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THE OBLIGATION OF NON-RECOGNITION FOR THE THIRTEEN POINT AMENDMENTS OF THE CYPRUS CONSTITUTION BY INTERNATIONAL COMMUNITY

Mehmet Şükrü GÜZEL[*]

Abstract

The Republic of Cyprus became an independent state on 16th August in 1960 after being declared formally as a Crown Colony on 10th March in 1925 by the United Kingdom. The Constitution of the Republic, which came into effect on the day of independence, had its roots in agreements reached between the heads of government of Greece and Turkey in Zurich on 11th February in 1959. These were incorporated in agreements reached between those governments and the United Kingdom in London on 19th February. On the same day, the representatives of the Greek Cypriot and Turkish Cypriot communities accepted the documents concerned, and accompanying declarations by the three governments, as "*the agreed foundation for the final settlement of the problem of Cyprus*".

The agreements were embodied in treaties - the Treaty of Establishment and the Treaty of Guarantee, signed by Cyprus, Greece, Turkey and the United Kingdom, and the Treaty of Alliance, signed by Cyprus, Greece and Turkey - and in the constitution, signed in Nicosia on 16th August in 1960. Republic of Cyprus was founded as a bi-communal state based on partnership between Turkish Cypriots and Greek Cypriots. The Greek Cypriots proposed amendments to the Constitution, known as the Thirteen Points that entailed usurping the rights of Turkish Cypriots and degrading their equal co-founder status to that of a minority on the Island. Turkish Cypriots refused the Thirteen Points as an obligation to protect their treaty rights and do not recognize the situation created by the abuse of rights as legal. International community has an obligation not to recognize as lawful within the principle of *ex injuria jus non oritur* based on the peremptory norm of self-determination of peoples under Article 73 of the United Nations Charter, the situation created by the Greek Cypriots with the amendments to the Constitutional Treaty of 16 August 1960.

Key words: *Cyprus, Decolonization, non-recognition, United Nations, International Community.*

[*] Prof.Dr. (h.c), Juridical Commission for Auto-Development of First Andesan Peoples (CAPAJ) -İsviçre *guzelmehmetsukru@gmail.com*

Özet:
İngiltere tarafından 10 Mart 1925 tarihinde bir Taç Kolonisi ilan edilen Kıbrıs, 16 Ağustos 1960 tarihinde bağımsızlığına kavuşmuştur. Kıbrıs Cumhuriyeti Anayasası'nın temelleri, 11 Eylül 1959 tarihinde Zürih'te Türkiye ve Yunanistan arasında yapılan antlaşmada atılmıştır. Bu antlaşmayı 19 Eylül tarihinde İngiltere'nin de imzacı olduğu Londra Antlaşması takip etmiştir. Aynı gün, Kıbrıs Türk Toplumu ve Kıbrıs Rum Toplumu temsilcileri imzalanan antlaşmaları onaylayarak, "Kıbrıs Sorununun nihai çözümü için antlaşmaya" vardıklarını deklere etmişlerdir.

16 Ağustos 1960 tarihinde Kıbrıs Cumhuriyeti'nin kuruluşu Türkiye, Yunanistan, İngiltere ve Kıbrıs Cumhuriyeti tarafından imzalanan Kıbrıs Cumhuriyeti Kurucu Antlaşması ve Garanti Antlaşması ile gerçekleşmiştir. Kıbrıs Cumhuriyeti, iki etnik grubun ortak kurucu unsur oldukları, ortak bir cumhuriyet ilkesi temelinde kurulmuştur. Kıbrıs Rum Kesimi, cumhuriyetin kuruluşundan sonra Kıbrıs Anayasası'nda değişiklik önerisi getiren 13 madde Türk Kesimi'ne dikte ettirmeye çalışmıştır. Önerilen 13 madde ile, Kıbrıs Cumhuriyeti'n de eşit kurucu ortak olan Kıbrıs Türk Toplumu, azınlık statüsüne indirgenmek istenmiştir. Kıbrıs Türk Toplumu, Kıbrıs Rum Kesimi'nin 13 maddelik Anayasa değişikliği önerilerini, antlaşmalardan kaynaklanan hukuklarını korumak adına ret etmiş ve Kıbrıs Rum Kesimi'nin yasa dışı işlemlerin sonuçlarını kabul etmemiştir. Uluslararasıı toplumun açısından da *ex injuria jus non oritur* ilkesi çerçevesinde, Birleşmiş Milletler Sözleşmesi'nin 73. Maddesi çerçevesinde, itiraz kabul edilemez gerçekleşmiş Kıbrıs Türk Toplunu'nun kendi kaderini tayin hakkının ihlal edilmesi ile gerçekleşen fiili durumu tanımaması, hukuki bir zorunluluk olarak yer almaktadır.

