Classical Morality in International Peremptory Criminal Law

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By

Farhad Malekian

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To our children and
grandchildren

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About the Author

Malekian has been recognised by the Association Internationale De Droit Pénal as one of the 'distinguished leaders in the field of international criminal law' in the 20th Century. *Prof. Bassiouni* recensuit Malekian's Criminal Responsibility of States in the *AJIL* (DePaul Univ., 1987) and *Prof. Kimminich* in the *Archiv des Völkerrechts (*Universität Regensburg, 1986*). Prof. Maier* has reviewed Malekian's System of International Law in the *AJIL* (Vanderbilt Law School, 1988). Malekian's two volumes in International Criminal Law were described as "truly remarkable: for a single scholar to have covered the entirety of I.C.L., in this day and age is a unique…Moreover, it is a very balanced, unbiased presentation." (*Prof. Mueller*, the State Univ. New Jersey, 1991). The reviewer of the Nordic Journal of Criminal Science evaluated "the work is an exciting addition to the existing literature on international criminal law, and it is beyond belief to witness that such a comprehensive work on international criminal law is written here in the Scandinavian countries" (Munk Plum, the State Attorney for Special Economic Crime, Denmark, 1993). The volumes were also debated in the ICJ in the Genocide case, side by side of Oppenheim work, *inter alia* by *Prof. Franck* (New York Univ.), *Prof. Pellet* (Paris Univ.) and Prof. Brownlie (Oxford Univ.) in the Peace Palace in The Hague (1996). Malekian was named in the Who's Who in the World in 1998 (15th ed.).

Malekian's Monopolization of International Criminal Law in the United Nations has become course literature from Europe to Vietnam. It is reviewed several times such as by Karin *Oellers-Frahm in* Zeitschrift für ausländisches öffentliches Recht und Völkerrecht *(*Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1994); by *Prof. Graefrath*, Humboldt-Universität zu Berlin in the *EJIL* (*Oxford Journals,* 1997*);* and by the *UN Human Rights Network* (2000). The book was also selected as "*Major Treatises"* by the library of the *University of Toronto Faculty of Law* (2000) and *Ohio University* (2001). In 2018, a Finnish commend reviewer declares that the 1993 "book constitutes one of the most selective and recommended International Criminal Law books by academic institutions for teaching, research and learning… Each paragraph of the book carries the weight of much knowledge and its framework has been crafted…."

The *Nordisk Tidsskrift for Menneskerettigheter* reviewed Malekian's book on Human Rights Law in 2007. His Comparative Islamic International Criminal Law (1994) has been recensuit on several occasions. In the *Journal of Islam and Christian-Muslim Relations, Prof. Saeed* declares that the book constitutes "a comprehensive work of twenty-four chapters…clearly and precisely" (Department of Arabic and Islamic Studies, University of Exeter, 1995). The book was also reviewed in the *Credho - Paris Sud, Centre de Recherches et D'études sur les Droits de l'Homme et le Droit Humanitaire* (2002). It came into the selected list of books as "Major Treaties in ICL" in the law library of Ohio University (2002). The book has globally been course literature since 2008 including its second edition (2011).

The widely enlarged edition was nominated for Gold Prize for scientific publishing in the Middle East (2013). It was reviewed in the *Insight Challenging Ideas on Turkish Politics and International Affairs* (2014). It is recommended by the library of Western New England School of Law as '*a good secondary source*' (2014); and as a basic reference book by recognised Western and Non-Western authors such as *Prof. Samuel* (Sydney Univ., 2013). "All of his important work and contributions" or "a leading authority in international criminal law" are continentally the type of descriptions about Malekian in PhD/doctoral dissertations from London to the world. Since 2015, Australia, Canada, Europe, USA, and worldwide have declared it the legacy of "scholarly knowledge freely accessible for each and every reader around the world" (Knowledge Unlatched).

Prof. Ferencz from Harvard Law School, the Prosecutor of the Nuremberg Tribunal, has written a prized introduction to Malekian's Jurisprudence of ICJ (2014). According to blind peer-reviewers in the *International Criminal Law Review*, his works are "'*excellent'*, '*decent' and reflection as an art form in legal theory ... an author who speaks Truth to Power and unafraid*" (2014). Prof. Richard from New York Univ. lauds the nobility of Malekian's Judgements of Love in Criminal Justice in 2017. He declares, "The fresh perspective of the book is the best thing about it. It argues with great force that the missing ingredient in international criminal law is that law and justice have not been understood through the prism of what the author calls love... There is a need for book of this sort, both because its general perspective could not be more original and its critical ethical edge on the state of international law in general and international criminal institutions could not be more timely."

