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Jus Cogens and Reparations: Can We Just End the Separation?

*By Dire Tladi**

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I. Introduction

The relationship between international law on reparations and *jus cogens* is an uneasy one. The law on reparations is a settled part of classical international law, with roots so deep that its place in international law is taken for granted.[1] The oft-quoted dictum in the 1928 *Chorzów Factory* case which sets out the requirement for reparation to "as far as possible, wipe out all the consequences of [an] illegal act and re-establish the situation" which would have existed but for the unlawful act was said, at the time, to be based on "international practice and … decisions of arbitral tribunals."[2] The same is not true of *jus cogens*, a relatively new entrant to the mainstream of international law, whose pedigree in the system is

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[1] Rosalind Elphick & John Dugard, Jus Cogens *and Compensation*, *in* Peremptory Norms of General International Law: Disquisitions and Disputations 414 (Dire Tladi ed., 2023) (describing the rules on reparation as "one of the most established norms of customary international law"); *see also* Dinah Shelton, *Reparations*, Max Planck Encyclopedia Pub. Int'l L., para. 4 (2015) ("In early history, vanquished peoples paid tribute to the victors, over time giving rise to the custom of war indemnities intended to cover the victor's war costs.").

[2] Factory at Chorzów, Judgment, Claim for Indemnity, Merits, PCIJ (Series A) No. 17, at 47 (1928), *at* https://jusmundi.com/en/document/decision/en-factory-at-Chorzow-merits-judgment-thursday-13th-september-1928. See for discussion, Felix E. Torres, *Revisiting the* Chorzów Factory *Standard of Reparation – Its Relevance in Contemporary International Law and Practice*, 90 Nord. J. Int'l L. 190, 191 (2021) (where this standard is described in the following glowing terms: "This standard has been considered as 'a source of wisdom' in cases involving expropriation, with scholars and judges referring to it in a broader context as a matter of 'legal logic,' a 'principle of reasoning' not requiring any further confirmation. Ever since the International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001, the *Chorzów* standard of reparation received additional support. Today it seems to consolidate itself in the mindset of

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less assured, and whose *application,* as opposed to mere references, by international courts is almost non-existent.[3] Yet, at the same time, at the heart of both reparations and *jus cogens*, is the notion of justice. The idea of undoing the effects of a wrongful act is intrinsically about (re)balancing the scales, while the notion of *jus cogens* seeks to infuse the system of international law with community values and a spirit of justice.

Although *jus cogens* was supposed to have a transformative (some might say destabilizing) effect on international law, it is debatable whether *jus cogens* has had such an effect on international at all.[4] It can be said with confidence that *jus cogens* has had no impact at all on the law of reparations. To illustrate, the International Law Commission's project on *jus cogens*, which was meant to be a comprehensive study of the identification and consequences of *jus cogens* in international law does not, at all, address or even consider the possible legal consequences of *jus cogens* on the law of reparations.[5] The reluctance to consider the legal consequences of *jus cogens* for reparations is also evident in the decisions of the International Court of Justice, which is consistent with its legendary reluctance to apply and even refer *jus cogens*. One need only refer to the 2024 advisory opinion on the *Policies and Practices of Israel in the Occupied Palestinian Territory*, where the Court found that the policies and practices of Israel amount to a breach of the *jus cogens* norm of self-determination, and also concluded that there is a duty on Israel to make reparations for its breaches of that norm. The Court, however, does not indicate any particular effects on the reparation arising from the fact that the norm breached is a *jus cogens* norm, such as, for example, heightened compensation.[6] These are but examples of a general trend to insulate reparations from the reaches of *jus cogens*.

international law actors as never before, as suggested by its increasing use by the International Court of Justice (ICJ) and arbitral tribunals in foreign investment disputes.").

[3] It should be stated that even prior to the International Court of Justice beginning to making references to *jus cogens*, the concept did appear in several individual opinions of judges of the Court. For early examples, see Oscar Chinn, PCIJ (Series A/B) No. 63, at 149–50 (1934) (sep. op., Schücking, J.), *at* https://jusmundi.com/en/document/opinion/en-oscar-chinn-separate-opinion-of-m-schucking-wednesday-12th-december-1934, and Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Sweden), Judgment, 1958 ICJ Rep. 55, 106 (Nov. 28) (sep. op., Moreno Quintana, J.), *at* https://www.icj-cij.org/sites/default/files/case-related/33/12549.pdf. See for a fuller list Gleider I. Hernández, *A Reluctant Guardian: The International Court of Justice and the Concept of "International Community,"* 83 BRIT. Y.B. INT'L L. 13, n. 60 (2013).

[4] *See, e.g.*, Ulf Linderfalk, *The Legal Consequences of* Jus Cogens *and the Individuation of Norms*, 33 LEIDEN J. INT'L L. 893, 893 (2020) (who, while declaring that "the concept of *jus cogens* has had a significant impact on the construction of international legal argument" also concedes that "the idea of *jus cogens* does not easily translate into practical action"). *See* Georges Abi-Saab, *The Third World and the Future of the International Legal Order*, 29 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 27, 53 (1973); Ian Brownlie *Comment*, *in* CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 110 (Antonio Cassese & Joseph H. H. Weiler eds., 1988) (where *jus cogens* is compared to a car stuck in a garage).

[5] The statement in paragraph 6 of the Commentary to Conclusion 1 of the ILC Conclusions on the Identification and Legal Consequences of Peremptory Norms, (*Jus Cogens*) Report of the International Law Commission of the Seventy-Third Session, UN Doc. A/77/10 (2022), to the effect that while "individual peremptory norms of general international law (*jus cogens*) may have specific consequences that are distinct from the general consequences flowing from all peremptory norms," the Conclusions "are not concerned with such specific consequences, nor do they seek to determine whether individual peremptory norms have specific consequences" does not detract from the intention of comprehensiveness. The Conclusions were intended to be comprehensive as far as *jus cogens*, but specific consequences arising from particular *jus cogens* norms are less about *jus cogens* and more about those particular norms.

[6] *See* Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, paras. 233, 273 et seq. (ICJ July 19, 2024).

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This uneasy relationship between *jus cogens* and reparations has not, so far as I am aware, received direct attention in scholarship. There has, of course, been some attention, both in legal and political circles, paid to the question of reparations for historical injustices, including for slavery, German genocide in Namibia, British atrocities against the Mau Mau in Kenya, British atrocities in India, including the Jallianwala Bagh massacre and other colonial-era atrocities.[7] These "historical injustices" implicate, for the most part, norms that are generally accepted as *jus cogens* such as the prohibition of slavery, the prohibition of racial discrimination, and the prohibition of genocide. Moreover, many of these injustices take place in the context of a breach of another *jus cogens* norm, namely the right of self-determination. But the focus of these accounts has not been on the intersection between *jus cogens* and reparations as such. At the same time, while academic writings on *jus cogens* sometimes touch on the intersection of *jus cogens* and reparations,[8] the attention to this relationship has largely been tangential.

The lack of direct attention to the intersection between *jus cogens* and reparation is somewhat curious because the insulation of reparations from the reach of *jus cogens* may affect the ability of *jus cogens* to play the transformative role in international law that its proponents seek. At least two main reasons for exclusion of *jus cogens* from the law of reparation in international law practice may be put forward. The first reason is the argument that conceptually, *jus cogens* and reparations have nothing to do with each other and, for that reason, "*jus cogens* talk" should not enter the fray of reparations. Second, many serious violations of *jus cogens* norms happened in the distant past, before the mainstreaming of *jus cogens* in the 1960s, and are thus excluded by the principle of intertemporal law.

