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**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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THE PROHIBITION OF GENOCIDE AS A NORM OF *IUS COGENS* AND ITS IMPLICATIONS FOR THE ENFORCEMENT OF THE LAW OF GENOCIDE

Prof. Dr. Jan Wouters* and Sten Verhoeven**

I. 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”)¹, 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.

II. THE PROHIBITION OF GENOCIDE AS A NORM OF *IUS COGENS*

II.1. Definition of *Ius Cogens*

The concept of *ius cogens* (or peremptory norms) first appeared in the Vienna Convention on the Law of Treaties (VCLT),² 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*”.³ Although some authors had mentioned the existence of peremptory norms before,⁴ the notion in

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¹ Convention on the Prevention and Punishment of the Crime of Genocide (1948), *U.N.T.S.*, Vol. 78, 277.

² Vienna Convention on the Law of Treaties (1969), *U.N.T.S.*, Vol. 1155, 331.

³ Art. 53 VCLT.

⁴ 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”, *R.d.C.* 1981-III, 228-229; more recently, A. VERDROSS, “Forbidden Treaties in International Law”, *A.J.I.L.* 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”, *A.J.I.L.* 1966, 57.

the VCLT could be regarded as a progressive development of international law⁵ at that time, and limited to the convention itself⁶. 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.⁷ 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*.⁸

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.⁹ 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, or at least a vast majority of States, establish a peremptory norm which will be binding upon all States.¹⁰ As a result, the purely consensualist approach of international law is partially abandoned, since a (qualified) majority of States can bind a minority.¹¹ While at first sight this may seem peculiar, it is the logical consequence of the aim of *ius cogens*, namely the protection of the fundamental interests of the international community and not the particular interests of certain States.¹² Thirdly, no derogation is permitted from the peremptory norm. This is not only a prerequisite for, but also a consequence of, peremptory norms.¹³ The norm

⁵ A.J.J. DE HOOGH, "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", *Aus.J.P.I.L.* 1991, 188-189; G. GAJA, "*Jus Cogens* beyond the Vienna Convention", *R.d.C.* 1981-III, 279; U. SCHEUNER, "Conflict of Treaty Provisions with a Peremptory Norm of General International Law and Its Consequences", *Z.a.ö.R.V.* 1967, 520; M. VIRALLY, "Réflexions sur le *Jus Cogens*", *A.F.D.I.* 1966, 6.

⁶ Art. 53 stipulates '*for the purposes of the present convention...*', thus indicating that the concept was not firmly established in general international law and limiting it to the VCLT.

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

⁸ A. AUST, *Modern Treaty Law in Practice*, Cambridge, Cambridge University Press, 2000, 258; A. GOMEZ ROBLEDI, "Le *Jus Cogens* International: Sa Genèse, Sa Nature, Ses Fonctions", *R.d.C.* 1981-III, 167.

⁹ 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.

¹⁰ A. ALEXIDZE, *l.c.*, 246-247 and 258; G. GAJA, *l.c.*, 283; L. HANNIKAINEN, *o.c.*, 210-212.

¹¹ See *inter alia* G.M. DANILENKO, "International *Jus Cogens*: Issues of Law Making", *E.J.I.L.* 1991, 44; C.L. ROZAKIS, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam, North-Holland Publishing, 1976, 2-3.

¹² G.M. DANILENKO, "International *Jus Cogens*: Issues of Law Making", *E.J.I.L.* 1991, 45; C.L. ROZAKIS, *o.c.*, 78; M. VIRALLY, *l.c.*, 14.

¹³ A.J.J. DE HOOGH, *l.c.*, 186.

should always be respected and deviation is generally not accepted. As a result, States cannot undertake actions which go against the norm of *ius cogens* involved. In particular, States are not allowed to take countermeasures which would violate a peremptory norm, even if another State has caused damage by breaching a peremptory norm.¹⁴ Moreover, it is held that situations of necessity, emergency, or self-defence are no justification for a breach of the norm in question; only the circumstance of *force majeure*, rendering compliance with a certain norm materially impossible, would be accepted.¹⁵

As they aim at protecting the fundamental interests of the international community, norms of *ius cogens* come at the top of the hierarchy of norms in international law. Consequently, all rules conflicting with peremptory norms are deemed to be void and only other peremptory norms can modify the specific peremptory norm.¹⁶