According to the Springer Publisher, the book is '*one of most top downloaded eBooks with global visibility*' in 2017-2018 (yet not including the hardback). A command reviewer maintains that the quality of the book

will cause the "*bankruptcy of legislation*" and "*soon or later the robust heritage of overseas legal legislation*." In India, the *Kiit Journal of Law and Society* concludes, "The work is one of its kinds and unveils a unique dimension in delivery of justice. It is an immense initiative in fulfilling a dearth. Appreciating this novel venture, the work will remain a path breaker in a less traversed path of legal literature- the norm of love." (Assoc. *Prof. Mitra*, Kiit University, 2017). The book is also under translation into Persian in the faculty of law, Payame Noor University (2018).

Malekian's books are also subjects of Wikipedia (2017-2018), and presented academic theme of international conference (Turkey, 2015). His most recent published book is *Corpus Juris of Islamic ICJ* (1st ed., December 2017). Its second paperback edition is under publication (2018). The Mirage of International Criminal Law: *Kant's Metaphysics of Mens Rea* is another art of the author (2018). His books on *Allegation by Political Laundering; Funeral of Criminal Justice;* and *The Necked Truth in Criminal Law* are all shortly forthcoming.

INTRODUCTION

The remote origins of law lie in the golden age of civilisation, in the provisions of the Hammurabi Code. The Code speaks about the necessity of the existence of high morality, of the subject of the law and the judges of courts. In primitive civilisations, breaking the rules, provisions and the norms of the law was treated as a declaration of war and consequently as a justification for waging war against the nation which violated the basic principles of morality of the law. Thus, the rights of a community to defend and protect itself against violations of the moral law were a recognised principle. These brief remarks, in connection with the importance of the possible cognitive content of morality in the sphere of international criminal law, may adequately explain the substance and role of moral principles with respect to the function of criminal law and criminal justice.

The system of international law has rapidly developed since the beginning of the last century and has become one of the leading laws in the sphere of international justice, international adjudication, arbitration, and, ultimately, peaceful methods for the settlement of a considerable number of international political, military, and economic problems.[1] This body of law is in fact so significant and essential for contemporary issues of international relations that no realistic national or international lawyer can deny its authority. Nonetheless, this does not mean that we have achieved peace. On the contrary, since the establishment of the United Nations Organisation, waging war has become one of the most frequent dilemmas of the organisation. The tally of the last century was the brutal killing of over 170 million of the world's population. They were killed in wars, not natural catastrophes. Indeed, those I mention here are a sufficient discredit to human spirit and clear evidence of violations to international peremptory criminal law. It is degrading to observe at what level the superstition of humankind under the United Nations Organisation has destroyed the lives of various nations.

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[1] Consult Ian Brownlie, *Principles of Public International Law* (7th ed., 2008); Antonio Cassese, *International Law* (2nd ed., 2005); Stephen C. McCaffrey *Understanding International Law* (2006); Farhad Malekian, *The System of International Law: Formation, Treaties, Responsibilit*y (1997).

In addition, we should remember that the genocide of the Armenian population, the genocide of the Jews, the genocide of the Vietnamese, the core crimes against Afghans, the crimes beyond barbarian civilisation against the Iraqis, and the brutal crimes against Palestinians have all been claimed to be legal consequences of sanctions or legislations. One can also add that the grave human rights violations against various Iranian indigenous people, 'the crimes of crimes'[2] in Srebrenica against the innocent Muslim population, the hidden policy crimes against Syrians and many other nations, have also been interpreted as the implementation of legal rules. Thus, the question arises whether these crimes under the power of jurisdiction of different states meet the metaphysic of morals to the critique of pure practical reason. The big powers find themselves in a unique predicament. This predicament is based on weak moral standards. Powerful political governments like to celebrate morality, but they do not like to confess that they were the cause of immoralities. Let us repeat here what we just said about the question of morality. Legality does not connote morality, but morality may contain legality too, if it is based on truly good faith, good thoughts, good promises and good deeds.

The entire system of international law has actually emerged from two essential parts of the history of international jurisprudence: originally the law of war and the law of law-making treaties. Beside these two pillars in the development of international law, one may also add the framework of customary international law, which has a definite function for the understanding and consolidation of all branches of international law.[3] This is mainly evident in international human rights law, certain vital principles of which constitute an integral part of *jus cogens* norms.[4] *Jus cogens* norms constitute the most significant parts of international law, international criminal law and justice as a whole. They imply that certain norms are consolidated norms of the international legal community and should not be violated by any means, nor at any level. As will be discussed, however, it

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[2] Pieter N. Drost, *The Crime of State: Genocide* (Original from Indiana University, 1959)., p.II; William A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press, 2000 and 2009).

[3] Jack L Goldsmith and Eric A Posner, 'A Theory of Customary International Law', *John M. Olin Law & Economics Working Paper* No. 63 (2nd Series) available at file:///C:/Users/oscar/Downloads/Documents/63.Goldsmith-Posner.pdf (Accessed: 5th August 2016), 1-2.

