 1976 draft) regarding the institution of international crimes. With such an institution, a classification of international violations was established for the first time, distinguishing serious crimes from simple delicts. The latter notion would take concrete form in the breach of obligations established to protect the fundamental interests of the international community as a whole. More precisely, para 1 established the general principle

according to their gravity, Ago differentiates between delicts and (more serious) crimes. While Anzilotti only admits violations of obligations between two or more particular states as giving rise to responsibility under international law, Ago also postulates obligations towards the international community of states as a whole'.

[6] See M. Mohr, 'The ILC's Distinction between International Crime and International Delicts and its Applications', in M. Spinedi and B. Simma eds, *United Nations Codification of State Responsibility* (New York: Oceana Publications Inc, 1987) 115; M. Spinedi, 'International Crimes of States: The Legislative History, in J.H.Weiler, A. Cassese, M. Spinedi ed (Berlin-New York: De Gruyter, 1989), 7; G. Gilbert, 'The Criminal Responsibility of States 39 *The International and Comparative Law Quarterly*, 345 (1990); K. Kawasaki, 'Crimes of State in International Law' *Shudo Law Review*, 27 (1993); G. Palmisano, 'Les causes d'aggravation de la responsabilité des Etats et la distinction entre 'crimes' et 'délits' internationaux' 98 *Revue générale de droit international public*, 629 (1994); O. Triffterer, 'Prosecution of States for Crimes of State' 67 *Review of Penal Law Volume*, 341 (1996); N. Jørgensen, 'A Reappraisal of Punitive Damages in International Law' 68 *British Year Book of International Law*, 247 (1997); D.W. Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *European Journal of International Law*, 163 (1998); S. Rosenne, 'State Responsibility and International Crimes: Further Reflection on Art 19 of the Draft Articles on State Responsibility' 30 *New York University Journal of International Law and Politics*, 145 (1998); G. Abi-Saab, 'The Uses of Article 19' 10 *European Journal of International Law*, 339 (1999); G. Gaja, 'Should All References to International Crimes Disappear from the International Law Commission Draft Articles on State Responsibility?', 10 *European Journal of International Law*, 365 (1999).

[7] For the exponents of this doctrine the international legal system does not include a criminal jurisdiction merely due to its relative youth and it is therefore the responsibility of legal scholarship to work in that direction. It appears obvious in light of these premises that these scholars welcomed with great satisfaction the distinction, proposed by the codification commission, between crimes and delicts. We may recall some of the principal exponents of the penal doctrine: P.N. Drost, *The Crime of the State* (Leyden: A.W. Sythoff), 1959; S. Glaser, *Droit international pénal conventionnel* (Bruxelles: E. Bruylant), 1970.

according to which a state's breach of an effective international obligation is an international offense, regardless of the content of the obligation violated. Para 2 dealt with defining the archetype of the crime consisting in a state's breach of an international obligation aimed at maintaining peace and international security and, particularly, in the breach of the ban on the threat or use of force against another State's territorial integrity or political independence. Lastly, para 3 described other potential crimes, such as serious breaches of norms of general international law accepted and recognized as essential by the international community as a whole.[8] The norm's formulation was the subject of much debate in the Commission, as the majority of members held that the reference to the seriousness of the act as the constituent element of an international crime, ought to be eliminated.[9] Indeed, according to the reported position, the qualification of an act as an international crime would have to be based exclusively on the nature of the obligation breached, without taking into account the nature or mode of the breach itself.

This formulation was not included in the final draft of the measure, adopted by the ILC in 1980 in Art 19,[10] where the requirement of the

[8] In particular, on the basis of the measure cited, such crimes included the failure to: respect the principle of the equality of peoples and their right to self-determination; respect the rights of man and fundamental freedoms, without distinction of race, sex, language or religion; and to preserve and permit the free enjoyment of any of humanity's common possessions.

[9] Such were the positions of Vallat: 'in categorizing an act as a crime, the pertinent factor is the nature of a particular obligation'*;* Ouchakov: 'the characterization of an internationally wrongful act depends not on the seriousness of the breach, but the importance of the obligation breached, in other words, the interest protected by the obligation'; as well as Quentin-Baxter: 'in distinguishing between the regimes of responsibility and in dealing with the higher order of breaches, the imprecise word serious could be eliminated by speaking of a breach by a State of an international obligation that constituted an offence because it was a breach of an *erga omnes* obligation'. For the aforementioned opinions, see *Yearbook of the International Law Commission*, I, 69, 73, 80 (1976).