Anahtar kelimeler: Kıbrıs, Sömürgeleştirme, Birleşmiş Milletler, Uluslar arası Toplum

INTRODUCTION

The General Assembly of the United Nations (UN) put Cyprus under Article 73 of the UN Charter and the decolonization list by his resolution 66 (I) on 14 December 1946. On 5 December 1958, with resolution 1287, the General Assembly took his last decision on the decolonization problem of Cyprus. In the resolution 1287, the General Assembly stated that:

> *"Express its confidence that continued efforts will be made by the parties to reach a peaceful, democratic and just solution in accordance with the Charter of the United Nations."*

With this resolution, the General Assembly of the UN capacitated Turkey, Greece and the United Kingdom for a peaceful solution of the decolonization problem of Cyprus within the principle of *Uti Possidetis*. After the resolution 1287, Greek and Turkish Prime Ministers met in Zurich in February 1959. They agreed on a draft plan for the independence of Cyprus under a Greek Cypriot and Turkish Cypriot president and vice-president respectively. In Zurich, the parties adopted three main agreements (1) The Basic Structure of the Republic of Cyprus, (2) The Treaty of Guarantee between Greece, Turkey and the United Kingdom and Cyprus, (3) The Treaty of Alliance between Cyprus, Turkey and Greece. (Blay, 1983, p.72)

On 19 February 1959, in London, the Greek, Turkish and British governments met to finalize arrangements based on the principles agreed in Zurich. These agreements that ended British Crown Colony rule consisted of a constitution and three treaties: the Treaty of Guarantee, the Treaty of Alliance, and the Treaty of Establishment. The Treaty of Establishment underpinned the constitution of the Republic of Cyprus.

The Constitution of the Republic, signed in Nicosia on 16 August 1960, laid out the foundations of a bi-communal state with a presidential regime, where the two prominent communities- Greek Cypriot and Turkish Cypriot- were to be recognized as partners. The economic, social and political rights were clearly outlined in the Constitution within the frame of this partnership approach. (Campbell-Thomson, 2014, p.61) It was the 1959/1960 Agreement that facilitated independence from Britain and that gave international legal personality to the Greek Cypriot community and the Turkish Cypriot community (both were signatories to the Agreement) as two distinct and equal constituent peoples (Olgun, 199, p.1).

The communal partnership and, hence, the Constitutional arrangements at the foundation of the Republic, lasted only three years. The 1960 Constitution of the Republic of Cyprus was abrogated in November 1963 by the then President of the Republic, Archbishop Makarios, who tried to create a unitary Greek Cypriot state based on a majority rule, in which Turkish Cypriots would be considered a minority. Thirteen amendments proposed by Makarios in the name of the Greek Cypriots on 30 November 1963 undermined the principles of bi-communality and were not accepted by the Turkish Cypriot members of the government. (Campbell-Thomson, 2014, p.61)

Turkey and the Turkish Cypriots rejected the proposed amendments as an attempt to settle constitutional disputes in favor of the Greek Cypriots[and as a means of demoting Turkish status from co-founders of the state to one of minority status removing their constitutional safeguards in the process. Turkish Cypriots filed a lawsuit against the 13 amendments in Supreme Constitutional Court of Cyprus (SCCC). Makarios clarified not to comply with whatever the decision of SCCC will be, and defended his amendments as being necessary "*to resolve constitutional deadlocks*" as opposite to the stance of SCCC. On 25 April 1963, SCCC decided that Makarios' 13 amendments were illegal. On 21 May, president of SCCC resigned due to the Makarios' disobedience to the laws of SCCC, thereby disobedience to the laws of Cyprus. On 15 July, Makarios ignored the decision of SCCC.On 30 November, Makarios legalized the 13 proposals (History North Cyprus, 2018).

As the 1960 Constitution of the Republic of Cyprus was the finalized agreement of the decolonization of Cyprus based on the peremptory norm of self-determination of peoples under Article 73 of the UN Charter. The Turkish Cypriots were accepted as an international legal personality on decolonization, the status of the Turkish Cypriots should not be accepted as a minority by the International Community on the legal principle of the obligation of non-recognition.

1. SELF-DETERMINATION (DECOLONIZATION) AS A PEREMPTORY NORM

In paragraph 29 of the International Court of Justice`s (ICJ) view on the East Timor case, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the charter and from United Nations practice, has an *erga omnes* character. In other words, it is irreproachable. The principle of self-determination of peoples has been recognized by the UN Charter and in the jurisprudence of the ICJ, and it is one of the essential principles of contemporary international law. However, the ICJ considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the ICJ could not rule on the lawfulness of the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another state that is not a party to the case. Where this is so, the ICJ cannot act, even if the right in question is a right *erga omnes* (Siu and Güzel, 2018, p.89)

2. SELF-DETERMINATION (DECOLONIZATION) AS A *JUS COGENS* AND AN *ERGA OMNES* NORM

The view that some norms are of a higher legal rank than others has found its expression in one way or another in all legal systems. In international law, propositions have consistently been made that there is a category of norms that are so fundamental that derogation from them can never be allowed. The *jus cogens* concept refers to peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty. *Jus cogens* means compelling law. (Sartipi and Hojatzadeh, 197). It is accepted by the international community that norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law, and are universally applicable (Hossain, 2005, p. 455). *Jus cogens* rules are higher law, a feature generally characteristic of national constitutional law in comparison with other ordinary laws. They place certain norms beyond the reach of states when states, bilaterally or multilaterally, exercise their treaty-making (i.e., lawmaking) function (Tomuschat, 1998, p. 425).

