

**Article 40. Application of this chapter**

**1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.**

**2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.**

*Commentary*

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish “serious breaches of obligations under peremptory norms of general international law” from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

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.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.<sup>[1881] 642</sup>

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission’s commentary to what was to become article 53,<sup>[1882] 643</sup> uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,<sup>[1883] 644</sup> the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and

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<sup>[1881] 642</sup> For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

<sup>[1882] 643</sup> *Yearbook ... 1966*, vol. II, p. 247–249.

<sup>[1883] 644</sup> In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

the Court's own position in that case.<sup>[1884] 645</sup> There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.<sup>[1885] 646</sup>

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.<sup>[1886] 647</sup> In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.<sup>[1887] 648</sup> Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.<sup>[1888] 649</sup>

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain

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<sup>[1884] 645</sup> *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), at pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

<sup>[1885] 646</sup> See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote [1151] 412 above), pp. 439–440; Counter-Claims (footnote [1152] 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel v. Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

<sup>[1886] 647</sup> Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others v. The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote [1154] 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga v. Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

<sup>[1887] 648</sup> *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

<sup>[1888] 649</sup> *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.<sup>[1889] 650</sup>

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.<sup>[1890] 651</sup>

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

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<sup>[1889] 650</sup> See the *Ireland v. the United Kingdom* case (footnote [800] 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a “consistent pattern of gross and reliably attested violations of human rights”.

<sup>[1890] 651</sup> At its twenty-second session, the Commission proposed the following examples as cases denominated as “international crimes”:

“(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

“(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

“(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

“(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.”

*Yearbook ... 1976*, vol. II (Part Two), pp. 95–96.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

## EUROPEAN COURT OF HUMAN RIGHTS

*Güzelyurtlu And Others v. Cyprus and Turkey*

In the case of *Güzelyurtlu And Others v. Cyprus and Turkey*, the European Court of Human Rights referred to articles 40 and 41, as well as the commentary to article 41, as relevant international law.<sup>[1891] 239</sup>

[A/74/83, p. 40]

## INTER-AMERICAN COURT OF HUMAN RIGHTS

*The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)*

In an advisory opinion concerning the effects of a State's denunciation of the American Convention on Human Rights, the Inter-American Court of Human Rights, in an analysis of *jus cogens* norms, cited articles 40, 41 and 48 and the commentary to article 40, indicating that the obligations contained in article 40 "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".<sup>[1892] 222</sup>

[A/77/74, p. 36]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)

*Dispute Concerning Costal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*

In its award concerning preliminary objections, the arbitral tribunal in *Dispute Concerning Costal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)* indicated that article 41 "imposes upon all States an obligation not to recognize as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law".<sup>[1893] 223</sup> Nevertheless, the arbitral tribunal concluded that it did not consider "that the [General Assembly] resolutions to which Ukraine refers can be read to go as far as prohibiting it from recognizing the existence of a dispute over the territorial status of Crimea".<sup>[1894] 224</sup> The tribunal also cited article 40.<sup>[1895] 225</sup>

[A/77/74, p. 36]]

[1891] 239 ECHR, Grand Chamber, Application No. 36925/07, Judgment, 29 January 2019, paras. 157–158.

[1892] 222 IACHR, Series A, No. 26, Advisory Opinion No. OC-26/20, 9 November 2020, paras. 103–104.

[1893] [223] PCA, Case No. 2017–06, Award (Preliminary Objections), 21 February 2020, para. 170.]

[1894] [224] *Ibid.*, para. 177.]

[1895] [225] *Ibid.*, para. 169.]