[10] Pursuant to Art 19 of the Draft on State Responsibility (text approved in first reading by the Commission in the twenty-eighth session from 3 May to 23 July 1976 in *Yearbook of the International Law Commission*, II, 2, 30 (1980)), entitled 'International Crimes and International Delicts'

1. An act of a State which constitutes a breach of international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia from:

a) a serious breach of international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

b) a serious breach of international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and

seriousness of the conduct, removed in the general provision, reemerged in reference to the single cases constituting a crime, such as 'serious breaches' of the ban on using armed force, of the right to external self-determination, of human rights and of norms implemented to protect the environment. That notwithstanding, part of the doctrine had argued that the term 'serious breach', used in the list of potential crimes, served merely to reinforce the value of the possession being safeguarded, identified in the protection of the fundamental interests of the international community as a whole and, therefore, was not a constituent, autonomous, and adjunctive element of an international crime.[11] Moreover, to clarify the definition, which, for that matter, was quite imprecise, of the legal possession violated, described as a fundamental interest of the international community, a list of example of such crimes was supplied (para 3). All other offenses, which we might term 'minor', were attributed the traditional denomination of international delicts (para 4).

While Art 19 finally clarified the specific cases constituting an international crime, it still seemed apt to specify what consequences were to result from such infractions as well. In 1982, following the positions previously expressed by Ago, Special Rapporteur Riphagen presented to the ILC the text of the second part of the draft in which, in Art 14, those consequences were finally articulated.[12]

apartheid;

d) a serious breach of international obligation of essential importance for safeguarding and preservations of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance whit paragraph 2, constitutes an international delict.

[11] So, argues G. Carella, *La responsabilità dello Stato per i crimini internazionali* (Napoli: Jovene, 1985), 250, who explains: 'the seriousness of the breach required by art. 19, par. 3, is not to be understood in its own right, as a concept distinct from the importance of the obligation breached, but as a means of reinforcing the importance of the content'. He continues '… given a correct understanding of the *erga omnes* obligations, it must be agreed that their breach is serious in and of itself' 'the introduction of the requirement of seriousness appears inopportune because it would make the notion of a crime relative and uncertain. Indeed, the breach of a single obligation would be a crime or not depending on the de facto circumstances with the consequence that, in the absence of an institutional structure competent to formulate a judgment on its seriousness according to objective criteria, the application of the regime of more serious responsibility would left to States' subjective evaluations …' and 'as there are no occurrences of the practice from which the requirement of seriousness arises, the introduction of it is not useful, nor appears opportune'.

[12] Pursuant to Art 14 of the draft of Special Rapporteur Riphagen (*Yearbook of the International Law Commission*, II, 2, 21 (1985)),

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

a) not to recognize as legal the situation created by such time; and

b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

c) to join other States in affording mutual assistance in carrying out the obligations under

By virtue of that measure, States were required to: not recognize situations arising from the infraction; lend no assistance or aid to the offending State; cooperate to foster compliance with the cited obligations. The norm contained an implicit clause of subordination *vis-à-vis* the collective security system, as regulated by Arts 41 and 42 ff of the UN Charter,[13] establishing that consequences deriving from it were subordinated to the Charter's procedures aimed at maintaining international peace and security.

The definitive text of the measures regulating the consequences of such crimes finally appeared only in 1996, presented by Special Rapporteur Arangio Ruiz, and contained no significant modifications except the elimination of the clause subordinating the cited measures to the UN security system.[14]

sub paragraphs a) and b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligation arising under paragraph 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respects to the maintenance of international peace and security.

4. Subject to Art 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paras 1, 2, and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

[13] Pursuant to Art 41 of the UN Charter,

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Pursuant to Art 42 of the UN Charter,

Should the Security Council consider that measures provided for in Art 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[14] In the draft approved in first reading in 1996, the numeration was modified as well. Consequences of crimes, in fact, were discussed in Arts 51, 52 and 53, Ch. V of part II.

Pursuant to Art 51 of the Draft on State Responsibility (*Yearbook of the International Law Commission*, II, 2, 64 (1996)), entitled 'Consequences of an International Crime'

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Arts 52 and 53.

Pursuant to Art 52 of the Draft on State Responsibility, entitled 'Specific Consequences'

Where an internationally wrongful act of a State is an international crime:

a) An injured State's entitlement to obtain restitution in kind is not subject to the limitation set out in subparagraphs c) and d) of Art 43;

b) An injured State's entitlement to obtain satisfaction is not subject to the restriction in para 3 of Art 45.

Pursuant to Art 53 of the Draft on State Responsibility (1996), entitled 'Obligations for all States'.

An international crime committed by a State entails an obligation for every other State:

a) Not to recognize as lawful the situation created by the crime;

b) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

Nevertheless, roughly twenty years after its first appearance, Art 19 was removed from the most recent version of the Draft on State Responsibility, prepared by Special Rapporteur Crawford and approved by the ILC in its 53rd session in 2001.

In this normative text the definition of 'international crime' disappeared, definitively making way for 'serious breaches' of the peremptory norms regulated by Arts 40 and 41.

Given, however, that the responsibility regime linked to their breach substantially overlapped with the one already laid down in Arts 51-53 of the 1996 version, it appeared evident that Crawford had merely aimed to overcome the 'static' description of cases that would permit a collective reaction, identifying them, rather, *per relationem,* in reference to peremptory international norms.