In its dictum on the Barcelona Traction case, the ICJ gave rise to the concept of *erga omnes* obligations in international law. The ICJ adapted an idea similar to the field of law enforcement by cryptically pointing to an essential distinction between the regular obligations of a state and those toward the international community as a whole (Siu and Güzel, 2018, p.31).

Breaches deemed to be of a collective nature are those that concern obligations established for the protection of the collective interest of a group of states (*erga omnes partes*) or indeed of the international community as a whole (*erga omnes*). Concrete examples of erga omnes partes obligations can be found in particular in human rights treaties. Obligations stemming from regional or universal human rights treaties would have *erga omnes partes* effect toward other states parties, as well as *erga omnes* effect to the extent that they are recognized as customary international law. The same would apply to the obligations articulated in the Statute of the International Criminal Court (ICC) that grant the ICC jurisdiction over the most serious crimes of concern to the "*international community as a whole*", namely genocide, crimes against humanity, and war crimes (De Wet, 2012, p. 554).

2. OBLIGATION OF NON-RECOGNITION FOR A BREACH OF A PEREMPTORY NORM

Recognition and non-recognition possess a central importance in the international system as a significant part of its reaction to the consequences of acts which violate established standards of international law. The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer (Lauterpacht, 1947, p. 411).

The obligation of non-recognition of an unlawful situation is in large part based on the well-established general principle that legal rights cannot derive from an illegal act, *ex injuria jus non oritur*. As a minimum, the rationale of the obligation of non-recognition is to prevent, in so far as possible, the validation of an unlawful situation by seeking to ensure that a fait accompli resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order (Dawidowicz, 2010, p. 677).

Accordingly, no legal order may admit that an unlawful [and] to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception.

The obligations in Article 41 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) rest on the assumption of international solidarity in the face of a violation of a norm of *jus cogens*. They stem from an understanding that a collective response by all States is necessary to counteract the effects of such a violation. In practice, it is most likely that this collective response will be coordinated through the competent organs of the UN (ICJ, 1970, p. 32).

The obligation of non-recognition of an unlawful situation is set out in Article 41 (2) ARSIWA in the following terms:

> *"No State shall recognize as lawful a situation created by a serious breach (by a State of an obligation arising under a peremptory norm of general international law)."*

The ILC's definition of the principle is based on three interrelated elements. First, all peremptory norms may in principle give rise to an obligation of non-recognition. Second, only a serious breach of a peremptory norm is subject to the obligation of non-recognition. Third,

the principle of non-recognition is only applicable where a serious breach of a peremptory norm specifically results in the assertion of a legal claim to status or rights by the wrongdoing State— "*a situation all States are obligated not to recognize as lawful.*" The ILC explains, without much further elaboration, that this general obligation of non-recognition reflects a well-established practice and is thus said to embody existing customary international law (Dawidowicz, 2010, p. 678).

The development of such objective obligatory laws (as entailed by the UN systems) points clearly to the creation of an international community in which a breach of law is deemed an offence against the entire community and each of its members. It matters little who is materially injured by the breach: every member of the community is entitled to claim the vindication of law as a matter of his own legal right. In such a community, an objective standard binding on all would exist for testing the legal validity of the acts of its members. Non-recognition would be the natural attitude of the law-abiding members towards illegal acts. Probably the main difference between international and intra-national society lies, not in the lack of objective law for testing the validity of acts, but in the lack of a central authority to administer the test, and the lack of effective means to rectify the situation (Chen, 1951, p. 427-428).

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

> *"Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or*

assistance in maintaining the situation created by such construction"(Talmon, 2005, p. 104).

4. VIENNA CONVENTION ON THE LAW OF TREATIES AND THE THIRTEEN AMENDMENTS

Article 31 gives pride of place in its opening sentence in para. 1 to good faith (bona fides) which is *"one of the basic principles governing the creation and performance of legal obligations"*. The notion is also referred to in the third preambular para. and in Article 26 on *pacta sunt servanda*. The crucial link is thus established between the interpretation of a treaty and its performance. However, good faith as such has no normative quality (Article 26). When interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing. Furthermore, good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage. When interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing. Furthermore, good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage (Villiger, 2009, p. 426).

