LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW

When is a norm peremptory? This is a question that has troubled legal scholars throughout the development of modern international law. In this work, Daniel Costelloe suggests – through an examination of State practice and international materials – that it is the legal consequences of a norm which distinguish it as peremptory. This book sheds new light on the legal consequences that peremptory norms have, for instance, in the law of treaties, international responsibility and State immunity. Unlike their substance or identification, the consequences of peremptory norms have remained under-studied. This book is the first specifically on this topic and is essential reading for all scholars and practitioners of public international law.

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For my parents

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FOREWORD

Peremptory norms of general international law enjoyed their initial moments of notoriety during the codification of the law of treaties in the 1960s. Though not unknown to scholars, they had been largely ignored by practitioners, but they took centre stage during the United Nations Conference on the Law of Treaties in Vienna. They were the stated reason for France's vote against the text as a whole and for several abstentions.

Notwithstanding such opposition, peremptory norms of international law – the *jus cogens* – eventually became part of accepted positive international law. Yet this took time. It was not achieved simply by the entry into force of the Vienna Convention in 1980, any more than it had been by the famous and equivocal dictum of the Court in *Barcelona Traction* in 1970 – equivocal because at the same time the Court endorsed the basic idea while avoiding the terminology of peremptory norms, finding it apparently less than cogent. These developments were accompanied by disagreements over these norms' theoretical basis, and the question which norms enjoyed this peculiar status endured. The practice of States offered few answers.

Peremptory norms have, to this day, remained something of a curiosity of the law. Extensive is the literature on the content of peremptory norms, yet few are the instances in which a court or tribunal has applied the concept so as to determine the outcome of a case. Universal is the support for these norms' existence, yet divergent are the views on the range of their legal effects.

Dr. Costelloe devotes his book to these legal effects of peremptory norms. Indeed, the concept of peremptory norms has, since the conclusion of the 1969 Vienna Convention, penetrated well beyond the confines of the law of treaties, yet the range of these norms' effects in these fields remains a matter of some uncertainty. This book's thesis is simple: it is, ultimately, their particular legal effects that render peremptory norms different in kind from other international legal norms, but State practice indicates that these effects are, in reality, comparatively few.

The author approaches these questions with modesty and an absence of bias. His discussions dispense with preconceptions or assumptions about the legal effects that peremptory norms *should* produce because of the important moral and political values they reflect. Consistent with this somewhat sceptical approach, he focuses on the study of State practice, international instruments and the decisions of courts and tribunals. His book – the first devoted specifically to the consequential question of legal consequences – is also timely, now that the International Law Commission has decided to address directly the questions concerning peremptory norms as a free-standing subject by adding the topic to its programme of work.

Despite his recognition of the realities of international law, Dr. Costelloe remains sensitive to the historical significance of peremptory norms and the importance of the principles reflected in them. These norms include rules no less important than the prohibitions under international law of the forcible acquisition of territory or of genocide, for example. He suggests that acknowledging the limits of peremptory norms may, ultimately, render a greater service to these goals than failing to do so. The result is a frank acknowledgement of international law's imperfections, but also of its achievements.

James Crawford
Peace Palace
The Hague
23 May 2016

PREFACE

Article 53 of the Vienna Convention on the Law of Treaties, a provision that has left its mark on the history of public international law, provides as follows:

> *Treaties Conflicting with a Peremptory Norm of General International Law ('Jus Cogens')*
>
> 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

To say that this article and its sister provision, Article 64, have generated an important body of scholarly work would by now amount to an understatement. As a study of peremptory norms, this book enters a crowded field. What, then, can a further study of peremptory norms hope to achieve? The question is as important as it is justified.