This also provides an explanation for the ILC's choice to insert 'serious breaches' in part II of the Draft, in relation to the consequences resulting from the commission of an internationally wrongful act, unlike Art 19 which, on the other hand, had been positioned in the first part concerning the origins of international responsibility. The extreme difficulty the ILC encountered in convincing the generality of States to accept the principle of the existence of a fundamental norm of international law that established a hierarchy of international obligations seems to have led it to avoid taking an express position on the existence of the same. The extreme delicacy of the question had thus induced Special Rapporteur Crawford to focus his attention not on affirming a general principle for differentiating the types of conduct from which international responsibility derives, but on the creation of a *regime of aggravated responsibility* as a consequence of the commission of a serious breach[15] of international peremptory norms.[16]

Such a solution was clearly preferrable, due in part to the meager 'success' that the institution of crimes had had within the international community, since

c) To cooperate with the other States in carrying out the obligations under subparagraphs a) and b); and

d) To cooperate with the other States in the application of measures designed to eliminate the consequences of crime.

[15] J. Crawford, J. Peel and S. Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' 12 *European Journal of International Law*, 977 (2001): 'In 2000, the Special Rapporteur proposed and the Commission accepted a compromise whereby the concept of international crimes of States would be deleted, and with it article [19], but that certain special consequences would be specified as applicable to a serious breach of an obligation owed to the international community as a whole'.

[16] Pursuant to Art 40 of the Draft on State Responsibility, 2001 (*International Law Commission Report* on 53rd Session, UN. Doc. A/56/10), entitled: 'Application of this Chapter'

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

it did not presume to provide for the specific types of conduct that were supposed to elicit States' reaction, but instead connected them to the breach of norms generally accepted by actors on the international stage as bearers of the system's foundational and irrevocable values.

To conclude this brief digression, the innovative character of the recent draft of conclusions on *jus cogens* is plain to see, providing as it does, even if in an apparently non-programmatic manner, a completion of the regulation of serious breaches when in conclusion 23 it specifies:

> 'Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions'.

It seems, therefore, that through the combination of Arts 40 and 41 of the draft and the list enclosed with the conclusions, the Commission backtracked in order to identify, even if *ratione temporis*, the types of criminal conduct to which the international system attributes particular relevance, distinguishing them from simple breaches of international law.

Such an intent is visible in the words of Special Rapporteur Tladi himself who, in his report to the G.A., was forced to admit that, owing to the unique nature of the matter, the Commission, in identifying norms to insert in the list, had begun from those considered to be of a binding nature in the commentaries on Art 50 of the draft of Arts on treaty law and in Art 26 and 40 of that on State responsibility.[17]

III. The Importance of Identifying Peremptory Norms in Order to Give Concreteness to the Regime of Aggravated Responsibility

Completing the regulations on serious breaches appears even more relevant when we consider that doctrine, ever since the first version of the draft on State responsibility, has already broadly explored the question of the relationship between crimes and peremptory norms. Even if it seemed logical, for the purpose of giving it a more precise consistency, to construct a regime of aggravated responsibility linked to breaches of peremptory norms, a perfect identification of the crimes that breached peremptory norms was impeded at the time precisely by the abovementioned list of examples of the same included

[17] See the 'Fourth report on peremptory norms of general international law (*jus cogens*)' by D. Tladi, Special Rapporteur doc. A/CN.4/727, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf?OpenElement (last visited 1 May 2022)

in Art 19. Letter d) of para 2, in fact, included the hypothesis of injury by pollution, while a generalized ban on polluting, provided it existed, certainly could not, then, or now, be configured as the object of a norm of *jus cogens* and consequently *a priori* excluded the existence of a univocal connection between the two notions.

The new formulation of Art 40, on the other hand, made it possible to overcome this dualism, attaching the regime of aggravated responsibility exclusively to breaches of peremptory norms and avoiding useless examples of the particular cases constituting a particular category of wrongful acts, which would expand gradually and, in a manner, directly proportional to the development of new peremptory norms.[18]