[4] Farhad Malekian, 'The Laws Governing Crimes against Women Constituting *Obligatio Erga Omnes*' in David Wingeate Pike, *Crimes against Women* (New York: Nova Science Publishers, 2011), pp.3-22; Farhad Malekian & Kerstin Nordlöf, *Prohibition of Sexual Exploitation of Children Constituting Obligation Erga Omnes* (Newcastle: Cambridge Scholars Publishing, 2012).

appears that the veto right constituting an integral part of the system of the United Nations contradicts the system of the international law of *jus cogens* and therefore contradicts the peremptory norms of international law, which must be respected and not violated to any degree. As Kant says, we have to analyse law, norms, our decisions and behave with appropriate reason if reason does not coincide with morality there cannot exist a genuine binding norm of peremptory norms, *jus cogens* norms, or *erga omnes* norms. Kant's view teaches us that the entire machinery of justice has to be

> entirely met by pure practical reason. Its laws set the standard that every other purpose has to satisfy, and there's no further standard that they have to meet. What makes them binding is a cheerily formal feature of the maxims that are to be adopted in accordance with them, namely the feature of being universal laws. Morality has no need for anything material to direct our free choices, i.e. no need for any end or purpose, to tell us what our duty is or to get us to perform it. When the question of duty comes up, morality can and should ignore all ends. Should I be truthful in my testimony in the witness box? Should I be faithful in returning to another man the property he has entrusted to me? There is no need for me to work out what my duty is by considering what end I can bring about by acting in either of those ways—ends don't come into it. Indeed, if when a man's avowal is lawfully demanded he looks around for some kind of end, that fact alone shows him to be worthless.[5]

This book is devoted to several aspects of peremptory law, in particular *international peremptory criminal law*. It further explores sources of international law and their developments in accordance with the law of the permanent International Court of Justice (ICJ). All these sources of international law as embodied in the provisions of Article 38 of the Court are analysed in combination with *jus cogens* and *erga omnes* obligations constituting the most authentic and valuable sources of international law.[6] While this work examines the value of peremptory norms for international criminal law and justice, it concludes that the universal rights of man embodied in peremptory norms are unfortunately not respected. The work

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[5] Immanuel Kant, *Religion within the Limits of Bare Reason* (1st ed., 1793), at 1.

[6] Consult Farhad Malekian, 'Conundrums of *Jus cogens*: in International Criminal Law' (Part I), *Вісник Південного регіонального центру Національної академії правових наук України No.12 Journal of the South regional Center of National Academy of Legal Sciences of Ukraine (*2017), pp.8-16; Farhad Malekian, 'Conundrums of *Jus cogens:* In Case Law' (Part II), No.13 *Вісник Південного регіонального центру Національної академії правових наук України, No.13 Journal of the South regional Center of National Academy of Legal Sciences of Ukraine (*2017), pp.12-21.

is heavily based on the writings of classical scholars of international law up until today. Consequently, the words and philosophies of most writers are analysed alongside book excerpts. The final theory is that United Nations Charter Chapter VII is in contradiction with the purposes of peremptory norms of international criminal law. The reason for this is that the principle of equality of arms and equality in voting constitutes one of the basic principles of *jus cogens*, and this does not exist in the central concepts of the organisation. A clear example is the voting process in the General Assembly, which constitutes a norm implying that equality of voting has to be respected in the procedures of law-making treaties. Since Chapter VII does not do this, the *jus cogens* framework is already violated.

The intention of this book is hence to consider all these matters and contradictions together and to emphasise that the most significant norms of community law in today's age are impractical because of the strong, overbearing political influence of the Security Council when violations of certain norms should be considered violations of international criminal justice. This book also substantially draws on the laws and judgements of national, regional, and international courts. I am grateful to a number of people for consultations among whom I ought to mention Dr. Yvonne Shah-Schlageter and Dr. Nandor Knust, two esteemed colleagues in the Max Planck Institute for Foreign and International Criminal Law.

I should also sincerely record that if there is ever research into my academic life by a future generation of genuine lawyers, who worship honesty for reasons of justice and not for earnings, position, and arrogance behind the collective power of organisations confirming each other under the tables, it also must be bonded with the name of my Romanian-German friend. Such scholastic efforts would not have been possible without the generous orientation and ease of personality of my cherished cerebral companion and colleague Johanna Rinceanu, who has been the kind input for the continuation of my work since 2014. She has been a rainbow amidst my storm clouds.

Of course, I alone am responsible for the content of the work.