According to Article 31, para.1, a treaty shall be determined in accordance with the ordinary meaning. The ordinary meaning is the starting point of the process of interpretation. This is its current and normal (regular, usual) meaning. A term may have a number of ordinary meanings, which may even change over time. This relativist view of hermeneutics underlies Article 31 which in para. 1 requires the ordinary meaning to be given by the interpreter in good faith to the terms of the treaty. In other words, that particular ordinary meaning will be established which is the common intention of the parties. The relativity of the meaning of a term is confirmed by para. 4 which envisages the possibility of a "*special*" meaning going beyond the ordinary meaning of terms.

> *"The limits of this means of interpretation lie* "i*n a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained* "(ICJ Reports, 1962, p. 335).

Consideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms (*ut res magis valeat quam pereat*, the *effet utile*).

> *"As the ILC Report 1966 expounded: [w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted "*(Villiger, 2009, p. 428).

Article 31 lists additional means for the purpose of the interpretation of a treaty which are defined as part of the context (para. 2), or shall be taken into account together with the context (para. 3). These means of interpretation serve together with the means of para. 1 to establish the meaning of a particular treaty term. The means in paras. 2 and 3 can only be invoked if all the parties to the treaty have been involved in the interpretation of a particular meaning of a treaty term by means of an agreement; or if one or more of the parties have been involved by means of an instrument or subsequent practice to which the other parties have agreed. Article 31, paras. 2 and 3 thus envisage a uniform interpretation of the treaty by the parties and for the parties (Villiger, 2009, p. 428).

The concepts of modification, amendment and revision all refer to treaty change procedures. Even if these notions are very closely related and often used as synonyms, they are not identical. *A Dictionary of Law* defines the concept of amendment as:

> *"1. Changes made to legislation, for the purpose of adding to, correcting, or modifying the operation of the legislation.*
>
> (…)
>
> *3. An alteration of a treaty adopted by the consent of the high contracting parties and intended to be binding upon all such parties. An amendment may involve either individual provisions or a complete review of the treaty"* (Biancet, 2017).

Traditionally, the amendment of a treaty required the agreement of all treaty parties. Eventually, more flexibility was achieved when practices developed enabling some parties to a treaty to modify multilateral treaties *inter se*, the original treaty remaining in force for the other parties, which did not accept the amendment (Article 41).

The amendment occurs by means of an agreement between the parties (occasionally called a Protocol). Strictly speaking, it is not the former treaty which is altered, rather a new treaty is concluded which supersedes (but does not substitute itself for) the previous one. The conception that a treaty may only be amended by a new and separate

agreement derives from the notion of *pacta sunt servanda* according to which treaties remain in force during their existence (Article 26).

The requirement of an agreement corresponds with the notion that a State party not willing to amend the treaty will not be affected by an amending instrument which remains *res inter alios acta* (Article 34). Unilateral action of a treaty party is irrelevant, though it may qualify as a breach of treaty (Article 60). As Articles 40 and 41 readily confirm (and not unlike reservations, Article 19), the amendment or modification of treaties may lead to a fragmentation of treaty relations. The relations between the parties to the various treaties are governed by Article 30. (Villiger, 2009, p. 513).

The issue arises which procedural rules apply to the amending agreement required in Article 39. The second sentence of Article 39 apparently proceeds from *two* situations: *first*, the treaty in question may be silent and not specify the procedure to be chosen for its own amendment. In this case, the rules laid down in Part II apply to such an agreement. Since the rules in Part II relate to (written) "*treaties*" within the meaning of Article 2, subpara. 1 (a), the reference in Article 39 to Part II relates solely to those amending agreements which were concluded in writing.

Before the codification of VCLT, the current widespread use of the expression "*object and purpose of a treaty"* in various contexts is very probably due to the crucial role which the ICJ assigned to it in the 1951 Advisory Opinion on Reservations to the Genocide Convention. The ICJ specified that *"purpose"* with *"intention"* and held that the intention behind the Genocide Convention is:

> *"To condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity."* (Buffard & Zemanek, 1998, p. 312).

The ICJ created an object and purpose test in its Genocide Opinion. In that opinion, the ICJ explicitly rejected the unanimous consent rule and introduced the object and purpose test as an alternative limit on reservation making. Some limits were necessary, the Court explained, because to hold otherwise would "*sacrifice the very object"* and "*frustrate the purpose*" of a treaty. With this language, the ICJ was invoking some value beyond any single state or reservation, implying that an incompatible reservation threatens not only the integrity of the treaty

obligations for the reserving state alone but also the core of the treaty for all states party. Also the ICJ's language, a reservation may "*sacrifice the very object*" of a treaty (Jonas & Saunders, p. 589).