[18] For a detailed bibliography see: A. Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law' 60 *The American Journal of International Law*, 55 (1966); M. Virally, *Réflexions sur le 'jus cogens'* 12 *Annuaire Français de droit international*, 5 (1966); A. Morelli, 'A proposito di norme internazionali cogenti' *Rivista di diritto internazionale*, 108 (1968); L. Alexidze, 'Legal Nature of Jus Cogens in Contemporary International Law' 172 *Contemporary International Law*, 219 (1981); A. Gomez Robledo, 'Le jus cogens international: sa genèse, sa nature, ses fonctions' *Recueil des cours*, 9 (1981); L. Hannikainen, *Peremptory Norm (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Pub. Co., 1988); U. Villani, 'In tema di 'jus cogens,' norme consuetudinarie e diritto all'informazione' (paper at the III seminar on the topic: 'Libertà di informazione e tutela della vita privata', Università Cattolica di Milano, 17-18 November 1989) *Rivista Internazionale dell'uomo*, 302 (1990); R. Casado Raigón, *Notas sobre el Ius Cogens Internacional* (Córdoba: Servicio de Publicaciones de la UCO), 1991; J. Kasto, *Jus Cogens and Humanitarian Law* (Houslow: Kingston Kall Kwik, 1994); R. Magnani, *Nuove prospettive sui principi generali nel sistema delle fonti del diritto internazionale* (Roma: Pontificia Università Lateranense, 1996), 135; J.A. Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' 8 *European Journal of International Law*, 583 (1997); S. Forlati, 'Azioni dinanzi alla Corte internazionale di giustizia rispetto a violazioni di obblighi *erga omnes*' *Rivista di diritto internazionale*, 69 (2001); S. Schiedermair, 'Die Menschenrechte als ius cogens', in *Rahmen des Seminars Aktuelle Fragen des Völkerrechts* (Cologne: De Gruyter, 2001); A.C. Romero, 'Los conceptos de obligación *erga omnes*, *ius cogens* y la violación grave a la luz del nuevo proyecto de la CDI sobre responsabilidad de los Estados por hechos ilícitos' 4 *Revista electrónica de estudios internacionales*, 1 (2002); K. Bartsch and B. Elberling, '*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al v. Greece and Germany Decision' 4 *German Law Journal*, 5 (2003); P. Picone, 'Il ruolo dello Stato leso nelle reazioni collettive alle violazioni di obblighi "erga omnes"' *Rivista di diritto internazionale*, 957-987 (2012); P. Picone, *Gli obblighi 'erga omnes' tra passato e futuro (Obligations 'erga omnes' between present and future)* - Relazione al Convegno *Interesse collettivo e obblighi* erga omnes *nel diritto internazionale contemporaneo*, Ravenna, 7-8 May 2015 *Rivista di diritto internazionale*, 1081-1108 (2015); E. Cannizzaro, *The Present and Future of* Jus Cogens (Roma: Sapienza Università Editrice, 2015); R. Kolb, *Peremptory International Law*-Jus Cogens*: A General Inventor* (Oxford: Bloomsbury, 2015); T. Kleinlein, 'Jus Cogens *Re-Examined: Value Formalism in International Law*' 28 *European Journal of International Law*, 295 (2017); I. Di Bernardini, 'Indagini sui crimini di guerra in Afghanistan e mancata autorizzazione della Corte Penale Internazionale' *Diritti dell'uomo*, 7-26 (2019); P. De Pasquale, 'Rapporti tra le fonti di diritto dell'Unione europea (The Relationship Between the Sources of EU Law)' *Diritto pubblico comparato ed europeo*, 191-213 (2019); F. Polacchini, 'Costituzione e '*ius cogens*' (Constitution and *jus cogens*)' *Diritto pubblico comparato ed europeo*, 501-549 (2020); P. Fois, 'Sui caratteri dello 'jus cogens' regionale nel diritto

It must nevertheless be pointed out how the extreme difficulty both doctrine and practice have encountered in establishing which norms truly are peremptory in nature has always made it impossible to apply the regime of aggravated responsibility, with the lone exception of the breach of the ban on the use of force.

It might also be worth our while to recall in passing that the concept of *jus cogens* only began to develop in the international system at the beginning of the last century.[19]

In any event, until the approval of the oft-cited draft of conclusions, international doctrine and jurisprudence did not dispose of a sure and clear guide for identifying the norms that possess a peremptory nature. In such a context it's worth remarking that the international community has often been unable to apply sanctions even against a breach of norms held to be peremptory, and that this failure to react has created further difficulties. On the one hand, it has made the identification of peremptory norms even more burdensome, since the lack of a reaction to their breach has prevented the confirmation of their existence; on the other, it has authorized those with contrary interests to consider these reiterated, unpunished breaches as the expression of a contrary practice with abrogative effects on the preceding norm of general international law.

In this complex institutional framework, in which the effectiveness of the norms on serious breaches is linked to the certain identification of *jus cogens*

dell'Unione Europea (The Elements of Regional 'Jus Cogens' in the Law of the European Union)' *Rivista di diritto internazionale*, 635-656 (2020); F.M. Palombino, *Introduzione al Diritto Internazionale* (Bari: Laterza, 2021), 207.

[19] As far back as the 1910 case of the North Atlantic fisheries between the United States and Great Britain, the North American thesis was based on the affirmation that a peremptory norm forbade States to eliminate through a convention a right of their own citizens, as was in the specific case the right of fishing on the high seas. A further step in this direction was certainly the drafting of the UN Charter at the San Francisco Conference in 1945. Art 2 para 4, indeed, codified the principle of the ban on the use of force in international relations, which is certainly one of the most important and undisputed norms of peremptory law.