II.2. The Prohibition of Genocide as a Norm of *Ius Cogens*

Various international documents illustrate that genocide endangers the fundamental interests of the international community. Already in 1946, the UN General Assembly unanimously identified genocide as a crime which the civilized world condemns and which is punishable,¹⁷ but even before that, the Nuremberg Tribunal prosecuted and punished perpetrators of genocidal acts.¹⁸ Furthermore, in 1948 the Genocide Convention was adopted, which has been ratified by 134 countries, explicitly stating that genocide is an international crime which States must not only punish, but also prevent.¹⁹ The Genocide Convention also provides that immunities are no bar to prosecution and it obliges States to enact the necessary legislation to effectively punish offenders.²⁰ Moreover, the Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity and its European counterpart, determine that no statutory limitation shall apply to genocide.²¹ More recently, the inclusion of the

¹⁴ Art. 50.1 (d) DASR, at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.

¹⁵ L. HANNIKAINEN, *o.c.*, 265.

¹⁶ Art. 53 VCLT.

¹⁷ U.N. G.A. Res. 96 (I).

¹⁸ Although the word 'genocide' is not mentioned in the Charter of the Nuremberg Tribunal, it was included in the categories of war crimes and crimes against humanity. The term also did not appear in the judgment itself, which spoke of 'a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans'. The indictment however used the word 'genocide'. See L. HANNIKAINEN, *o.c.*, 457 and M. RAGAZZI, *The Concept of International Obligations Erga Omnes*, Oxford, Clarendon, 1997, 92-93.

¹⁹ Art. I Genocide Convention.

²⁰ Art. V and Art. VI Genocide Convention.

²¹ Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity (1968), *U.N.T.S.*, Vol. 754, 73; European Convention on Non-Statutory Limitations to War Crimes and Crimes against Humanity (1974), *E.T.S.* No. 82; both regard genocide as a specific crime against humanity.

prohibition of genocide in the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)²², the International Criminal Tribunal for Rwanda²³ and the International Criminal Court²⁴, shows the renewed determination of the international community to eradicate genocide from the globe. From this it is clear that the prohibition of genocide is a strong candidate for the status of a norm of *ius cogens*.

This status is also confirmed in several cases of the ICJ. Already in its Advisory Opinion concerning *Reservations to the Genocide Convention* (1951), the Court emphasised the binding character of the prohibition of genocide, even on States which did not subscribe to the convention, since this prohibition is vested in the principles of civilized nations. Furthermore, it expressed the universal character of the condemnation of genocide and of the cooperation required in order to liberate the world from this odious scourge.²⁵ In the *Barcelona Traction Case* (1970), the Court cited the prohibition of genocide among the obligations *erga omnes*, or obligations towards the international community as a whole, in the protection of which every State has a legal interest.²⁶ Lastly, in the *Case concerning the Application of the Convention on the Prevention and Punishment of Genocide*, the Court reiterated that the crime of genocide ‘*shocks the conscience of mankind... and is contrary to moral law and to the spirit and aims of the United Nations*’.²⁷ Furthermore, in the *Kupreškić Case*²⁸ the ICTY regarded the prohibition of genocide as a norm of *ius cogens*. In addition, almost all legal authors confirm the *ius cogens* character of the prohibition of genocide.²⁹

²² Art. 4 Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by U.N. S.C. Res. 827, as amended by U.N. S.C. Res. 1166, U.N. S.C. Res. 1329, U.N. S.C. Res. 1411, U.N. S.C. Res. 1431 and U.N. S.C. Res. 1481.

²³ Art. 2 Statute of the International Criminal Tribunal for Rwanda, adopted by U.N. S.C. Res. 955, as amended by U.N. S.C. Res. 1165, U.N. S.C. Res. 1166, U.N. S.C. Res. 1329, U.N. S.C. Res. 1411, U.N. S.C. Res. 1431, U.N. S.C. Res. 1503 and U.N. S.C. Res. 1512.

²⁴ Art. 6 Rome Statute of the International Criminal Court (1998), *U.N.T.S.*, Vol. 2187, 3.

²⁵ *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, *I.C.J. Rep.* 1951, 23.

²⁶ *Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, 5 February 1970, *I.C.J. Rep.* 1970, §§ 33-34; on the relation between *ius cogens* and obligations *erga omnes* see III.1.

²⁷ *Case concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order of 8 April 1993, *I.C.J. Rep.* 1993, § 49.

²⁸ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Trial Chamber II, 14 January 2000, § 520 at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf>.

