

ORDRE PUBLIC PROTECTION AS LEGITIMATE AIM FOR FREEDOM OF EXPRESSION RESTRICTION IN THE INTERNATIONAL LEGAL ORDER

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The right to freedom of expression (FOE) is one of the cornerstones of the rule of law, but it is not an absolute right. It can be restricted on specific conditions. International criminal justice, in its fight against war crimes, and more recently against terrorism, by issuing contempt orders restricting FOE, reveals at first sight a disrespect of this fundamental right. The aim of this paper is to evaluate the legality of the restrictions imposed by international criminal courts, according to the international standards set by international human rights conventions. The applicability of the principles enshrined in the *International Covenant on Civil and Political Rights*, in particular the restrictive circumstances allowing limitation of FOE before international criminal courts, raises doubts. Restriction of FOE for *ordre public* protection, in particular, is of great interest. This notion of *ordre public* appeared in recent international case-law but it is quite difficult to pin down. In an attempt to define the notion of *ordre public*, this paper made first the distinction between *ordre public* and neighbouring notions, especially with public policy notion and tried to find out if there was a recognized and identified international public order, and if *jus cogens* and public order had the same meaning or could be interchanged. Here also, few distinctions with neighbouring notions was conducted in order to answer to the final question which is to know if the administration of justice was part of the international *ordre public* or a *jus cogens* norm. As a conclusion, it was found that international human rights conventions are not directly applicable to international criminal courts and that their extension to such sector requires an additional effort from the lawmakers; and that administration of justice was not a peremptory norm of international law; it is not part of the international *ordre public* and cannot serve as legal ground for FOE restriction.

La liberté d'expression constitue la pierre angulaire de l'État de droit, mais elle n'est pas un droit absolu. Elle peut être restreinte dans des conditions spécifiques. La justice pénale internationale, dans sa lutte contre les crimes de guerre et, plus récemment, le crime de terrorisme, en édictant des ordres d'outrage à la Cour pour divulgation d'information interdite, semble de prime abord ne pas respecter certains droits fondamentaux. Le but de cet article est d'évaluer la licéité des restrictions imposées par les cours pénales internationales, sur la base des standards posés par les conventions internationales des droits de la personne. L'applicabilité, par les tribunaux pénaux internationaux ou devant eux, des principes contenus dans le *Pacte international relatif aux droits civils et politiques* et, en particulier, les cas très réduits permettant une telle restriction de la liberté d'expression, soulève des doutes. La restriction de la liberté d'expression pour motif de protection de l'ordre public est particulièrement intéressante. Cette notion d'ordre public apparaît dans la jurisprudence internationale récente mais elle est difficile à cerner. Dans une tentative de définition de cette notion d'ordre public, cet article fait d'abord la distinction entre la notion d'ordre public et des notions avoisinantes, surtout la notion de *public policy*, et tente de voir s'il y a véritablement un ordre public international reconnu et identifié, si *jus cogens* et ordre public ont le même sens et peuvent être interchangés. Là aussi, les distinctions avec des notions voisines ont permis de répondre à la question de savoir si l'administration de la justice faisait partie de l'ordre public international ou bien constituait une norme du *jus cogens*. En conclusion, il a été constaté que les conventions internationales relatives aux droits de la personne ne sont pas automatiquement applicables aux tribunaux pénaux internationaux et que leur extension à ce secteur demandait un effort additionnel de la part des faiseurs de droit; et que l'administration de la justice n'était pas une norme péremptoire du droit international; qu'elle ne fait pas partie de l'ordre public international et qu'elle ne peut servir de fondement pour une quelconque restriction de la liberté d'expression.

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El derecho a la libertad de expresión (DLE) es una de las piedras angulares del estado de derecho, pero no es un derecho absoluto. Puede ser restringido bajo condiciones específicas. La justicia penal internacional, en su lucha contra los crímenes de guerra, y más recientemente contra el terrorismo, al emitir órdenes de desacato por divulgación de información prohibida, pareciera a primera vista vulnerar ciertos derechos fundamentales. El objetivo de este artículo es evaluar la legalidad de las restricciones impuestas por los tribunales penales internacionales, en base a los estándares internacionales establecidos por las convenciones internacionales de derechos humanos. La aplicabilidad de los principios consagrados en el *Pacto Internacional de Derechos Civiles y Políticos*, en particular las circunstancias restrictivas que permiten la limitación del DLE, por o ante los tribunales penales internacionales, genera dudas. La restricción del DLE para la protección del orden público, en particular, es de gran interés. Esta noción de orden público ha aparecido en la jurisprudencia internacional reciente, sin embargo, es bastante difícil delimitarla. En un intento por definir la noción de orden público, este artículo inicia con distinguir la noción de orden público de otras nociones parecidas, especialmente la noción de *public policy* (políticas públicas), e intenta determinar si existe realmente un orden público internacional reconocido e identificado, si *jus cogens* y orden público tienen el mismo significado y pueden intercambiarse. Asimismo, las distinciones con nociones parecidas permiten aclarar si la administración de justicia es parte del orden público internacional o más bien, si constituye una norma de *jus cogens*. En conclusión, se puede apreciar que las convenciones internacionales de derechos humanos no son directamente aplicables a los tribunales penales internacionales y que su extensión a dicho sector requiere un esfuerzo adicional por parte de los legisladores; asimismo, la administración de justicia no es una norma imperativa del derecho internacional; no es parte del orden público internacional y no puede servir como base legal para la restricción del DLE.

While studying freedom of expression (FOE) during the Study Days mentioned in the introductory part, experts went through FOE itself and its components, however the conditions of its restriction before international criminal courts were more critical and we selected some of the subjects dealt with during those Study Days.

This article deals with *ordre public* as a motive to curtail FOE in the international legal order. Indeed, in the internal or domestic legal order, this subject is well explored, and the abundant case-law of the different human rights bodies and courts traces a clear path that is now well mastered.

However, nothing indicates if the relevant conventions are applicable in the international legal order, since those conventions are directed towards the State as a major source of restrictions. What is it, hence, about in the international legal order? And if there is an undue or even illicit restriction, what is the competent side to which the individual might go? This is the question to which we will try to bring an answer.

While examining the restrictive circumstances allowing limitation of FOE cited in subparagraphs (a) and (b) of the *International Covenant on Civil and Political Rights (ICCPR)* Article 19 paragraph 3,¹ (rights or reputations of others and protection of national security or of public order, *ordre public*, or of public health or morals), one can have doubts about their applicability in the framework of the two cases where FOE was opposed to contempt of Court,² or more generally, in cases held before international criminal courts, in which FOE was restricted. The cases of contempt of Court where FOE was restricted are not many, as it was mentioned in the previous paper.

Ad hoc international criminal courts were created by decision of Security Council. The question is to know if they are bound by international human rights conventions. Some authors argued that Security Council, when acting in virtue of Chapter VII is not bound to respect human rights because of the important priority given to maintenance of international peace and security.³ This view is not shared by other

¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 19(3) (entered into force 23 March 1976) [ICCPR].

² *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Final Judgement (14 September 2009) (International Criminal Tribunal for the former Yugoslavia, Specially Appointed Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_hartmann/tjug/en/090914judgement.pdf>; *In the Case Against Florence Hartmann*, No IT-02-54-R77.5-A, Appeals Chamber judgement (19 July 2011) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_hartmann/acjug/en/110719_judgement_hartmann.pdf>; see also, *Akhbar Beirut S.A.L. and journalist Ibrahim Mohamed Al Amin*, STL-14-06/I/CJ, Order lifting Confidentiality (12 October 2018) (Special Tribunal for Lebanon, Contempt Judge), online: STL <<https://www.stl-tsl.org/crs/assets/Uploads/20181012-F0287-PUBLIC-Order-Lifting-Confidentiality-EN-Web.pdf>>; see also *TV Company Al Jadeed and journalist Karma Khayat*, STL-14-05/I/CJ, Decision in Proceedings for Contempt with Orders in Lieu of an Indictment (31 January 2014) (Special Tribunal for Lebanon, Contempt Judge), online: STL <https://thedovjacobs.files.wordpress.com/2014/10/20140131_f0001_public_cj_rv_dec_contempt_orders_lieu_of_indict_filed_en_lw_joomla.pdf>.