Written in the Sovereignty of the European Union;
With full love for my family members
in the core of which is our grandchild.
Paliz 23rd June 2018

Farhad Malekian
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Uppsala, Sweden

CHAPTER I

MOSAIC OF MORALITY IN INTERNATIONAL PEREMPTORY CRIMINAL LAW

1. Peremptory Norm in Objection to Unlawful Legality

It may sound preposterous and sarcastic to initiate this volume with sentences from my own earlier volumes. I should elect to remain entirely silent as the judge of my own works. It is the duty of impartial colleagues to judge them within the scope of their own broad knowledge. However, there is nothing to restrain my writing, and I cannot help averting my thoughts to my earlier works. Hence, I am obliged to quote the following passage, even though it contradicts the thoughts of other dear colleagues. This passage simply reflects the inescapable formula of human beings − *jus sanguineous* − or a shared value that with universal origin.

> The technique of war develops very rapidly, and it soon becomes impossible to bring every action under international humanitarian law of armed conflict and even under public international law. There is the possibility that a state may develop a technique which does not fall under the jurisdiction of the international criminal system, international criminal justice, or the United Nations as a whole. The new technique may be of such capability that it does not fall under any rules of international criminal law and therefore its use is not apparently prohibited. When an armed conflict is waged, the relevant state may use the new technique and kill human beings on a massive scale. What is international criminal justice is going to do?
>
> Are we going to say that we do not have any applicable law, and law did not prohibit the conduct? Are we bound by the principles of *nullum crimen sine lege* or *nulla poena sine praevia lege*? Have we violated the provisions of the Convention on Genocide? Whatever the answer may be and whatever we are obliged to do in accordance with the attitude of laws, we are surely forced by the principle of human morality and love to assert that such conduct cannot go without accountability. This is regardless of the philosophy of Mohamadism, Kantianism, Kelsenism, Marxism, the theory of our jurisdiction, the ethics of our politicians, the morality of our criminologists, the argumentation of prosecutors, the ignoring of the voice

> of the victims, and various reasoning presented by the users of the new technique.
>
> We cannot accept at any rate that violators of legalised/illegalised conduct go without prosecution and punishment. *This is what I call the criminal law of morality, the criminal law of our international human conscience, the invisible criminal law expressed by the human mentality of love that the offenders of grave atrocities have to be prosecuted and punished in accordance with the principles of natural law, human rights law, justice without law, and ethics. One may ask what the nature of justice without law is. This is a justice which not only relies on the statutory law that is suggested by Hart but also relies on much more. It is a law that relies on the substance of all laws, on the statutes of all legislation, on the natural existence of man, on the core principles of the substance of human rights law, and on the strength of justice to achieve its essence.*
>
> This is what should be called the encouragement and the strength of all laws of human beings demanding the implementation of criminal justice in accordance with love for human beings.[1]

"Never forget that everything Hitler did was legal." We should remember that law is a box of nonsense without the existence of the notion of morality and not violate the law of international morality. As Martin Luther King says, "the richer we have become materially, the poorer we become morally and spiritually. We have learned to fly in the air like birds and swim in the sea like fish, but we have not learned the simple art of living together as brothers."

Let us begin this book with the writings of one of the most authoritative American philosophers, whose words and ultimately thoughts ought to, one day, be solely written in pure golden ink. Exaggeration aside, his scripture is relevant to any existing legal system and his explanations bringing us to the core of our small book on the *Classical Morality of International Peremptory criminal Law*. Here, I am referring to Lysander Spooner, who wrote his works with the lifeblood of the heart when dealing with all aspects of the problems of peremptory norms or identification of *jus cogens*.

Although we are aware that the terms "*jus cogens*", "*erga omnes*", and "peremptory" are the innovation of our times, the works of many classical writers deal with these inviolable norms of common unity.[2] Spooner

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1 Malekian, Judgements of Love in Criminal Justice (Springer, 2017), 102-3.

2 Consult Bianchi, A 'Human Rights and the Magic of *Jus cogens*' 19 *European Journal of International Law* (2008), p.491; Bassiouni, C 'International Crimes: *Jus cogens* and *Obligatio Erga Omnes*' 59 *Law and Contemporary Problems* (1996) p.63; Cançado Trindade, A '*Jus cogens* in Contemporary International Law', UN Audiovisual Library, (http://www.un.org/law/avl); Danilenko, G

clearly points out how and why *jus cogens* crimes are repeatedly committed in the international legal community without any particular end. His words are also completely relevant to the system of Security Council monopolisation and the reasons for the crimes being committed. He says:

