

The “International Community’S Interests” Element of the State of Necessity Test: Does It Make the *Jus Cogens* Limitation on Necessity Superfluous?

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Abstract

According to Article 25 par. 1 (b) and Article 26 of the 2001 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the concept of general international law peremptory norms and that of interests of “the international community as a whole” play an important role in shaping the state of necessity as one of the circumstances that preclude wrongfulness of States’ conduct under general international law. The limitation on the necessity defense, placed by the international community’s interest condition contained in Article 25 par. 1 (b) of the ILC Articles, serves as a safeguard for the interests protected by the *erga omnes* international obligations. The concepts of *erga omnes* and of general international law peremptory norms differ significantly and while all the norms of the latter type give rise to obligations *erga omnes*, not every such obligation arises out of peremptory norms. This evidences of an autonomous role of the relevant provision of Article 25 par. 1 (b) but not of the *jus cogens* limitation under Article 26 in the context of the necessity defense. The present article argues that the *jus cogens* limitation under Article 26 plays a role largely independent from that of Article 25 par. 1 (b) since it is incorrect to see the latter as an absolute guarantee of obligations *erga omnes*. The present article is a part of a larger project “Circumstances precluding wrongfulness of conduct: the analysis of functional role and applicability parameters in the framework of International Human Rights Law” supported by the Russian Foundation for Basic Research (RFBR Grant No. 18-011-00660).

Keywords: *erga omnes*, interests of the international community as a whole, *jus cogens*, state of necessity

1. Introduction

The concepts of general international law peremptory norms and of interests of “the international community as a whole” play an essential role in shaping the state of necessity as a circumstance precluding wrongfulness of States’ conduct under general international law. According to Article 25 par. 1 (b) of the 2001 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), “[n]ecessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) *does not seriously impair an essential interest* of the State or States towards which the obligation exists, or *of the international community as a whole*” (emphases added). In its turn, Article 26 of the ILC Articles states that “[n]othing in this chapter [ILC Articles Chapter V “Circumstances precluding wrongfulness”] precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”.

The limitation on the necessity defense, placed by the international community’s interest condition contained in Article 25 par. 1 (b) of the ILC Articles, undoubtedly serves as a safeguard for the interests protected by the so-called *erga omnes* international obligations, i.e. those that are owed by States towards international community as a whole (as it was pointed out by the International Court of Justice (ICJ) in its judgment in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*).

Although the concept of obligations *erga omnes* is sometimes equated or confused with that of peremptory norms of general international law (*jus cogens*), it is widely recognized that they differ significantly as to their content and functional role in international law. While all the *jus cogens* norms give rise to obligations *erga omnes*, not every obligation of this type arises out of peremptory norms. In contrast with *jus cogens*, obligations *erga omnes*, despite the importance of underlying rights and interests, are not necessarily non-derogable. This evidences of an autonomous role of the relevant provision of Article 25 par. 1 (b) of the ILC Articles independent of the guarantee contained in Article 26 of the ILC Articles since the existence of an interest of the international community as a whole does not axiomatically imply the peremptory status of legal rules protecting such interest.

But what about the autonomy of the role of the *jus cogens* limitation in Article 26 of the ILC Articles in the context of the state of necessity rule? Taking into account that all peremptory norms give birth to *erga omnes* obligations and that Article 25 par. 1 (b) of the ILC Articles serves a safeguard of obligations of that type, a question arises as to whether the latter effectively shields the obligations under *jus cogens* norms thus making the Article 26 of the ILC Articles guarantee superfluous in the context of necessity. The present article is the authors' attempt to address these issues.

2. Material Studied, Area Descriptions, Methods and/or Techniques

2.1 Relationship between Erga Omnes and General International Law Peremptory Norms

Although the concept of *erga omnes* international rights and obligations is fraught with some clarity issues, it has acquired wide acceptance in modern international law doctrine and practice. In contrast with international obligations of a classic kind, i.e. those of bilateral nature (even arising under multilateral treaties or customary international law) (De Wet, 2013b), the *erga omnes* obligations protect interests of a collective nature, and more specifically those of the international community as a whole, and thus are owed to the international community. The concept was first recognized by the International Court of Justice in its judgment in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, and since then the ICJ has referred to it directly or indirectly in a number of cases, including *South West Africa, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *East Timor (Portugal v. Australia)*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)*.

