

### 3. On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law

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The determination of the substantive consequences of serious breaches of *jus cogens* has been much debated in the works that led, in 2001, to the adoption of the International Law Commission's Articles on State responsibility. To the limited scope of this writing, which gathers some reflections offered to the participants to a seminar included in the 2014 edition of the *Gaetano Morelli Lectures*, there is no need to follow retrospectively all the threads of such debate, which touches upon controversial conceptions of international responsibility. In this brief contribution, I propose to appraise some fundamental issues related to the nature and content of these special consequences. In particular, I will examine, mainly in an evolutionary perspective, issues related to the *erga omnes* character of the obligations flowing from Article 41 and to the derogability of the consequences of a serious breach of *jus cogens*.

#### **3.1. Special consequences for breaches of *jus cogens* rules**

Article 41(1) and Article 41(2) lay down two special obligations that flow from serious breaches of peremptory international law: the positive obligation to cooperate to bring the breach to an end; the negative obligation not to recognize the situation created by such a breach, nor to render aid or assistance in maintaining that situation.

These provisions do not establish special consequences for the State which has committed a serious violation of *jus cogens*. They rather establish obligations for other States, namely for all the States of

the international community, not injured by the breach.<sup>1</sup> In principle, thus, the State which has violated fundamental interests of the international community is bound only by the ordinary consequences of a wrongful conduct, envisaged in Part II, Chapter I, of the Articles on State responsibility.

The absence of special consequences for the author of the breach is basically due to the limited scope of the Articles on State responsibility. The Articles do not govern institutionalized actions, which may appear the most natural response to a breach of fundamental interests of the international community. Nor they concern the criminalization of the conduct of natural persons, which has proved to be another, and particularly efficient, response to a violation of fundamental values of mankind. The Articles only govern the consequences of a serious breach of *jus cogens* flowing for States. The ILC proved to be unable to shape special substantive consequences for the responsible State. That State is, therefore, to abide by the "ordinary" consequences of a breach: it must cease the violation and offer reparation and assurances of non-repetition. Special consequences, thus, only regard the other States acting, individually or collectively, in response to the breach.

However, in spite of the unitary character of the set of substantive consequences flowing from the breach for the responsible State, one cannot exclude that, in practice, such consequences may be more onerous in case of a *jus cogens* breach than those envisaged for a breach of "ordinary" international law. Some examples of this additional onerousness will be given in the following paragraphs.

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<sup>1</sup> Article 41(3) points out that the consequences expressly enshrined in the two first paragraphs are without prejudice to the other consequences referred to in the Articles and to the further consequences that a breach may entail under international law. This latter provision seems to refer to institutional responses to a *jus cogens* breach that, albeit mentioned by Article 59 of the Articles, fall outside the scope of the Articles. Equally outside the scope of this study is the issue concerning the relationship between special consequences of serious breach of *jus cogens* and instrumental measures envisaged by Art. 54 of the Articles. However, a quick reference to this provision will be made in the last paragraph, with a view to comparing the regime of implementation of *erga omnes* obligations with to the special consequences of a breach of peremptory rules of international law, envisaged by Art. 41.

### 3.2. The obligation not to recognize or to assist a situation created by the violation and the obligation to bring the breach to an end

Article 41(2) imposes on all the States of the international community, acting individually, the obligation not to recognize the situation created by the *jus cogens* breach, nor to render aid or assistance in maintaining such a breach<sup>2</sup>.

The provision was probably inspired by the 1971 Advisory Opinion on *Namibia* of the International Court of Justice (ICJ)<sup>3</sup>. In para. 119 the Court said: “The member States of the United Nations are [...] under obligation to recognize the illegality and invalidity of South Africa’s continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia”.<sup>4</sup>

In that case the obligation not to recognize was based on resolution 276 (1970) of the Security Council (SC). In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ based an analogous obligation not to recognize the legality of a situation created by a serious breach of an *erga omnes* obligation established in the interest of the international community on general international law.<sup>5</sup>

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<sup>2</sup> Talmon, *Duty ‘Not to Recognize as Lawful’*; Christakis, *L’obligation de non-reconnaissance*; Dawidowicz, *The Obligation of Non-Recognition*.

<sup>3</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, paras. 121 ff.