³ Clemens A Feinaugle, "The UN Security Council al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?" (2008) 210:1 German LJ 101.

authors⁴ who maintained that Security Council is bound by UN international human rights conventions because the purposes and principles of the UN *Charter* have evolved over time, and “they are, therefore, to be interpreted in the light of contemporary standards”.⁵ For Debbas-Gowlland:

The concept of international peace and security has... acquired a meaning that extends far beyond that of collective security (envisaged as an all-out collective response to armed attack), to one in which [...] gross violations of human rights, [...], as well as grave breaches of humanitarian law, including those encompassed within a state's own borders, are considered component parts of the security fabric.⁶

However, international human rights instruments had been created for an implementation and enforcement in the domestic legal order. Therefore, the application of the principles they enshrine to the international legal order is not clear.

One of the legitimate aims allowing restriction of FOE is public order. It was relied upon by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Florence Hartmann's* case. The question is to know if *ordre public* can be sustained as a legitimate aim in the international legal order. Moreover, the question is to know if there is a public order in the (public) international legal order.

I. The reference to public order (*ordre public*) in the recent jurisprudence

In the *Florence Hartmann's* case,⁷ ICTY grounded its decision on the duty to protect the public order (*ordre public*), which was the legitimate aim for FOE restriction. In *al Jadedd, Khayat, Al Akhbar and Al Amin* contempt cases,⁸ the Special Tribunal for Lebanon (STL) based its decision on its inherent power. For the Tribunal, its inherent power allowed it to take such decision, to adopt *Rule n°60*, and to apply it. However, the Tribunal does not tell us if the current limitation met the conditions required by international standards, if it was done in the perspective of realizing one of the legitimate aims allowed by the *International Covenant on Civil and Political Rights (ICCPR)*. Or perhaps the Court considered that its inherent powers are the legitimate aim?

Back to the applicable law regarding FOE, two major treaties were involved: the *European Convention on Human Rights (ECHR)*⁹ and the *ICCPR*.¹⁰ Time

⁴ Vera Gowlland-Debbas, “Security Council Change: The Pressure of Emerging International Public Policy” (2009-2010) 65:1 Intl J 119 at 132.

⁵ *Ibid.*

⁶ *Ibid* at 121.

⁷ *Florence Hartmann*, Final Judgement, *supra* note 2.

⁸ *Ibid*; *Akhbar Beirut S.A.L. and journalist Ibrahim Mohamed Al Amin*, *supra* note 2.

⁹ *Convention for the Protection of Human rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].

¹⁰ *ICCPR*, *supra* note 1.

wise, *ECHR* was adopted before the *ICCPR* and we notice that the latter is more restrictive on the limitations. Indeed, *ECHR* Article 10 is probably more suitable than *ICCPR* Article 19 for a contempt case since it states that FOE can be curtailed only in the interests of

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing disclosing the information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹¹

For the drafters of *ECHR*, “maintaining the authority of the judiciary” is a legitimate aim, allowing proportional and necessary restrictions on FOE. *ICCPR*, however, did not keep this condition, certainly because it might open the door for abuses in certain regimes. Comparison between the two texts shows that the conditions set by *ICCPR* Article 19 to curtail FOE are definitely more restrictive than *ECHR* Article 10.

In *Hartmann’s* case, ICTY Trial Chamber discussed the issue of FOE on the grounds of *ECHR* Article 10 but Appeals Chamber chose the *ICCPR* as applicable law. In application of Article 19, it found that the legitimate aim was maintaining public order (*ordre public*). The basic idea is that disseminating information in violation of a confidentiality order threatens public order. We will see later what the understanding of *ordre public* for the Tribunal is.

ICTY Appeals Chamber also relied on *ICCPR* article 14§1, which puts other conditions for a limitation to be lawful since the “press and the public may be excluded from all or part of a trial” for the following reasons: i. Morals; ii. Public order (*ordre public*); iii. National security in a democratic society; iv. The interest in the private lives of the parties; v. When publicity would prejudice the interests of justice, but only “to the extent strictly necessary in the opinion of the court in special circumstances”.¹² [emphasis added]. It is important to highlight the cautious wording that implies that this is an extreme that should be used in really extraordinary circumstances.

But ICTY did not provide any justification on how these articles applied to *Hartmann’s* case. *ICCPR* Article 14 continues by affirming that if publicity during the proceedings can be avoided, rendered judgments have to be made public, here again with a very narrow exception related to juvenile persons or if the proceedings concern matrimonial disputes or the guardianship of children.

Comparing with *ECHR* Article 6§1, regulating the “Right to a fair trial”, and specifying five unique exceptions where FOE before the judiciary can be restricted,¹³ we notice that *ICCPR* Article 14 used the same exact words, the very same cases cited in *ECHR* Article 6§1.

¹¹ *ECHR*, *supra* note 9, art 10.

¹² *ICCPR*, *supra* note 1, art 14(1).

¹³ *ECHR*, *supra* note 9, art 6(1).

In *Hartmann's* case, the Appeals Chamber invoked the necessity of keeping the “public order”,¹⁴ and considered that the condition required by article 19§3 was met.¹⁵ Then, it invoked the harm to prejudice that will be done to the confidence in such institutions and the effect on the States which will not be willing to cooperate with the Tribunal in the future, which means that ICTY considers, hence, that confidence in international criminal tribunals is of public order. Appeals Chamber consequently declared being “satisfied that the Trial Chamber adequately took into account all relevant considerations to ensure that its Judgment was rendered in conformity with international law.”¹⁶ Appeals Chamber did not refer to *ICCPR* Article 19. It confirmed that the Trial Chamber decision had met the conditions required by International law. However, both *ECHR* Article 10 and *ICCPR* Article 19 do not mention the question of states cooperation with the Tribunal as an aim for the restriction of a right; nor does *ICCPR* Article 14, or *ECHR* Article 6.¹⁷

But to summarize it, Appeals Chamber has considered that the protection of states' cooperation is an aim allowing restriction of FOE in international humanitarian law.¹⁸ It is hence necessary to shed light on the notion of *ordre public* and its history to assess its application in the International Legal Order.

II. The early reference to public order (*ordre public*) principle

This notion of public order (*ordre public*) is like Godot:¹⁹ everyone talks about him, waits for him, but no one has ever seen him, or is sure about his existence. Public order is mentioned in different international documents as a fact. For example, Article 17 of the by-laws (*règlement*) of the Institut de Droit International, adopted in Brussels in 1936, recognizes the existence of public order as a rule of customary law, and says:

Recognition de jure of a government implies the recognition of the judicial, administrative or other organs, and the attribution of extraterritorial effects to their acts, in conformity with the rules of international law and particularly under the customary reservation of respect for public order, even if these acts

¹⁴ *Florence Hartmann*, Appeals Judgement, *supra* note 2 at 161: “[...] restricting Hartmann’s freedom of expression in this manner was both proportionate and necessary because it protected the “public order” by guarding against the dissemination of confidential information.”

¹⁵ *Ibid*, The Appeals Chamber concluded: “These restrictions were therefore within the ambit of Article 19(3) of the *ICCPR*.”

¹⁶ *Ibid*.

¹⁷ *ICCPR*, *supra* note 1 at art 14, 19; *ECHR*, *supra* note 9 at art 6, 10.