The International Law Commission in August 2014 first added the topic of peremptory norms to its long-term programme of work.[1] The syllabus on the basis of which the ILC added the topic notes: 'Notwithstanding its inclusion in the Vienna Convention, the contours and legal effects of *jus cogens* remain ill-defined and contentious.'[2] Further, the proposal indicates that 'although the formulation [in Article 53 of the Vienna Convention on the Law of Treaties] addresses a basic issue of consequences for treaties, it leaves open several other issues relating to consequences, including consequences for other rules not contained in treaties.'[3] Finally, and most

[1] Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), A/69/10, p. 265.
[2] Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), A/69/10, Annex (Dire D. Tladi, *Jus Cogens*), para. 3.
[3] *Ibid*. para. 9.

importantly, the ILC proposal observes in this connection: 'The consideration of the effects and consequences of *jus cogens* is likely to be the most challenging part of the study and will require careful analysis of the jurisprudence of both international and domestic courts.'[4]

As becomes clear from these passages alone, especially when read in light of State practice, the jurisprudence of courts and tribunals as well as scholarly publications, the legal consequences of peremptory norms have so far not received sufficient academic attention. As litigation in national courts and before the International Court of Justice over the years has demonstrated, much uncertainty has, for example, long surrounded the effects of peremptory norms for rules of State immunity under international law. Likewise, the extent of obligations for non-injured States in response to another State's serious breach of an obligation under a peremptory norm, and the question whether these consequences are even peculiar to peremptory norms, remain uncertain. A further area of uncertainty concerns the legal effectiveness of an attempted act of waiver by an injured State of claims arising out of another State's breach of an obligation under a peremptory norm. The status of a treaty reservation in conflict with a peremptory norm is yet another question in need of clarification. These and other areas have been marked by pronounced disagreement.

A study devoted to the legal consequences of peremptory norms also has the potential to clarify lingering systemic uncertainties in general international law. This book offers an analysis of how peremptory norms and their consequences are features of the multilateral character of certain legal norms and obligations in general international law. These conclusions will – hopefully – not only contribute to the study of international law as an academic discipline but likewise offer clarity for international legal practice and dispute settlement. Moreover, the ILC's study of peremptory norms as a free-standing topic – i.e., not as part of the law of treaties, State responsibility or another field – lends this treatment of the subject contemporary significance.[5]

The present study has the following two principal features. First, it focuses centrally on the legal consequences of peremptory norms, which remain an area of some uncertainty, rather than on their substance or identification. Second, and more importantly, it advances the thesis that it is these norms' consequences across various areas of international law that lend them a particular character.

[4] *Ibid*., para. 17.

[5] *See* Dire Tladi, First Report on Jus Cogens, A/CN.4/693. Due to the publication date of this book, it does not yet consider the Special Rapporteur's second report on this topic or States' comments on that report.

The book takes the position that it is not the substance of a legal norm, such as the area it regulates, or the norm's moral or political significance, that renders it peremptory. Nor is acceptance and recognition, as specified in Article 53 VCLT,[6] of a norm's non-derogability necessarily an appropriate test outside the setting of the VCLT. In this context, only the legal consequences of a norm can render it different in kind from other norms in any meaningful way. The book's main conclusion is that one gains little by asserting that an international legal norm is peremptory if one is not able to point to any particular consequences associated with that character, i.e., if nothing follows from what otherwise is a mere label. Each such consequence requires an independent basis in the reality of practice and cannot be freely inferred from pre-supposed characteristics. As a result, this study's method is to study these norms' consequences in State practice and to formulate general conclusions about their character on that basis, rather than taking certain characteristics for granted and suggesting inferences about what consequences these norms should accordingly give rise to.

The consequences of a peremptory norm under the VCLT include, for example, the invalidity of a treaty in conflict with it, subject to provisions on dispute settlement under Articles 65 and 66.[7] Under general international law, peremptory norms can create interpretive presumptions for treaties and other international instruments, including Security Council resolutions. Further, the breach of an obligation under a peremptory norm generates obligations of non-recognition and non-assistance for third States under the general law of State responsibility. Peremptory norms do not, however, give rise to an across-the-board result that any rule that may merely render the enforcement of a peremptory norm more difficult must be set aside, as has been suggested in the context of customary international rules on State immunity. On the contrary, the effects of peremptory norms are particular, discrete and limited, and did not develop in any noticeably systematic way. For this same reason, it is possible that additional legal consequences associated with peremptory norms may develop in State practice in the future.

[6] Article 53 VCLT ('Treaties conflicting with a peremptory norm of general international law ('*jus cogens*')).

[7] Article 65 ('Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty'); Article 66 ('Procedures for judicial settlement, arbitration and conciliation'). These provisions must be read in conjunction with Article 42 ('Validity and continuance in force of treaties'), Article 69 ('Consequences of the invalidity of a treaty') and Article 71 ('Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law').