<sup>4</sup> It is worth noting that the Articles on State responsibility invert the semantic logic of this holding: the obligation to recognize the invalidity of that situation is converted in the obligation not to recognize the legality of the situation created by the breach; the obligation to refrain from lending support or assistance to the wrongdoer is converted into the obligation to cooperate to put an end to the breach.

<sup>5</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136. Although the Court did not mention *jus cogens*, it clearly referred to this notion. In para. 159 the Court said: “Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by

The obligation not to recognize the legality of situations created by a breach of international law is incumbent on every State of the international community, which is individually responsible in case of breach. On a different paradigm rests the obligation flowing from Article 41(1): States have the duty to cooperate to bring to an end the wrongful conduct through lawful means. Whereas the duty to cooperate is incumbent on every individual State, the responsibility to bring the breach to an end pertains to all the States of the international community, acting collectively.

It is worth noting that, under Article 54, individual States have the right, but not the duty, to adopt lawful conduct to ensure the “ordinary” consequences of an *erga omnes* obligation’s breach, namely cessation and reparation in the interest of the beneficiaries of the breached obligation. Article 41(1) has transformed this right into a duty to react. The legal regime of implementation of international responsibility is thus hardened when *jus cogens* rules are at stake. However, the content of the duty to react under Art. 41(1) is much more elusive than the content of the rights to react under Art. 54. Under Art. 41(1), individual States do not have the duty to adopt positive measures. They have a simple duty to cooperate. The responsibility to attain, through collective action, the goal set out by Article 41(1), namely to bring the breach to an end, is incumbent upon a different entity: all the States of the international community, acting collectively, or the international community as a whole, conceived of as an autonomous holder of rights and duties.

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the ICJ referred to that obligation in the following terms: “It is [...] for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end”.<sup>6</sup> It is not entirely clear whether the Court wished to point out that every State was individually responsible for the attainment of this objective, or rather that the responsibility fell on the international community as whole. Eloquent-

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such construction”.

<sup>6</sup> Ibid., para. 159.

ly, the Court went further by saying, in paragraph 160, that “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime”.

### **3.3. *Erga omnes* character of the obligations laid down in Article 41**

In this paragraph, I will set forth some argument in favour of the *erga omnes* character of the special obligations laid down Article 41.

To demonstrate the *erga omnes* character of the obligation to cooperate enshrined in Article 41(1) a logical argument could be of some avail.

In the conceptual system of Art. 41(1) the obligation to cooperate is not established by itself but it is rather aimed to achieve an ultimate objective, namely to bring the breach to an end. In other words, the concerted action by individual States constitutes the instrument by which the international community can attain its final goal. If the obligation to cooperate had not *erga omnes* character, it would not establish legal relations among its addressees, but simply a network of bilateral relations between each of them and the injured State, with the consequence that only the latter would be entitled to claim compliance with it. This, however, would considerably affect the capacity of the mechanism set up by Art. 41(1) to attain its objective. If the interest to bring to an end a serious violation of *jus cogens* pertains to a collective entity, one should logically assume that the obligation of individual States to cooperate to each other in order to attain this goal cannot be owed to the injured State only.

A logical argument can also be employed to demonstrate the *erga omnes* character of the obligation not to recognize the situation created by the breach.

Such an obligation is not the hallmark of *jus cogens* rules. Quite the contrary, States have the obligation not to recognize the effect of a breach of international law in a number of situations. The expropriation of goods in breach of the international rules on minimum standards of treatment of aliens, for example, entails the obligation not to recognize the effect of the change of property. Albeit incumbent upon

all the States, such an obligation can be hardly deemed to have *erga omnes* character. More plausibly, it creates a bilateral relationship between the injured State and the third State, which, by its conduct, has given effect to the breach.

It would have made little sense, if any, to formulate in Article 41(2) an obligation which, regardless of its legal basis, is already part of international law. Its inclusion in the set of rules governing the special consequences of serious breach of *jus cogens* seems rather to highlight that the individual obligation not to recognize is part of the collective response to the breach. In other words, Art. 41(2) establishes an obligation that the States have the duty to perform not only in the interest of the injured State but, again, in the interest of the international community.