¹⁸ *Florence Hartmann*, Appeals Judgement, *supra* note 2 at 161: “[...] the effect of Hartmann’s disclosure of confidential information decreased the likelihood that states would cooperate with the Tribunal in the future, thereby undermining its ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law. [...] The Appeals Chamber is therefore of the view that the Trial Chamber was correct to conclude that *Rule 54 bis* of the *Rules* permits the Tribunal to impose confidentiality in an effort to secure the cooperation of sovereign states.”

¹⁹ Samuel Beckett, “En attendant Godot”, Theater piece (5 January 1953); Where two characters, Vladimir and Estragon, wait endlessly and in vain for the arrival of someone named Godot.

had been consummated before any previous de facto recognition.²⁰

The *Polish Minority Treaty* of 28 June 1919, also recognizes the existence of public order, but in the domestic legal order.²¹

However, in the case of the *Norwegian Ship-owners Claims*,²² the Permanent Court of International Arbitration used the expression public policy as used by the Permanent Court of Arbitration (PCA) and not public order, and “International public policy” is synonymous of “*Ordre Public International*”, as it stated:

L'Ordre Public International is obviously not at stake when this Tribunal deals with such contracts. But should the public law of one of the Parties seem contrary to international public policy (« *Ordre Public International* »), an International Tribunal is not bound by the municipal law of the States which are Parties to the arbitration.²³

Also, in the *Oscar Chinn* case before the Permanent Court of International Justice (PCIJ), the notion of “international public policy” was brought up by Judge Schücking in his separate opinion,²⁴ when he asserts that “The attitude of the tribunal should, in my opinion, be governed in such a case by considerations of international public policy, even when jurisdiction is conferred on the Court by virtue of a Special Agreement.”²⁵

As for the ICJ, it was granted a dominant place by the *Vienna Convention on the Law of the Treaties (VCLT)*²⁶ of 1969 for the recognition of peremptory norms and treaty annulment. However, its jurisprudence remained quite reserved in the identification of peremptory law. Some authors even see a strategy for avoiding such recognition²⁷ since the Court uses close notions to identify such norms.²⁸ In 2006, ICJ

²⁰ Institut de droit international, *Règlement de l'Institut de droit international*, 9 September 2019, at art 17, online: IDI <<http://www.idi-iiil.org/app/uploads/2018/02/reglement-de-linstitut-de-droit-international-final-21122017.pdf>>.

²¹ *Polish Minority Treaty*, 28 June 1919, art 2 [*Little Treaty of Versailles*]: “Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race, or religion. All inhabitants shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.”

²² Permanent Court of Arbitration, *Reports of International Arbitral Awards: Norwegian Shipowners' Claims (Norway v U.S.A.)*, 13 October 1922 at 330, , online: PCA <http://legal.un.org/riaa/cases/vol_1/307-346.pdf>: see also *Convention for Protection of Human Rights and Fundamental Freedoms*, September 1953.

²³ *Ibid.*

²⁴ *The Oscar Chin case*, [1934] ICJ Rep 65 at 150. “The court would never, for instance, apply a convention the terms of which were contrary to public morality... The attitude of the tribunal should, in my opinion, be governed in such a case by considerations of international public policy, even when jurisdiction is conferred on the court by virtue of a special agreement.”

²⁵ *Ibid.*

²⁶ *Vienna Convention on the law of the treaties*, 23 May 1969, 1155 UNTS 18232 (entered into force 27 January 1980) [*VCLT*].

²⁷ Raphaële Rivier, *Droit impératif et juridiction internationale* (Paris: Université Panthéon-Assas, 2001), at 379.

²⁸ Catherine Maia, “Le juge international au cœur du dévoilement du droit impératif: entre nécessité et prudence” (2005) 83:1 Rev DI, *Sci diplomatiques et Pol* 1 at 36.

admitted explicitly for the first time the existence of a *jus cogens* norm, which was the prohibition of genocide.²⁹

Regional courts have participated to this effort of identifying peremptory norms, especially in the human rights field which is considered as the main legal sector where peremptory norms have a major signification, as the case-law of the Inter-American Court for human rights indicates.³⁰

This quick review of certain doctrinal opinions shows that attempts to define public order relies on different notions that do not necessarily have the same meaning and cannot be interchanged. The definition of public order (*ordre public*) seems problematic and all attempts have failed.³¹ Also, there are notions close the one to another, and it is important to differentiate between them. The content of this international public order has to be defined, and here also, authors do not unanimously agree on its content. We will try to shed more light on the definition of “public order” (*ordre public*) by making the difference between this notion and other principles; and we will also try to see what its contents can be.

III. Differentiation between neighbouring notions

Public order is often mingled with close notions which might lead to certain confusion. There are notions which do not exactly have the same meaning or legal effect but which are as difficult to define as *ordre public*. We can make, first, a difference between public order (*ordre public*) in the domestic legal order, and public order in the international legal order. This paper is only studying *ordre public* in the international legal order.

The main confusion has a linguistic origin, and it comes from the translation of the expressions *ordre public* from French into English. Public order in English is not the exact translation of the expression *ordre public* in French. It was translated into public policy, but it seems that the doctrine has changed its mind. (1) Another

²⁹ *Armed Activities on the Territory of the Congo (New application: 2002) (Democratic Republic of the Congo v Rwanda)*, [2006] ICJ Rep 6 at 64: “The Court will begin by reaffirming that “the principles underlying the [*Genocide*] *Convention* are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” and that a consequence of that conception is “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the *Convention*)” it follows that “the rights and obligations enshrined by the *Convention* are rights and obligations *erga omnes* [...]”

³⁰ Elise Hansbury, *Le juge interaméricain et le « jus cogens » : sa nature et l’identification de ses normes*, 11th ed (Genève: Graduate Institute Publications, 2011) at 13-23.

³¹ Henri Batiffola, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1958) at 159: “[...] tous les essais de définition de cette notion ont naturellement échoué”; see also, Marie-Laure Niboyet & Géraud de Geouffre de la Pradelle, *Droit international privé* (Paris: L.G.D.J, 2007): il est “impossible de donner une définition précise de la notion d’ordre public international”; Jean-Pierre Queneudec, “Pour un véritable ordre public de la mer” in Annie Cudennec, dir, *Ordre public et Mer* (Paris: Pedone, 2012) 257 at 258: “La notion d’ordre public est fuyante et évolutive, comme l’atteste la multiplicité de définitions rencontrées. De surcroit, les textes qui y font référence ne sont pas toujours d’un grand secours.”

distinction can be noticed between *ordre public* in private international law and *ordre public* in public international law. This distinction comes from the continental legal system, whereas the American legal system only talks about international law without any further precision, as it is the case in the French language (2).

A. Public order or public policy

It is very important to stress on the fact that public order as *ordre public* is different from the expression often used in English: public policy.³² Political scientists have devoted considerable attention to the problem of defining public policy without reaching a consensus.³³ Some authors define public policy as “an intentional course of action followed by a government, institution, or official for resolving an issue of public concern.”³⁴ It is the whole a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives.

Public order as *ordre public* has a totally different meaning. *Ordre public* is legal principle, difficult to define as well. The expression public order in the text of *ECHR* and *ICCPR* is taken from the French system where *ordre public* means all the mandatory rules that are linked to the general organization of the state, to the economic system, morals, health, security, public peace, rights, fundamental rights and freedoms of each citizen. These rules cannot be ignored, individuals cannot derogate to them, with very few exceptions. Public order can, hence, be defined as the set of mandatory norms organizing life in society within a given State. These norms are issued for the public interest, and without them, life in society would not be possible and States could not survive. Public order as *ordre public* is guaranteed by the State through the police. It is a set of supreme values that cannot be touched. It mixes different interests: political, moral, economical, or social interests.³⁵

If the concept of *ordre public* is easily conceivable or understandable in the domestic legal order, its application to the international legal order is not very simple.