²⁹ See *inter alia* A. ALEXIDZE, *l.c.*, 262; A. AUST, *o.c.*, 257; I. BROWNIE, *Principles of Public International Law*, Oxford, Oxford University Press, 2003, 488-489; P. DAILLIER and A. PELLET, *Droit International Public*, L.G.D.J., Paris, 2002, p. 205, para. 127; L. HANNIKAINEN, *o.c.*, 462-464; P. MALANCZUCK, *Akehurst's Modern Introduction to International Law*, London, Routledge, 1997, 58; U. SCHEUNER, *l.c.*, 526; M.N. SHAW, *International Law*, Cambridge, Cambridge University Press, 2003, 117; M. VIRALLY, *l.c.*, 11.

Since the peremptory character of an international norm has important legal consequences, the exact content of the peremptory prohibition of genocide needs to be established. The definition of genocide can be found in Article II of the Genocide Convention. Since this is the key description of genocide, it will be reflected and incorporated in the peremptory prohibition of genocide. As a result, the flaws of this definition will also be applicable to the *ius cogens* prohibition: Article II requires a specific intent to destroy a national, ethnic, racial or religious group,³⁰ and political groups are excluded from the peremptory prohibition since only the enumerated groups can be subjected to genocide.³¹ The main consequence of the peremptory character of the prohibition of genocide is the bar on derogation from it in treaties or customary international law. Furthermore, this rule can only be modified by a rule having the same character. On the one hand, since it is quite unlikely that a treaty would be concluded or a customary norm formed tolerating genocide, this outcome is rather theoretical. On the other hand, other consequences of more practical relevance may exist, in particular the possible corollary between *ius cogens* and obligations *erga omnes*.

III. THE PEREMPTORY PROHIBITION OF GENOCIDE AS AN OBLIGATION *ERGA OMNES*

III.1. Peremptory Norms as Obligations *Erga Omnes*

The concept of obligations *erga omnes* first appeared in the *Barcelona Traction Case* before the International Court of Justice. In a famous *obiter dictum* the Court held that obligations towards the international community as a whole (obligations *erga omnes*) exist, in which all States have a legal interest in their protection in light of the importance of the rights involved.³²

Although the definition was clearly framed, the Court did not elaborate the legal regime of obligations *erga omnes*.³³ The Court furthermore failed to do this at other occasions where it had the opportunity.³⁴ Moreover, it seemed to diminish the

³⁰ A. CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2003, 103; W.A. SCHABAS, *Genocide in International Law*, Cambridge, Cambridge University Press, 2000, 217-221; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998, § 497, at <http://www.ictj.org>.

³¹ A. CASSESE, *o.c.*, 96; W.A. SCHABAS, *o.c.*, 134-145.

³² *Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, 5 February 1970, *I.C.J. Rep.* 1970, § 33.

³³ C. ANNACKER, "The Legal Régime of *Erga Omnes* Obligations in International Law", *Aus.J.P.I.L.* 1994, 133.

³⁴ In the *Nuclear Test Cases* the *erga omnes* obligation to be free from atmospheric nuclear tests was considered to be without merits (*Nuclear Tests Case (Australia v. France)*, 20 December 1974, *I.C.J. Rep.* 1974, § 50 and § 53.) and in the *Nicaragua Case* the Court did not touch upon the enigmatic

relevance of obligations *erga omnes* by declaring that universal human rights instruments do not allow States to protect victims of human rights violations regardless of their nationality³⁵ and by refraining from exercising its jurisdiction when the rights of a third State, not party to the dispute before the ICJ, risked being endangered.³⁶ As a result, the concept of obligations *erga omnes* might be well-established in the case law of the International Court of Justice, but its content and effects remain vague at best.

Notwithstanding this opaqueness, there appears to be a relation between norms of *ius cogens* and obligations *erga omnes* in the Court's case law. First of all, the wording used in the *Barcelona Traction Case* refers to Article 53 VCLT. Both the treaty provision and the *obiter dictum* of the case refer to 'the international community as a whole'. Furthermore, the examples enumerated in the *Barcelona Traction Case* were also examples which the International Law Commission gave during the discussions on the VCLT.³⁷ Moreover, in his separate opinion Judge Ammoun did mention *ius cogens* and linked it to the concept of obligations *erga omnes*.³⁸ These facts imply that the Court had *ius cogens* in mind, while introducing the concept of obligations *erga omnes*. Recently, the ICJ has strengthened this assertion in the *East Timor Case* (1995) and in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004). In the former case, the Court accepted that the peremptory right of self-determination³⁹ was an obligation *erga omnes*, but dismissed the case on the basis of lack of jurisdiction.⁴⁰ In the latter case, it held that Israel had violated the right of self-determination of the Palestinian people

nature of the concept by unconditionally denying a third State's right to react with force against armed intervention, leaving aside the *erga omnes* character of the duty of non-intervention (*Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, *I.C.J. Rep.* 1986, §§ 248-249).