> In process of time, the robber, or slave holding, class—who had seized all the lands, and held all the means of creating wealth—began to discover that the easiest mode of managing their slaves, and making them profitable, was not for each slaveholder to hold his specified number of slaves, as he had done before, and as he would hold so many cattle, but to give them so much liberty as would throw upon themselves (the slaves) the responsibility of their own subsistence, and yet compel them to sell their labour to the land-holding class—their former owners—for just what the latter might choose to give them.
>
> Of course, these liberated slaves, as some have erroneously called them, having no lands, or other property, and no means of obtaining an independent subsistence, had no alternative—to save themselves from starvation—but to sell their labour to the landholders, in exchange only for the coarsest necessaries of life; not always for so much even as that.
>
> These liberated slaves, as they were called, were now scarcely less slaves than they were before. Their means of subsistence were perhaps even more precarious than when each had his own owner, who had an interest to preserve his life. They were liable, at the caprice or interest of the land-holders, to be thrown out of home, employment, and the opportunity of even earning a subsistence by their labour. They were, therefore, in large numbers, driven to the necessity of begging, stealing, or starving; and became, of course, dangerous to the property and quiet of their late masters.
>
> The consequence was, that these late owners found it necessary, for their own safety and the safety of their property, to organize themselves more perfectly as a government, and make laws for keeping these dangerous people in subjection; that is, laws fixing the prices at which they should be compelled to labour, and also prescribing fearful punishments, even death itself, for such thefts and trespasses as they were driven to commit, as their only means of saving themselves from starvation.
>
> These laws have continued in force for hundreds, and, in some countries, for thousands of years; and are in force to-day, in greater or less severity, in nearly all the countries on the globe.

'International *Jus cogens*: Issues of Law-Making' 2 (1) *European Journal of International Law* (1991), p.42; D'Amato, A. 'It's a Bird, It's a Plane, It's *Jus cogens*' (1990) 6 *Connecticut Journal of International Law, p.*1; Brunnée, J 'The Prohibition on Torture: Driving *Jus cogens* Home?' 104 *Proceedings of the Annual Meeting of the American Society of International Law* (2010), p.454.

> The purpose and effect of these laws have been to maintain, in the hands of the robber, or slave holding class, a monopoly of all lands, and, as far as possible, of all other means of creating wealth; and thus to keep the great body of labourers in such a state of poverty and dependence, as would compel them to sell their labour to their tyrants for the lowest prices at which life could be sustained.
>
> The result of all this is, that the little wealth there is in the world is all in the hands of a few—that is, in the hands of the law-making, slave-holding class; who are now as much slave-holders in spirit as they ever were, but who accomplish their purposes by means of the laws they make for keeping the labourers in subjection and dependence, instead of each one's owning his individual slaves as so many chattels.
>
> Thus the whole business of legislation, which has now grown to such gigantic proportions, had its origin in the conspiracies, which have always existed among the few, for the purpose of holding the many in subjection, and extorting from them their labour, and all the profits of their labour.
>
> *And the real motives and spirit which lie at the foundation of all legislation—notwithstanding all the pretences and disguises by which they attempt to hide themselves—are the same to-day as they always have been. The whole purpose of this legislation is simply to keep one class of men in subordination and servitude to another.*[3]

Insofar, promoting the highest model of qualified ethical norms and values is not essential for international political and legal community, violations of these provisions remain frequent. A *jus cogens* norm constitutes an ethical norm.[4] In the above passage, Spooner gives us a clear picture of ethics, morality, and legal norms in the system of law in general and in the body of international peremptory criminal law in particular. In this

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3 *Italics mine*.

4 O'Connell, ME '*Jus cogens*: International Law's Higher Ethical Norms' in Childress, DE III (ed.), *The Role of Ethics in International Law* (2012); Orakhelashvili, A *Peremptory Norms in International Law* (2006); Pellet, A 'Comments in Response to Christine Chinking and in Defense of *Jus cogens* as the Best Bastion against the Excesses of Fragmentation' *Finnish Yearbook of International Law* (2008), p.83; Paust, J 'The Reality of *Jus cogens*' 7 *Connecticut Journal of International Law* (1991), p.81; Saul, M 'Identifying *Jus cogens* Norms: The Interaction of Scholars and International Judges' *Asian Journal of International Law* (2014); Shelton, D 'Normative Hierarchy of International Law' 80 *American Journal of International Law* (1986), p.1; Suy, E 'Article 53: Treaties Conflicting with a Peremptory Norm of General International Law ('*jus cogens*')' in Corten, O and Klein, P (Eds.) *The Vienna Convention on the Law of Treaties: A Commentary Volume II* (2011); Tomuschat, C and Thouveinin, JM (eds.) *The Fundamental Rules of the International Legal Order: Jus cogens and Obligations* Erga Omnes (2006).

context, we are forced to define the system called *jus cogens* as *erga omnes* in its high state and as "*peremptory law*" in the final stage of its development under the legal and political machinery of the United Nations. Thus, one may in advance define international peremptory criminal law as a law with the intention to prevent the commission of certain crimes that are against the natural rights of man, natural law, universal law, and positive law. In the Eichmann case, the Israeli Court defines international criminal law, international customary criminal law and the international peremptory criminal law in the following prescription.

