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## PART I

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### Peremptory norms of general international law (*jus cogens*)

The doctrine of *jus cogens* can be understood as the confluence of international law and social contract. This part presents these core concepts as referred to throughout this book. Chapter 1 consists of a discussion of interrelated elements of international law – peremptory norms of general international law (*jus cogens*), obligations *erga omnes*, and the international law of responsibility – that give definition to *jus cogens*. Chapter 2 provides an introduction to the theory of the social contract and explains how the idea is applied to *jus cogens* to frame the analysis of this book. The analysis of the elements of international law set out in Chapter 1, in the parts of this book to follow, are guided by the framework set out in Chapter 2.

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Excerpt

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## International law

This book comes into contact with three interrelated areas of international law: peremptory norms of general international law (*jus cogens*), obligations *erga omnes*, and the international law of responsibility. An understanding of *jus cogens* requires consideration of each of these convergent elements, and it serves to introduce them at the outset.

### A Peremptory norms of general international law (*jus cogens*)

Translating from Latin to mean ‘compelling law’, the concept of *jus cogens* is of Roman law origin, though the term itself only first arises in nineteenth-century works regarding pandects.<sup>1</sup> The principle of *jus cogens* originates from the municipal law of obligations, with reference to those particular rules and principles whose application cannot be compromised by the will of parties to a contract.<sup>2</sup> Formally, *jus cogens* constitutes a form of public order by delineating the boundaries within which positive law may be concluded.<sup>3</sup> As a legal concept, the notion of *jus cogens* is regarded to be universal: it is found in all major forms of domestic legal order.<sup>4</sup> The proposal to introduce a provision on *jus cogens* into international law is found in the First Report on the Law of Treaties by *special rapporteur* Hersch Lauterpacht. Lauterpacht, the second of four *special rapporteurs* appointed by the International Law

<sup>1</sup> Manfred Lachs, *The Development and General Trends of International Law in our Time*, 169 RECUEIL DES COURS 202 (1980); Jerzy Sztucki, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* 6 (Vienna: Springer-Verlag 1974).

<sup>2</sup> Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 946, 948–9 (1967).

<sup>3</sup> Alexander Orakhelashvili, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 19 (Oxford University Press, 2006).

<sup>4</sup> Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 411, 423 (1989).

Commission (ILC) on the matter, posited in 1953 that there must be recognized boundaries beyond which the State may not conclude law:

It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations[.]<sup>5</sup>

The inception of a category of international law expressive of the higher interests and values of the international community, one from which conventional law could not deviate, is often contextualized as a reaction to the excesses of unbridled State sovereignty that reached a zenith during the Second World War.<sup>6</sup> It represents a departure from theories of international law that hold State practice to be the exclusive source of international law.

The notion of international public policy was further developed during the drafting of the law of treaties by the ILC. Gerald Fitzmaurice, the third *special rapporteur* on the law of treaties, postulated that the establishment of such a category in international law necessarily gave rise to a distinction between two classes of rules in international law, ‘those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) . . . the variation or modification of which under an agreed régime is permissible’.<sup>7</sup> Echoing the commentary by Lauterpacht, Fitzmaurice alluded to the normativity implicit in the material content of *jus cogens*:

It is not possible – nor for the present purposes necessary – to state exhaustively what are the rules of international law that have the character of *jus cogens*, but a feature common to them, or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order.<sup>8</sup>

<sup>5</sup> Hersch Lauterpacht, First Report on the Law of Treaties, [1953] II YbILC 154–6, para. 4.

<sup>6</sup> Mark Janis, *The Nature of Jus Cogens*, 3 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 359, 362 (1987–8).

<sup>7</sup> Gerald Fitzmaurice, Third Report on the Law of Treaties, [1958] II YbILC 40, para. 76.

<sup>8</sup> *Ibid.*, 40–1, para. 76 (Fitzmaurice distinguishes *jus cogens* from morals or good order not incorporated as ‘an actual legal rule’).