³⁵ *Case concerning the Barcelona Traction, Light and Power Company Ltd.* (Belgium v. Spain), 5 February 1970, *I.C.J. Rep.* 1970, § 91; C. ANNACKER *l.c.*, 133; A.J.J. DE HOOGH is of the opinion that this dictum does not limit the application of obligations *erga omnes*: see A.J.J. DE HOOGH, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, Nijmegen, 1995, 45.

³⁶ *Case concerning East Timor* (Portugal v. Australia), 30 June 1995, *I.C.J. Rep.* 1995, § 29.

³⁷ Report of the International Law Commission on the work of its 18th session, *Y.I.L.C.* 1966, Vol. II, Part II, 248.

³⁸ Separate Opinion Judge AMMOUN, *Case concerning the Barcelona Traction, Light and Power Company Ltd.* (Belgium v. Spain), 5 February 1970, *I.C.J. Rep.* 1970, 325.

³⁹ The right to self-determination is widely considered as a norm of *ius cogens*; see A. CASSESE, *Self-Determination of People: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995, 133-140; P.D. COFFMANN, "Obligations *Erga Omnes* and the Absent Third State", *G.Y.I.L.* 1997, 315; K. PARKER and L.B. NEYLON, "Jus Cogens: Compelling the Law of Human Rights", *Hastings Int. & Comp. L.R.* 1989, 440-441; M. RODRIGUEZ-ORELLANA, "Human Rights Talk... and Self-Determination too", *Notre Dame L.R.* 1998, 1406.

⁴⁰ *Case concerning East Timor* (Portugal v. Australia), 30 June 1995, *I.C.J. Rep.* 1995, § 29.

and certain obligations of international humanitarian law⁴¹ and that these involved obligations *erga omnes*.⁴² Furthermore, in determining the duties of other States towards these breaches of *erga omnes* obligations, the Court implicitly applied Article 41 of the Draft Articles on State Responsibility for Internationally Wrongful Acts (“DASR”) (2001), which obliges States not to recognize as lawful a situation created by a serious breach of a peremptory norm, nor render aid or assistance in maintaining that situation.⁴³

The relationship between *ius cogens* and obligations *erga omnes* has also been recognized outside the case law of the International Court of Justice. In the *Furundzija Case*, the ICTY held that the prohibition of torture is an obligation *erga omnes* and a peremptory norm of general international law⁴⁴, while the *Kupreškić case* qualifies norms of international humanitarian law (including the prohibition of genocide) as norms of *ius cogens* and as obligations *erga omnes*.⁴⁵ Legal authors have also extensively discussed and examined both concepts, leading to a clearer understanding of the correlation. According to some authors, the two concepts are different sides of the same coin.⁴⁶ Others contend that all norms of *ius cogens* are obligations *erga omnes*, but that the opposite does not hold.⁴⁷ On one issue, there is, however, agreement: while *ius cogens* deals with the hierarchy of norms and international public order, obligations *erga omnes* refer to the enforcement of these

⁴¹ A substantial part of international humanitarian law is *ius cogens*: indeed, the International Court of Justice stated in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (8 July 1996, *I.C.J. Rep.* 1996 (I), § 79) that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ (...), that they are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute *intransgressible* principles of international customary law” (emphasis added). For an in-depth study of peremptory norms of international humanitarian law, see L. HANNIKAINEN, *o.c.*, 596-715.

⁴² *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, §§ 155-157, at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

⁴³ See *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, § 159.

⁴⁴ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber II, 10 December 1998, § 144 and §§ 151-154, at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

⁴⁵ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Trial Chamber II, 14 January 2000, § 519 and § 520 at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf>.

⁴⁶ A.J.J. DE HOOGH, *o.c.*, 45-48; B. SIMMA, “From Bilateralism to Community Interest in International Law”, *R.d.C.* 1994-VI, 300; V. STARACE, “La Responsabilité Résultant de la Violation des Obligations à l’égard de la Communauté Internationale”, *R.d.C.* 1976-V, 289.