It says that "...the features which identify crimes that have long been recognized by customary international law ... include, among others, [that] these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations [in the absence of an international criminal machinery] international law authorizes the countries of the world to mete out punishment for the violations of its provisions which is effected by putting these provisions into operation either directly or by virtue of municipal legislation... the classic example of a customary international crime... is that of piracy jure gentium."[5]

According to an interesting analysis, the above quotation exists in the following reworded form.: "...Crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. Firstly, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order... Every State has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria."[6]

The term '*peremptory law'* means that there are certain norms, principles, rules, provisions, legislations, laws, etc., which have a consistent character and cannot therefore be deleted by other laws. This also means that no derogation from such law is permitted. However, we

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5 Attorney-General of the Government of Israel v. Adolf Eichmann, 36 *Israeli Law Review* (1968), pp.290-291; see also Covey Oliver , 'The Attorney-General of the Government of Israel v. Eichmann' 56 (3) *The American Journal of International Law* (1962), pp.805-845.

6 Statement of Lord Millet in Pinochet case House of Lords, Appeal, Mar. 24, 1999.

should take into account that each of the phrases, namely natural rights of man, natural law, universal law, and positive law, has a slightly different definition, regardless of the fact that the core intention of each law has to be the same. Regardless of its name, the high stage of understanding of the nature of the law gives a real value to the law. All laws should have in their nature the essence of understanding the natural rights of man, and any law that does not have such a nature is not a useful law and in certain situations, just nonsense or dictatorial law.

2. Unity of Peremptory Norms

As we will observe, classical scholars, such as Hugo Grotius, Emer de Vattel, and Christian Wolff made a distinction between *jus dispositivum* (voluntary law) and *jus scriptum* (obligatory law). The German philosopher Christian Wolff and the Swiss philosopher Emer de Vattel (the latter's work on *The Law of Nations* has been influenced by the former) believed that a "necessary law" existed for all human beings and that the provisions of treaties and customs could not modify its natural essence. The respect for *necessary law* was mandatory for all states. Any contract or legislation, ignoring the value of necessary law was null and void. This unalterable notion of natural law is also known as universal law governing all human beings in all parts of the world. This differentiation between consensual agreements and necessary compulsory principles of the system of the law of nations was to be followed by all states regardless of their given consent. Today they are known as the *jus cogens* law. This universal character of international peremptory criminal law can also be examined in the provisions of the Convention on Genocide. The International Court of Justice in its Advisory Opinion clearly points to this significant fact. It says that:

> The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se,* and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations 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, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th, 1946). The first consequence arising from this conception

> is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universa1character both of the condemnation of genocide and of the CO-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.[7]

Jus cogens norms are not only based by law, but also by morality. It means on "considerations of morals and of international good order."[8] This theory implies that *jus cogens* norms have an ethical basis that is unquestionable and part of the universal order. The theory of *jus cogens* may also go back to the distinction made in Roman law between *jus strictum* and *jus dispositivum* and to Grotius' references to *jus strictum.* Beyond these explanations, however, any law or theory that creates unequal treatment of the integrity of one man in comparison with another certainly has a tendency to violate *jus cogens* law.[9] When we refer to the law of *jus cogens*, we are at the same time referring to the *existing field of morality*. This includes the morality of man in all aspects of universal life in which justice has to prevail if wrongs are not going to be served as rights, and rights are not going to violate rights. Cicero was actually right, though he was from a society that had no idea how our society would function today. He correctly maintained that:

> in the whole moral sphere of which we are speaking there is nothing more glorious nor of wider range than the solidarity of mankind, that species of

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7 *Reservations to the Convention* on *Genocide, Advisory Opinion*: *I.C. J . Reports 19-51, p.*12.

8 Third Report by G.G. Fitzmaurice, Special Rapporteur (UN Doc. A/CN.4/115), *in* II *Yearbook of the International Law Commission* (1958), 20, 41, para.76.

9 R Kolb, *Théorie du Jus cogens International: Essai de Relecture du Concept* (2001); R Kolb, '*Jus cogens*, Intangibilité, Intransgressibilité, Dérogation 'Positive' et 'Négative'' 109 *Revue Générale de Droit International Public* (2005), p.305; R Kolb, 'Observations sur l'Evolution du Concept de *Jus cogens*' 113 *Revue Générale de Droit International Public* (2009), p.837; Uhlmann, EM Komicker 'The State Community Interests, *Jus cogens* and the Protection of the Global Environment: Developing Criteria for Peremptory Norms' 11 *Georgetown International Environmental Law Review* (1998), p.101; T Meron, 'On Hierarchy of International Human Rights' 80 *American Journal of International Law* (1986), p.1; Nieto-Navia, R *International Peremptory Norms* (*Jus cogens*) *and International Humanitarian Law* (2011).