The term *"object and purpose"* is an inherently abstract concept that refers broadly to a treaty's goals. VCLT Article 31 states that a treaty should be interpreted in light of its object and purpose, that a treaty's text should be interpreted to reflect the goals embodied in the document as a whole.

The VCLT, which is widely understood to reflect Customary International Law, does not recognize any general unilateral right to revoke or withdraw. The VCLT recognizes several different circumstances in which a party to a treaty may withdraw. (Brilmayer & Tesfalidet, 2018).

The termination of treaties is an immensely practical topic. Part V, Articles 42 to 45 and 54 to 64, VCLT set out the various circumstances in which a treaty can be denounced, terminated, or its operation suspended, other than on the ground of invalidity, which ground is very rarely invoked, and even more rarely successfully. Articles 65 to 72, VCLT specify the procedures to be followed and the consequences of termination or suspension. Article 42, entitled *"Validity and continuance in force of treaties,"* recognizes that it is the normal state of affairs for treaties to continue in force; a party that seeks to withdraw from or terminate a treaty bears the burden of showing that the conditions for withdrawal exist. Paragraph 2 of Article 42 provides:

> *"The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention."*

The object of Article 42 is to limit the grounds for invalidity, termination, or suspension of treaties to those that are exclusively recognized by the VCLT, and, as far as termination or suspension of treaties goes, to the possible grounds foreseen by a treaty itself. The purpose is simple: to reaffirm the rule *pacta sunt servanda*. To state the position in the terms used by the ILC, it is (Kohen & Heatcote, 2011, p. 1016):

> *"As a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of*

> *things which may be set aside only on the grounds and under the conditions provided for in the present articles"* (Kohen & Heatcote, 2011, p. 1016).

To be effective, termination or suspension may only take place as a result of the application of the provisions of the treaty itself or the VCLT (Article 42 (2)). Unless the treaty provides otherwise, it is for the party claiming that a treaty has been terminated or suspended to establish that the necessary grounds exist. Most treaties contain provisions on termination, and termination provisions are usually closely linked to those on the duration of the treaty. The two matters must therefore be considered together (Brilmayer & Tesfalidet, 2018).

The principal reason for the existence of two distinct paragraphs in Article 42 is that a State can only contest the validity of a treaty on the basis of those grounds for invalidity foreseen in the Convention, whereas room is left "*for the freedom of the parties"*" will when it comes to the termination, denunciation, withdrawal, or suspension of treaties. Indeed, paragraph 2 provides that these latter categories can operate, either by applying the provisions of the Convention, or by virtue of the treaty's own provisions. In contrast, parties to a treaty are not free to create new grounds for invalidity which would apply in their mutual relations. This reflects the idea underlying the concept of invalidity: the existence of a public order; of a general interest which governs a declaration of invalidity of a treaty and which goes beyond the mere interests of the parties. The absolutely restrictive nature of the first paragraph of Article 42 is also due to the gravity attached to involving the invalidity of treaties and the consequences which follow from a declaration to that effect. As an exceptional situation, the parties know that only the grounds admitted by the Convention can lead to a treaty's invalidity (Kohen & Heatcote, 2011, p. 1020).

Trying to give an answer to the question as to whether a State may rely on its internal law in order to put into question an international obligation, Article 46 of the 1969 VCLT is characterized by a fundamental tension between sovereignty and democracy, on the one hand, and the efficiency of international law, on the other hand. A reasonable and practical compromise had, thus, to be found between the two interests at stake.

The rule established by Article 46 provides that internal law may not be invoked. This provision thus constitutes a clarification, as to the specific rules it covers, of the general principle that a State may not rely

on its internal law for escaping its international obligations, which is restated in Article 27 of the Convention but the latter rule only applies if the international obligation is legally valid. Thus, the consent of a State to be bound must have been expressed by an organ entitled to do so, as provided by Article 7 of the Convention. For the purposes of the international legal order, that provision establishes the rules which determine the capacity of State organs concerning the conclusion of treaties. The basic principle in this respect is the *ius repraesentationis omnimodo* of the Head of State. Nevertheless, that provision also refers back to internal law, if only to a limited extent. For it is impossible to determine, in any given case, who are the persons envisaged by Article 7 without referring back to the internal order of the State in question. Article 46 provides for the possibility to *"invoke"* the invalidity of a treaty. The procedure to be followed in this case is regulated by Articles 65 and Following of the Convention (Bothe, 2011, p. 1093).

Article 27 relates to the binding force of a treaty: this binding force is determined solely by international law, which entails that the execution of a treaty by the parties cannot depend on their respective internal laws. This provision was conceived as the corollary of the fundamental rule contained in Article 26: the principle of *pacta sunt servanda*, according to which every treaty binds the parties and must be performed in good faith.