In this Article, I do not address the second issue concerning *jus cogens*' exclusion from international law on reparation, namely intertemporal law. The rule of intertemporal law, based mainly on the 1928 statement by sole arbitrator Max Huber in *Island of Palmas*, according to which "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled"[9] has had the effect of excluding from the reach of international law some of the most egregious violations of *jus cogens* norms in human history. Violations that, to borrow and adapt a famous statement from the International Court of Justice, amount to a "denial" of the most basic rights of people, including "the right of existence of entire human groups" and the right to fully determine their political status and freely pursue their economic, social

[7] *See* Patrick Robinson, Introduction to the Report on Reparations for Transatlantic Chattel Slavery (TCS) in the Americas and the Caribbean, for Discussion of Past Reparations for Racial Discrimination Rooted in Slavery and Colonialism, attached to Coleman Bazelon, Alberto Vargas, Rohan Janakiraman & Mary M. Olson, *Brattle Quantification of Reparations for Transatlantic Chattel Slavery* (June 8, 2023); Tendayi Achiume Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, UN Doc. A/74/321 (Aug. 21, 2019); Shashi Tharoor, *Saying Sorry to India: Reparations or Atonement?*, HARV. J. INT'L L. (online symposium), *at* https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Tharoor-Reparations.pdf; Max du Plessis, *Reparations and International Law: How Are Reparations to Be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?*, 22 WINDSOR Y.B. ACCESS JUST. 41, 49 (2004). In his article on slavery and reparations, Max du Plessis makes a brief reference to *jus cogens*.

[8] *See, e.g.*, DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW (2017). See however, ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 247 et seq. (2006).

[9] Island of Palmas Case (Neth. v. U.S.), PCA, II Reports of International Arbitral Awards 829, 845 (Apr. 4, 1928).

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and cultural development in accordance with basic tenets of dignity and which should "shock the conscience of mankind and result in great losses to humanity, and which [are] contrary to moral law and to the spirit and aims" of an international community.[10] While this aspect is not considered in this Article, and indeed the problems raised by the conceptual issues addressed in this Article are distinct from the intertemporal law problem, the same concerns motivating the search for ending the conceptual isolation of *jus cogens* and reparations, animate my thoughts concerning the insulation of reparation from *jus cogens* because of intertemporal law.[11]

In this Article I explore only the first reason for the splendid isolation of *jus cogens* and reparations: the conceptual distinction between them. There are, generally two reasons that underlie this conceptual isolation of *jus cogens* from reparations. The first is that under the law of reparations, reparations are intended to address the consequences of the unlawful act, i.e., the harm that results from the unlawful act, and not the unlawful act itself. The essence of this first reason is that *the purpose* of reparations is not affected by the nature of the conduct. The second argument is that reparations, being part of the secondary rules of international law, and *jus cogens*, being primary rules of international law, address different things and, for that reason, do not come into contact with another. These two reasons for splendid isolation are evaluated in turn in the following sections. In conclusion, I suggest that there are good reasons to end this splendid isolation.

II. Lack of Conceptual Intersection

A. Jus Cogens *and Reparations Serve Different Purposes*

It appears the first reason for the view that *jus cogens* cannot influence the reparations is that there can be no intersection between reparation and *jus cogens*. The argument, as I understand it, is that the two concepts are qualitatively different because they are aimed at different things. Conceptually, reparations are aimed at redressing the harms caused by an act in breach of a primary norm, i.e., reparations concern secondary rules of state responsibility. Peremptory norms, on the other hand, are aimed at the protection of the primary rule, i.e., ensuring that the primary rule does is not derogated from. Seen from this perspective, there is no *a priori* reason for the character of the norm breached to have any impact whatsoever on reparations because the two concepts serve different purposes.

Under the rules of state responsibility, it is the breach of an international obligation that results in state responsibility, whether that breach causes harm or not. Thus, for state responsibility to be invoked, it is unnecessary for there to be a particular harm that results from the unlawful act. However, the case is different for reparations, which are a consequence of state responsibility. For reparations, the relevant point of departure is the Permanent Court of International Justice's dictum in the *Chorzów Factory* case to the effect "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been

[10] Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 15, 23 (May 28).

[11] *See also generally* Achiume, *supra* note 7.

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committed."[12] The essence of *Chorzów Factory* is the "existence of a damage to be made good,"[13] or put differently that reparation must be directed at making good the damage sustained on account of the unlawful act, while the nature of the unlawful act itself (including the character of the norm breached) is deemed irrelevant for determining the reparation. Thus, reparation is assessed on the "damage to be made good" or "the consequence[] of the illegal act" and not on the basis of the unlawful act itself.[14]

The notion that harm is central for the determination of reparation has been carried through in the jurisprudence of the Court. In *Certain Activities Carried Out by Nicaragua*, for example, the International Court of Justice, when setting out its methodology for assessing compensation for environmental damage, focused not on the importance of the rules for the protection of the environment but rather on the "value to be assigned to the *restoration of the damaged environment* . . . [and] to the impairment or loss of environmental goods and services prior to recovery."[15] While in this case the Court was not concerned with a norm it had determined to be *jus cogens*, the reasoning is relevant because the Court focused not on the nature of the rule, but on the harm caused. This reasoning is fully consistent with the *Chorzów Factory* standard: if the purpose of reparation is to "as far as [is] possible, wipe out *all the consequences* of the illegal act," then a breach of an "unimportant" rule of international law that causes grave damage cannot command less reparation than the actual damage sustained.[16] It must command the reparation necessary to wipe out the consequences of the illegal act. The reverse would also be true for a serious breach of an important rule that causes little or no damage. The proportionality or equivalence is thus not between the unlawful act (including the character of the norm) and the reparation but rather between the damage sustained (or the consequence of the unlawful act) and the reparation.[17] The effect of this logic is that in the case of a breach of a peremptory norm, what is to be looked at is not the unlawful act itself but the consequences of the unlawful act. Accordingly, if, notwithstanding the seriousness of the unlawful act, there is little or no damage, the reparation should be equally little or non-existent.

The idea that the nature of the norm is not a relevant factor for reparation, and consequently that the peremptory character of the norm breached would have little effect on reparation, is borne out by decisions of International Court of Justice. In cases where the norm breached has been recognized as constituting *jus cogens*, the Court has not considered the peremptory character of the norm as a relevant factor. For example in *Democratic Republic of the Congo v. Uganda*,[18] the Court found, *inter alia*, that Uganda had violated the

[12] *Chorzów Factory, supra* note 2, at 47.

[13] *Id.* at 46.

[14] *Id.*

[15] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Question of Compensation, Judgment, 2018 ICJ Rep. 15, para. 53 (emphasis added); *see also generally* paras. 29 et seq. *Cf.* the Dissenting Opinion of Judge *ad hoc* Dugard, which is discussed further below.

[16] *Chorzów Factory, supra* note 2 (emphasis added).