> alliance and partnership of interests and that actual affection [*caritas*] which exists between man and man, which, coming into existence immediately upon our birth, owing to the fact that children are loved by their parents and the family as a whole is bound together by the ties of marriage and parenthood, gradually spreads its influence beyond the home, first by blood relationships, then by connections through marriage, later by friendships, afterwards by the bonds of neighbourhood, then to fellow-citizens and political allies and friends, and lastly by embracing the whole of the human race. This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice; connected with it are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind. And while these belong peculiarly to Justice, they are also factors shared by the remaining virtues. For human nature is so constituted at birth as to possess an innate element of civic and national feeling, termed in Greek *politikon*; consequently all the actions of every virtue will be in harmony with the human affection and solidarity I have described, and Justice in turn will diffuse its agency through the other virtues, and so will aim at the promotion of these. For only a brave and a wise man can preserve Justice. Therefore the qualities of this general union and combination of the virtues of which I am speaking belong also to the Moral Worth aforesaid; inasmuch as Moral Worth is either virtue itself or virtuous action; and life in harmony with these and in accordance with the virtues can be deemed right, moral, consistent, and in agreement with nature.[10]

Hugo Grotius, one of the prominent scholars of international law, who was instructed by Roman jurisprudence, also confirms Cicero's view. According to Grotius, the safeguarding of a nonviolent community order is itself an inherent good quality, and the circumstances shaping that rationale are as compulsory as those whose intents serve more personal results. Consequently, Grotius argues that "This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have received from it, the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts."[11]

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10 Cicero, *De Finibus Bonorum et Malorum*, Book V, XXIII. A passage also cherished by Leibniz in his 1689 Rome commentary on Cudworth's *True Intellectual System of the Universe* (Leibniz 1948b).

11 Grotius 1964, Prolegomena, pars 8.

The question is what Grotius means by the phrase “the obligation to fulfil promises, the making good of a loss incurred through our fault.” Does it apply to the obligations that the permanent members of the Security Council have taken to carry out regarding the safeguarding of justice, peace, and security? Do these explanations of Grotius mean that the system of international peremptory criminal law must tolerate the obligations to fulfil our given promises in the law of treaties? Does promises refer to those promises that already exist in customary and conventional international criminal law or within international human rights law, which are fundamental rights of our universal nature? I may be wrong in my argumentation. It may also be unwise to mix the Grotian social or community order with the contemporary legal order as integrated into the United Nations Charter. I may have misused the theory of doing good and bad, the notion of failure of conduct and the very nature of our powerful will towards independence of the international legal personality of the state.

I am completely certain in one sense, however, that in order to exist, international justice cannot be isolated from the pure sense of universal morality of rights.[12] These rights are not legislated by governments and international organisations, but by the perpetual protection of the rights of man stemming from our shared values as inalienable classical rights independent from manmade laws.[13] These rights ascend to the echelon of *jus cogens and therefore encompass the character of obligatio erga omnes*, which is inderogable. Thus, the terms “*jus cogens*,” “peremptory,” and “*erga omnes*” all represent the modern version of the *universal rights of man*, love for justice, love of civilisation, and love for the health of our natural environment which are unchangeable. My purpose here is not to convince international lawyers or the judges of the national and international courts that there is a powerful norm in law which is called love, but I definitely fear, and I am concerned about the truth that law which does not build its basic *raison d’eˆtre* on love for human beings cannot survive properly.[14] As a result, the construction of the law is at all times in very serious threat. When we speak about the genocide law and its relevant regulations in the system of international law of *jus cogens*, we are trying to assert that its elements are based on love for human nature and humanity as a whole.[15] The intention of the relevant law is clearly to

12 Consult Malekian, *Judgements of Love in Criminal Justice* (Springer, 2017).
13 *Id.*
14 *Id.*
15 *Id.*

prevent certain acts against human beings as a whole and is thus vital for justice.[16]

3. Natural Dignity and Rights

Grotius puts forth and creates certain conditions for all laws that have to be respected before being called law; these include the Charter of the United Nations and the Statute of the International Criminal Court. Therefore, for Grotius, the existence of minimum values or conditions is essential. They denote that human nature is as it is, if the goals of the community should continue. Distinctively, this relates to the security of our property, including movable property, immovable property, and property that is called *natural dignity and rights*.[17]

Obviously, according to him, achieving peremptory rights that already exist and do not really need protection by means of legislation also requires good faith, fair dealing, and harmony in the behaviour between men, even if it is guided by good or bad political mentalities. In other words, no political power, small or large, has the right to violate the peremptory universal rights of man or the right to vote against its inviolable substance. These conditions should not be affected by national or international arrangements. National and international politicians do

