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## JUS COGENS

One of the most complex doctrines in contemporary international law, *jus cogens* is the immediate product of the socialization of the international community following the Second World War. However, the doctrine resonates in a centuries-old legal tradition which constrains the dynamics of voluntarism that characterize conventional international law. To reconcile this modern iteration of individual-oriented public order norms with the traditionally State-based form of international law, Thomas Weatherall applies the idea of a social contract to structure the analysis of *jus cogens* into four areas: authority, sources, content, and enforcement. The legal and political implications of this analysis give form to *jus cogens* as the product of interrelation across an individual-oriented normative framework, a State-based legal order, and values common to the international community as a whole.

THOMAS WEATHERALL holds a J.D. from Georgetown University, a Ph.D. in International Law from the University of Cambridge, an M.Sc. in Global Governance and Diplomacy from the University of Oxford, and a B.A. in International Studies from The Johns Hopkins University. This book is based on the doctoral thesis completed by the author as an International Scholar of the Cambridge Overseas Trust at the University of Cambridge.

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# JUS COGENS

International Law and Social Contract

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University Printing House, Cambridge CB2 8BS, United Kingdom

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107081765](http://www.cambridge.org/9781107081765)

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First published 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Weatherall, Thomas, author.

Jus cogens : international law and social contract / Thomas Weatherall.

pages cm

ISBN 978-1-107-08176-5 (Hardback)

1. Jus cogens (International law) I. Title.

KZ1261.W43 2015

341'.1-dc23 2014043410

ISBN 978-1-107-08176-5 Hardback

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CONTENTS

<i>Foreword</i>	ix
<i>Acknowledgments</i>	xviii
<i>Table of cases</i>	xx
<i>Decisions of international courts and tribunals</i>	xx
<i>Decisions of special tribunals</i>	xxiii
<i>Decisions of regional courts</i>	xxiv
<i>National court decisions</i>	xxvi
<i>Introduction</i>	xxxvii
<i>Overview</i>	xlii
<b>PART I</b>	<b>Peremptory norms of general international law</b>
	<b>(<i>jus cogens</i>) 1</b>
1	International law 3
A	Peremptory norms of general international law ( <i>jus cogens</i> ) 3
B	Obligations <i>erga omnes</i> 8
C	The international law of responsibility 11
2	The social contract 13
<b>PART II</b>	<b>The authority of <i>jus cogens</i> 19</b>
3	The interests of the international community 21
A	The international community of States as a whole 24
i	‘The international community’ 24
ii	‘of States’ 26
iii	‘as a whole’ 28
B	Individual-oriented interests 29
C	The philosophy of human dignity 34
4	Human dignity as a general principle of law 41
A	Constitutional law 44
B	European Union law 48

	C Public international law	51	
	D Peremptory norms of general international law ( <i>jus cogens</i> )	54	
5	The authority of <i>jus cogens</i>	67	
	A Human dignity as a moral concept	67	
	B Morality and peremptory norms	71	
	i <i>Travaux préparatoires</i>	71	
	ii Jurisprudence	79	
	C The expression of morality in <i>jus cogens</i>	84	
	i Non-derogation	86	
	ii Universality and normative hierarchy	89	
6	Expression of an international social contract	95	
	<b>PART III Material and formal sources of <i>jus cogens</i></b>	107	
7	Historical antecedents	109	
	A Ancient law	111	
	B The development of international law	114	
	C The science of legal positivism	119	
	D <i>Jus cogens</i> as public order in international law	121	
8	The formal source of peremptory norms	124	
	A Positive sources of international law	124	
	i Treaty law	125	
	ii Customary international law	126	
	iii General principles of law	129	
	B Article 53 of the Vienna Convention	130	
	i <i>Opinio juris sive necessitatis</i>	136	
	ii State practice	144	
	iii Shortcomings of customary international law	152	
	C A new source of international law	156	
	i Consent	156	
	ii Hierarchy	158	
	D Judicial organs	162	
9	Normativity and positivism: a reconciliation	175	
	<b>PART IV Peremptory norms and the individual</b>	183	
10	Contemporary legal foundations	185	
	A Individual legal personality	185	