A treaty, whether bilateral or multilateral, may terminate, or a party may with draw from it, in conformity with its provisions of Article 54 of VCLT. The purpose of Article 54 is to set out a quite obvious rule: the termination of a treaty or the withdrawal of a party may take place if the parties agree to it, whether this agreement is expressly stated in the treaty in paragraph a, or at any other time under any other form in paragraph b. Thus, both paragraphs express the same requirement of consent and specify when it must be expressed and, with regard to Article 54 paragraph a, the Form it must take.

Paragraph (a) of Article 54 states that the termination of a treaty or the withdrawal of a party may take place "*in conformity with the provisions of the treaty*". Thus, Article 54(a) serves as a reminder of the *pacta sunt servanda* rule, and affirms that this rule applies to the provisions of the treaty governing its termination or the withdrawal of a party. The application of the *pacta sunt servan*da rule to termination and withdrawal was not contested during the travaux preparatoires of the Convention. In addition, many members of the Commission stressed the obvious-or useless-character of this provision, which was even

momentarily removed from the project, only to be finally reinserted for the sake of clarity. Moreover, no State contested this notion during the preparatory phase of the Convention and some even noted its evident character. As a simple reminder of the principle *pacta sunt servanda*, Article 54(a) shares with this principle its recognized customary character.

Article 54(b) requires the Fulfillment of two conditions to terminate a treaty or allow a party to withdraw from it: first, all parties must consent to the termination or withdrawal; secondly, the other contracting States must be consulted. The termination of or withdrawal from a treaty on the basis of Article 54(b) will only take effect after these two conditions have been fulfilled. It seems that concerning termination or withdrawal by consent, the customary rule is only constituted by the first obligation (consent of all States parties). The obligation to consult the 'other contracting States' must essentially be considered a conventional rule (Chapaux, 2011, p. 1238).

The provision supplements Article 54 VCLT. Where a treaty is silent as to termination or withdrawal, the question arises if individual parties have an implied right of unilateral withdrawal in the sense of Article 54 lit a, or if their withdrawal requires the consent of all the other parties, as provided by Article 54 lit b.

The rebuttable presumption embodied in Article 56 represents a reasonable compromise between a strict version of *pacta sunt servanda*, allowing parties to withdraw from a treaty only when it "*is provided for in the treaty or consented to by all other parties"* and a strict version of sovereignty, assuming that States retain an implied power of withdrawal unless "*expressly renounced in the treaty*". The provision tries to steer a middle course between extreme inflexibility, restricting a State to extraordinary rights of withdrawal (Articles 60-62) when unable to secure the consent of all the other parties, and exaggerated flexibility, which devalues treaty commitments voluntarily entered into by allowing any party to withdraw at any time.

While the majority of treaties contain provisions on termination and/or withdrawal, a number of important ones, including law-making conventions and constitutions of international organizations, do not. There is no obvious reason such as topic, category, etc. to explain which treaty falls on which side of the line. The problem of silence that Article 56 attempts to regulate is therefore of considerable practical importance (Philippe Sand, 2011, p. 968).

Article 56 is divided into two paragraphs, the first of which lays down the substantive rules, while the second sets forth a procedural requirement. Article 56 para. l in its introductory clause formulates a presumption against a right to denounce or withdraw from a treaty that is conditioned by the absence of express provisions in that treaty both on termination and on denunciation or withdrawal. This presumption can be rebutted in two different ways, as defined in lit a and b, which both lead to the conclusion that the treaty contains an implied right of denunciation or withdrawal. If the presumption can be rebutted, the denunciation of or withdrawal from a treaty is still subject to a period of notice under Article 56 para 2 (Kohen & Heatcore, 2011, p. 1069).

Article 56, which applies to both bilateral and multilateral treaties, distinguishes between three terms: the termination of a treaty, the denunciation of a treaty and the withdrawal from a treaty. Termination (in the narrower sense) means the end of the treaty as a whole, releasing all the parties from any further obligation to perform the treaty (Article 70 para 1 lit a). Denunciation is a unilateral declaration by which a party terminates its participation in a treaty. Whereas a bilateral treaty will necessarily terminate if one of the parties validly denounces it, a multilateral treaty will normally continue, the denunciation amounting to a withdrawal of one party only, putting an end to the withdrawing State's status as a party or, in other words, terminating its treaty relationships with each of the other parties. For the purposes of the VCLT, withdrawal is a synonym for denunciation, as is evident from Article 70 para 2 and indicated by the "*or*" formulation of Article 56. The Convention uses both terms interchangeably for the same State action because the terminology in international treaty practice is not uniform (Kohen & Heatcore, 2011, p. 1069).