There is no doubt, however, that the first formal recognition in international law of the existence of a group of norms that have a peremptory nature occurred in the Vienna Convention on treaty law in 1969. Art 53, today unimaginatively reproposed by conclusion no 2, has the virtue of having given the first definition of peremptory norms as the collection of rules accepted and recognized by the international community as a whole as norms which are binding and that can be modified only by subsequent norms of the same character. Art 64, on the other hand, which sanctions the nullity and consequently the resolution of treaties not compatible with new peremptory norms, provided the implicit recognition of the relative nature of the rules of *jus cogens* which, therefore, can undergo modifications over time. Part of the doctrine, however, has argued that Art 103 of the UN Charter, by imposing the prevalence of the obligations continued within it over all other obligations contracts by the Member States, implicitly identifies peremptory law with the obligations deriving from the Charter, including the ban on the use of force, the ban on compromising the economy of other Nations, the ban on committing 'gross violations' of human rights and the ban on impeding the self-determination of peoples.

norms, there were also proposals of a norm that would grant a jurisdictional body the authority to decide whether or not a particular system's rules were peremptory,[20] along the lines of Art 66 letter a) of the 1969 Vienna Convention on treaty law.[21]

Even this solution, immediately abandoned in the drafting of the various projects presented, was partially adopted in the recent draft of conclusions on international peremptory law which, after listing the relevant international acts, in conclusion 9.1, for the purpose of proving the peremptory nature acquired by a norm, identifies the decision of international courts and, particularly, of the International Court of Justice as the first subsidiary tool.

Such a provision demonstrates the aim of entrusting a genuinely impartial body with the task of establishing the existence of the binding nature of a specific norm of general international law, in itself certainly variable over time.[22]

In such a context we would be remiss not to mention the significant scope of conclusion 14, which, by excluding any customs in contrast with peremptory norms from going into force unless the former are to be considered binding as well, makes it extremely difficult to abrogate norms already inserted in the category of *jus cogens*. Undoubtedly, in fact, the characteristic of peremptoriness has often been attributed to pre-existing norms of general international law, and the limit imposed by the reported norm could be surpassed only in the unlikely hypothesis of the formation of a customary norm that, in the international community's view, immediately appears as peremptory.[23]

[20] See F. Maiello, 'Le violazioni gravi dello jus cogens come distinte fattispecie di illecito internazionale' *Rivista della cooperazione giuridica internazionale*, 29, 114-135 (2008): 'It would certainly have been opportune, for purposes of the certainty of law, that the Draft on State Responsibility courageously take a position in that sense, providing for the authority of the ICJ to ascertain whether a State's wrongful act, in consideration of the obligation breached, qualified as a serious breach of *jus cogens,* with all the consequences that pursuant to Art 41 arise from it'.

[21] As is well known, each State that is a party in a dispute related to the incompatibility of a treaty with a norm held to be binding is granted the faculty to refer the question unilaterally to the ICJ so that it may resolve the dispute concerning the nullity of the treaty, subsequent to, naturally, the identification of the general norm with which the treaty conflicts as peremptory.

In fact, pursuant to Art 66 off the 1969 Vienna Convention on treaty law, entitled 'Procedures for judicial settlement, arbitration and conciliation'.

If, under para 3 of Art 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed: a) any one of the parties to a dispute concerning the application or the interpretation of Arts 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

[22] Submitting a dispute to the IJC is normally subject to the acceptance of its jurisdiction on the part of the State convened, an acceptance, furthermore, that can be given in a moment prior to or following the submission to the same. From this point of view the ICJ's function of settling international disputes has the nature of mere arbitration with the exception of the function under Art 66 letter a).

[23] In other words, to abrogate a norm of *jus cogens* a later one must be formed, incompatible with the first, without passing through the state of customary norm. Only

IV. Collective Intervention Between Serious Breaches of *Jus Cogens* and *Erga Omnes* Obligations

If the ILC's recent intervention, despite the difficulties previously highlighted, has the merit of completing the regulation of serious breaches, the same cannot be said concerning the precise identification of States' rights and responsibilities in preventing their perpetration and particularly the powers granted for blocking their commission.

Conclusion 19 is substantially a restatement of Art 41 of the Draft that dealt with defining the specific consequences arising from the commission of serious breaches,[24] in the sense specified by Art 40.[25] Concerns regarding the formulation of the measure had already been expressed, as it contained no specific references to the obligations of the Responsible State, such as, for example, implementing particular forms of reparations, but merely obligations regarding other States, whether or not these have been injured by the wrongful act committed.

Only in the concluding norm in para 3, indeed, was it specified that the particular consequences, under Art 41, do not prejudice the application of all consequences generally envisaged with regard to international wrongful acts[26]

through the formation of a sort of instantaneous *jus cogens* could States overcome the ban in question, maintaining a form of conduct immediately legitimate on the international level.

[24] Art 41 of the 2001 Draft on State Responsibility:

'Particular consequences of a serious breach of an obligation under this chapter.'

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Art 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Art 40, nor render aid or assistance in maintaining that situation.