The concept of general international law peremptory norms was defined in the Vienna Convention on the Law of Treaties, adopted in 1969 (Article 53) and further developed by international judiciary, state practice and legal doctrine. Despite some criticism (Brownlie, 1988), it is widely employed not only in the area of law of treaties, but more broadly in relation to issues of States' jurisdiction (Nagle, 2011) and immunities (Potesta, 2010; Caplan, 2003), in international human rights law (Bianchi, 2008; Simma & Alston, 1992), in the field of international responsibility (Weatherall, 2015; Tams & Asteriti, 2013), etc. Since 2015 the topic of *jus cogens* has been included into the ILC's program of work and in 2019 it adopted on first reading the Text of the draft conclusions on peremptory norms of general international law (*jus cogens*) (hereafter – Text of the draft conclusions on *jus cogens*).

The relationship between *erga omnes* and general international law peremptory norms has attracted considerable attention from commentators (Zemanek, 2000; De Wet, 2013a; Bassiouni, 1996) not least due to controversies surrounding practical application of the concepts. For instance, in the context of the discussion in the present article, in the practice of investment arbitration some tribunals apply these concepts separately and independently, while others confuse and basically equate them (compare *CMS Gas Transmission Company v. Argentine Republic* with *Von Pezold v. Zimbabwe*).

The fact that all the *jus cogens* norms give rise to obligations *erga omnes* is beyond any dispute. This is expressly confirmed by the International Law Commission in its Text of the draft conclusions (Conclusion 17) on *jus cogens*: "Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest". Nevertheless, as E. de Wet points out, "[o]ne should nonetheless be careful not to assume that the opposite also applies, namely that all *erga omnes* obligations necessarily also have *jus cogens* status" (De Wet, 2013a). It has been widely accepted in academic commentaries that *erga omnes* is a concept much broader than *jus cogens*. In the words of L.-A. Sicilianos, "[o]bligations *erga omnes* and those resulting from peremptory norms form two concentric circles, the first of which is larger than the second" (Sicilianos, 2002). Besides, the two concepts differ in their functionality. While *jus cogens* is basically a "reflection of normative hierarchy in international law" (Vidmar, 2012) and thus "can result in the invalidity of conflicting (treaty) obligations" (De Wet, 2013a), the nature of obligations *erga omnes* "can result in the invocation of international responsibility" (ibid.).

2.2 Obligations Erga Omnes and Article 25 par. 1 (b) of the ILC Articles

On its face, the language of Article 25 par. 1 (b) of the ILC Articles neither contains any reference to international obligations or norms, nor reflects any direct and mandatory link with the obligation subject to departure by the State invoking state of necessity. Instead, it uses the concept of an interest of the international community as a whole which is also used to qualify *erga omnes* obligations in international law.

But it would be incorrect to read into Article 25 par. 1 (b) of the ILC Articles a kind of absolute prohibition of non-compliance with *erga omnes* obligations.

First, it cannot be presumed that this limitation is only triggered by violation of such obligations. There is no doubt that a State's departure from *erga omnes* obligations presumably impairs relevant interests of the international community. As it was emphasized by the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Furundzija*, "the violation of such obligation [toward all the other members of the international community] simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member". Although it would be methodologically incorrect to define interests through obligations which are in turn defined through that same interests, there is no obstacle to identify impairment of interest through violation of obligation. Nevertheless, an *erga omnes* obligation is an *ipso facto* and a sufficient but not an exclusive evidence of an existing interest of the international community as a whole. To suggest the opposite would amount to arguing the completeness of international law (Lauterpacht, 2011). The absence of a specific legal rule cannot be indicative of the absence of an interest because it cannot be presumed that every interest acquires legal protection immediately after it is crystallized.