[17] *See* Elphick & Dugard, *supra* note 1, at 425 (describing the traditional approach to compensation as follows: "Ostensibly, the only criteria relevant to quantification is the extent of the harm, given the restorative focus of the reparation's standard. Indeed, the amount of compensation should reflect as closely as possible the value of the damage incurred. As such compensation cannot have a punitive, 'expressive or exemplary' character.").

[18] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ Rep. 168, 227 (Dec. 19).

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prohibition on the use of force,[19] a *jus cogens* norm, in addition to certain other violations of international human rights, including the prohibition of torture, which has since been held by the Court to constitute *jus cogens*,[20] and international humanitarian law.[21] The Court found that these violations resulted in an obligation on Uganda to make reparation.[22] While, the Court decided that "the nature, form and amount of the reparation" due to the Democratic Republic of the Congo will be determined by the Court only if the two states fail to arrive at an amount, it said nothing to suggest that the nature of the norms in question, including the seriousness of the breach, should guide the parties in their negotiations.[23] In fact, the Court's judgment seems to confirm that, in its view, the nature of the obligations breached does not affect reparation, by recalling that the Democratic Republic of the Congo would have an "opportunity to *demonstrate and prove the exact injury* that was suffered as a *result of specific actions* of Uganda constituting internationally wrongful acts."[24]

The Court's rejection of the claim for compensation in *Bosnian Genocide*, another case involving a *jus cogens* norm, is distinct but related.[25] It is distinct because there the Court did not find that Serbia had itself committed genocide, nor did it find that Serbia was complicit in the commission of genocide.[26] Thus, the compensation sought was not for the breach of a *jus cogens* norm, but rather for the breach of the duty to prevent the commission of genocide, which is a significant difference.[27] But, the *Bosnia Genocide* decision cannot be completely divorced from the Court's traditional approach because, even there, the Court relied on the lack of a "causal nexus between the wrongful act" on the one hand, and, on the other "the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide" in order to dismiss the claim for reparation.[28] This seems to suggest, consistent with the overall approach of the Court, that any reparation that would have been awarded would have to be "financially assessable damage ... so far as this is established."[29]

In the 2024 advisory opinion on the *Legal Consequences on Israeli Policies and Practices in Occupied Palestinian Territory*, the Court found the breach of several norms, some of which undoubtedly constitute *jus cogens*: the right to self-determination that the Court explicitly

[19] *Id.*, para. 165 ("The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.").

[20] *Id.*, paras. 211, 219 ("Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment."). The Court found that the prohibition of torture constitutes *jus cogens* in: Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 ICJ Rep. 422, para. 99 (July 20).

[21] *Armed Activities on the Territory of the Congo*, *supra* note 18, para. 219.

[22] *Id.*, para. 259

[23] *Id.*, para. 260

[24] *Id.* (emphasis added)

[25] *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 ICJ Rep. 43 (Feb. 26).

[26] *See id.*, paras. 432 et seq.

[27] *See id.* (where the Court, in the context of the distinction between the duty to prevent and the prohibition of complicity, the Court noted that the differences for reparations "are so significant as to make it impossible to treat the two types of violation in the same way").

[28] *Id.*, para. 462.

[29] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), para. 1 of the Commentary to Article 36 [hereinafter ARSIWA]

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characterized as *jus cogens*,[30] the prohibition on the use of force, the peremptory character of which is virtually undisputed,[31] possibly Apartheid,[32] certain rules of international humanitarian law, and various international human rights. In respect of consequences for Israel, the Court states that Israel "is also under an obligation to provide full reparation for the damage caused by its internationally wrongful acts," noting that reparation includes "restitution, compensation and/or satisfaction."[33] In connection with the duty to provide reparation, the Court does not refer at all to the character of the norms that were breached or the seriousness of the breach as a relevant factor in the determination of reparation. Indeed, it is worth noting that in the *Chagos* advisory opinion, the Court goes no further than concluding that the United Kingdom must "bring to an end its administration of the Chagos Archipelago."[34] The Declaration of the then president of the Court, Judge Salam, in *Legal Consequences on Israeli Policies and Practices in Occupied Palestinian Territory*, which goes into some detail on reparation, similarly makes no reference to the *jus cogens* character of the norms breached.[35] President Salam recounts the content of reparation as provided for in the International Law Commission (ILC) Articles on State Responsibility.[36] In my own Declaration, I adopt a somewhat ambivalent approach, noting that the question of whether *jus cogens* has any effect on reparations is a "rather difficult" question and that—while I believed there was some effect—this view goes "against the grain" and that the Court should not go against the grain unless "it has a watertight basis."[37]

The splendid isolation of reparations and *jus cogens* can also be seen in the work of the International Law Commission and the views of states. In 2022, the International Law Commission adopted a set of Conclusions on *jus cogens*, which, according to the Commission had two main purposes, namely, clarifying the methodology for the identification of *jus cogens* and identifying the legal consequences of *jus cogens* norms. The Conclusions describe the consequences for secondary rules, including invocation of responsibility, but they say nothing about reparations. Acknowledging this omission, the Commentary simply states that the Conclusions "do not address the question of whether" compensation will be affected by the fact that the norm that is breached has *jus cogens*

[30] *Legal Consequences Arising from the Policies and Practices of Israel*, *supra* note 6, para. 233.

[31] *See* Olivier Corten & Vaios Koutroulis, *The* Jus Cogens *Status of the Prohibition on the Use of Force: What Is Its Scope and Why Does It Matter?*, *in* PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW: DISQUISITIONS AND DISPUTATIONS, *supra* note 1.

[32] In respect of Apartheid, the Court adopts a rather ambiguous posture, resulting in several judges providing observations that pull in different directions. See *Legal Consequences Arising from the Policies and Practices of Israel*, *supra* note 6, para. 229 ("For this reason, the Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD.") and the Declarations of President Salam (para. 29), Judges Brant (paras. 4 et seq.), Iwasawa (para. 12 et seq.), Nolte (paras. 8 set seq.), Tladi (paras. 36 et seq.), and Xue (para. 4).

[33] *Id.*, para. 269.

[34] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, para. 183 (Feb. 25).

[35] *Legal Consequences Arising from the Policies and Practices of Israel*, *supra* note 6, paras. 60–63 (dec., Salam, Pres.).

[36] *Id.* (especially at para. 62, where he quotes the ILC Commentary, which states that "any financially assessable damage" is possible to the extent that it is "established").

[37] *Legal Consequences Arising from the Policies and Practices of Israel*, *supra* note 6, para. 55 (dec., Tladi, J.).