Article 62 has rightly been called one of the "*fundamental articles"* of the VCLT. The principal challenge in formulating Article 62 was to maintain the proper balance between on the one hand the stability ("*sanctity*") of treaties as the cornerstone of the international legal order and international relations, which is expressed in the fundamental rule of *pacta sunt servanda* (Article 26) and on the other hand the principles of equity and justice calling for the adaptation of treaties to a profoundly changing environment. In this tension, Article 62 cautiously attempts to ensure harmony between the dynamism inherent in the life of the international community, necessitating continuous evolution of international law, and the stability essential in every legal order. One important element in that precarious balance is the limited effect of the

article which does not automatically terminate the treaty but instead gives the parties no more than an option to initiate a procedure, however imperfect, toward terminating or suspending their treaty obligations.

Article 62 extends to all treaties which are, pursuant to Articles 1-5 VCLT, covered by the Article 26 with the sole exception of treaties establishing a boundary in the sense of Article 62. It is not through far reaching exceptions of certain treaty types from its coverage but through the narrow formulation of its elements that the provision safeguards the stability of international relations, which is based on the security of treaties. (Kohen &Heatcore, 2011, p. 1069). Article 62 did not at all apply to boundary treaties in violation of the principle of decolonization because these were void by virtue of Article 52 or Article 53.

Article 53 of the Vienna Convention on the Law of Treaties, provides for the invalidity of treaties that, at the time of their conclusion, are in conflict with a peremptory norm of general international law. Article 53 does not identify any norms having peremptory status. Article 53 was thus negotiated so as to leave it to the international community as a whole to identify those international law norms belonging to the category of *jus cogens* (Erika, 2012, p. 541). According to the definition provided in the Vienna Convention on the Law of Treaties Article 53, a *jus cogens* norm 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 (Yearbook of the International Law Commission, 2001, p. 112).

Article 53 of the 1969 VCLT restricts itself' to a relatively narrow aspect, notably the effect of a conflict between a treaty, as defined in the Convention, and a peremptory rule of law. Under treaty law or, as stated in Article 53, "*for the purposes of the present Convention*", conflict with a *jus cogens* norm or peremptory law is a ground for voidance of a treaty. Logically, therefore, this Article forms part of that section of the Convention dealing with the invalidity of treaties.

Article 53 of the VCLT applies to the specific circumstance in which a treaty conflicts, at the time of its conclusion, with a pre-existing *jus cogens* rule. It does not extend to circumstances in which a treaty conflicts with a rule that has arisen since its conclusion; the latter scenario is covered by Article 64 of the Convention, the commentary to which add support to the developments set out infra, in particular as

regards the specific circumstances in which the *jus cogens* superveniens principle applies (Suy, 2011, p. 1225).

The VCLT Article 53 requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, and thus be binding as such, but further, that the international community of states as a whole should recognize it as having a peremptory character. Peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination (decolonization).

Norms of *jus cogens*, as distinct from *jus dispositivum*, are also generally recognized as being universally applicable. As a point of departure, the majority of international law rules are binding on states that have agreed to them, in case of treaties, or at the very least, to states that have not persistently objected to them, in the case of customary international law (*jus dispositivum*). *Jus cogens*, as an exception to this basic rule, presupposes the existence of rules "*binding upon all members of the international community."* (Tladi, 2017, p. 41).

In Article 64 of the VCLT, it is written that "*if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.*" The VCLT, Article 2 provides that the validity of a treaty may be impeached "*only through the application of the present Convention.*" The basic limitation in the effective enforcement of *jus cogens* norms in the regime of the law of treaties is that this ground of invalidity may be invoked only by the parties to the convention (Magallona, 1976, p. 528).

The non-retroactivity rule contemplated in Article 4 may be concretized in the application of Article 53. Since it is to be understood that a treaty under the latter article is one that is concluded after the convention enters into force, a *jus cogens* norm cannot possibly reach a treaty concluded before the convention comes into force because the point of conflict defined by this article is "the time of its treaty's conclusion." Treaties concluded before the convention's entry into force are perforce saved from the operation of Article 53, even if they conflict with a *jus cogens* norm. Here, the date of the convention's entry into force draws the dividing line between treaties that are affected by the non-retroactivity rule and those that are not. However, Article 4 bears a different level of relevance with respect to Article 64. Commenting on

the issue of retroactivity in regard to its draft Article 61, which is now Article 64 of the VCLT, the commission explained as follows :

> *"Manifestly, if a new rule of that character—a new rule of jus cogens— emerges, its effect must be to render void not only future but existing treaties. This follows from the fact that a rule of jus cogens is an overriding rule depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery"* (Magallona, 1976, p. 538).

It is suggested that by "*existing treaties*," the commission necessarily had in mind treaties already concluded at the time it submitted its report to the UN General Assembly in 1966, together with its final articles on the law of treaties. In other words, it was referring to treaties already concluded before the convention enters into force. It would be reasonable to interpret the commission's view as meaning that existing treaties, although concluded before the convention's entry into force, are affected by the invalidating force of a *jus cogens* norm when it is given binding force as such by the entry into force of the convention. In this case, the non-retroactivity rule in Article 4 does not relate so much to the fact that a treaty in question was concluded before the convention's entry into force, which is the literal requirement of that article, as to the non-retroactive effect of a particular *jus cogens* norm on a treaty concluded before the convention's entry into force (Magallona, 1976, p. 539).