While the book's various chapters address different fields, the themes mentioned above are fully developed, and appreciated by the reader, across the work read as a whole. The general conclusions follow precisely from a study of peremptory norms and their consequences across a range of areas in international law. The book concludes that there is nothing mysterious about peremptory norms and that their legal consequences are limited and often modest. For example, the legal effects of peremptory norms under the law of treaties and with respect to Security Council resolutions are more limited than is often assumed. Indeed, it is often not even necessary to appeal to the concept of a peremptory norm. For example, a treaty reservation's incompatibility with the object and purpose of a treaty typically can provide a sufficient answer to its lack of legal effect. Likewise, impermissible derogations from certain fundamental international legal norms may, if the norm is already codified in a multilateral treaty, typically already be excluded by virtue of Articles 41 and 58 VCLT[8] as between parties to both the multilateral treaty and the VCLT. All these questions will receive fuller elaboration across the remainder of this study.

The study arrives at these conclusions not by starting from an *idée fixe*, but through an examination of State practice and international materials – including judicial and arbitral decisions, governmental statements and the work of the International Law Commission, among others – with a focus on recent developments where possible and appropriate. The study emphasizes formal analysis, but avoids, for example, unnecessary personifications of 'international law' and of the 'State'. One of its goals is to reintroduce analytical and terminological clarity into the scholarly debates on peremptory norms. It is important to remain sensitive to, and engage with, the realities of international legal practice. These methodological postures are among the book's important features. Indeed, the concept of peremptory norms has developed to a significant extent in the literature and has taken on a life of its own in that realm which, while at times instructive, does not always enjoy a convincing basis in the reality of international legal practice. On the whole, the work draws conclusions that speak in favour of a reserved stance towards peremptory norms. A frank statement of the legal position, and of its limits, can yield greater fruits than placing too much hope in this legal concept.

[8] Article 41 ('Agreements to modify multilateral treaties between certain of the parties only'); Article 58 ('Suspension of the operation of a multilateral treaty by agreement between certain of the parties only').

As always, though in particular with respect to peremptory norms, there are numerous and divergent views and approaches. A degree of methodological and substantive disagreement between scholars is inevitable and indeed to be welcomed. The purpose of this book is not to assert that any of those approaches lacks merit. Instead, it argues in favour of one particular approach that focuses on international practice and draws balanced conclusions from the observable effects of peremptory norms, one which it considers most defensible and particularly helpful to scholars and international practitioners. The purpose of this study is to shed a realistic light on peremptory norms and their legal consequences in international law. By no means, however, should this approach convey the impression that the fundamental principles that peremptory norms seek to protect are undeserving of stringent safeguards.

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Examples: Abass (2004).
Alland (2002), 1233.
Jørgensen (2010b), 697.

Articles in the *Max Planck Encyclopedia of Public International Law* are cited by giving the name of the author, followed by the Encyclopedia's year of publication *and* the year in which the article was last updated.

Example: Watts (2012/2007).

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Examples: *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa)*, ICJ Reports 1966, 6.
Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Reports 1996, 595, 616 (para. 31).

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Reports 2012, 403, 442 (para. 94).

North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark), ICJ Reports 1969, 3, 229 (Judge Lachs, diss.).

Subsequent references to ICJ decisions are given in short form.

Examples: *Jurisdictional Immunities*.
Reservations to the Genocide Convention, 23.

Decisions of other courts or tribunals are cited in an appropriate international or national format and subsequently in short form.

Examples: *Cyprus v. Turkey*, Application no. 25781/94 (Judgment of May 10, 2001), (2001-IV) E.C.H.R. 1, para. 94.
Argentine Republic v. Amerada Hess Shipping Corporation, 109 S.Ct. 683 (1989).
Pinochet (No. 3).

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Examples: *Al-Adsani v. Government of Kuwait*.
Al-Adsani v. United Kingdom.

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ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts 2001
DALT	Draft Articles on the Law of Treaties 1966
DARIO	Draft Articles on the Responsibility of International Organizations 2011

The document 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of

the Study Group of the International Law Commission, finalized by Martti Koskenniemi' is cited in the following short form: ILC, *Fragmentation*, [para. xx].

Footnotes in all cited material are omitted.

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