16 For the crime of genocide, see for further analysis and references *id,* p.119. For example, on the non-ratification of the international Convention on Genocide, see J. Duffett, *Against the Crime of Silence* (New York, London, 1968). W. Michael Reisman, '*Legal Responses to Genocide and Other Massive Violations of Human Rights',* 59 *Law and Contemporary Problems* (1996), p.75; William L. Hurlock, '*The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)',* 12 *American University Journal of International Law and Policy* (1997), p.299; Beth van Schaack, '*The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot',* 106 *Yale Law Journal* (1997), p.2259; John D. van der Vyver, '*Prosecution and Punishment of the Crime of Genocide',* 25 *Fordham International Law Journal* (1999), p.286; Mary Robinson, *Genocide, War Crimes, Crimes Against Humanity,* 25 *Fordham International Law Journal* (1999), p.275; William A. Schabas, *Genocide in International Law, the Crime of Crimes* (2000); Matthew Lippman, 'Genocide', in *International Criminal Law*, *Vol. I* (M. Cherif Bassiouni, ed., 2008) pp.405-455. In particular, see the statements of Bertrand Russell and the Russell International War Tribunal held in Stockholm, Sweden, May 2-10, 1967 and Roskilde, Denmark from November 20 to December 1, 1967. The Tribunal was essentially created as a result of different meetings in London in 1966.

17 Guido Fassò*, Storia della filosofia del diritto* (1966–1970), vol. 2: 100–1.

not, in actual reality, have any right to choose among various universal peremptory rights of man. They have to respect them without question. This is because, as Grotius puts it, "for the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of society, is the mother of the law of nature."[18]

Indeed a serious question, even today. What must "the very nature of man" do to be recognised as "the mother of the law of nature?" Can we put the same theory into the following assumption or interpret it as Grotius intends, is *the very nature of the peremptory norm is the decisive leading mother of international criminal law*? Obviously, the intention here is to understand the power of peremptory law or to see whether the power of peremptory law is the most significant ingredient of the world's legislation or the power of man (or which one owns the other). The very importance of drawing a distinction between the *mother of the law of nature and the power of the law of man* is questioned. For a variety of reasons, the answer may not be easy, but the historical evaluation of international criminal justice clearly demonstrates that the strong voice of powerful states is the leading red line between the peremptory norm and its final enforceability. This implies that the whole body of a peremptory norm and its interpretation are under the command of state power.

Another scholar of international law expresses much more strong views similar to those of Grotius. Accordingly, it is believed that "in the field of general international law there are rules having the character of *jus cogens.* The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence, these rules are absolute. The others are relative, because the rights and obligations created by them concern only individual states *inter se.*"[19]

Due to Verdross writings, the International Court of Justice recognises two categories of general international law in its Advisory Opinion. For instance, in the case concerning Reservations to the Genocide Convention, the Court clarifies that "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose ...in such a convention the contracting States *do not have any interest of their own;* they merely have, one and all, a *common interest,* namely, the accomplishment of those high

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18 Grotius 1964, Prolegomena, pars 16. However, we must admit the fact that Grotius views have although been useful, they have also been criticised because of his ethic of presentation.

19 Verdross, 'Jus Dispositivum *and Jus cogens* in International Law', 60 *American Journal of International Law* (1966), p.58.

purposes which are the *raison d'être* of the Convention." [20] Accordingly, the peremptory norms have the nature of common interest. What is really the basic substance of international peremptory criminal law and does the international legal community have the necessary power to reach to it?

4. Peremptory Norm as Universal Substantive Elements

Certain international judges and scholars believe that there are several rules of international law or international criminal law that should not be violated by any state of the international legal community.[21] These are rules that have to be respected by all members of the United Nations. They have therefore a universal nature and should consequently not be refused attention in the international relations of states. There is a mass of evidence implying their non-derogable nature. For instance, Judge Fitzmaurice has introduced a list of certain principles as the most significant, consolidated *naturalist-universalist* elements that have to be achieved in any cooperation between members of international legal and political community. Accordingly, these are:

> A. The rule of non-resort to the use of force and the consequent non-recognition of situations brought about by its use.
> B. The rules now contained in article 52 of the Convention on the Law of Treaties, that treaties imposed by force (sometimes called 'unequal' treaties) are void *ab initio.*
> C. The interdiction of crimes against peace and humanity, including genocide and acts in the nature of genocide and near genocide.
> D. The rule that the plea of 'superior orders' is *prima facie* no answer to a charge of crime against peace and humanity or of a war crime.
> E. The recognition, also enshrined in provisions of the Vienna Convention (articles 53 and 64) of the principle commonly known as *jus cogens,* of entrenched rules of law from which in principle no release or

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20 *Reservations to the Convention* on *Genocide, Advisory Opinion* : *I.C.J . Reports* 19-51, p.12.

21 It is rightly asserted that 'For the first time in history almost all jurists and almost all States were agreed in recognizing the existence of fundamental norms of international law from which no derogation was permitted, and on which the organization of international society was based. The norms of *jus cogens* had a long history but had crystallized only after the Second World War. In spite of ideological difficulties, a shared philosophy of values was now emerging and the trend had been sharply accelerated by the growth of international organizations.' *UN. Conference on the Law of Treaties, Ist Sess., Vienna, 26 Mar. - 24 May, 1968, Official Records,* at 297, U.N. Doc. A/Conf. 39/11.