To determine the correct application of the non-retroactive rule under Article 4 in relation to Article 64, the relevant issue is not whether the treaty in question was concluded before or after the convention`s entry into force, but from the point of time after the convention's entry into force a *jus cogens* norm should invalidate that treaty. On the basis of the nature of the *jus cogens* rule in Article 64, the more precise non-retroactivity rule applicable is not Article 4, but paragraph 2(b) of Article 71, which provides, inter alia, that the termination of a treaty under Article 64 "*does not affect any right, obligation or legal situation of the parties created by the execution of the treaty prior to its termination."* (UN Document. A/51/389, p. 702).

5. CONCLUSION

The obligations in Article 41 of the ILC Articles on ARSIWA rest on the assumption of international solidarity in the face of a violation of a norm of *jus cogens.* They stem from an understanding that a collective response by all States is necessary to counteract the effects of such a violation. In practice, it is most likely that this collective response will be coordinated through the competent organs of the UN. The obligation of non-recognition of an unlawful situation is set out in Article 41 (2) ARSIWA.

The Constitutional Treaty of 1960 recognizes the Turkish Cypriots as a subject of international law, recognized by the UN General Assembly under Article 73 of the UN Charter. The Turkish Cypriots were recognized their right of self-determination of the Turkish Cypriots under the principle of *uti possidetis* of decolonization.

Cyprus ratified and accepted the obligations of the VCLT by ratifying as the date 28 December 1976. Cyprus is obligated under international law to comply the provisions of the Constitutional Treaty of 16 August 1960 in good faith and cannot use domestic/internal laws to justify the failure of implementation of all the Articles of the Constitutional Treaty of 16 August 1960 as a treaty obligation under the VCLT, not only to the Greek Cypriots but to the international community as well.

The non-retroactivity rule contemplated in Article 4 of the VCLT is not valid for the Thirteen Amendments and the Constitutional Treaty of 16 August 1960. The treat, itself provides no right to withdraw; in other words, the withdrawal provision was intended or agreed to by all of the signatories that is by the Greek Cypriots. Part V, Articles 42 to 45 and 54 to 64, VCLT set out the various circumstances in which a treaty can be denounced, terminated, or its operation suspended, other than on the ground of invalidity, which ground is very rarely invoked, and even more rarely successfully. Articles 65 to 72, VCLT specify the procedures to be followed and the consequences of termination or suspension with the object of limiting the grounds for invalidity, termination, or suspension of treaties to those that are exclusively recognized by the VCLT, and, as far as termination or suspension of treaties goes to the possible grounds foreseen by a treaty itself.

The VCLT indicated by Article 46 provides that internal law may not be invoked to rely on its internal law for the purpose of escaping its

international obligations, which is restated in Article 27 of the VCLT but the latter rule only applies if the international obligation is legally valid.

The Thirteen Amendment to the Constitutional Treaty of 1960 is a serious breach of obligations under peremptory norms of general international law, *jus cogens* norm of self-determination right of the Turkish Cypriots to the international community as a whole. Tthere exists a breach of a *jus cogens* norm on the right to self-determination. The international community has an obligation of non-recognition of an unlawful situation created by the Thirteen Amendments to the Constitutional Treaty of 1960 by the Greek Cypriots.

According to Article 64 of the VCLT, it is written that "*if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.*" The VCLT, Article 2 provides that the validity of a treaty may be impeached "*only through the application of the present Convention.*" The basic limitation in the effective enforcement of *jus cogens* norms in the regime of the law of treaties is that this ground of invalidity may be invoked only by the parties to the convention. The Constitutional Treaty of 16 August 1960 is under the *object and purposes* of Article 64 of VCLT.

To determine the correct application of the non-retroactive rule under Article 4 in relation to Article 64, the relevant issue is not whether the treaty in question was concluded before or after the convention`s entry into force, but from the point of time after the convention's entry into force a *jus cogens* norm should invalidate that treaty. On the basis of the nature of the *jus cogens* rule in Article 64, the more precise non-retroactivity rule applicable is not Article 4, but paragraph 2(b) of Article 71, which provides, inter alia, that the termination of a treaty under Article 64 "*does not affect any right, obligation or legal situation of the parties created by the execution of the treaty prior to its termination."*

The Thirteen Amendment to the Constitutional Treaty of 1960 is a serious breach of obligations under peremptory norms of general international law, of right to self-determination of the Turkish Cypriots.

The international community has an obligation of the non-recognition of the unlawful situation created by the Thirteen Amendments to the Constitutional Treaty of 1960 by the Greek Cypriots.

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