Humphrey Waldock, the fourth and final *special rapporteur* on the law of treaties, similarly affirmed the notion of public order norms in international law:

Imperfect though the international legal order may be, the view that in the last analysis there is no international public order – no rule from which States cannot at their own free will contract out – has become increasingly difficult to sustain.<sup>9</sup>

Although no explicit reference to ‘international public order’ was included in the final draft of the law of treaties,<sup>10</sup> its effect is manifest in the establishment of a normative category of inviolable rules of such importance to the international community that no derogation is permitted. Broad consensus in support of this conceptualization of *jus cogens* among the drafters of the law of treaties is reflected in a statement by the Soviet member of the ILC:

[T]here was no disagreement on the juridical nature of *jus cogens*. The important point was that all members agreed on the practical issues that a rule having the character of *jus cogens* was one from which States could not contract out, and that such rules existed.<sup>11</sup>

The formal recognition of *jus cogens* in the law of treaties was therefore conceived to have broad structural implications in international law.<sup>12</sup>

The category of *jus cogens* formally entered into international law in Articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969),<sup>13</sup> which establish the illegality of treaties conflicting with a peremptory norm of general international law:

**Article 53. Treaties conflicting with a peremptory norm of general international law (*‘jus cogens’*)**

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the

<sup>9</sup> Humphrey Waldock, Second Report on the Law of Treaties, [1963] II YbILC 52, para. 1 (noting that the limitation of the use of force and development of international criminal law ‘presupposes the existence of an international public order containing rules having the character of *jus cogens*’).

<sup>10</sup> [1966] I(1) YbILC 38, para. 25 (828th Meeting, statement by Mr Tunkin).

<sup>11</sup> [1963] I YbILC 76, para. 28 (685th Meeting, statement by Mr Tunkin) (emphasis added).

<sup>12</sup> See, e.g., [1963] I YbILC 62–78 (683rd–686th Meetings); [1966] I(1) YbILC 36–41 (828th Meeting).

<sup>13</sup> Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, 1155 UNTS 331 (*entered into force* 27 Jan. 1980).

present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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**Article 64. Emergence of a new peremptory norm of general international law ('*jus cogens*')**

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.<sup>14</sup>

The 'Vienna Convention' effects of peremptory norms are clear: a treaty is null and void upon its conclusion that conflicts with a norm belonging to *jus cogens*, and should a peremptory norm emerge with which a treaty in force conflicts, that treaty 'becomes void and terminates'. No treaty is valid in international law that derogates from a peremptory norm.<sup>15</sup>

Although the Vienna Convention concerns the law of treaties and binds only signatories – notwithstanding that its provisions are considered to be declaratory of customary international law<sup>16</sup> – Article 53 reflected a concept with legal effect beyond the treaty context. As much was indicated by the Chairman of the drafting committee at the first session of the UN Conference on the Law of Treaties at Vienna in 1968:

The article expressed a reality by setting forth the consequences in the realm of treaty law of the existence of rules of *jus cogens*. The existence of such rules was beyond dispute. No jurist would deny that a treaty which violated such rules as prohibition of the slave-trade was null and void. Article 5[3], however, did not purport to deal with the whole broad problem of the rule of *jus cogens*: its sole purpose was to set forth the effect of those rules on treaties.<sup>17</sup>

<sup>14</sup> *Ibid.*, Articles 53 and 64.

<sup>15</sup> See Fitzmaurice, Third Report, [1958] II YbILC 26, para. 2 (Article 16. Legality of the object (general)) ('It is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*'); Waldock, Second Report, [1963] II YbILC 52 (a treaty is void 'if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*').

<sup>16</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note (1987) (quoting the US Department of State) (The Vienna Convention 'is already generally recognized as the authoritative guide to current treaty law and practice . . . codifying existing international law').

<sup>17</sup> United Nations Conference on the Law of Treaties, Vienna, 26 March – 24 May 1968, A/CONF.39/11 (1969), First Session 295, para. 21 (statement by Mr Yasseen).

The contemporary practice of international and domestic judicial organs, to refer to Article 53 for any consideration of *jus cogens*, is consistent with this view of a concept existing outside the treaty context.<sup>18</sup> As the best available textual guidance to *jus cogens* in international law, Article 53 provides the logical starting point from which to analyze the formal source of peremptory norms.<sup>19</sup> And, as the first codification of the concept of *jus cogens* in international law, the *travaux préparatoires* of Article 53 provides a rich resource documenting understandings of the ILC during drafting, positions of governments present at the UN Conference on the Law of Treaties at Vienna, and the views of States ratifying the Vienna Convention.

