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Hierarchy of Norms in International Law – Gleider Hernández

Hi, welcome to my brief overview of Chapter 3 of the textbook *International Law,* where we discuss what are called ‘peremptory norms’ of international law. Now, this is a chapter that actually isn't included in most textbooks. It's discussed within a wider discussion on sources, but I felt that it was very important to pull them out and to give them comprehensive treatment in a separate chapter for two reasons: one, historically, students have struggled to understand some of these concepts, the two most important ones which I'll be discussing in this micro lecture; but the second reason is that if these concepts are taken to their logical conclusion then they form a prominent and important challenge to how we visualize international law as a whole, how we can see this as a system, and I'll explain why.

So, if one has a hierarchy of different sources, as discussed in the previous chapter, so you've got written treaties and you've got unwritten custom, and you've got general principles which exist within domestic legal systems, that is a very different discussion than if you have a hierarchy of norms, the idea that certain rules are of a higher status and cannot be derogated from by lower rules. This is part of the wider discussion, this is a debate that was called The Debate on Relative Normativity, and it’s been at the heart of the debate as to whether international law has these peremptory norms. Now, that it has them is not open to question anymore because there's been widespread treaty practice and customary practice, and even some important judicial decisions that have recognised both categories of peremptory norms. So I'll describe those very briefly and hopefully that will be helpful to you in making sense of what we're talking about here.

So the first category are called ‘norms of *jus cogens*’. These are norms that, by virtue of their content, by virtue of their substance, are considered to be recognised by the international community of states as a whole as being of a higher status than ordinary rules of international law (that would be a treaty, or that would be a customary rule, or general principle). These rules of *jus cogens* cannot be derogated from and if a rule comes into effect that is in conflict with them, that rule becomes void. So, by virtue of its substance, a norm of *jus cogens* has this higher status. So examples of norms of *jus cogens* include the prohibitions on genocide; on torture; on the commission of certain war crimes; on

the commission of crimes against humanity; crimes such as apartheid, slavery. These are the category of norms that we're talking about when we talk about a norm of *jus cogens*.

So there's a second category, and that category are called obligations *erga omnes*. And by *erga omnes* (now we use this Latin language and I know it can become a bit complicated, but to distill it a bit, *jus cogens* means 'cogent law', or law that is that is compelling, and obligations *erga omnes* means 'obligations owed to all'), and the idea behind them is that, rather than have a law that by its substance is higher, we have a law that by virtue of the way it's constructed, every other actor, every other state in general, can claim for its violation. So that is what an obligation *erga omnes* means. It has a procedural character, rather than a substantive character. And examples of obligations *erga omnes* (well, most norms of *jus cogens* –and, arguably, all of them –are also of *erga omnes* character) but it is possible for a rule to be *erga omnes* because it's been agreed to in a treaty (so that's *erga omnes partes*, 'between the parties'), that is not necessarily one that is *jus cogens*.

A good example of that was in the 2013 case at the International Court of Justice between Australia and Japan, and in that case there was an issue: there were obligations relating to the regulation of whaling that had been embodied in a convention, and those obligations were argued by Australia to be obligations *erga omnes partes*. The court looked at them, and looked at the fact that all parties to that treaty had a right to claim, and it concluded that, indeed, it was an obligation e*rga omnes*. Again, it wasn't because the protection of whales is of higher substantive character, but rather it was because within the treaty, within the structure of the treaty, all parties of that treaty had been given the right. So broadly speaking, this is one of the relevant distinctions between norms of *jus cogens* and obligations *erga omnes*, and hopefully that helps to clarify them somewhat as you navigate through various chapters because they are very important in relation to the jurisdiction exercised by states, the immunities enjoyed by states, and various legal regimes, such as the prohibition on the use of force, the law of armed conflict, international economic law, and international environmental law. And hopefully this brief summary helps you navigate those.

Thank you.