In its 2004 Advisory Opinion on the *Legality of the construction of a wall on the occupied Palestinian territories*, the ICJ abstained from expressly qualifying this obligation as *erga omnes*. However, its “communitarian” character clearly emerges from the reasoning of the ICJ.<sup>7</sup> This character seems also to emerge from General Assembly Resolution 60/147, which lays down Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>8</sup>

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<sup>7</sup> In her separate opinion, Judge Higgins said that: “Unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes*” (para. 37). Judge Higgins went further by contesting tenaciously the *erga omnes* character of the obligation not to recognize: “That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of ‘*erga omnes*’”. According to Judge Higgins, the obligation not to recognize constitutes the logical consequence of the unlawfulness of an act, and there would be no need to advocate a special legal consequence flowing from the breach. In this reasoning, however, the identification of the entity having the right to claim performance of the obligation not to recognize remains in the shadow.

<sup>8</sup> UN doc. GA A/Res/60/147, 21 March 2006. The Resolution points to the duty of all States to investigate reports of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law; to submit to prosecution the persons allegedly responsible for the violations if there is sufficient evidence and, if found guilty, to punish them. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. Since gross violations of

An argument common to both, the obligation to cooperate to bring the breach to an end and the obligation not to recognize or assist, comes from the circumstance that most *jus cogens* rules establish obligations in the interest of individuals. If the obligation deriving from Article 41(1) and Article 41(2) were owed to the injured State only, there could be no entity entitled to invoke a breach of that obligation. The existence of additional obligations designed to secure the effectiveness of *jus cogens* would be rendered virtually meaningless.

In its judgment on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the ICJ found that the alternative obligation to prosecute or to extradite, enshrined in the Torture convention, was an obligation *erga omnes partes*, which gives to all the parties to the convention the right to claim respect with such a rule by another party, without the need to demonstrate a special interest. The Court said that the “common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim”.<sup>9</sup> The same rationale applies to the obligations flowing from a previous breach of *jus cogens*, whose respect certainly corresponds to a common interest of the international community.

### 3.4. The status of the secondary consequences of a *jus cogens* breach

The use of the notion of *jus cogens* in the Articles on State responsibility has represented a conceptual development whose final implications are still not entirely clear. Originally conceived as a limit to the contractual capacity of States, *jus cogens* is more and more considered as higher law, expressing the fundamental value of the interna-

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human rights are frequently committed by the national State of the injured individuals, it would be incoherent to point out to such a duty, if this did not correspond to an *erga omnes* obligation.

<sup>9</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422, para. 69.

tional community.

The relevance of the notion of *jus cogens* in the regime of State responsibility is not merely theoretical. Quite the contrary, the notion of peremptory law may be more useful at the level of the secondary rules than at that of the primary rules. Whereas the conclusion of treaties directly conflicting with peremptory rules appears to be a rare occurrence, more frequently States conclude treaties, or adopt unilateral acts, to deal with situations created by previous unilateral breaches of peremptory law. As pointed out by the ICJ in the 1971 *Namibia* Advisory Opinion, the obligation not to recognize the legality of an illegal act, which now constitutes one of the legal consequences of a violation of *jus cogens*, can be breached not only through unilateral conduct but also through agreements which purport to regulate the consequences of the breach.<sup>10</sup>

In this final paragraph, therefore, a quick reference ought to be made to an issue which is acquiring relevance in diplomatic and judicial practice: whether the notion of *jus cogens* may be useful also at the secondary level of the consequences which flow from serious breach of peremptory primary rules.

This issue can be hardly answered on the plane of pure legal logic. Indeed, there is no logical necessity to assume that the secondary rules, designed to govern the legal consequence of a breach, borrow the same normative value of the primary rules breached.

The issue has been recently discussed by the ICJ with regard to the obligation to offer reparation. In its judgment of 3 February 2012 on the *Jurisdictional immunities of a State*,<sup>11</sup> the ICJ pointed out that “against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum set-

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<sup>10</sup> The Court has drawn from SC resolutions the obligation for UN Member States “to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia” (see note 3 above, para. 122). The conclusion of treaties with South Africa is further characterised in terms of invalidity in paragraph 126, where the Court said, with regard to South Africa, that “no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship”.

<sup>11</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99.



tlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted".<sup>12</sup>

Although phrased in quite imperative terms, the precedential value of this dictum is not absolute. Post-war settlements are concluded by States in their own interest and in the interest of their citizens. The action of the national State seems thus to be deeply influenced by the legal regime of diplomatic protection, which, by nature, establishes a bilateral relation between the acting State and the State which has allegedly breached the minimum standard of treatment of aliens. Not infrequently, moreover, the conclusion of these settlements represents the only possible way to obtain some form of redress for injuries suffered by nationals.