In any case, the two notions are evolutive. And, as Gerhart Husserl states, “[t]here is no *ordre public* and no public policy for all times and for all nations. Public policy is necessarily variable. It changes with changing conditions.”³⁶ The *ordre public* is a function of time and place.³⁷

³² Gerhart Husserl, “Public Policy and Ordre Public” (1938) 25:1 Virginia LR 37 at 40-1: “The concepts of public policy and of *ordre public* do not fully coincide. [...] *Ordre public* and public policy belong to the body of legal phenomena which cannot be construed under a rigid formula.”

³³ James E Anderson, *Public Policymaking: An Introduction*, 2nd ed (Boston: Houghton Mifflin, 1994) at 4-8.

³⁴ Clarke E Cochran *et al*, *American Public Policy: An Introduction*, 9th ed (Farmington Hills: Cengage Learning Inc., 2009) at 2.

³⁵ Niboyet & Pradelle, *supra* note 31.

³⁶ *Straus and Co v Canadian Pacific Ry Co*, [1930] 245 NY 407, 173 NE 564 Hubbs J [*Straus and Co*] cited by Husserl, *supra* note 32.

³⁷ *Ibid*.

B. International public order as *ordre public international*

In the international legal order, public order was most often discussed in private international law issues, and not public international law. Charles Brocher even suggested to use the expression *ordre public interne* by opposition to *ordre public international* considered as an institution of private international law.³⁸ The doctrine used to follow this trend³⁹ but PCIJ and ICJ jurisprudence mention public order, without any further precision.

Public order is also closely linked to the idea of public power. The mere idea of public order cannot be separated from the notion of State. The guarantee of public order is also closely linked to the State activity in the space submitted to its sovereignty.⁴⁰ How is it possible hence to talk about international public order? At the same time, the validity of a treaty depends of its object: if the object is illicit the treaty (or a particular clause) becomes null, but not automatically. This norm has been brought by *Vienna Convention on the law of the treaties* of 1969⁴¹, based on the principle of *jus cogens* which we will see later.⁴²

Today, and with all the military interventions and sanctions imposed mainly by UN Security Council, one can wonder if a new *ordre public international* is not born. Reactions to violations of international law have traditionally been unilateral. States enforced their own rights having recourse to coercive measures if necessary. During the last decade, things have radically changed, with increased collective institutionalized responses to breaches of international law. Today, the international intervention in Syria and Iraq against the terrorist group ISIS, with the cover of UN Security Council, is an illustration of the new dimension of international cooperation.

This has gone hand in hand, says late professor Vera Debbas-Gowlland, with the creation and expansion of a domain of public interest or international public policy, the emergence of the legal notion (and legal fiction) of an international community, and the "hierarchization" of rules due to a growing value-oriented international law, i.e., the creation of a core of norms deemed fundamental in the sense that they are directed to the protection of certain overriding community values, or indispensable for the functioning of a highly complex and interdependent international society, and the non-observance of which would affect the very essence of the international legal system.⁴³

The new international world leans towards a system based on protecting human security as well as states' security through a stronger international judiciary system.

³⁸ Charles Brocher, *Cours de Droit international privé* (Genève: Van Doosselaere, 1882) at 22 cited by Husserl, *supra* note 32 at 38.

³⁹ *Ibid* at 23, 26.

⁴⁰ Queneudec, *supra* note 31 at 260: "*L'ordre public est intimement lié à l'idée de puissance publique. L'idée même d'ordre public est inséparable de la notion d'État [...] la sauvegarde de l'ordre public est étroitement liée à l'action de l'État... dans les espaces soumis à la souveraineté de celui-ci.*"

⁴¹ *Supra* note 26.

⁴² Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, *Droit international public* (Paris: LGDJ, 1999) at 99-124: "*La validité d'un traité dépend-elle de la licéité de son objet? Pour qu'il puisse en aller ainsi, il faut pouvoir affirmer l'existence d'un ordre public international.*"

⁴³ Vera Gowlland-Debbas, *supra* note 4 at 120.

The place granted to international justice relies mainly on states' will or consent, and finally offers a minimal possibility to international lawsuits.⁴⁴ With the new trend that has been witnessed after the fall of Berlin wall and the end of the Soviet empire, a new doctrine has seen light, called the "Progressive doctrine".⁴⁵ It shows the intention of this new doctrinal stream to give a new look to the international legal order, a look where the international judge has a dominant place. In this new world, the judge's function is to guarantee the respect of the international public order, presupposing the existence of a hierarchy between the international legal norms, and depends on the existence of peremptory norms of *jus cogens*.⁴⁶ The emergence of all the international criminal courts and tribunals goes together with this trend and with the new conception of the individual as "subject" of international law. The condition of existence of the international *ordre public* is, hence, linked to the existence of *jus cogens*.

IV. *Ordre public and jus cogens*

The place occupied by *jus cogens* in international law is well seated now, especially after its new recognition in 2001 by the UN General Assembly (UNGA) in its *Resolution on Responsibility of States for internationally wrongful acts*⁴⁷ where Chapter III concerning Serious breaches of obligations under peremptory norms of general international law states in its Article 40 that:

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.⁴⁸

The concept of *jus cogens* is now part of substantive law and it even "transcends nowadays the ambit of both the law of treaties and the law of the international responsibility of States, so as to reach the general International Law and the very foundations of the international legal order."⁴⁹

However, is it possible to consider that public order (*ordre public*) and *jus cogens* are the same concept? This is what some authors seems to think. For

⁴⁴ Charles Leben, "La juridiction internationale" (1989) 9:1 Dr 144 at 146: "*une justiciabilité minimale*".

⁴⁵ Philippe Blacher, "L'État dans la doctrine « progressiste » du droit international public" (2004) 2:18 Cités 77.

⁴⁶ *Ibid* at 79.

⁴⁷ *Responsibility of States for internationally wrongful acts*, GA Res 56/83, UNGA, 56th Sess, Supp no 10, UN Doc A/56/10 (2002).

⁴⁸ *Responsibility of States for internationally wrongful acts*, GA Res 56/83, UNGA, 53th Sess, UN Doc A/56/49 (2001) art 40.

⁴⁹ Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (Boston: Martinus Nijhoff, 2010) at 336. See also James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge: University Press, 2002) at 188; Gennadi Danilenko, "International Jus Cogens: Issues of Law-Making" (1991) 2:1 Eur JIntl L 42.

Alain Pellet, *ordre public international* amounts to imperative norms of general international law, that is for him *jus cogens*.⁵⁰ He asserts that:

*Au terme d'une lente évolution, qui n'est pas allée sans à-coups, l'humanité s'est mise à adhérer à un minimum - oh, encore un strict minimum! - de valeurs communes qui sont à l'origine d'un ordre public international, encore très embryonnaire, mais dont l'existence n'en est pas moins indiscutable.*⁵¹

For Pellet, peremptory norms of international law are part of this international public order, or at least they are the practical translation of its existence.

The principle of *jus cogens* passed through different phases but if today it is not contested anymore, its contents remain unclear, especially that it was dealt with in a conventional framework which might not be sufficient anymore today. Indeed, violations can happen by unilateral acts and not through a treaty; moreover, the *jus cogens* norms themselves are fundamental norms and the place that human rights are taking in the international law fora creates new challenges.

A. The legal framework of *jus cogens*

The notion of *jus cogens*, although it has its origin in municipal legal systems, was definitively introduced in the realm of international law by the *VCLT* in 1969, and confirmed by the 1986 *VCLT*.⁵² Article 53 of the 1969 *VCLT* states about “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.⁵³

From this article, some of the components of this notion can be deduced: its origin or source, and its effects.