3. This Art is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

[25] On the particular consequences, see C.J. Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' 13 *European Journal of International Law*, 1161 (2002); A.C. Romero, n 18 above.

[26] The notion of *restitutio in integrum* is not univocal in doctrine. According to part of this, it consists in re-establishing the *status quo ante*, while in others' view it permits the re-establishment of the situation that would have existed if the wrongful act had never been committed. The first orientation seems preferrable because it grants the institution a more restricted extension, conforming to the meaning evoked in the Draft. The second definition, in fact, contemplates not only the restoration the pre-existing situation but also the compensation of any damages occurring due to the wrongful act, subject of an autonomous measure *ex* Art 36. The faculty of the injured State to request and obtain such form of reparation cannot be used only in two hypotheses: the case in which restitution is impossible; and if said restitution gives the injured State a disproportionate advantage compared to the burden undertaken by that which committed the wrongful act. With regard to the first we might quickly note that impossibility must be understood as impossibility *in rerum natura*, being of no value the simple difficulty, whether legal or material, to perform the restitution. Should the *restitutio* be possible, it must be carried out, unless it harms the rights of third parties. In the case *Forests of Central Rhodope*, indeed, the court of arbitration, though not finding the material impossibility of *restitutio in integrum*, considered it unfeasible since in the meantime several private citizens had acquired rights to the forests themselves (see *Forests of Central Rhodope*

(but different than those in question). Nevertheless, para 4 of conclusion 19 is even less clear when it specifies that an exception is made for other consequences of the breach of peremptory norms. In other words, the regulation cited, albeit vaguely (the other consequences of the commission of international wrongful acts are not referrable only to peremptory norms, but to all those in force in the international community), guarantees the application of 'general' norms regarding wrongful acts. On this basis, the State that commits a serious breach of peremptory law is required, as in the event of the commission of any other international wrongful act, to cease doing so as well as to offer reparation[27] in feasible forms.[28]

In any event it seems indisputable that both conclusion 19 and Art 41 impose both a positive and negative obligation on all States belonging to the community.

The positive obligation consists in cooperating for the purpose of bringing about the cessation of the wrongful conduct (conclusion 19 para 1 and Art 41, para 1) and creates no shortage of uncertainties.[29]

case, *United Nations Reports of International Arbitral Awards*, III, 1405-1432 (1933)).

Deriving from this is that reparation is applied whenever restitution is impossible either entirely or partly. It consists in the payment of a monetary sum equal to the value of the damage suffered by the injured State. The same Permanent Court of Justice in the sentence concerning the matter of the *Factory of Chorzòv* specified that the compensation of the damages must cover '*the losses suffered in the measure in which such losses are not already covered by the restitution in kind*' (*Factory at Chorzów case*, *Merits,* 1928, *Permanent Court of International Justice*, Series A, n 17, 48).

The last form of reparation, this, too, alternative or concurrent to restitution and compensation, is satisfaction. This last differs from the previous ones in that it tends not to repair the material damage caused by the wrongful act, but rather its moral counterpart. According to international practice, satisfaction can consist in a formal apology, a salute to flag, the payment of a symbolic sum or other corresponding forms. Such a form of reparation, at least in recent times, is not particularly relevant from the legal standpoint. But there is much to be said about the theory according to which satisfaction has 'the function of reaffirming the rule of international law that was breached … and constituting a precedent for future breaches'.

[27] Art 31 of the Draft on State Responsibility, 2001, n 16 above:

'Reparation'

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

[28] Appearing particularly interesting on this point is that opinion of a part of the doctrine that admits, for the sole purposes of reparation, the possibility of renunciation by the injured State even in the case of the breach of a peremptory norm (see E. Cannizzaro, 'On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law', in *The Present and Future of Jus Cogens*, n 18 above, 140).

[29] The Draft's measure establishes a genuine obligation for all States to act to impose the cessation of the wrongful act. While such a solution is desirable, it seems difficult to envisage, at least currently, that States cease to conform their conduct to free foreign policy choices. To this end suffice it to recall that the measures of the UN Charter, relating to the collective use of force for the maintenance of peace under the direction of the Security Council (Arts 42 ff), have not received, from 1945 to today, a correct application, as highlighted by the recourse to the proxy procedure.

The measures cited, in fact, do not specify which tools States ought to use to bring an end to the wrongful act perpetrated by the Responsible State[30] and, above all, whether recourse to force, at least in the presence of specific situations, is possible or even obligatory. If international law recognizes the principle of a customary nature according to which the reaction must be proportionate to the attack,[31] it is then necessary to distinguish between the possible reactions with reference to breaches of the various norms of peremptory law.

There is no doubt that, in the case of the breach of norms of peremptory law other than the ban on the use of armed force, States can react via the most important form of self-defense provided for by international law: non-violent countermeasures. It proves more difficult, on the other hand, to acknowledge that States can react to such breaches via the use of armed force. Even if some openness[32] in that direction has been proposed, to justify armed interventions in defense of one's own citizens abroad or against States that violate the human rights of their own citizens.[33]

It seems preferable to argue, however, particularly in light of Art 40 and its exact reproduction in the most recent draft, that the international legal system

[30] In this sense see also P. Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' 13 *European Journal of International Law*, 13, 1241 (2002).