Since its codification in the law of treaties, the concept of *jus cogens* has evolved dramatically.<sup>20</sup> Although the first codified consequence of public order norms in international law is to invalidate contrary law concluded between States, there is virtually no instance in which Article 53 has been invoked to invalidate a treaty.<sup>21</sup> Moreover, in practice, peremptory norms are violated by individual conduct rather than international agreements between States. This suggests that the inclusion of a provision concerning peremptory norms in the law of treaties was primarily structural: if international law admits the existence of non-derogable norms that bind

<sup>18</sup> See, e.g., *Military Prosecutor v. Albers*, Court of Cassation (Italy), No. 32139/2012, ILDC 1921, para. 2.3 (2012); *Habib v. Australia*, Federal Court of Australia, [2010] FCAFC 12, para. 83, ILDC 1518 (2010); *C v. Director of Immigration*, Court of First Instance (Hong Kong), HCAL 132/2006, [2008] 2 HKC 165, para. 77, ILDC 1119 (2008); *A. v. Federal Department of Economic Affairs*, Federal Supreme Court (Switzerland), No. 2A 783/2006, para. 8.1, ILDC 1200 (2008); *Re Víctor Raúl Pinto v. Relatives of Tomás Rojas*, Supreme Court (Chile), Decision on Annulment, No. 3125-04, ILDC 1093, para. 32 (2007); *Fang v. Jiang*, High Court (New Zealand), [2007] NZAR 420, para. 26 (2006); *Jones v. Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz*, House of Lords (United Kingdom) [2006] UKHL 26, 21, para. 42 (Hoffmann, L.) (2006); *Suresh v. Canada (Minister of Citizenship and Immigration)*, Supreme Court (Canada), 2002 SCC 1, para. 61 (2002); *Prosecutor v. Kupreškić*, IT-95-16-T, para. 520, note 771 (2000); *Office of the Prosecutor v. Priebke*, Supreme Court (Argentina), P/457/XXXI, para. 70, ILDC 1599 (1995); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–15 (9th Cir. 1992).

<sup>19</sup> See, e.g., Vladimir Degan, *SOURCES OF INTERNATIONAL LAW*, 217–18 (The Hague: Martinus Nijhoff 1997) ('The starting point of any discussion on *jus cogens* in general international law is Article 53 of the 1969 Vienna Convention on the Law of Treaties').

<sup>20</sup> To suggest that *jus cogens* has merely been '[s]eized upon by idealists, who would extend it beyond the narrow context of treaty making', demonstrates unawareness of a depth of *jus cogens* jurisprudence: Compare David Armstrong, Theo Farrell & Hélène Lambert, *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 14–15 (Cambridge University Press 2nd edn, 2012), with discussion *infra*, Chapter 8.D (Judicial Organs).

<sup>21</sup> See discussion *infra*, Chapter 5.C.i (Non-Derogation).

States apart from their consent, *a fortiori*, these norms cannot be abrogated by treaty agreements between States. The unilateral aspect of peremptory norms, rather than the treaty dimension articulated in Article 53, has assumed the greatest practical importance,<sup>22</sup> as illustrated by jurisprudence of the International Court of Justice (ICJ).<sup>23</sup>

### B Obligations *erga omnes*

The concept of obligations *erga omnes* in international law is closely related to *jus cogens* norms. Literally translating to mean ‘against all’, *erga omnes* refers to an obligation owed by each State to the international community as a whole.<sup>24</sup> The doctrine of obligations *erga omnes* was first articulated by the International Court of Justice in *Barcelona Traction*,

<sup>22</sup> Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW 205–8; Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 491, 495–6 (2008); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 288 (1994); Theodor Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 196–7 (Oxford: Clarendon Press 1986); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 946, 955 (1967).

