

## The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide

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### Introduction

This contribution aims to investigate how the prohibition of genocide can be easily and more swiftly enforced by focusing on the allegedly peremptory nature of this prohibition. In the first part, it will be demonstrated that genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”),<sup>1</sup> is peremptorily prohibited in international law. Secondly, the relation between *ius cogens* and obligations *erga omnes* will be established and the practical consequences of this corollary examined. In particular, the focus will be placed on the ability to launch a case against States violating the prohibition of genocide before the International Court of Justice (ICJ) and to impose countermeasures.

### The Prohibition of Genocide as a Norm of *Ius Cogens*

#### Definition of *Ius Cogens*

The concept of *ius cogens* (or peremptory norms) first appeared in the Vienna Convention on the Law of Treaties (VCLT),<sup>2</sup> where it was 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”.<sup>3</sup> Although some authors had mentioned the existence of peremptory

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<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948), United Nations Treaty Series, Vol. 78, 277.

<sup>2</sup> Vienna Convention on the Law of Treaties (1969), United Nations Treaty Series, Vol. 1155, 331.

<sup>3</sup> Art. 53 VCLT.

norms before,<sup>4</sup> the notion in the VCLT could be regarded as a progressive development of international law<sup>5</sup> at that time, and limited to the convention itself.<sup>6</sup> However, today this definition has transcended the specific context of the VCLT, and is regarded as the general definition of *ius cogens* in international law.<sup>7</sup> Unfortunately, examples of norms of *ius cogens* were not included in the VCLT. Instead the formal definition should allow States, international judicial bodies, and scholars to establish which norms conform to the requirements of Article 53 VCLT, and are thus considered to be *ius cogens*.<sup>8</sup>

Based on the aforementioned definition, it is traditionally held that for an international norm to qualify as *ius cogens*, the following three conditions should be fulfilled. Firstly, the norm should be a norm of general international law, which means that it is binding for the great majority of States. From this, it can be deduced that regional law is excluded.<sup>9</sup> Secondly, the definition requires that the norm be accepted and recognized by the international community of States as a whole as non-derogatory. It is not necessary for all States to have the same opinion: what is required is that virtually all States,

<sup>4</sup> Especially natural law thinkers like *Francisco de Vitoria*, *Francisco Suarez*, *Hugo Grotius* and *Emmerich de Vattel* were of the opinion that the provisions of natural law were peremptory and that positive law was subjected to it, see *A. ALEXIDZE*, "Legal Nature of *Jus Cogens* in Contemporary International Law", *Recueil des Cours* 1981-III, 228–229; more recently, *A. VERDROSS*, "Forbidden Treaties in International Law", *American Journal of International Law* 1937, 571–577; for an overview of other authors after World War II see *E. SUY*, "The Concept of *Jus Cogens* in Public International Law", in *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE*, *The Concept of Jus Cogens in International Law*, Geneva, Carnegie Endowment for International Peace, 1967, 26–49 and *A. VERDROSS*, "*Jus Dispositivum* and *Jus Cogens* in International Law", *American Journal of International Law* 1966, 57.

<sup>5</sup> *A.J.J. DE HOOGH*, "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", *Austrian Journal of Public International Law* 1991, 188–189; *G. GAJA*, "*Jus Cogens* beyond the Vienna Convention", *Recueil des Cours* 1981-III, 279; *U. SCHEUNER*, "Conflict of Treaty Provisions with a Peremptory Norm of General International Law and Its Consequences", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1967, 520; *M. VIRALLY*, "Réflexions sur le *Jus Cogens*", *Annuaire Français de Droit International* 1966, 6.

<sup>6</sup> Art. 53 stipulates "for the purposes of the present convention..." (emphasis added), thus indicating that the concept was not firmly established in general international law and limiting it to the VCLT.

<sup>7</sup> *L. HANNIKAINEN*, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki, Finnish Lawyers' Publishing, 1988, 3.

<sup>8</sup> *A. AUST*, *Modern Treaty Law in Practice*, Cambridge, Cambridge University Press, 2000, 258; *A. GOMEZ ROBLEDÓ*, "Le *Jus Cogens* International: Sa Genèse, Sa Nature, Ses Fonctions", *Recueil des Cours* 1981-III, 167.

<sup>9</sup> *L. HANNIKAINEN*, o.c., 208–209; *C.L. ROZAKIS*, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam, North-Holland Publishing, 1976, 55–56; *M. VIRALLY*, l.c., 14.