⁴⁷ M. RAGAZZI, *The Concept of International Obligations Erga Omnes*, Oxford, Clarendon, 1997, 194-199; L.-A. SICILIANOS, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility”, *E.J.I.L.* 2002, 1137; E. WYLER, “From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations under Peremptory Norms of General International Law’”, *E.J.I.L.* 2002, 1156; K. ZEMANEK, “New Trends in the Enforcement of *erga omnes* Obligations”, *Max Planck U.N.Y.B.* 2000, 6.

peremptory norms.⁴⁸ In particular, a breach of a norm of *ius cogens* violates a norm which is so fundamental for the international community that every member of that community can be regarded as having a legal interest in compliance with this norm.⁴⁹ As a result, when a violation occurs, every member of the international community, even if it is not directly affected by the breach, has a legal interest in protecting these norms, and can take steps to enforce them.⁵⁰ Precisely what individual enforcement measures are available when a violation occurs, will be the subject of the next sections. Since genocide is typically committed by a government against its own civilians, no directly involved State will come into play. Hence the emphasis will be on the possible actions of indirectly concerned States, in their capacity of member of the international community.

III.2. Judicial Proceedings before the International Court of Justice

It is submitted that violations of peremptory norms and obligations *erga omnes* allow States not directly concerned to bring a case against the culprit State before the International Court of Justice. However, in order to do so, obstacles of jurisdiction and admissibility have to be hurdled.

III.2.1. Problems of Jurisdiction

The International Court of Justice has made it clear that jurisdiction of the Court is still needed when a State claims standing on the basis of an obligation *erga omnes*.⁵¹ In other words, one of the conditions of Article 36 of the Court's Statute has to be fulfilled. In practice it will be unlikely, however, that a State committing genocide will conclude a *compromis*⁵² to allow a State not directly affected to pursue its claim based on the obligation *erga omnes* not to perpetrate genocide. Moreover, even a jurisdictional clause in a treaty often will not help, since this will be limited to the rights contained in that treaty. If the treaty in question does not allow standing for

⁴⁸ M.C. BASSIOUNI, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", *L.C.P.* 1996, 73; M. RAGAZZI, *o.c.*, 206; P. WEIL, "Towards Relative Normativity in International Law", *A.J.I.L.* 1983, 431-432; see also *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber II, 10 December 1998, § 153, at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

⁴⁹ J.A. FROWEIN, "Reactions by Not Directly Affected States to Breaches of Public International Law", *R.d.C.* 1994-IV, 405-406; E. WYLER, "From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law'", *E.J.I.L.* 2002, 1157.

⁵⁰ J.A. FROWEIN, "Collective Enforcement of International Obligations", *Z.a.ö.R.V.* 1987, 68; G. GAJA, "Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts", in J. WEILER, A. CASSESE and M. SPINEDI (eds.), *International Crimes of States*, Berlin, de Gruyter 1989, 158-159.

⁵¹ *Case concerning East Timor* (Portugal v. Australia), 30 June 1995, *I.C.J. Rep.* 1995, § 29.

⁵² Art. 36.1. Statute of the International Court of Justice.

indirectly involved States, this possibility will be barred.⁵³ Fortunately, the Genocide Convention contains a provision allowing parties to the convention to launch a case before the International Court of Justice.⁵⁴ Since Article IX permits any State to start up a case against another party which has allegedly breached its obligations under the convention, States not directly affected should also be able to seize the Court.⁵⁵ Moreover, when a non-party State which has accepted the compulsory jurisdiction⁵⁶ of the Court, violates the prohibition of genocide, States other than the affected will also have the opportunity to have recourse to the Court.⁵⁷

A second problem arises between an obligation *erga omnes* and the justiciability of claims affecting States which are not party to the dispute before the Court. Indeed, in the *East Timor Case* the Court held that in such a case it lacks jurisdiction,⁵⁸ thus entitling the absent State to veto the actual outcome of the case even if that State allegedly violated such significant rules as norms of *ius cogens* and obligations *erga omnes*.

The *East Timor Case* concerned a treaty between Australia and Indonesia delimiting the continental shelf of East Timor, which had been invaded and annexed by Indonesia. Portugal claimed that it alone had the power to conclude the treaty as Administrative Power and argued *inter alia* that by the conclusion of the treaty Australia had violated the right of self-determination of the Timorese people. Australia objected that the real dispute lay between Portugal and Indonesia and, since the latter was absent, the Court had no jurisdiction.⁵⁹ The Court agreed and referred to its decision in the *Case concerning the Monetary Gold Removed from Rome in 1943*.⁶⁰ In that case, Italy brought a claim against France, the United Kingdom and the

⁵³ A.J.J. DE HOOGH, "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Preemptory Norms in Perspective", *Aus.J.P.I.L.* 1991, 197.

