The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?

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I. INTRODUCTION

1) The Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) provide in Art. 41(2) that ‘no State shall recognize as lawful a situation created by a serious breach’ of an obligation arising under a peremptory norm of general international law. A peremptory norm of general international law (jus cogens) is defined as a norm which is 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. The ILC identified as jus cogens the prohibition of aggression and the illegal use of force, the prohibitions against slavery and the slave trade, genocide and racial discrimination and apartheid, the prohibition against torture, the basic rules of international humanitarian law and the right of self-determination. The following norms have been added to these:

1 General Assembly Resolution 56/83 (2001), 12 December 2001, Annex. The General Assembly took note of the articles and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action (ibid., para. 3).


the prohibition of cruel, inhuman or degrading treatment⁴ and crimes against humanity, the prohibition of piracy, and the principle of permanent sovereignty over natural resources.⁵ The German Constitutional Court considered even the ‘basic rules for the protection of the environment’ as forming part of *jus cogens*.⁶

The obligation of non-recognition as laid down in the ILC Articles recently gained prominence in the advisory opinion of the International Court of Justice (ICJ) on the *Wall in the Occupied Palestinian Territory* (2004).⁷ The Court advised that the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, were contrary to international law. It held that Israel had violated certain obligations *erga omnes* including the obligation to respect the right of the Palestinian people to self-determination, certain rules of humanitarian law applicable in armed conflict which are fundamental to the respect of the human person and elementary considerations of humanity, and Art. 1 common to the four Geneva Conventions.⁸ The Court then stated:

‘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 such construction.’⁹

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⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports* 2004 (hereinafter *Wall in the Occupied Palestinian Territory*), available at <www.icj-cij.org>.
⁹ *Ibid.*, para. 159. See also the written statement by France to the ICJ, dated 30 January, 2004: ‘Since it is internationally wrongful, the act of constructing the wall on the Occupied Palestinian Territory also entails legal consequences for third States and international organizations. *Inter alia*, they are under an obligation not to recognize as lawful the situation created by the route taken by this wall.’ The statement is available at <http://www.icj-cij.org>.