Second, in the context of relationship of Article 25 par. 1 (b) of the ILC Articles and obligations *erga omnes*, the qualifying criterion of essentiality of the relevant international community's interest can matter, and taking into account the degree of vagueness of the notion of such interest (Tanaka, 2011) as well as the problems of identification obligations *erga omnes*, the role of this criterion can be perceived differently. The *erga omnes* is a value-based concept and the interests underlying the relevant obligations are considered as so important that these obligations are seen as owed to the international community as a whole. But does this mean that such interests necessarily are of a significant value for the community? On the one hand, for instance, the ICJ is very cautious in identifying *erga omnes*, while on the other hand, its justification of existence of such obligations allows some authors to include obligations arising under almost all of the universally guaranteed human rights into this category (De Wet, 2013a). This is true that the importance of the relevant interest elevates it to the rank of the international community's interest but does not automatically endow it with a characteristic of essentiality. It seems too simplistic to assume that a violation by a State of any *erga omnes* obligation always amounts to impairment of an *essential* interest (as opposed to a "regular" interest) of the international community as a whole.

Third, Article 25 of the ILC Articles speaks of seriousness of impairment of a relevant interest. This condition clearly represents a criterion related to gravity of interference into that interest and thus not any breach of obligations *erga omnes* meets this condition. In addition, this condition involves balancing of (potential) harms to competing interests (Denicola, 2008).

Thus, although Article 25 par. 1 (b) of the ILC Articles serves as a safeguard for the international obligations *erga omnes*, it does not provide for an absolute guarantee of such obligations.

3. Results

The present article argues that the provision of Article 26 of the ILC Articles plays a role largely independent from that of Article 25 par. 1 (b) of the ILC Articles since it is incorrect to see the latter as an absolute guarantee of *erga omnes* obligations. The qualifying condition of seriousness of impairment as well as the balancing test implied by Article 25 par. 1 (b) of the ILC Articles reserve a significant degree of autonomy of the *jus cogens* limitation in relation to the state of necessity defense, and the narrow area of overlap between these guarantees only covers situations where the interests protected by peremptory norms are seriously impaired by State's conduct.

4. Discussion: Relationship between the Provision of Article 25 of the ILC Articles and General International Law Peremptory Norms

The earlier version of the provision on state of necessity in the International Law Commission Draft Articles on State Responsibility omitted mentioning international community's interest and the relevant limitation only concerned "essential interest of the State towards the obligation existed". This approach has been widely

objected, especially in the human rights context (Boed, 2000). Despite the fact, that, as was rightly emphasized by the Special Rapporteur to the ILC J. Crawford in his Second report on State responsibility, the *erga omnes* criterion can only have limited use, because, firstly, many of the obligations of the *erga omnes* type involve *jus cogens* which are entirely excluded from the scope of the necessity defense and, secondly, such obligations may in principle exclude reliance on this defense, “circumstances can be envisaged of a single unforeseen case where the interests at stake in compliance with an *erga omnes* obligation ought not to prevail over a claim of necessity”.

For example, R. Boed concluded that the state of necessity within the framework of Article 33 of the International Law Commission Draft Articles on State Responsibility was applicable to the principle of non-refoulement (which, in the author’s opinion, had not reached the character of *jus cogens*), and argued that the absence of guarantees to ensure the interests of the international community as a whole when implementing legal regulation of the state of necessity may undermine the development of international cooperation on human rights, the effectiveness of which largely depends on the recognition of the *erga omnes* character of the relevant obligations (Boed, 2000).

The issue of the need to balance the interests of a State invoking state of necessity with the interests of the international community as a whole was also discussed within the ILC, and, as a result, the current version of the rule on state of necessity addresses these concerns. K. Zemanek argues that “[t]he text of article 33 of the draft as adopted on first reading has been redrafted in order to take better account of *erga omnes* obligations” (Zemanek, 2000). According to the Second report on State responsibility by the Special Rapporteur to the ILC J. Crawford, “paragraph 1 (b) has been reformulated to make it clear that the balance to be struck in cases where the obligation is established in the general interest (e.g. as an obligation *erga omnes*) is that very interest”.