⁵⁴ Art. IX Genocide Convention.

⁵⁵ P. AKHAVAN, "Enforcement of the Genocide Convention: A Challenge to Civilization", *Harv.Hum.R.J.* 1995, 247.

⁵⁶ Art. 36.2. Statute of the International Court of Justice.

⁵⁷ The International Court of Justice has already held that the underlying principles of the Genocide Convention are binding on all States, whether or not they are a party to the convention (*Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, *I.C.J. Rep.* 1951, 23) and that the obligations of the Genocide Convention are obligations *erga omnes* (*Case concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia-Herzegovina v. Yugoslavia), 11 July 1996, *I.C.J. Rep.* 1996, § 31); for jurisdiction on the basis of Art. 36.2. Statute of the International Court of Justice in relation to obligations *erga omnes*, see A. KORKEAKIVI, "Consequences of Higher International Law: Evaluating Crimes of State and *Erga Omnes*", *J.I.L.S.* 1996, 110; O. SCHACHTER, "General Course in Public International Law", *R.d.C.* 1982-V, 198.

⁵⁸ *Case concerning East Timor* (Portugal v. Australia), 30 June 1995, *I.C.J. Rep.* 1995, § 29.

⁵⁹ P.D. COFFMAN, *l.c.*, 291-292.

⁶⁰ *Case concerning the Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom and United States), 15 June 1954, *I.C.J. Rep.* 1954, 19.

U.S. with regard to monetary gold plundered by Germany in World War II, which belonged to Albania. At that time, the gold was entrusted to a commission composed of these three nations, and the United Kingdom planned to use the gold for fulfilment of the *Corfu Channel Case*.⁶¹ In its application, Italy requested that the Court established that Albania had unlawfully expropriated Italian assets and that the resulting claim had superiority over the claim of the United Kingdom. The Court found that it had no jurisdiction and held that, since Albania's responsibility was the key question in the dispute, it could not issue a judgment in the absence of Albania.⁶² The same ruling was applied in the *East Timor Case*, thereby strongly reducing the effectiveness of obligations *erga omnes*.⁶³ The Court failed to distinguish the two cases: in the *Monetary Gold Case* the rights of Albania would be directly affected, while in the *East Timor Case* the outcome would only have had an impact on the rights and duties between Portugal and Australia, leaving aside Indonesia's obligations towards Australia and Portugal.⁶⁴ Furthermore, the International Court of Justice followed a different approach in the *Nicaragua Case*, in which El Salvador, Honduras and Costa Rica contended that the actions of the U.S. against Nicaragua were in fact measures of collective self-defence on behalf of El Salvador, Honduras and Costa Rica. They argued that the Court could not pronounce on the case, pursuant to the *Monetary Gold Case*. The Court, however, rejected this argument, stating that the absent States' interest did not constitute the subject matter of the dispute.⁶⁵ But this was the same with the *East Timor Case*. Although the U.S.' actions in Nicaragua were illegal unless proven otherwise, and the conclusion of a treaty on the delimitation of a continental shelf was not, the Court failed to notice that the invasion and annexation of East Timor by Indonesia had been widely condemned by the UN General Assembly and Security Council.⁶⁶ Portugal was thus still the Administrative Power and it was the only country with whom a treaty could be concluded.⁶⁷ Hence, this was the subject matter, which left the dictum of the *Monetary Gold Case* out of play.

III.2.2. Problems of Admissibility

If an indirectly affected State manages successfully to navigate the troubled waters of jurisdiction, it then has to deal with the problem of admissibility. Although Article 48

⁶¹ P.D. COFFMAN, *l.c.*, 293.

⁶² *Case concerning the Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom and United States), 15 June 1954, *I.C.J. Rep.* 1954, 32.

⁶³ P.D. COFFMAN, *l.c.*, 309.

⁶⁴ *Ibid.*, 316.

⁶⁵ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 26 November 1984, *I.C.J. Rep.* 1984, §§ 86-88.

⁶⁶ U.N. S.C. Res. 384; U.N. S.C. 389; U.N. G.A. Res. 32/34.

⁶⁷ P.D. COFFMAN, *l.c.*, 319.

DASR allows States that are not directly injured to raise the question of State responsibility and request reparation, this is subsequently limited by the requirement that the rule of nationality of the claims be respected.⁶⁸ This has the effect of precluding States that are not directly affected from inducing the culprit State to make reparation on behalf of injured non-nationals.⁶⁹ But since, for example, genocide and other gross human right violations are often perpetrated on a State's own citizens, Article 48 DASR effectively bars a vigorous enforcement of obligations *erga omnes*. Moreover, it partially negates the distinction drawn in the *Barcelona Traction Case*.