Concerning its source, the *VCLT* states that *jus cogens* is a norm of general international law, that is customary law, then it mentions the peremptory character of these norms had to be accepted and recognized by the international community of states as a whole, which means to states which are not parties to the *Convention*. However,

⁵⁰ Alain Pellet, “Cours général : Droit International entre souveraineté et communauté internationale” (2007) 2:1 *Anuario Brasileiro De Direito Internacional* 10 at 22 : “[...] ces règles qui permettent de déterminer laquelle de deux normes incompatibles va s'appliquer prioritairement sont de deux sortes: [...] d'autre part, de façon encore embryonnaire, on recourt à la notion d'ordre public international, et ce sont les normes impératives du droit international général - le fameux *jus cogens*.”

⁵¹ *Ibid* at 42, 117.

⁵² *Vienna Convention on the Law of Treaties between States and International Organizations and Between International Organizations*, 21 March 1986, 2 UNTC 129 (not entered into force yet).

⁵³ *VCLT*, *supra* note 41 at art 53.

by this stance, the *Convention* is not able to give a shape to the *jus cogens* norms, and this task is handed over to the State Parties and to the judiciary.⁵⁴ As for the effects, it is clear that by declaring null all treaties contrary to *jus cogens* norms, some authors feared an instability of international relations, and were skeptical for its effects.

Reflecting somehow this doctrinal hesitation or even skepticism, the case-law remains very thin, and the clear reference to the *jus cogens* as such is rare, even if it does not create any confusion on the substance of *jus cogens*. ICJ examined few cases where *jus cogens* was invoked. In an *Advisory Opinion* dated 28 May 1951, related to the reservations on the *Convention for the Prevention and Repression of Genocide*, it stated that an elementary “moral” principle bound States irrespectively of any treaty. In 1970, in the *Barcelona Traction* case,⁵⁵ the World Court *obiter dictum* talked about *erga omnes* obligations, but the expression *jus cogens* never appeared in the judgment. In an *Order* dated 15 December 1979,⁵⁶ ICJ declared that

while no State is under any obligation to maintain diplomatic or consular relations with another, yet it cannot fail to recognize the imperative obligations inherent therein, now codified in the *Vienna Conventions* of 1961 and 1963, to which both Iran and the United States are parties⁵⁷

without mentioning directly *jus cogens* norms. It was only in the *Nicaragua Case* in 1986, that ICJ finally clearly affirmed *jus cogens* as an accepted doctrine in international law, but in the framework of the prohibition of the use of force.⁵⁸ But ten years later, in an *Advisory Opinion* dated 1996, the Court once again refused to use the expression *jus cogens* and made reference to the “intransgressible principles of international customary law.”⁵⁹

As for the arbitral justice, an annulation of treaty based on *jus cogens* was invoked by Guinea-Bissau in the case concerning the determination of their maritime frontier with Senegal.⁶⁰ The Arbitral Tribunal recognized the existence of *jus cogens* norms, refusing to consider them as of higher hierarchy than other norms. For the

⁵⁴ Serge Sur, “La créativité du droit international : Cours général de droit international public” (2014) 363:60 AFDI at 120.

⁵⁵ *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v Spain)*, [1964] ICJ Rep 6.

⁵⁶ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1979] ICJ Rep 7 at 20, 41; whereas, while no State is under any obligation to maintain diplomatic or consular relations with another, yet it cannot fail to recognize the imperative obligations inherent therein, now codified in the *Vienna Conventions* of 1961 and 1963, to which both Iran and the United States are parties.

⁵⁷ *Ibid.*

⁵⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 at 190.

⁵⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at 279: “Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”

⁶⁰ International Arbitral Awards, *Reports of Arbitral Awards : Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, 31 July 1989, online: RIAA <http://legal.un.org/riaa/cases/vol_XX/119-213.pdf>.

Arbitral Tribunal, and from the Law of the Treaties point of view, *jus cogens* is simply the characteristic peculiar to certain legal norms so they cannot be overruled or derogated upon by conventional dispositions.⁶¹ But the Tribunal stated that Guinea Bissau was unable to bring evidence on the existence of a *jus cogens* norm in its allegations.⁶²

Today, *jus cogens* is being employed in other areas than treaties, and by a variety of actors, not only states, by NGOs and individuals. Unilateral acts of states and binding resolutions of international organizations are said to be null and void if they are contrary to peremptory international norms.

If the international public order existence was somewhat contested, today an:

ordre public emerging from the hierarchization of rules due to a growing value-oriented or public interest-oriented international law. The international legal order has singled out certain vital functions of the system, inter alia, maintenance of international public order and the incorporation of a certain universal moral or ethical foundation in the form of human rights.⁶³

B. *Jus cogens* and *erga omnes* obligations

Jus cogens norms create for states *erga omnes* obligations. In other words, the peremptory character of a norm cannot be denied by a state, and the obligations it creates are *erga omnes* that is to say “opposable” to all countries. If *jus cogens* is about the peremptory character of the norm, *erga omnes* character is its opposability to any state.

However, if the two notions are certainly inter-related, they are not exactly the same.

The ICJ has given the definition of “*erga omnes* obligations” in a famous *obiter dictum* in the *Barcelona Traction Affair*⁶⁴ where it stated that:

⁶¹ *Ibid* at 135 para 41: “La doctrine actuelle du droit international s'est abondamment occupée du *jus cogens*, surtout à partir de la Convention de Vienne sur le droit des traités de 1969. Une partie de cette doctrine fait apparaître le *jus cogens* comme composé de normes d'une hiérarchie supérieure. Les études sur la notion de *jus cogens* et l'identification des normes ayant un tel caractère ont été souvent influencées par des conceptions idéologiques et par des attitudes politiques. Du point de vue du droit des traités, le *jus cogens* est simplement la caractéristique propre à certaines normes juridiques de ne pas être susceptibles de dérogation par voie conventionnelle.” (emphasis added)

⁶² *Ibid* at 136 para 44: “Un État né d'un processus de libération nationale a le droit d'accepter ou non les traités qu'aurait conclus l'État colonisateur après le déclenchement du processus. Dans ce domaine, le nouvel État jouit d'une liberté totale et absolue, et il n'existe aucune norme impérative qui l'oblige à déclarer nuls les traités conclus pendant cette période ou à les récuser. La Guinée-Bissau n'a pas établi dans le présent arbitrage que la norme invoquée par elle serait devenue une règle de *jus cogens*, soit par la voie coutumière, soit par la formation d'un principe général de droit.”

⁶³ Vera Gowlland-Debbas, Linos-Alexander Sicilianos & Grainne Burca, “Is the Un Security Council Bound by Human Rights Law?” (2009) 103:1 Cambridge University Press 199.

⁶⁴ *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v Spain) second phase*, [1970] ICJ Rep 3 at 3.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.⁶⁵

Erga omnes obligations are, hence, designed for the protection of collective interests and their respect is due towards all the members of the international collectivity simultaneously. *Jus cogens* norms have the same aim since they impersonate the highest values of a society.

The difference between the two notions appears to the scrutiny of the definition proposed by ICJ, which was judged unsatisfying,⁶⁶ because not accurate regarding the elements of *erga omnes* obligations, i.e. their indivisible character and the multiplicity of stakeholders. It also restricts the scope of application of the concept to obligations protecting fundamental interests of international community, but it implies at the same time that such obligations can only result for general international law or universal treaties, whereas the reality is different and such norms can emanate from other sources.

In fact, a norm can be *erga omnes* without being a norm of *jus cogens*, even if the opposite is not true: a peremptory norm of *jus cogens* is *erga omnes* without a hesitation. It is also perfectly possible to create by treaty *erga omnes* obligations within a limited group of states, or regionally. *Erga omnes* norms do not have to be of universal value. The relation between the two concepts is very important to clarify, since they are, as we previously said, very close.