<sup>23</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, para. 99 (finding *erga omnes* obligations arising from *jus cogens* prohibition of torture sufficient under Torture Convention to grant third-State standing before the court); *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, p. 99, para. 93 (finding *jus cogens* prohibitions of war crimes and slavery substantive rules with no impact on the procedural rule of State immunity under customary international law); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403, para. 81 (noting illegality of declarations of independence connected with ‘the unlawful use of force’, as among ‘egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)’); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 161 (finding international responsibility of Serbia for breach of *erga omnes* obligations arising from *jus cogens* prohibition of genocide); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports 2006, p. 3, paras. 64, 78, 125 (finding *jus cogens* status of prohibitions of genocide and racial discrimination at issue insufficient to engage the jurisdiction of the court); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, p. 3, paras. 56–60 (finding no exception to immunity *ratione personae* of foreign minister for *jus cogens* violations of war crimes and crimes against humanity).

<sup>24</sup> See Christian Tams, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (Cambridge University Press 2005); Maurizio Ragazzi, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (Oxford University Press 1997); André De Hoogh, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES (The Hague: Martinus Nijhoff 1996).



*Light and Power Company, Limited (Belgium v. Spain)* (1970) and has since been revisited on numerous occasions.<sup>25</sup> In *Barcelona Traction*, the ICJ distinguished State obligations owed to another State from those ‘towards the international community as a whole’ and interpreted such obligations to arise from peremptory norms:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.<sup>26</sup>

This conceptualization was interpreted by the ILC to refer to ‘a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are – unlike the others – obligations in whose fulfillment all States have a legal interest’.<sup>27</sup>

Structurally, as obligations owed to the international community as a whole, the classification *erga omnes* denotes a general legal interest in

<sup>25</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, 450, paras. 68–9; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, 104, 111, paras. 147, 162; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, ICJ Reports 2006, p. 6, 32, 51–2, paras. 64, 125; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, 172, 199, paras. 88, 155–7; *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, 102, para. 29; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, para. 126; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3, 32, paras. 33–4.

<sup>26</sup> ICJ Reports 1970, p. 3, 32, paras. 33–4.

<sup>27</sup> Report of the International Law Commission on the Work of its Twenty-Eighth Session, [1976] II(2) YbILC 99, para. 10 (Commentary to Draft Article 19 adopted by the ILC at its 28th Session).

their fulfilment. This means that, simultaneously, each State is bound by *erga omnes* obligations and every State has a legal interest in their performance. This *erga omnes* status is an effect of the importance of the maintenance of norms from which such obligations derive, as noted by *special rapporteur* Robert Ago in his Fifth Report on State Responsibility (1976):

The specially important content of certain international obligations and the fact that respect for them in fact determines the conditions of the life of international society are factors which, at least in many cases, have precluded any possibility of derogation from the rules imposing such obligations by virtue of special agreements. These are also the factors which render a breach of these obligations more serious than failure to comply with other obligations.<sup>28</sup>

It is from this seriousness of compliance to the public order of the international community that a general legal interest in the performance of obligations *erga omnes* arises, an importance rendering the legal obligations arising therefrom ‘indivisible’. *Special rapporteur* Gaetano Arangio-Ruiz set out this relationship in his Fourth Report on State Responsibility (1992):

It is well known . . . that the concept of *erga omnes* obligation is not characterized by the importance of the interest protected by the norm (as is typical of *jus cogens*) but rather by the ‘legal indivisibility’ of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others.<sup>29</sup>

This general legal interest in the performance of obligations to the international community departs from the bilateralization that traditionally characterizes obligations in international law.

Functionally, obligations *erga omnes* concern the enforcement norms of *jus cogens*, as indicated by *special rapporteur* James Crawford in his

<sup>28</sup> Robert Ago, Fifth Report on State Responsibility, [1976] II(1) YbILC 33, para. 101.

<sup>29</sup> Gaetano Arangio-Ruiz, Fourth Report on State Responsibility, [1992] II(1) YbILC 34, para. 92; see Robert Ago, Fifth Report on State Responsibility, [1976] II(1) YbILC 29, para. 89; *Prosecutor v. Furundžija*, IT-95-17/1-T, para. 151 (1998) (‘Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued’).