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status,[38] without offering any further explanation. While the commentary explains that the Conclusions "are without prejudice to other consequences that" a breach of a *jus cogens* norm "may entail under international law,"[39] this statement seems to refer to other "normal" consequences of state responsibility rather than any of sense of heightened reparation on account of the *jus cogens* character of the norm violated.[40]

The silence of the Commission in 2022 on the effect of *jus cogens* is in fact a continuation of the Commission's general stance. In 2000, the International Law Commission's Drafting Committee provisionally adopted Draft Article 42 of the Articles on State Responsibility, which provided that a serious breach of essential obligations—later changed to *jus cogens*—"may involve, for the responsible State, damages reflecting the gravity of the breach."[41] This text, if it had been accepted, would have opened up the possibility for the *jus cogens* character of the norm breached to be a factor in the determination of reparation. However, commenting on this text, several states expressed concern with the notion of damages being tied to the type of norm breached. France, for example, described the approach as introducing "punitive" or "retaliatory" damages which did not "rest on solid legal foundations."[42] Similarly, Japan expressed the view that this approach was not "established under recognized international law."[43] Indeed, the United States described this purported legal effect as "[t]he most troubling," pointing out that there was "scant support under customary international law" (in contrast to domestic law) for the imposition of punitive damages in response to a "serious breach."[44] The United Kingdom also questioned the propriety of the differentiation based on the type of norm stating that there was no reason for such differentiation.[45]

There were, however, some states that supported the approach of signifying that reparations could be affected by the character of the norm or obligation breached. Argentina, for example, referenced the importance "of a differentiated regime of responsibility in accordance with the seriousness of the wrongful act."[46] Spain too supported the idea of "an aggravated regime of international State responsibility" noting that "breaches of [customary international law] differ quantitatively and qualitatively from those that arise where aggression is committed . . . or where acts of genocide are committed."[47] The Netherlands

[38] Commentary to Conclusion 19 of the Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), Report of the international Law Commission, Seventy-Third Session, para. 18, UN Doc. A/77/10 (2022).

[39] *Id.*

[40] *Cf.* DIRE TLADI THE INTERNATIONAL LAW COMMISSION'S DRAFT CONCLUSIONS ON PEREMPTORY NORMS 196 (2024) ("At first reading, paragraph 4 provided that Draft Conclusion 19 [is] without prejudice to other consequences that serious breaches of *jus cogens* might entail. This would include, for example, the duties of cessation, payment of compensation, including whether a higher amount of compensation is applicable in the event of a serious breach ....").

[41] Draft Articles on State Responsibility Provisionally Adopted by the Drafting Committee on Second Reading, Art. 42, UN Doc. A/CN.4/L/600 (Aug. 21, 2000).

[42] *See* France, State Responsibility: Comments and Observations Received from Governments, 64 UN Docs. A/CN.4/515, Add.1-3 (Mar. 19, Apr. 3, May 1, June 28, 2001); *see also* Mexico, at 65 (which described the approach as not advisable).

[43] *Id.*, Japan, Comments and Observations, at 68.

[44] *Id.*, United States of America, at 71.

[45] *Id.*, The United Kingdom, at 66; *see also* Republic of Korea, at 72 (suggesting the deletion of the provision).

[46] *Id.*, Argentina, at 64.

[47] *Id.*, Spain, at 66.

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made perhaps the strongest argument for the retention of the "aggravated" responsibility and reparation based on the seriousness of the violation and the character of the norm breached. It took the view that the notion of "damages reflecting the gravity of the breach" was not sufficiently precise and that the provision ought to indicate that "in the event of serious breaches damages are payable over and above compensation for the material damage incurred."[48] In its view, in the event of such breaches

> consequences for the responsible State should be correspondingly serious. Apart from *restitutio in integrum* and satisfaction, options might include financial consequences exceeding the costs of compensation for material damage, or institutional measures such as being placed under control or restriction of the rights attached to membership of an international organization.[49]

To place this debate in context, when James Crawford, then special rapporteur, introduced the provision, he stated, not only that there is no authority for the notion of aggravated reparation, but that in fact, there "was much authority for the proposition that punitive damages *did not exist* in international law."[50] In the end, the Commission opted not to have any reference to the notion of aggravated responsibility. The Commentaries do provide that the "primary obligation breached may also play an important role with respect to the form and extent of reparation ...."[51] With specific reference to *jus cogens*, the Commission noted that "in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation."[52] Yet even, these references may appear more significant than they actually are. For example, the statement in paragraph 3 of the commentary to Article 34, i.e., the "primary obligation breached may also play an important role with respect to the form and extent of reparation"[53] can best be understood as expressing the idea that the breach of some norms results in particular types of harms that can only be repaired through certain means. For example, by definition, violations of the right to life cannot be remedied by restitution, since life once taken cannot be restored.

Thus, in its work, over decades, when the Commission has considered *jus cogens*, it has not addressed the consequences of *jus cogens* for reparations. In fact, there appears to be a reluctance to address the state responsibility consequences of a breach of *jus cogens* in general. The ILC Articles on State Responsibility that reference consequences of breaches of *jus cogens* norms in the form of duties on third states to cooperate to bring to an end serious breaches of *jus cogens*, not to recognize as lawful situations arising from such breaches and not to assist in the maintenance of such situations,[54] are, in my view, "not about ... the responsibility of States" as such, and "are better seen as consequences of *jus cogens* relating to their

[48] *Id.*, The Netherlands, at 70.
[49] *Id.*
[50] Report of the International Law Commission, Fifty-Second Sess., II(2) Y.B. INT'L L. COMM'N, para. 358 (2000) (emphasis added).
[51] ARSIWA, *supra* note 29, para. 3 of the Commentary to Article 34.
[52] *Id.*, para. 3 of Commentary Article 35.
[53] *Id.*, para. 3 of the Commentary to Article 34.
[54] *Id.* Art. 41.

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enforcement [which are relevant for] ensuring their respect."[55] Therefore, they do not define the responsibility of a state for breaches of international law, which includes the obligation to make reparation, but rather tell us what other (third) states are obliged to do to ensure that an ongoing breach of *jus cogens* does not continue. Thus, the ILC work over the years has promoted the splendid isolation of *jus cogens* and reparation. Moreover, it appears that this isolation in the work of the Commission is expected to continue into the future. In 2025, the Commission decided to include the topic "Compensation for Damage Caused by an Internationally Wrongful Act" on its Agenda.[56] In the syllabus for the topic, the ILC expresses an intention to confirm the "the impermissibility of punitive damages."[57]

B. Procedural Rule Substantive Rule Distinction

The second reason that has been advanced for the splendid isolation between reparation and *jus cogens* is that the two concepts do not operate at the same level, because while the former is substantive, the latter is procedural. This particular reason for the splendid isolation is most clearly reflected in the jurisprudence of the International Court of Justice relating to *erga omnes* obligations and *jus cogens*. The two concepts (*jus cogens* and *erga omnes*) are closely related in the sense that *erga omnes* obligations arise from *jus cogens* norms.[58] This means that all rules having *jus cogens* status produce *erga omnes* obligations. There is, as a consequence, "at the very least substantial overlap between" *obligations erga* omnes and *jus cogens*.[59] There are, of course, obligations *erga omnes* that do not flow from *jus cogens* norms, but this is a small category related mainly to common spaces.[60] In its jurisprudence concerning both concepts, the Court has emphasized the distinction between procedural rules and substantive rules, in a way that serves to entrench the splendid isolation.

In relation to the splendid isolation, this distinction between procedural rules and substantive rules was first made by the Court in 1995 in the *East Timor* case in the context of the *Monetary Gold* principle. The *Monetary Gold* principle is a procedural doctrine developed by the Court under which it would not exercise jurisdiction over a case which would affect the rights of a State that is not party to the dispute and that has not consented to the Court's jurisdiction.[61] When, in *East Timor,* Australia raised the *Monetary Gold* principle to prevent

[55] TLADI, *supra* note 40, at 177.

[56] Report of the International Law Commission, Seventy-Sixth Session, para. 437, UN Doc. A/80/10.