[31] For the affirmation of this principle see *Military and Paramilitary Activities (Nicaragua/United States of America) Merits. J. 27.6.1986 ICJ Reports* 1986, 94*:* 'there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law' *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of 8 July 1996 ICJ Reports* 1996, 24 -245: 'The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law'.

[32] N. Ronzitti, *Rescuing National Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht: M. Nijhoff Publisher, 1985), 26. *Contra* B. Conforti and M. Iovane, *Diritto internazionale* (Napoli: Editoriale Scientifica, 2021), 376.

[33] For humanitarian interventions see U. Leanza, 'Diritto internazionale ed interventi Umanitari' *Rivista della cooperazione giuridica internazionale*, 6 (2000). For an evolution of international law thereby so argues P. Picone, 'Le Nazioni Unite nel nuovo scenario internazionale. Nazioni Unite ed obblighi 'erga omnes" *Comunità Internazionale*, 714 (1993): ' … it may occur that traditional international law, based on the ban on States' interference in the internal affairs of other States, and on the ban (rather legendary, furthermore) on the use of force, has recently transformed into an international law that, in practice, considers the collective interventions of States in defense of the more general interests of the community a cornerstone of its functioning and mode of operating'.

For an evolution of international law in this sense, see also M. Condinanzi, '*L'uso della forza e il sistema di sicurezza collettiva*', in S.M. Carbone, R. Luzzatto, A. Santa Maria eds, *Istituzioni di diritto internazionale* (Torino: Giappichelli, 2002). The author argues that the practice of humanitarian interventions can bring about the evolution of international law, in the sense that a new cause of justification for breaches of the ban on the use of force is developing. Arguing against this is B. Conforti and M. Iovane, n 32 above, 449, for whom in the face of a praxis essentially contrary to the ban on the use of force, we ought to admit that 'international law … has exhausted its function'. According to the author, moreover, starting a war 'cannot be evaluated legally but only politically and morally' and therefore is 'neither licit nor illicit' but 'indifferent'.

is evolving towards allowing a collective reaction to breaches against peremptory norms – such as egregious human rights' violations carried out (though not exclusively) via the use of force.

Resolution 1973 (2011), adopted by the Security Council at its 6498th meeting on March 17, appears an expression of this type of reaction, in which member States have been authorized to protect the civilian population from the ongoing internal conflict, to create a no-fly zone and to set an arms embargo.[34]

Similarly, with Resolution 2401 (2018), the Security Council, after imposing a temporary ceasefire for humanitarian purposes, called on member States to use their influence on the parties to ensure its implementation and to coordinate efforts to monitor the suspension of hostilities.[35]

When, on the other hand, the breach of peremptory law occurs through the use of force, the international community's response certainly can take the form of peaceful countermeasures,[36] but *quid iuris* concerning an armed reaction? From this perspective one wonders whether among the ILC's aims was the creation of a new regime of collective self-defense or the fostering of its development,[37] or rather to refer implicitly to the collective security system of the United Nations. It is certain, however, that the majority doctrine[38] inclines toward the non-existence of a general regime of collective self-defense that goes beyond the cases of legitimate defense in response to an armed attack provided in Art 51 of the UN Charter, despite admitting that conventional norms can institute specific regimes attributing each contracting State the right to intervene even when not directly injured.

It seems preferable to argue that the hypothesis of a collective reaction of the international community to a violation of peremptory law perpetrated through the use of international force, can easily be included in the case of which in Art 51 of the UN Charter. Indeed, the use of international force in itself already

[34] See the Resolution 1973 (2011), adopted by the Security Council at its 6498th meeting, on 17 March 2011, S/RES/1973 (2011), available at https://www.un.org/securitycouncil/s/res/1973-%282011%29 (last visited 2 May 2022).

[35] See the Resolution 2401 (2018), adopted by the Security Council at its 8188th meeting, on 24 February 2018, S/RES/2401 (2018), available at https://undocs.org/en/S/RES/2401(2018) (last visited 2 May 2022).

[36] In this sense, the sanctions put in place by many states in relation to the crisis in Ukraine must certainly be seen, given that at the meeting of the Security Council of 25 February 2022 a resolution condemning the use of force was not adopted, due to the veto placed by the Russian Federation.

[37] See J. Crawford, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Cambridge: Cambridge University Press, 2002), 114, where we read: 'Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breach in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation'.

[38] B. Conforti and M. Iovane, n 32 above, 458-459.

implies an armed attack, condition necessary for the application of Art 51.