In *Barcelona Traction* the Court indeed made a distinction between obligations towards another State and those towards the international community as a whole and held that the rules concerning diplomatic protection are only applicable to the former.⁷⁰ However, the Court gave the impression of blurring this distinction by stating that universal human rights treaties which contain certain obligations *erga omnes*, do not bestow on States the ability to protect the victims of human rights violations regardless of their nationality.⁷¹ A thorough reading leads to another conclusion, though. In the relevant paragraph, the Court dealt with human rights in general and with the prohibition of denial of justice in particular, whereas it had previously only identified *basic* human rights, like the prohibition of slavery, as obligations *erga omnes*.⁷² Not all human rights are peremptory norms or obligations *erga omnes*, though. Furthermore, the prohibition of denial of justice stems from the law of treatment of aliens, and the corresponding right of protection could only be exercised by the granting of diplomatic protection by the State of which the alien suffering from maltreatment is a citizen.⁷³ Seen in this light, the Court's reasoning perfectly makes sense. As a result, Article 48 DASR unjustly diverges from the Court's case law. Moreover, the International Law Commission adopted a different stance on this issue in its debates on the codification of the law of diplomatic protection where it expressed the view that any State could request the cessation of human rights violations whether or not the individuals affected were its nationals.⁷⁴ To conclude, the requirement of the nationality of the claim is probably not a limit to the invocation of a breach of an obligation *erga omnes*.

⁶⁸ Art 48 *juncto* Art. 44 DASR.

⁶⁹ A. GATTINI, "A Return Ticket to 'Communitarisme', Please", *E.J.I.L.* 2002, 1195-1196; I. SCOBIE, "The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'", *E.J.I.L.* 2002, 1217.

⁷⁰ *Case concerning the Barcelona Traction, Light and Power Company Ltd.* (Belgium v. Spain), 5 February 1970, *I.C.J. Rep.* 1970, § 33.

⁷¹ *Ibid.*, § 91.

⁷² A.J.J. DE HOOGH, *o.c.*, 45; J.A. FROWEIN, "Reactions by Not Directly Affected States to Breaches of Public International Law", *R.d.C.* 1994-IV, 406.

⁷³ A.J.J. DE HOOGH, *o.c.*, 45.

⁷⁴ Report of the International Law Commission on the Work of Its Fifty-Second Session, 145, § 422, at <http://www.un.org/law/ilc/reports/2000/english/chp5e.pdf>.

III.3. Countermeasures

Apart from judicial action, indirectly affected States can also take countermeasures against a State violating obligations *erga omnes*. As such, this is not surprising: indeed every State of the international community has an interest in the legal protection of rights and obligations which by their content are the fundamental rules of the international community.⁷⁵ When a State violates such rules, it endangers a legal interest of every member of the international community, and each member individually can take subsequent action, including countermeasures.⁷⁶ Naturally, countermeasures taken pursuant to breaches of obligations *erga omnes* must satisfy the conditions of regular countermeasures. First, available remedies for solving the dispute, if provided under international law, should be exhausted.⁷⁷ Secondly, the countermeasure should be a legitimate measure.⁷⁸ Thirdly, it should be proportionate in relation to the original wrong suffered by the injured State.⁷⁹ Fourthly, third States must not be directly injured by the countermeasure.⁸⁰ Finally, the injured State should call on the responsible State to fulfill its obligations and announce to the latter that recourse to countermeasures is envisaged.⁸¹

The 1996 version of the Draft Articles on State Responsibility explicitly mentioned that such countermeasures could be taken, but the final version of the DASR remains

⁷⁵ See note 51.

⁷⁶ Countermeasures are legitimate breaches of international obligations, as a response to the violation of international law by another State, see art. 22 DASR; *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, *I.C.J. Rep.* 1997, § 83; *Naulilaa Case*, *R.I.A.A.* II, 1025-1026; *Cysne Case*, *R.I.A.A.* II, 1052; *Air Services Case*, *R.I.A.A.* XVIII, 416; D. ALLAND, “Légitime Défense et Contre-mesures”, *J.D.I.* 1983, 729-734; S.P. JAGOTA, “State Responsibility: Circumstances precluding Wrongfulness”, *NYIL* 1985, 257-260; P. MALANCZUK, “Countermeasures and Self Defence”, *Z.a.ö.R.V.* 1983, 715; E. ZOLLER, *Peacetime Unilateral Remedies*, 1984, New York, Transnational Publishers, 81-93. For the ability to take countermeasures for breaches of obligations *erga omnes*, see: D. ALLAND, “Countermeasures of General Interest”, *E.J.I.L.* 2002, 1221-1239; C. ANNACKER, *l.c.*, 160-162; J.A. FROWEIN, “Reactions by Not Directly Affected States”, *R.d.C.* 1994-IV, 406; L.-A. SICILIANOS, *l.c.*, 1141-1144.