[57] Mārtiņš Paparinskis, Compensation for the Damage Caused by Internationally Wrongful Acts, Annex I in the Report of the International Law Commission, Seventy-Fifth Session, para. 14, UN Doc A/79/10 (2024).

[58] Conclusions on Peremptory Norms, *supra* note 38, Conclusion 17 ("Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.").

[59] *See* ARSIWA, *supra* note 29, Chapter III General Commentary para. 4.

[60] *See* Conclusions on Peremptory Norms, *supra* note 38, Commentary to Conclusion 17 para. 3; Obligations of States in Respect of Climate Change, Advisory Opinion, para 440 (ICJ July 23, 2025). It is possible to read the jurisprudence of the Court as suggesting that other norms, such as particular rules under human rights or international humanitarian law, might also fall in this category. *See Legal Consequences Arising from the Policies and Practices of Israel*, *supra* note 6, para. 274 ("Among the obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination and the obligation arising from the prohibition of the use of force to acquire territory as well as certain of its obligations under international humanitarian law and international human rights law."). But even if this were accepted, the category would remain nonetheless, limited.

[61] Case of the Monetary Gold Removed from Rome in 1943 (It. v. Fr., UK, N. Ire., U.S.), Judgment, 1954 ICJ Rep. 19 (June 15).

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the Court from exercising its jurisdiction, Portugal argued that since the rule at issue was the right of self-determination—a norm that the Court had already deemed to be *erga omnes*—the *Monetary Gold* principle could not be applied.[62] The Court accepted that "Portugal's assertion that the right of peoples to self-determination . . . has an *erga omnes* character, is irreproachable,"[63] but nonetheless, concluded that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."[64] According to the Court, "[w]hatever the nature of the obligations invoked," and "even if the right in question is a right *erga omnes*" the Court cannot disregard the *Monetary Gold* principle, which is a procedural rule designed to protect third states.[65] In *DRC v. Rwanda*, the DRC had argued that the reservation of Rwanda to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which provides for the jurisdiction of the Court over the interpretation and application of the Genocide Convention, had no effect since the unlawful act complained of, the commission of genocide, was a norm of *jus cogens*.[66] There the Court first confirmed, citing *East Timor*, that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" and that flowing from this "the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute."[67] The Court then applied this reasoning to *jus cogens*:

> The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.[68]

In *East Timor* and *DRC v. Rwanda*, the Court applied this distinction to prevent the circumvention of a purely procedural rule concerning the jurisdiction of the Court. Five years after *DRC v. Rwanda*, the Court in *Jurisdictional Immunities of the State* case considered the relationship between *jus cogens* and a different type of procedural rule, immunity from the jurisdiction of domestic courts.[69] The effect of *jus cogens* on the procedural rules of immunity have been a topic of debate for at least the last two decades.[70] In *Jurisdictional*

[62] Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, para. 29 (June 30).

[63] *Id*

[64] *Id.*

[65] *Id.*

[66] *See* Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda: New Application: 2002), Jurisdiction and Admissibility, 2006 ICJ Rep. 6, para. 58 (Feb. 3).

[67] *Id.*, para. 64.

[68] *Id.* This position was confirmed by the Court in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Sudan v. UAE), Order on Provisional Measures (May 5, 2025).

[69] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 ICJ Rep. 99 (Feb. 3).

[70] Third Report of the Special Rapporteur on Peremptory Norms (*Jus Cogens*), para. 121, UN Doc. A.CN.4/714 (Feb. 12, 2018) (describes the intersection between *jus cogens* and immunities as follows: "Perhaps no other potential consequence has been more controversial and topical than the effect that *jus cogens* norms have on the immunity of States and immunity of officials."). For some relevant literature, see Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 853 (2002); Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and*

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Immunities of the State case, Italy had argued that rules on immunity could not apply to rules of international law that had acquired the status of *jus cogens*, such as the prohibition of crimes against humanity and basic principles of international humanitarian law.[71] The Court accepted that Italy's argument would prevail if there were a conflict between the substantive *jus cogens* norms at issue and the rules on immunity.[72] The Court's response to the question whether there was a conflict between the two sets of rules confirmed the substance-procedure dichotomy:

> Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[73]

It is hard to argue against the distinction between substantive and procedural rules.[74] Yet, it is not clear to me that the line between substantive and procedural rules is as hard as the jurisprudence of the Court may suggest. Beyond the fact that, of course, procedural rules affect substance, there does not exist "a bright line" between substance and procedure.[75] There is rather a continuum between, on one end of the spectrum pure procedural rules and procedural rules that are intertwined with substantive rules.[76]

Foreign Domestic Courts, 21 EUR. J. INT'L L. 815 (2011); Thomas Weatherall, Jus Cogens *and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT'L L. 1151 (2015); Dire Tladi, *Immunity in the Era of "Criminalisation": The African Union, the ICC and International Law*, 58 JAPANESE Y.B. INT'L L. 17, (2015).

[71] *Jurisdictional Immunities of the State*, *supra* note 69, para. 92.

[72] *Id.* ("This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.")

[73] *Id.*, para. 93.

[74] See, however, *Jurisdictional Immunities of the State*, *supra* note 69, paras. 294–95 (diss. op., Cançado Trindade, J.) ("Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of the kind so widespread in the legal profession, such as, inter alia, the counterpositions of 'primary'" to 'secondary' rules, or of 'procedural' to 'substantive' rules, or of obligations of 'conduct' to those of 'result'. Words, words, words ... Where are the values?"); *see also* Alexander Orakhelashvili, *The Classification of International Legal Rules: A Reply to Stefan Talmon*, 26 LEIDEN J. INT'L L. 89 (2013), especially at 102 ("The proponents of the division of rules into substantive and procedural have so far failed to provide either consistent methodology or conclusions that can be tested and maintained against the background of the international legal system."), also p. 103 ("'procedural' rules form no recognizable or consistent category of the rules of international law.").

[75] JUTTA BRUNNÉE, PROCEDURE AND SUBSTANCE IN INTERNATIONAL ENVIRONMENTAL LAW 20 (2020); *see also* Matina Papadaki, *Substantive and Procedural Rules in International Law Adjudication: Exploring Their Interaction in Intervention Before the international Court of Justice*, *in* INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 37 (Hélène Ruiz Fabri ed., 2019) (noting that while the distinction between procedure and substance is importance, the boundary between them "are not only blurred but also permeable"). Elsewhere she uses "hazy and movable." *Id.* at 44.