CONTENTS

vii

B.	The human rights movement	188
C.	Individual responsibility in international law	191
11	The content of <i>jus cogens</i>	200
A	Identifying peremptory norms	200
i	Piracy	205
ii	Slavery	209
iii	War crimes (serious violations of humanitarian law)	213
iv	Crimes against humanity	219
v	Aggression	223
vi	Genocide	228
vii	Torture	232
viii	Apartheid (systematic racial discrimination)	236
ix	Terrorism	241
B	Self-determination	250
C	The common heritage of mankind	253
i	The high seas	255
ii	Outer space, the moon and other celestial bodies	257
iii	The Antarctic	258
iv	The environment	259
v	Cultural heritage	260
D	The right to life	264
12	Individual responsibility	266
A	Individual criminal responsibility	267
B	Individual civil responsibility	276
C	Immunities	285
i	Immunity <i>ratione personae</i>	287
ii	Immunity <i>ratione materiae</i>	299
D	Amnesty	319
i	Invalidation	322
ii	Non-recognition	331
13	The form of <i>jus cogens</i>	339
A	The individual as the subject of peremptory norms	339
B	Social contract through historical exigencies	342
	<b>PART V Peremptory norms and the State</b>	<b>349</b>
14	The enforcement of <i>jus cogens</i> : obligations <i>erga omnes</i>	351
A	Prevention and consequences for third-States	355
B	Protection and the use of force	363

viii	CONTENTS	
	i The conservative position	365
	ii The interventionist position	366
	iii The hybrid position: 'humanitarian self-defence'	369
	C Punishment and universal jurisdiction	371
15	State responsibility and <i>jus cogens</i>	384
	A State responsibility for internationally wrongful acts	384
	i International responsibility for breaches of obligations <i>erga omnes</i>	384
	ii International responsibility for violations of peremptory norms	391
	B Dual responsibility	394
	C Standing before the International Court of Justice	398
	D Jurisdictional immunity of the State	402
16	An illustration: the Libya crisis	409
	A The violation of peremptory norms	410
	B Breaches of obligations <i>erga omnes</i> arising from peremptory norms	412
	C Consequences for breaches of obligations <i>erga omnes</i>	416
	D Individual and State responsibility	423
17	Realizing the international social contract	431
	<b>PART VI International law and social contract</b>	<b>439</b>
18	Legal observations	441
	A An individual-oriented <i>jus cogens</i>	441
	B The State-based legal framework of peremptory norms	444
19	Theoretical implications	447
	A Frameworks relevant to <i>jus cogens</i>	447
	B The social contract	452
	C Final remarks	456
20	Annex	459
	<i>Index</i>	476

## FOREWORD

The history of political thought is marked by a constant tension between the universal and the parochial. Ever since the formation of the first city states, political organization was conceived of as a form of governance focused on the self. But it was also defined in terms of governance free from the other—free from control of those political organizations that had formed themselves beyond the city walls.

True, among the Greek city states there was a sense of a broader Hellenic identity. Large threats, such as Persian invasion, required the otherwise bickering microstates of the Hellenic world to engage in temporary alliances. But whatever united them, the Greek *polis* as an individual unit was seen as the natural focus and principal or exclusive unit of governance.<sup>1</sup>

Similarly, when Rome absorbed much of the Western world, it still defined itself, its Roman core, in contrast to those barbarians to whom the civilizing mission of the Empire was sadly denied.

However, throughout history, starting with the influential school of the Stoa, this parochial view was of course balanced by the recognition of common bonds of humanity. Just like the physical laws of nature that apply equally everywhere on the globe or throughout the universe, human characteristics were seen to exhibit similar, universal features that make humans human. These could be inherent in human nature, such as the will to survive, the capacity to love, or the need for a metaphysical grounding of life and of the inexorable drive towards death consciously experienced.

