PROBLEM - THE SAWHOMAYAXA CASE (PART 2) (1/1 point)

2. Human rights are part of peremptory norms of international law, also referred to as jus cogens: these are rules that States cannot circumvent by the conclusion of treaties that would be in violation with them, and they form therefore a sort of "public policy" in the international legal order. Therefore, Paraguay and Germany could not conclude an investment treaty providing guarantees to the investor of the other Party such that this creates an obstacle to one of the Parties complying with its duties under human rights law.

- (•) valid ✔
- ( ) invalid

Help

[EXPLANATION]

The argument is essentially *valid*. The Vienna Convention on the Law of Treaties (http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), which was concluded in 1969 but is widely recognized as essentially codifying existing customary international law, states that any treaty which, at the time of its conclusion, is in violation of a *jus cogens* rule, is to be considered void (article 53). A peremptory norm of general international law is defined as "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" (according to the same provision of the Vienna Convention). Though this definition is in part tautological (as it essentially states that *jus cogens* norms are those that are accepted and recognized as such by the international community), it does at least make clear that the content of the set of *jus cogens* norms is in permanent evolution, as such norms express the "conscience" of the international community, as it may change in time and the succession of historical events. However, there is a debate as to which human rights actually belong to the category of *jus cogens* norms. At a minimum, this category would include the prohibition of aggression, slavery and the slave trade, genocide (International Court of Justice, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (http://www.icj-cij.org/docket/files/126/10435.pdf), judgment of 3 February 2006 (Jurisdiction of the Court and Admissibility of the Application), para. 64), racial discrimination, apartheid and torture (see para. 153 of the judgment of 10 December 1998 delivered by the International Criminal Tribunal for former Yugoslavia (ICTY), Trial Chamber, in the case of *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998), as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination (*Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)* (http://www.un.org/documents/ga/docs/56/a5610.pdf), commentary to article 40 of the draft articles on State Responsibility prepared by the International Law Commission, paras. (4)–(6)). But it may be argued

that *all* human rights, even beyond this subset, impose on States a duty not to conclude treaties that would be in violation with them -- and that, should such treaties be concluded despite this prohibition, they should be disapplied to the extent of the incompatibility. Though not *all* consequences attached to *jus cogens* norms would apply to *all* human rights, particularly as regards the rules on State responsibility (see articles 40 and 41 of the International Law Commission's Draft Articles on Responsibility of States for internationally wrongly acts, adopted in 2001), at least the consequences article 53 of the Vienna Convention on the Law of Treaties would appear to apply to any rule in a treaty that is in violation of human rights norms contained in customary international law or part of the general principles of law: this, we noted above, would include all human rights listed in the Universal Declaration on Human Rights.

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