[76] *See also* Papadaki, *supra* note 75, at 38 (who recognizes, not only that there "is a spectrum with a permeable boundary," but also that the distinction is fluid); *see also* André Nollkaemper, *International Adjudication of Global*

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To take as an example, a rule that pleadings must be filed within a given period is purely a procedural rule with little or nothing to do with substantive law. One can say the same about any number of purely procedural rules, such as page limits in pleadings, the rules pertaining to the presentation of evidence, the appointment of agents and so on. These rules, which are similar to those that Stefan Talmon refers to as "procedural law" or "rules of procedure,"[77] fall at the furthest end of the procedural spectrum. While the establishment of an international court's jurisdiction is not a "a rule of procedure" in the same sense, it is also a purely procedural rule, such that the nature of the substantive rule in question should have no effect on this purely procedural rule.[78] In my view, it "would be going too far to suggest that any invocation of a *jus cogens* [norm] would grant the International Court of Justice jurisdiction in a dispute."[79] The law concerning the jurisdiction of international courts and tribunals is, in particular the rule of consent to jurisdiction, to my mind, at the far end of the spectrum of the procedural side of the continuum and with *little* connection to substantive rules.[80] There is, of course, some substantive connection, because whether a court will have jurisdiction or not will depend, in part, on whether consent to jurisdiction in respect of the substantive rule in question, has been granted. Other rules that have been identified as, though still procedural, being a little more removed from the pure procedural end of the spectrum but which remain procedural in nature, what André Nollkaemper refers to as the "middle category," include admissibility and exhaustion of local remedies.[81]

But further along the spectrum, there may be rules that, though still procedural, are much closer to substantive norms. Examples of these include the obligation to negotiate the delimitation of the exclusive economic zone and the continental shelf under the UN Convention on the Law of the Sea and estoppel.[82] Human rights such as the right of access to courts have also been put forward as examples of rules that may be procedural but having substantive elements (or even vice versa). So too, the rule of immunity from the jurisdiction of domestic courts seems to me to be closer substantive rules end of the spectrum than the rule on jurisdiction of the Court.[83]

There is nothing controversial about the idea that some rules can be more procedural than others and that some procedural rules can have elements of substance. Take international environmental law, for example. There is no question that the rule on the conduct of environmental impact assessment and the right to access information in environmental matters are both procedural rules. Yet, the former has elements of substance while the latter

Public Goods: The Intersection of Substance and Procedure, 23 EUR. J. INT'L L. 769, 773 (2012) (stating that the distinction "is not a binary one").

[77] *See* Stefan Talmon, Jus Cogens *After* Germany v. Italy*: Substantive and Procedural Rules Distinguished*, 25 LEIDEN J. INT'L L. 982 (2012).

[78] *See* Third Report on Peremptory Norms, *supra* note 69, para. 134 ("the distinction between procedural and substantive norms seems hard to criticize in the context of jurisdiction" of international courts and tribunals).

[79] *Id.* See however, *Jurisdictional Immunities of the State*, *supra* note 69, para. 297 (diss. op., Cançado Trindade, J.) (who takes issue also with the distinction made by the Court in *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 66.

[80] Nollkaemper, *supra* note 76, at 774 (who having showed that rules on jurisdiction could have some substantive elements, proceeds to state "[s]till, jurisdiction is quite separate from the substantive rules that define the rights and obligations").

[81] *Id.*; *see also* Papadaki, *supra* note 75, at 40 et seq.

[82] *See* Talmon, *supra* note 77, at 984.

[83] *See* Third Report on Peremptory Norms, *supra* note 70, para. 134.

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is closer to the more procedural rules side of the continuum. The point is that the distinction between procedural and substantive rules cannot be simply mechanical. Because, as recognized even by the proponents of the distinction between procedure and substance, there is spectrum or continuum and because the distinction between substantive and procedural rules is hazy or blurry, there is no hard and fast rule for making a determination of when a rule is purely procedural and when it has substantive elements. Moreover, as correctly noted by Alexander Orakhelashvili, there is no "consistent methodology" for making the distinction between substantive and procedural rules or criteria for determining when a rule is closer or further from one side of the spectrum.[84] Admittedly, this may introduce *some* arbitrariness.[85]

Without attempting to set forth any rule, even one of thumb, there are some indications that lead me to the view that the rule on immunity from the jurisdiction of national courts, though still essentially procedural, is closer on the spectrum to substance than to pure procedural rules. The very fact that the immunity debate is one of the most intense international law debates in the last two decades, and that in this debate, different authors take different views about whether immunity is a procedural rule, is itself an indication of its closeness to substance. I am known to hold strong reservations about the jurisprudence of the International Criminal Court on immunity,[86] but it is clear from that jurisprudence that that International Criminal Court does not view immunity as purely procedural.[87] While the procedural rule of immunity is often contrasted with its close substantive cousin contained in Principle III of the ILC's Nuremberg Principles,[88] it is noteworthy that the ILC itself, when

[84] Orakhelashvili, *supra* note 74; *see also* Papadaki, *supra* note 75, at 38 (who concedes that the distinction between procedural rules and substantive rules can be "challenged in theory and practice").

[85] Indeed, while I accept that the substance/procedure distinction in *Case Concerning Armed Activities on the Territory of the Congo* makes sense, Judges Koroma and Cançado Trindade disagree. *See Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 66, especially at para. 25 (diss. op., Koroma, J.) ("While I do not accept the substance of the DRC's argument on this issue, I do believe that the gravity of the matter and the nature of the allegation before the Court are such that the Court should have been allowed to adjudicate the case. There is no impediment in law preventing Rwanda from expressing its consent and thereby entitling the Court to examine the alleged breaches of Rwanda's obligations under the Genocide Convention."). *See also Jurisdictional Immunities of the State*, *supra* note 69, paras. 296–97 (diss. op., Cançado Trindade, J.).

[86] *See, e.g.*, Dire Tladi, *Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited*, 60 GER. Y.B. INT'L L. 43 (2017).

[87] Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09-397-Anx1 OA2 (May 6, 2019) (joint concur op., Eboe-Osuji, Morrison, Hofmański, Bossa, JJ.) is especially relevant. It dedicates twenty paragraphs over nine pages, to support (para. 238) the UN Secretariat's caution "that 'the formalism in this dichotomy ['procedural' versus 'substantive' immunity] tends to obscure the nature of the dynamic relationship that seems to exists' between that construct of aspects of immunity."

[88] ILC Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries, II Y.B. INT'L L. COMM'N, Prin. III (1950). Part III, Formulation of the Nürnberg Principles, Principle III, at 375, provides that "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." An example of the distinction made between immunity as a procedural rule and the content of Principle III can be found in the ILC's Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, II(2) Y.B. INT'L L. COMM'N (2019). See paragraph 31 of the Commentary to Article 6 ("For the purposes of the present draft articles, paragraph 5 means that an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.")

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first putting forward the principle in 1950, advances immunity-related arguments, indicating a close relationship between the two concepts.[89]

What is said in the preceding paragraphs is not intended to deny the procedural rule substantive rule distinction. I only seek to make the point that the closer the procedural rule is to the substance of the rule, the less we should be inclined to apply the substance/procedure distinction of *East Timor* and *DRC v. Rwanda*. Indeed, this fluid approach to the distinction can be supported with reference to the Court's jurisprudence. Presumably, the rule that responsibility of a state for wrongful acts can only be invoked by the victim state is a procedural rule. Yet, the Court has recognized the standing of non-injured states to invoke the responsibility of the state in breach in respect of *erga omnes* obligations flowing from *jus cogens* norms.[90] In this connection, as I have said, the immunity rule, though procedural, is closer on the continuum to the substance of the rule than is the principle concerning consent to jurisdiction.[91] I believe the same to be true of reparations. Nollkaemper, who appears to take no issue with the treatment of immunity as falling closer to the procedural end of the spectrum, takes the view that reparations "fits better in the category of substance than of procedure."[92] In his view, to define reparations "in terms of procedure would be 'to confound the remedy with the process by which [the remedy] is made available.'"[93]

Consistent with Nollkaemper's classification of reparations, there are several authors that argue against the sharp isolation between reparation and *jus cogens*. Rosalind Elphick and John Dugard, for example, described the traditional approach of splendid isolation as "appear[ing] somewhat outdated."[94] Similarly, Orakhelashvili argues that, because of its nature, the *jus cogens* character of a norm should be relevant to reparations as a departure from the traditional conception of international law.[95] To this end, in a strongly worded critique of the substance/procedure dichotomy in *Jurisdictional Immunities of the State* case, Judge Yusuf refers to the "shrinking of immunity coverage" in recent times.[96] It is clear that for Judge Yusuf the shrinkage of this procedural rule is linked to the substance of the rules in question, i.e., prohibitions having the status of *jus cogens*, because, according to him, the shrinkage of the rule of immunity from jurisdiction has been "largely prompted by the growing recognition of the rights of individuals" and has occurred for the "purpose of protecting the rights of individuals or juridical persons vis-à-vis States."[97] Of particular

[89] *See* Commentary to Principle III of the Formulation of the Nünberg Principles, *supra* note 88 ("The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment .... The same idea was also expressed in the following passage of the findings: 'He who violates the laws of war cannot *obtain immunity* while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.'") (emphasis added).