Jus cogens is a normative category narrower than the group of norms producing *erga omnes* obligations. Peremptory norms form a sub-category of *erga omnes* obligations with a stronger legal shield.⁶⁷

C. The norms of *jus cogens*

What are the norms that can be considered as peremptory norms? If the recognition of the peremptory character of certain norms, their content, or their object is not easily determined.

⁶⁵ *Ibid* at 31-2.

⁶⁶ François Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Genève: Graduate Institute Publications, 2004) at 239-62.

⁶⁷ *Ibid* at 44.

VCLT of 1969 has focused on the function of *jus cogens* which makes a treaty in breach with its norms null and void. However, the content of *jus cogens* norms was left aside, adopting a definition that looked at first sight as repetitive, or redundant.

The international practice is not very abundant, on the contrary, and this scarcity is due to the fact that states are not willing to extend the scope of application of *jus cogens*, but on the contrary, they try to keep it within a restricted frame.

1. THE PROHIBITION OF THE USE OF FORCE

Prohibition of the use of force is without contest, the perfect illustration of *jus cogens* norm, despite its frequent violations. But even this well-established principle is subject to controversies as for its peremptory character.

Article 2§4 of the *UN Charter* has set a fundamental principle: the prohibition of use of force in international relations. The article clearly states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The prohibition of the use of force is first and foremost a treaty-based rule, inscribed both in the *Charter of the United Nations* and in numerous other treaties of regional scope.

The prohibition of the use of force has been reaffirmed in several international UNGA resolutions such as res. 2625 (XXV) dated 24 October 1970; res. 2660 (XXV) dated 7 December 1970; Res. 3314 (XXIX) dated 14 December 1974; A/RES/31/9 dated 8 November 1976; A/RES/33/72 dated 14 December 1978; A/RES/42/22 dated 18 November 1987; etc.

This principle is now considered as a customary norm, applying also to States who have not accepted this character. However, the question is to know if it is considered as a *jus cogens* norm, a norm to which no derogation is possible, to know if the “essential components” of the international community have accepted the peremptory character of this norm.⁶⁸

The expression “essential components” of the international community is not very clear and needs to be fine-tuned. Does it designate the permanent members of Security Council?

For the large majority of states, the prohibition of use of force in international relations is a norm of *jus cogens*.⁶⁹ However, the debates having taken place before the adoption of UN General Assembly *Resolution 42/22* dated 18 November 1987 show

⁶⁸ Giorgio Gaja, “Jus Cogens beyond the Vienna Convention” (1981) 172:1 RCADI 271 at 283.

⁶⁹ Olivier Corten, “The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate” (2006) 16:5 EJIL 803 at 819.

some more nuanced positions on the subject, even if Article 2 of this *Resolution* clearly states that “the principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance.”⁷⁰

In the debates, Honduras went even further and mentioned the *Charter*'s dispositions related to international public order which are the expression of imperatives principles.⁷¹

However, few states did not clearly state that the prohibition of the use of threat or force in international relations was a peremptory norm of international law, neither a norm of *jus cogens*, but only a fundamental principle. But even in this category, the wording changes:

The USSR stance was more subtle; without expressing their opinion about the peremptory character of this principle, they stated that “*les principes touchant les relations amicales et la coopération entre les États sont le fondement du droit international contemporain.*”⁷²

As for the United States they rejected the idea that the prohibition of use of force is a *jus cogens* norm, and stated:

Whatever contribution the statements in the elaborations of those principles might help make to a better and more tolerant world, they were not *jus cogens*. His delegation was not so presumptuous as to make any claim to that effect.⁷³

India's statement is particularly interesting, since it affirms that the principle of prohibition of the use of force is the corner stone of the “international public order”,⁷⁴ in a clear acceptance of the existence of international public order and considering, hence, *jus cogens* as part it.

The principle is now admitted and the larger part of the doctrine agrees that the prohibition of the use of force is a *jus cogens* norm,⁷⁵ even if some other authors allege that this principle has fallen into disuse. Indeed:

if the breach of a legal rule obviously has an impact on its effectiveness, it

⁷⁰ *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22, UNAG, 42nd Sess, Supp No 41, UN Doc A/42/766 (1987) art 2.

⁷¹ A/C.6/34/SR.23, 22 October 1979, at 5, para 17, cited in Olivier Corten, “Recours à la force/jus cogens”, online : <https://iusadbellum.files.wordpress.com/2011/07/forcejus_cogens_1.pdf>.

⁷² A/C.6/S.R.1163, 29 November 1969, at 354, para 8, cited in *ibid*.

⁷³ *Report of the Special Committee on Principles of International Law concerning Friendly relations and cooperation among States*, UNGA, 25th Sess, Supp No 18, UN Doc A/8018 (1970) at 119 para 254.

⁷⁴ A/C.6/S.R.994, 9 novembre 1967, at 216 para 8; See also, A/C.6/S.R.1162, 28 novembre 1969 at 343 para 19: “constitue en quelque sorte la pierre angulaire de tout l'ordre public international contemporain [et] est à la base de tous les autres principes du droit international.” (format added)

⁷⁵ Joe Verhoeven, *Droit international public* (Bruxelles: Larcier, 2000) at 671; Daillier & Pellet, *supra* note 42 at 967; Guillaume Le Floch, “Is the Prohibition of the Use of Force still a positive Law Rule?” (2009) 57:1 Dr et Cult 49 at 49.

does not automatically question its existence. Even when infringed, the principle of the prohibition of the use of force remains a positive law rule.⁷⁶

ICJ jurisprudence confirmed that the prohibition of the use of force was a peremptory norm, a *jus cogens* norm. For the ICJ, this principle is the cornerstone of the *UN Charter*,⁷⁷ and that it had acquired a customary value.⁷⁸ It is very often cited as a typical example of *jus cogens*, as a principle that cannot be transgressed.⁷⁹

In its *Opinion n°10* dated 4 July 1992, the Arbitration Commission for ex-Yugoslavia (Commission Badinter) admits that rules of international law regarding non-use of force and protection of minorities are peremptory, since new states can only be recognized if they comply with “the imperatives of general international law, and particularly those prohibiting the use of force in dealings with other states or guaranteeing the rights of ethnic, religious or linguistic minorities.”⁸⁰

2. FEW HUMAN RIGHTS AND HUMANITARIAN LAW PEREMPTORY NORMS

As some authors have noted, “Most of the case law in which the concept of *jus cogens* has been invoked is taken up with human rights.”⁸¹

Even before *VCLT* adoption, concerns about protection of humans was already strongly present. In 1966, Judge Tanaka, in the *South West Africa* case, stated in his dissenting opinion:

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.⁸²

In 1968, the representative of the Vatican at the Diplomatic Conference of the UN on the Right of the Treaties, Professor René-Jean Dupuy, even proposed “[le] principe de la primauté des droits de l’homme comme dénominateur commun au jus

⁷⁶ Le Floch, *ibid.*

⁷⁷ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 at 223.

⁷⁸ *Nicaragua v United States of America*, *supra* note 58 at 103.

⁷⁹ *Ibid* at 100, 101, 190; The Court has extensively cited a passage from the words of the International Law Commission which presented this principle as the best example of a *jus cogens* norm, see International Law Commission, *Yearbook of the International Commission : Summary Records of the Eighteenth Session*, 19 July 1966, at 270, online: ILC <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v1_p2.pdf>.

⁸⁰ Danilo Turk, “Recognition of States: A Comment” (1993) 4:1 EJIL 66 at 90.

⁸¹ Andrea Bianchi, “Human rights and the Magic of *Jus Cogens*” (2008) 19:3 EJIL 491 at 491.