⁷⁷ Art. 50.2 (a) DASR; *Case concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), 24 May 1980, *I.C.J. Rep.* 1980, § 53; S.P. JAGOTA, *l.c.*, 258.

⁷⁸ Art 50.1 DASR.

⁷⁹ Art. 51 DASR; O.Y. ELAGAB, *The Legality of Non-forcible Counter-measures in International Law*, Oxford, Clarendon 1988, 64-79; S.P. JAGOTA, *l.c.*, 258.

⁸⁰ Art. 49.1 DASR; *Cysne Case*, *R.I.A.A.* II, 1057; Report on Draft Articles on State Responsibility for Internationally Wrongful Acts (1979), *Y.I.L.C.* 1979, Vol. II, Part II, 120, § 18; O.Y. ELAGAB, *o.c.*, 111-113; S.P. JAGOTA, *l.c.*, 258.

⁸¹ Art. 52.1 (a) DASR; *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, *I.C.J. Rep.* 1997, § 84; *Naulilaa Case*, *R.I.A.A.* II, 1025; *Air Services Case*, *R.I.A.A.* XVIII, 444.

silent on the issue.⁸² However, it leaves the option open that States can take lawful measures in case of a breach of an obligation *erga omnes* to ensure cessation of the breach and reparation in the interests of the injured State or of the beneficiaries of the breached obligation.⁸³ What is meant by lawful measures is not readily apparent: on the one hand, one may think of retorsions, but these are excluded from the scope of the DASR.⁸⁴ On the other hand, countermeasures could be considered as lawful measures under international law if they fulfil the requirements of the DASR (and customary international law).⁸⁵ Of course dangers loom here. Since the content of the category of peremptory obligations *erga omnes* is not crystallized, States risk becoming the victims of countermeasures taken by other States based on political considerations. However, the entitlement of States to have recourse to countermeasures is without prejudice to the Charter of the United Nations and measures taken pursuant to the Charter.⁸⁶ Furthermore, States are in general quite cautious about applying countermeasures on the basis of doubtful violations of obligations *erga omnes*, as they risk being held accountable for illegal countermeasures.⁸⁷ As a result, they will only react in case of clear breaches, such as genocide, aggression and the like. This should reduce the danger emanating from a decentralized system of enforcement of obligations *erga omnes*.

IV. CONCLUSION

The prohibition of genocide forms part of the category of peremptory international norms. While under the VCLT the practical implications of this status seem somewhat modest, the actual consequences are more far-reaching. Norms of *ius cogens* are also obligations *erga omnes*, and hence every member of the international community has a legal interest in the protection of these norms and can enforce them even if it is not directly affected by the breach. In particular, States that are not directly affected can bring a case before the International Court of Justice and claim reparation from the culprit State if they can establish a basis for jurisdiction. As has been demonstrated, the difficulties arising from the case law of the Court and the DASR are no bar to the successful enforcement of norms of *ius cogens*. Furthermore, States that are not directly injured can have recourse to countermeasures under international law for breaches of peremptory norms. Although there is a risk that certain States will try to impose their views on other States, the alternative is frequently inaction. Of course, action through the channels of the UN is preferable and should have priority. If, however, the UN fails to act against violations of fundamental norms of the

⁸² D. ALLAND, *l.c.*, 1221, L.-A. SICILIANOS, *l.c.*, 1142.

⁸³ Art. 54 DASR.

⁸⁴ L.-A. SICILIANOS, *l.c.*, 1143.

⁸⁵ *Ibid.*, 1143.

⁸⁶ *Ibid.*, 1144.

⁸⁷ Art. 22 DASR.

international community, every State should take its responsibility and react for the sake of the international community and for its own sake. Admittedly, until now, the possibilities proposed in this contribution have not been used to a great extent, but if the international community seriously desires to eradicate the scourges of humankind, such as genocide, it might be time to put them to the test.