Thus, given that all *jus cogens* norms give rise to *erga omnes* obligations, but not all *erga omnes* obligations arise from such norms, the provision of Article 25 par. 1 (b) of the ILC Articles plays an important independent role in establishing the limits of operation of the state of necessity.

Even though the criteria included into the necessity test may partially overlap, the international community’s interest criterion clearly has an autonomous content and it can be assumed that outside the framework of all other existing criteria for the applicability of the necessity defense, there may exist an essential interest of the international community as a whole, a serious impairment of which will render this defense inapplicable due to Article 25 par. 1 (b) of the ILC Articles.

The above discussed criteria of seriousness of impairment of the international community’s interest within the framework of Article 25 par. 1 (b) of the ILC Articles concerns the degree of gravity of interference within the relevant interest. At the time of drafting of the ILC Articles the Special Rapporteur to the Commission J. Crawford in his Second report on State responsibility commented in the context of necessity that, “[w]hat matters is the extent of the injury to the interests protected by the obligation”. In contrast, Article 26 of the ILC Articles precludes reliance on necessity in relation to “any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law” (emphasis added). The absence of an indication of the degree of gravity of a relevant violation means that this provision in an absolute manner excludes the possibility of invoking necessity to preclude wrongfulness of conduct inconsistent with *jus cogens*. It follows that Article 26 of the ILC Articles establishes a special advanced regime of absolute protection for such narrow circle of sources of obligations *erga omnes* as *jus cogens*, thus securing an independent role for itself.

5. Conclusion

The condition concerning serious impairment of an essential interest of the international community as a whole did appear in Article 25 of the ILC Articles due to the fact that neither the *jus cogens* limitation, enshrined in Article 26 of the ILC Articles, nor the criterion of individual State/States interests serve as a sufficient safeguard for the essential international community’s essential interests.

From this perspective, the autonomous role of the relevant part of Article 25 par. 1 (b) of the ILC Articles is self-evident: since not all the international community’s interests are ensured by the general international law peremptory norms, this provision significantly expands the range of interests that cannot be sacrificed in order to protect the endangered interests of a single State, even the essential ones.

As regards the autonomy of the guarantee contained in Article 26 of the ILC Articles, in the light of the qualifying conditions in Article 25 par. 1 (b) of the ILC Articles it is clear that the relationship between the provisions of these articles is not determined exclusively by the parameters of relationship between obligations *erga omnes* and general international law peremptory norms. Indeed, it should be presumed that all general

international law peremptory norms give rise to obligations *erga omnes* (and the vice versa is not correct). However, Article 25 par. 1 (b) of the ILC Articles cannot be identified with a guarantee for such obligations, nor does it protect them to the extent that Article 26 of the ILC Articles protects *jus cogens*. Unlike the latter article, the former one, first, does not come down to protecting such type of obligation exclusively, and second, does not contain an absolute rule precluding derogation from the relevant norms: while Article 26 of the ILC Articles does not allow a State to rely on any of the circumstances that preclude wrongfulness of conduct (including necessity) to excuse its non-compliance with general international law peremptory norms, Article 25 of the ILC Articles establishes qualifying conditions of essentiality of interest and of seriousness of impairment, and the latter also implies a balancing test. Given that it is impossible to exclude a situation where an impairment of an interest protected by peremptory norms will not be assessed as having reached the level of seriousness and outweighing a relevant individual essential interest of a State, in the absence of Article 26 in the ILC Articles such violations would not have been excluded from the framework of necessity regime under general international law.

Thus, in the context of the necessity defense, Article 26 of the ILC Articles plays a role to a large extent independent from that of Article 25 par. 1 (b) of the ILC Articles, and it becomes superfluous only in a situation when a violation of general international law peremptory norms can be qualified as an impairment of underlying interest that has reached the level of seriousness and when the potential harm to that interest can be considered to outweigh harm to the essential individual interest of the relevant state, which is not an automatic characteristic of any violation of such norms.

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