⁸² *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, [1966] ICJ Rep 250 at 298.

cogens.”⁸³

Few years later, Professor Roberto Ago recognized that fundamental rules of humanitarian character (prohibition of genocide, of slavery, of racial discrimination, protection of human persons’ essential rights in times of peace and in time of war), belonged to *jus cogens* hard core norms.⁸⁴

The Arbitration Commission for ex-Yugoslavia (Commission Badinter), in its first *Opinion* dated 29 November 1991, tackling the issue of State succession, stated that “the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession”.⁸⁵

In other words, individual human rights, and collective rights to self-determination, and rights of minorities could be considered as peremptory.

The first comment concerns the principle adopted by this *Opinion* which is to recognize collective rights and not only individual rights. Indeed, for certain authors, human rights are the rights of human beings as individual being. Groups may have rights of some sort, but whatever those rights might be, they cannot be human rights. Human rights must be rights born by human individuals. While other authors insist that human rights can take collective as well as individual forms.⁸⁶ This *Opinion* has taken position by recognizing collective rights within the framework of state succession.

However, the wording of the *Opinion* is quite ambiguous and could be interpreted in different ways. However, we don’t think that the word “binding” is a synonymous of “peremptory” especially that all fundamental individual rights are not part of the *jus cogens*. Moreover, the *Opinion* specifies that these norms are binding on all parties to a state succession.

Some of the European Court for Human rights judges tend to think that human rights are *jus cogens*.⁸⁷ Other European judges think that general principles of law,

⁸³ United Nations, *United Nations Conference on the Law of Treaties, First and Second Session Vienna, 26 march - 24 May 1968, Official Records: Summary records of the plenary meetings of the Committee of the Whole, 24 May 1968* at 258, paras 73-75, online: ILSA <<https://www.ilsa.org/Jessup/Jessup15/VCLT%20First%20Session.pdf>>.

⁸⁴ Roberto Ago, “Droit des traités à la lumière de la Convention de Vienne” (1971) 134:1 RCADI 297: “*Les règles fondamentales de caractère humanitaire (interdiction du génocide, de l’esclavage, de la discrimination raciale, protection des droits essentiels de la personne humaine en temps de paix et en temps de guerre).*”

⁸⁵ The Arbitration Commission for ex-Yugoslavia, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia (Opinion n° 1)*, 29 November 1991, at 165, online: Cambridge University <<https://www.cambridge.org/core/journals/international-legal-materials/article/conference-on-yugoslavia-arbitration-commission-opinions-on-questions-arising-from-the-dissolution-of-yugoslavia/30921428D0CD93AF766BC1766217049D>>.

⁸⁶ On this controversy, see Peter Jones, “Human rights, Group Rights, and Peoples Right” (1999) 21:1 Human rights Q 80.

⁸⁷ *Belolos v Switzerland* (1988), 4 ECHR (Ser A), 10 EHRR 466, Concurring Opinion, Judge De Meyer: “*La Convention européenne des Droits de l’Homme a pour objet et pour but, non pas de créer, mais de reconnaître des droits dont le respect et la protection s’imposent même à défaut de tout texte de droit positif. On conçoit mal que des réserves puissent être admises en ce qui concerne des dispositions reconnaissant des droits de ce genre. On peut même penser que de telles réserves, ainsi que les*

which are not part of the *jus cogens* cannot bring restrictions to the rights recognized by the *ECHR* human rights, which is a *lex specialis*.⁸⁸

However, in the absence of any solid statement, we cannot consider that their rights are *jus cogens*. At present, very few norms from the international humanitarian law or international human rights law are considered as *jus cogens* norms: prohibition of genocide, of slavery and torture. The prohibition of discrimination could be a *jus cogens* norm, but no statement in this respect has been detected in the international doctrine or jurisprudence.

a) *Prohibition of Genocide*

Even if the right to life is an “absolute” right, it is not a norm of *jus cogens*. But mass killings on discriminatory basis, i.e. genocides, are considered as banned under any circumstances. Some of the humanitarian law principles are, hence, considered as peremptory norms of international law.

The ICJ affirmed this principle in more than one occasion. For the Court, “genocide is a crime under international law”. It considers it as a norm of customary international law, as in its jurisprudence of 1951⁸⁹ when it stated that:

The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge.’⁹⁰

In 1996, in the case between *Bosnia and Herzegovina v. and Yugoslavia*, it stated that “the rights and obligations enshrined by the [genocide] Convention are rights and obligations *erga omnes*”.⁹¹

The ICJ reaffirmed the same principle in 2006, in the case regarding *Armed*

dispositions qui les autorisent, sont incompatibles avec le ius cogens et, dès lors, nulles, à moins qu’elles ne se rapportent qu’à des modalités de mise en œuvre, sans toucher à la substance même des droits dont il s’agit.”

⁸⁸ *McElhinney v Ireland*, No 31253/96, [2001], XI ECHR 763, 34 EHRR 13, Dissenting Opinion, Judge Loucaïdès, at 22-23: “Dans une affaire comme celle dont la Cour se trouve ici saisie, la *lex specialis* est la Convention européenne des droits de l’homme. Les principes généraux du droit international ne sont pas consacrés par la Convention sauf lorsqu’elle y fait expressément référence (voir, par exemple, les articles 15, 35(1) et 53 de la Convention et l’article 1 du Protocole n°1). On devrait dès lors hésiter à accepter des restrictions aux droits de la Convention qui découleraient de principes du droit international comme ceux établissant des immunités qui ne figurent même pas parmi les normes du *jus cogens*.”

⁸⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 18 at 23.

⁹⁰ *Ibid.*

⁹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, [1996] ICJ Rep 595 at 616.

*Activities on the Territory of the Congo*⁹² where it started by reaffirming that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”⁹³ and that a consequence of that conception is “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention)”⁹⁴, referring to its former 1951 jurisprudence,⁹⁵ and reaching the conclusion that “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*”,⁹⁶ according to its 1996 jurisprudence. The Court asserted once again that prohibition of genocide had “assuredly” an *erga omnes* character.⁹⁷

In 2007, the Court clearly stated, without further justification, that “[...] the prohibition of genocide has the character of a peremptory norm (*jus cogens*).”⁹⁸

In 2015, the Court, relying on its previous jurisprudence, stressed that it “has made clear that the *Genocide Convention* contains obligations *erga omnes* [and] that the prohibition of genocide has the character of a peremptory norm (*jus cogens*).”⁹⁹

b) *Prohibition of slavery and torture*

International law of human right is one of few legal fields where ethics, moral values, and universality of rights meet together.¹⁰⁰ Some barbarian acts have been prohibited, by international instruments first, then by international courts.

Prohibition of slavery and torture are one of the main principles set by the *Universal Declaration of Human rights* Article’s 4 and 5.¹⁰¹ *ICCPR* tackled the same principles by stating first that these rights did not accept any derogation.¹⁰² This is quite interesting because *ICCPR* Article 6 guarantees the right to life, Article 4 refuses any derogation, however, killing is still allowed under different excuses: *ICCPR* does not forbid death penalty, the *UN Charter* accepts the use of force with what it carries with it as deaths and casualties, and “collateral damages” are admitted and excused.

If right to life is finally not so absolute, it seems that slavery and torture or cruel, inhuman or degrading treatment or punishment are not tolerated by the

⁹² *Genocide*, *supra* note 29 at 31-2.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 42.

⁹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, [2015] ICJ Rep 3.

¹⁰⁰ Pierre-Marie Dupuy, *Droit international public* (Paris: Dalloz, 2008) at 220.

¹⁰¹ *Universal Declaration of Human rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) arts 4, 5.

¹⁰² *ICCPR*, *supra* note 1, art 4(2): “No derogation from articles 6, 7, 8 (para I and 2), 11, 15, 16 and 18 may be made under this provision (i.e. public emergency)”.