Thus, the question remains whether derogation is possible from the obligation to offer reparations even where it is established solely "in the interest of the injured State or of the beneficiaries of the obligation breached", according to the very terms of Article 54 of the ILC Articles on State responsibility.

In spite of the great interest of the issue, one must frankly admit that the practice does not allow shaping a definite solution.

In its *Advisory opinion* on the legality of the construction of a wall on the Palestinian occupied territories, the Court repeatedly said that the illegal construction of the wall, in breach of the principle of self-determination, entails the obligation to cease the breach and return the property seized to the natural or legal persons who legitimately owned it and, in case of material impossibility, to offer reparation.<sup>13</sup> The Court, however, did not address the question of whether the right to reparation can be waived, unilaterally or by means of a treaty. Even the Resolution of the General Assembly 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, while providing for a complex system of reparation to the victims, is silent on the legal nature of such a

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<sup>12</sup> See note 5 above, para. 94.

<sup>13</sup> *Ibid.*, paras. 152 and 153.

right.<sup>14</sup>

*Jus cogens* has been sometimes evoked with regard to treaties aimed to regulate the exploitation of resources of unlawfully occupied territories. The underlying idea is that a State which, instead of abiding by the legal consequences envisaged by Article 41(1) and Article 41(2), concludes a treaty with the wrongdoer, whereby it regulates the consequences of the previous violation, commits a breach of *jus cogens* and that the instrument employed, namely the treaty, is null and void. To conclude that not only the conclusion of such treaties constitutes an unlawful act, but also that the treaties are invalid, however, would entail the demonstration that the obligations laid down by Article 41(1) and Article 41(2) have already acquired the status of peremptory law. Such a demonstration, however, has not been convincingly offered.

In a different perspective, one cannot exclude that treaties which purport to regulate a situation created by a *jus cogens* breach interfere with the proper application of higher law, and, therefore, can be assessed as to their validity against the primary *jus cogens* rule. This perspective tends thus to abandon the idea that the rules which establish secondary consequences of a *jus cogens* breach necessarily have *jus cogens* value. Rather, it remains in the area of primary rules and tends to enlarge the notion of conflict under Articles 53 and 64 of the Vienna Convention on the Law of Treaties, so as to cover situations of indirect conflict or even of occasional collisions between a treaty and a *jus cogens* rule. According to the very notion of hierarchy, higher values are offended not only by rules which purport to violate them directly, but also by rules which aim to produce effects inconsistent with their *effet utile*.<sup>15</sup>

This methodological frame could conveniently accommodate the vexed issue of the derogability of the "substantive" consequences of a breach of *jus cogens*.

In this regard, a distinction seems to emerge between the obligation of cessation and the obligation of reparation. The first is established in the interest of the international community as a whole, and, consequently, it is unconditional. The unconditional character of the

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<sup>14</sup> See note 9 above, part. IX of the resolution.

<sup>15</sup> Cannizzaro, *Higher Law for Treaties*, 425.

obligation to cessation also emerges from the instrumental rules which assist its implementation. As already said, Articles 41(1) and 41(2) impose upon all the States of the international community, acting concertedly or individually, the duty to cooperate to bring the breach to an end. This is perfectly reasonable. Although included among the consequences of the breach, indeed, the primary effect of cessation is to resuming compliance with the primary rule breached. If *jus cogens* rules are established for the protection of fundamental interests of the international community, it is consequential that the international community has a fundamental interest to secure the cessation of the breach. Since the failure to perform the obligation of cessation necessarily deprives the primary rule of its effectiveness, it is unimaginable that the obligation to cease a serious breach of *jus cogens* could be dispensed with, through a treaty or through unilateral waive.

Not necessarily the same rationale applies also to the obligation of reparation. This obligation, although *erga omnes*, is not unconditional but, under Article 48 (2) and Article 54, it is established in the interest of the injured State or of the beneficiaries of the breached primary obligation. Therefore, the obligation of reparation is not an indissoluble corollary of the primary rule breached, in the sense that its failure does not necessarily amount to a deprivation of the effectiveness of the primary rule breached.

In consequence thereof, it is not unreasonable to conclude that the beneficiaries of the peremptory rule breached can waive their right to reparation, through a treaty or through unilateral acts. The more precise identification of these beneficiaries falls outside the scope of the present contribution.