In any case, it seems clear that in the most recent norms, developed principally at the impetus of the ILC, a concept of solidarity is beginning to take shape, along with the existence of obligations, that the failure of which to respect calls for a 'collective' reaction. This concept of solidarity represents the first nucleus of the notion of 'public' interest, but the latter obligations appear to develop more along the lines of national administrative law than its criminal counterpart.

This public interest, then, defined on multiple occasions in the 2001 and 2019 Drafts as a fundamental interest of the international community as a whole, is undoubtedly tied to the violation of *erga omnes* obligations springing from breaches (*rectius*: serious breaches) of peremptory law, and could allow a collective reaction whether or not the aforementioned breaches were perpetrated via the use of international force.

Today this thesis finds express confirmation in conclusion 17 which, just short of twenty years later, clarifies that breaches of *jus cogens* produce *erga omnes* obligations, thus binding the two institutions indissolubly.[39]

Furthermore, the third part of the Draft on State Responsibility[40] already allowed the invocation of a state's responsibility even by those not directly injured, pursuant to Art 48,[41] when the obligation breached is contracted

[39] On this point also see F.M. Palombino, n 18 above, 247.

[40] The third part of the Draft, entitled 'The Implementation of the International Responsibility of a State', regulates the invocation of international responsibility by establishing a series of rules concerning the identification of the injured party, the admissibility of appeals, and of the loss of the right to invoke responsibility. This is the first attempt to shape a procedural system aimed at defining the forms through which States have the right to invoke others' responsibility.

According to Special Rapporteur Crawford, the invocation of international responsibility, as regulated by these articles, does not refer to simple protests expressed by one State for the non-fulfillment, on the part of another State, of norms of international law. The latter, indeed, have the nature of mere diplomatic exchanges, while the invocation of responsibility pertains to acts of a formal nature such as, for example, a recourse presented to the International Court of Justice or a court of arbitration and even the implementation of countermeasures. For this purpose, it is necessary that the State have a right to act conferred upon it by a treaty or can regard itself as an *injured party*. Unfortunately, we must admit that, while this attempt is admirable, this body of norms loses much of its meaning in the absence of a jurisdictional authority automatically competent to judge international matters. Despite the high level of prestige achieved by the ICJ, in fact, its jurisdiction is nevertheless still bound to its acceptance by the parties in a given dispute.

[41] Art 48 of the Draft on State Responsibility (2001), n 16 above:

'Invocation of responsibility by a State other than an injured State'

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (*a*) The obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group; or (*b*) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-

toward a group of States or the international community (*rectius*: *erga omnes* obligations).[42]

Nevertheless, missing in the 2001 Draft was a specific connection between a serious breach of *jus cogens* and the reaction of third-party States, which the Commission has now definitively clarified.

This connection has also given rise to what appears to be an attempt to codify a system of collective self-defense related to *erga omnes* breaches and, therefore, of *jus cogens* rules.

This solution would permit the reaffirmation of the theory of intervention[43] only in the case of serious breaches of peremptory law. Such a limitation would have the advantage of overcoming the most persuasive objection raised against intervention, consisting in the possibility that the latter be used as a pretext and for the purpose of justifying illegitimate interference in the juridical sphere of sovereign States. Clearly, the chances of betraying the *ratio* of the institution are notably - if not entirely - reduced if the breaches, *which allow for the authoritative interference of one or more States in the internal or international life of another*,[44] are such by characteristics and content that they can be added to the cases delineated by the attachment to the recent draft of conclusions.

Moreover, it cannot be denied that a practice in this sense has recently been initiated even in cases that are not exactly classifiable in the general regime of collective self-defense. This can be seen in the 2014 intervention against the Islamic State in various sites on the border between north-eastern Syria and western Iraq in which participated over twenty states belonging to both the western bloc and to the eastern one.[45]

repetition in accordance with article 30; and (*b*) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

[42] On the topic, see J. Crawford, n 37 above, 318 and I. Scobbie, 'Invocation of Responsibility for the Breach of `Obligations under Peremptory Norms of General International Law' 5 *European Journal of International Law*, 1201 (2002).

[43] Intervention is defined as 'the authoritarian interference of one or more States in the internal or international life of another State'; 'If such pressure remains within the limits of a threat, we speak of a diplomatic intervention; if, on the other hand, it takes the form of the use of military force, whether peaceful or aggressive, then we speak of an armed intervention', see R. Quadri, *Diritto internazionale pubblico* (Napoli: Liguori Editore, 1989), 275.

[44] See R. Quadri, n 43 above, 275.

[45] On this point, it should be remembered that Resolution 2249 (2015) on the Islamic State, adopted by the Security Council on 20 November 2015, while stigmatizing its objectives, did not identify a concrete role of the Council in international action aimed at weakening it and above all intervenes subsequently at the beginning of the intentional mission. On the topic, see R. Cadin, 'Considerazioni generali: nella risoluzione 2249 (2015) contro l'Isil il Consiglio di Sicurezza descrive ma non spiega' *Ordine internazionale e diritti umani*, 1241-1245 (2015).