International community. Servitude is considered like slavery and equally banned.

This peremptory norm was consecrated by different international courts. The contribution of the International Criminal Tribunals was important. In 1998, the ICTY was the first to identify *jus cogens* norms in the case *Furundzija*.¹⁰³

The European Court for Human rights followed and admitted that prohibition of torture is a norm of *jus cogens*, in 2001 then, in 2008.¹⁰⁴

Finally, the ICJ, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, clearly confirmed that prohibition of torture is part of customary international law and a peremptory norm (*jus cogens*), and justified its position by demonstrating that there was a wide acceptance by States of this peremptory character.¹⁰⁵

D. Is the administration of justice a norm of *jus cogens*?

¹⁰³ *Prosecutor v Anto Furundzija*, IT-95-17/1-T, Trial Chamber Judgment (10 December 1998) at para 139 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<https://www.refworld.org/cases,ICTY,40276a8a4.html>>: “It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law”; para 142: “Under current international humanitarian law [...] torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility”; para 143: “[...] these rules ban torture both in armed conflict and in time of peace”; para 147: “There exists today universal revulsion against torture; (b) The Prohibition Imposes Obligations *Erga Omnes*”; para 151: “Furthermore, the prohibition of torture imposes upon States obligations *erga omnes* (c) The Prohibition Has Acquired the Status of *Jus Cogens*”; para 153: “[...] this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. *Qualifiée de « droit absolu auquel il ne peut être dérogé, même en situation de crise », le Tribunal reconnaît que l’interdiction de la torture génère des obligations erga omnes et s’impose au rang le plus élevé du système normatif international en raison de la « répulsion universelle » que de tels actes inspirent (id., respectivement para 144 et 147).*”

¹⁰⁴ *Demir & Baykara v Turkey*, No 34503/97, [2008] V ECHR 12, 48 EHRR 54 at para 73: “la Cour, dans son arrêt *Al-Adsani c. Royaume-Uni*, a constaté, à partir de textes universels (l’article 5 de la Déclaration universelle des droits de l’homme, l’article 7 du Pacte international relatif aux droits civils et politiques, les articles 2 et 4 de la Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants) et de leur interprétation par des juridictions pénales internationales (le jugement du 10 décembre 1998 rendu par le Tribunal pénal international pour l’ex-Yougoslavie en l’affaire *Furundzija*) ou nationales (l’arrêt de la Chambre des Lords dans l’affaire *ex parte Pinochet* (No. 3)), l’existence d’une norme impérative de droit international ou *jus cogens* quant à l’interdiction de la torture, qu’elle a incorporée à sa jurisprudence dans ce domaine.”

¹⁰⁵ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 422 at 457 para 99: “In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*). That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the *Universal Declaration of Human Rights* of 1948, the 1949 *Geneva Conventions for the protection of war victims*; the *International Covenant on Civil and Political Rights* of 1966; *General Assembly Resolution 3452/30* of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.”

The question is to know if the administration of justice is part of the international public order, a norm of *jus cogens*, since freedom of expression can only be curtailed or violated for certain reasons, among which the sake of *ordre public*, the only reason applicable to international criminal justice.

The good administration of justice is one of the individual fundamental rights protected by international law. It is considered as a key condition for democracy and the rule of law. The question is to know if it is a peremptory norm.

Moreover, in the international field, the good administration of justice does not have the same aims. International criminal justice only exists to punish the perpetrators of most heinous crimes against humanity, only if domestic justice is incapable, or unwilling to prosecute them. The principle of complementarity of international justice is one of its basic character, and it is translated by the principle of exhaustion of all internal recourses. In his separate *Opinion* attached to the Judgment, in the case *Ringeisen v. Austria*, Judge Verdross stated that the rules of general international law regarding exhaustion of internal remedies are not part of the *jus cogens*.¹⁰⁶ Does it mean that this principle can be over ruled by an international court? Giving such power to international justice would mean that Security Council will turn into a "supra power" with super powers, and the authors are skeptical about states agreement on such trend, disregarding the fact that recent tensions between Russia and the United States will most likely hinder any new attempt for international criminal charges for international crimes. The example of the Syrian crisis illustrates today very well the dead-end of international criminal justice.

In any case, nothing has been mentioned about administration of justice. The offence of contempt of Court originated from the idea that administration of justice had to be preserved in the best interest of individual's rights. Because one has to remember that justice has been created to serve human beings and no the other way around.

There are no indications so far, that administration of justice is a peremptory norm, and it cannot be invoked to curtail FOE or violate the principles enshrined in ICCPR Article 19.

Public order as *ordre public* is not a peremptory norm of international law, and it cannot be invoked to curtail FOE. In the light of the *Florence Hartmann's* case, strict application of FOE principles to contempt to Court is an uneasy task for several reasons:

Those principles were originally designed for an application in the internal legal order and their extension to the criminal international legal order was done in

¹⁰⁶ *Ringeisen v Austria* (1971), 65 ECHR (Ser A) 2, 1 EHRR 455 at para 2: "Les règles du droit international général concernant l'épuisement des voies de recours internes ne font pas partie du jus cogens."

contradiction with the principles of restrictive interpretation of texts prevailing in the application of legal norms in criminal law.

There was a contradiction concerning the applicable law before the ICTY, between the Trial Chamber and the Appeals Chamber; The interpretation of the requirements imposed by the different applicable international instruments was not uniform, stable, or clear, as this paper tried to demonstrate; International public order – especially in the field of criminal law, and the fight against impunity – requires for its implementation that “justice” and “power” – or “justice” and “strength” – work together, and that, what is fair is strong and what is strong is fair, as per Pascal’s words.¹⁰⁷ Is it the case for the international criminal tribunals? This is perhaps the main issue in this lawsuit, the *raison d’être* of this jurisprudence, to preserve the strength of an international criminal justice that might not be as strong in the future, especially that the ICTY is reaching the end of its mandate. It looks like the whole foundations of the jurisprudence in the *Florence Hartmann’s* case are circumstantial. Therefore, they cannot be considered as a case-law, even if the application of the standards of FOE, before international criminal courts, is certainly a step forward, a significant progress in this field. A lot of work is still to be done in order to extend the application of international standards to international criminal courts, since the applicable conventions do not provide solid legal grounds to the ruling of the Tribunal. However, and in any case, the Tribunal could have disregarded ICCPR Article 19 and only taken into consideration Article 14, which is a solid foundation for the restriction of freedom of expression. It is not sure that ICCPR Article 19 is designed to be applied before the judiciary, unlike Article 10 of the ECHR.

International criminal justice, in its fight against war crimes, and more recently against terrorism, reveal at first sight a disrespect of certain fundamental rights. In fact, it is a tension between two different rights.

More recently, since the aftermath of the terrorist attacks of 9/11, the Security Council has been at the forefront of the fight against international terrorism, and set a normative strategy which consisted on targeted sanctions have been adopted against individuals and entities suspected of being affiliated with terrorist networks, in addition to *Resolution 1373*, which lays down general obligations that states must implement, ranging from the prevention and repression of terrorism financing to international judicial cooperation.¹⁰⁸ The creation of the Hariri Tribunal – the STL – comes in this line, and there are talks about creating an international tribunal against terrorism. However, the side effects of Security Council policy considering security concerns as compelling priority materialized soon thereafter, as “the inevitable encroachment of such measures on fundamental rights and freedoms of individuals has become a source of concern for the international community and its different components”.¹⁰⁹

Finally, it is to the states to decide on the weight to give to confronting rights. This is the margin of appreciation provided to states that is to be discussed in another

¹⁰⁷ Queneudec, *supra* note 31 at 260.

¹⁰⁸ Bianchi, *supra* note 81 at 497.

¹⁰⁹ *Ibid* at 498.

paper.