[90] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Preliminary Objections, Judgment, 2022 ICJ Rep. 47, paras. 108–13 (July 22).

[91] *Id.*; Third Report on Peremptory Norms, *supra* note 70, para. 134 ("Without entering into the debate concerning the correctness or not of the distinction between substance and procedure in the context of immunities, it seems reasonable to conclude that there is a closer relationship between the procedural rules of immunities and the substantive rules underlying *jus cogens* norms than there is between the procedural rule requiring consent to jurisdiction and the substantive norm underlying *jus cogens* norms.").

[92] Nollkaemper, *supra* note 76, at 774.

[93] *Id.*

[94] Elphick & Dugard, *supra* note 1, at 425.

[95] ORAKHELASHVILI, *supra* note 8, at 242.

[96] *Jurisdictional Immunities of the State*, *supra* note 69, para. 22 (diss. op., Yusuf, J.).

[97] *Id.*

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importance for Judge Yusuf is that the shrinkage of immunity on account of the substance of the rules in question is related to the duty to make reparations for violations of human rights and basic principles of humanitarian law.[98] Judge *ad hoc* Gaja is more explicit about the relationship between *jus cogens* and reparations.[99] While conceding that the *jus cogens* character of a particular norm does not transform the duty to make reparation for breach of that norm into a *jus cogens*,[100] he nonetheless states that "the fact that the alleged breach concerns an obligation of *jus cogens* may have some relevant consequences" for reparations.[101] He does this by referring to the consequences of serious breaches of *jus cogens* in Article 41 of the Articles on State responsibility—these are the duties of cooperation, non-assistance and non-recognition—suggesting that on the strength of these duties "a restriction of immunity could well be regarded as an appropriate consequence" and would "strengthen ... the obligation to make reparation."[102]

III. The Insulation of Reparations from *Jus Cogens* Can End

The distinction between substantive and procedural issues is relative. In some cases, substantive and procedural rules are so distinct that it is understandable to maintain a splendid isolation between them. This is the case for the distinction between the peremptory character of a norm and the rule concerning consent to jurisdiction. As argued above, in other cases, the relationship between substantive rules and the procedural rules is much closer. In particular, as suggested by Nollkaemper, reparations is closer to the substance end of the spectrum than it is to the procedural end of the spectrum. Consequently, the procedure substance distinction to justify the isolation between *jus cogens* and reparation is unconvincing to me. The question that now arises is how the peremptory character of norms is to be taken into for the purposes of reparations.

I begin, first, by noting that even under the current framework of splendid isolation there has been *some* room for considering the nature of the obligation breached in the determination of reparations. As I explained earlier, the current framework is based, in part,[103] on the idea that reparations respond not to the unlawful act as such but rather that reparations respond to the consequences of the unlawful act or, put differently, the harm resulting from the unlawful act. The Inter-American Court of Human Rights' case of *Aloeboetoe v. Suriname* provides an example of a court taking into account "the nature of the right" when ordering "pecuniary compensation."[104] *Aloeboetoe* remains, however, a case that applies the current framework of isolation because in that case the court was concerned with the breach of the right to life. The nature of the right breached in *that case,* namely the right to life, has particular *consequences*, i.e., the end of life, which makes restitution impossible. It is in that context that the Court concludes that in cases "involving violations of the right to

[98] *Id.*, para. 30.
[99] See *id.*, paras. 223 et seq. (diss. op., Gaja, J. *ad hoc*).
[100] *Id.* at 223–24.
[101] *Id.* at 224
[102] *Id.* A similar position is taken in TLADI, *supra* note 40.
[103] The other part is the related notion of the distinction between substance and procedure.
[104] Aloeboetoe et al. v. Suriname, Judgment, Reparations and Costs, para. 46 (Inter.-Am. Ct. Hum. Rts. Sept. 10, 1993). This example is provided by ORAKHELASHVILI, *supra* note 8, at 245–46.

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life" restitution is not possible and therefore "reparation must of necessity be in the form of pecuniary compensation."[105]

The *Republic of Guinea v. Democratic Republic of the Congo* (*Diallo)* case too provides an example of a case where the nature of the right was relevant in the relation to reparation. There, the International Court of Justice held that compensation was the appropriate form of reparation, due "in particular" to "the fundamental character of the human rights obligations breached."[106] Yet, despite this statement that the appropriate form of reparation was compensation on account of the nature of the obligations breached, the Court in *Diallo* followed the traditional approach to reparation by deciding that compensation was intended to make good the injury suffered by Mr. Diallo.[107] What *Diallo* shows, however, is that even under the current framework, courts and tribunals, particularly when considering "non-material damage" have a degree of latitude in setting forth the amount of compensation.[108] It is worth recalling, in this respect, that the United Kingdom, while rejecting the International Law Commission's Drafting Committee's proposal for "damages reflecting the gravity of the breach," suggested, nonetheless, that the peremptory character of a norm might be taken into account when assessing "damages for moral injury" rather than as part of "compensation for material injury," a position which, according to it, would be more "limited and principled."[109] Indeed it has been pointed out that the monetary valuation of compensation, particularly for non-material damage, is not "an exact science" and may be "a creative task," suggesting that this leaves room for *jus cogens* to play a greater role in reparation.[110] Thus, within the current framework, the peremptory character of a norm may have a role to play in assessing the amount of damages for moral damage.

Judge *ad hoc* Dugard's dissenting opinion in *Certain Activities Carried Out by Nicaragua* illustrates that even outside the *Diallo* and *Aloeboetoe* exceptions, it is possible to take into account *jus cogens* in the determination of reparations. At the outset Dugard makes it plain that the case, in his view, is about more than just the harm caused (which the Applicant itself had valued at only 6.7 million dollars).[111] Rather, in the view of Judge *ad hoc* Dugard, the nature of the rules in question, and the seriousness of the breach, are what should be at the

[105] *Aloeboetoe*, *supra* note 104, para. 46.

[106] Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, Judgment, 2010 ICJ Rep. 692, para. 161 (Nov. 30).

[107] *See id.*, para. 165(7) ("[T]he Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea *for the injurious consequences of the violations of international obligations* referred to in subparagraphs (2) and (3) above.").

[108] Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation Owed by the Democratic Republic of Congo to Republic of Guinea, Judgment, 2012 ICJ Rep. 326, paras. 18 et seq. (June 19). See for a similarly "flexible approach," Armed Activities on the Territories of the Congo, Reparations, 2022 ICJ Rep. 13 (Feb. 9) (diss. op., Daude, J. *ad hoc*).

[109] State Responsibility: Comments and Observations, United Kingdom, *supra* note 42, at 66–67.

[110] Elphick & Dugard, *supra* note 1, at 426 (emphasis removed). In their analysis, Elphick and Dugard consider cases awarding moral damages for mental harm such as: Opinion in the Lusitania Cases (U.S. v. Germany), UN RIAA 35, Ruling of 1 November 1923; Moiwana Community v. Suriname, Judgment, Preliminary Objections, Merits, Reparations and Costs (Int.-Am. Ct. Hum. Rts. June 15, 2005).

[111] *Certain Activities Carried Out by Nicaragua*, *supra* note 15, para. 2 (diss. op., Dugard, J. *ad hoc*) ("On the face of it this case may appear to be trivial. Damage to a wetland of 6.19 hectares for which the injured State claims a mere US$6,711,685.26 in compensation hardly suggests that this is an important case .... Such an assessment would, however, be wrong.").

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heart of the compensation.[112] The particular elements that, in Judge *ad hoc* Dugard's view, ought to have been taken into account include "the importance attached to the protection of the environment in the contemporary international legal order,"[113] the duty to take action to mitigate climate change,[114] and the gravity of the actions of the respondent (as opposed to only the gravity of the harm).[115]

Dugard's approach seeks to move beyond the current framework by acknowledging that the nature of the obligation breached must be accounted for in the determination of reparation not only in cases of non-material damage, or in cases similar to *Aloeboetoe,* but as a general rule for reparation, including in relation to compensation. This approach, if followed, would open up the possibility of including in the factors to be considered in the determination of reparation beyond moral damage, the peremptory character of a norm. I acknowledge that the position advanced here, while based on legal considerations, is also influenced by normative and moral considerations. In my view, there is a reason why norms of *jus cogens* are superior to other rules of international law. They reflect a collective morality that animates the very notion of a supposed international community. The breach of these norms may have consequences for generations afterward. The notion of *jus cogens* represents "elementary principles of morality" that have to be infused into the law so that it reflects this collective morality.[116] Conduct that falls below this standard must attract appropriate consequences. Appropriate consequences must include reparations that recognize the seriousness of the breach and not only the consequences of the breach or harm caused by the breach. Serious breaches of *jus cogens* norms such as the prohibition on the use of force, the right of self-determination, the prohibition of genocide, the prohibition of crimes against humanity cannot attract the same consequences as breaches of other rules of international law.

At this stage, it has to be conceded that the current framework of international law on reparations does not recognize the effect of *jus cogens* on reparations.[117] But international law, like any legal system, should be able to develop in response to social and other changes.[118] As Judge Manfred Lachs opined, we have to avoid "petrifying the rules of yesterday and thereby

[112] *Id.* ("The dispute between Costa Rica and Nicaragua involves three fundamental issues: the forcible invasion of the territory of a State, the purposeful damage to an internationally protected wetland and the calculated and deliberate violation of an Order of this Court.").

[113] *Id.*, para. 30.

[114] *Id.*, paras. 33 et seq.

[115] *Id.*, paras. 40 et seq.

[116] Reservations to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 12 (May 28).

[117] See, in this regard, my Declaration in *Legal Consequences Arising from the Policies and Practices of Israel*, *supra* note 6, para. 55 (dec., Tladi, J.) (acknowledging that the weight of argument, at this point, does not support the position I have put forward: ("I would have been particularly pleased if the Court had ... engaged with the (rather difficult) question of whether the peremptory character of the norms in question has any impact whatsoever on the question of reparations—I believe it does, but *I understand that this would be going against the grain*, something a court of law should avoid doing unless it has a watertight basis.")) (emphasis added).

[118] Dire Tladi, *Between Stability and Responsiveness in International Law – The Example of* Jus Cogens, 13 ESIL REFLECTIONS (2024); *see also* Karl Zemanek, *International Law Needs Development. But Where to?*, *in* FROM BILATERALISM TO COMMUNITY INTERESTS: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 793 (Ulrich Fastenrath et al. eds., 2011).

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halting progress" in the name of process.[119] To do so, i.e., petrify the rules of yesterday, would be to consolidate the injustices of the past, calling *that* law, and in that way "outlawing the future."[120] International law has been known be change in response to social, political and economic events and developments.[121] Fundamental changes to the system, such as the recognition of individual criminal responsibility, entrenchment of the international human rights system, the development of international environmental law and the codification of the exclusive economic zone, illustrate that international law can develop in response to changes in society. The emergence of *jus cogens* as a concept from the periphery to the mainstream of international law with the Vienna Convention on the Law Treaties, and its consecration as one of the most important concepts in international law, demands that its effect on international law, including on the rules of reparations, is concrete and not only rhetoric. Today, the standing of a state not directly affected by a breach to invoke the responsibility of the state in breach—a consequence of *jus cogens* and *erga omnes*—unthinkable several decades ago, is unquestioned.[122] The law on reparations cannot remain oblivious to the impact of *jus cogens* on account of an outdated interpretation of a statement of the Permanent Court of International Justice in the 1920s that "that reparation must, as far as possible, wipe out all the *consequences of the illegal act*"[123] or the rigid distinction created by the International Court of Justice between on the one hand substantive rules and, on the other hand, procedural rules.

IV. Conclusion

Contemporary international law views reparation and *jus cogens* as operating in different spheres, hardly influencing each other. This conception of international law has been perpetuated on the basis of two main arguments. The first argument concerns the purposes of reparation, namely that it is intended to undo the consequences of the wrongful act, i.e., injury, and not the wrongful act itself. The character of the norm breached, which is not necessarily related to the harm, is thus irrelevant to reparation. The second argument is that reparation and *jus cogens* address different things. The former is based on procedural rules of international law while the latter concerns substantive rules. As such they operate on different levels and the *jus cogens* character of the norm cannot affect the determination reparations. As a consequence, so the argument goes, not allowing *jus cogens* to influence reparations does not undermine *jus cogens*. Both of these arguments have been developed and promoted in the decisions of the International Court of Justice, the work of the International

[119] Statement by President of the International Court of Justice, Manfred Lachs, on the Occasion of the Twenty-Fifth Anniversary of the International Law Commission, General Assembly Official Records, Official Records, 2151st Plenary Meeting, para. 36.

[120] *Id.*

[121] Tladi, *supra* note 118.

[122] Dire Tladi, *The Role of the International Court of Justice in the Development of International Law*, *in* The Cambridge Companion to the International Court of Justice (Carlos Espósito & Kate Parlett eds., 2023).

[123] *Chorzów Factory*, *supra* note 2, at 47 (emphasis added). See in this regard, Torres, *supra* note 2, at 227 (who states that the *Chorzów Factory* standard is not "a static set of uncontested rules" but rather can be understood as "a dynamic and disputed standard with different levels of legitimacy").

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Law Commission and in scholarly works. The view expressed in this article is that neither of these two arguments should be able to withstand the transformative power of *jus cogens*. International law can, and should evolve so that reparations of breaches of *jus cogens* reflect the importance of those and the collective morality that they embody.

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