For some, shared humanity meant that there were also shared principles relating to rules of human conduct that apply universally. As

<sup>1</sup> Aristotle famously noted that a state should only be as large as was necessary to fulfil its function of security, a good life for its citizens, and not more than can be ‘taken in at a single view’. Aristotle, *THE POLITICS* 163 (Stephen Everson, ed., Cambridge University Press 1988).

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978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

Cicero observed, human laws would differ from community to community. However, true law, and justice, are universal and eternal:

But of all the things which are a subject of philosophical debate there is nothing more worthwhile than clearly to understand that we are born for justice and that justice is established not by opinion but by nature. That will be clear if you examine the common bonds among human beings. There is no similarity, no likeness of one thing to another, so great as the likeness we all share.<sup>2</sup>

Cicero also laid the groundwork for subsequent natural law theory in emphasizing that ‘True law is right reason, consonant with nature, spread through all people.’<sup>3</sup> Anticipating to an extent the discussion about *jus cogens*, he added:

It is wrong to pass laws obviating this law; it is not permitted to abrogate any of it; it cannot be totally repealed. We cannot be released from this law by the senate or the people. . . . There will not be one law at Rome and another at Athens, and now and another later, but all nations at all times will be bound by this one eternal and unchangeable law.<sup>4</sup>

As natural law theory advanced from the period of scholasticism and the Renaissance towards modernity, the manifestations of eternal rules of human behaviour became more varied. Indeed, they are altogether too varied to be summarized in a few short points. However, one might perhaps roughly distinguish four types of natural law:

- There were those rules that flowed directly or indirectly from religious text or precepts. It is divine will re-cast into mandatory rules of conduct, into divine law. While these rules applied principally to the circle of believers, some principles might also be applied to those who had not yet been converted—a debate that erupted with particular vigour in the context of the ‘discovery’ of the native population of the Americas by Spain.
- There was the assumption that all human beings, made in the image of God, share certain attributes, including in particular human dignity. Hence, all human societies would similarly share common features. Among them were the eternal principles of natural law. These could be

<sup>2</sup> Marcus Tullius Cicero, *ON THE COMMONWEALTH AND ON THE LAWS* 115 (James E. G. Zetzel ed., Cambridge University Press 1999).

<sup>3</sup> *Id.* at 71. <sup>4</sup> *Id.*

identified through the application of right reason by those capable of applying reason right.

- Referring back to Roman law, there was also reference to a more positive expression of these principles, through the concept of *jus gentium*. These were voluntary or necessary rules shared by the civilized in-group (Rome) and the barbarians outside of the civilizational system of the empire.
- Finally, there was the *jus inter gentes*—international law. This could be voluntary or contractarian law, or it could be natural law. The latter assumed that states were collectivities of persons, and they would therefore behave like natural persons. Hence, states, too, were subject to the natural rules that necessarily govern any human society.

These different types of law shared a number of common characteristics. First, as natural law was related to traits of human nature, and therefore of human societies, it was pre-ordained or inherent. It could be discovered through biblical exegesis or the application of right reason, but it did not need to be created through an act of will. It was necessary law, rather than voluntary law.

Second, the principles of natural law were eternal, or at least as stable as the perennial characteristics of human nature.

Third, natural law, being based in the universal reach of God or the universally shared characteristics of human beings, applied universally. This could be true universality, applying to all human beings. Or there could be relative universality, extending to those seen to be part of the community of mankind, but excluding others. In previous ages this might for instance have excluded women, slaves, or in some respects the infidels.

Fourth, natural law principles applied directly to the conduct of individuals, whether acting for themselves, or as agents of a social organization including the state. Natural law was therefore perfect law in itself, rather than a pre-cursor of law. No additional step was necessary to enact natural law to render it binding.

Fifth, the content of natural law tended to be dominated by values. Natural law generally aimed at a perfecting society, a social organization arranged according to universal core values that would channel human conduct towards ethically and socially desirable ends.

When Jean Bodin proclaimed the principle of state sovereignty in his *Six livres de la republique* of 1576, this did not spell the end of natural law. Instead, natural law theories and approaches coexisted with the increasing emphasis on voluntary law, as is most famously evident in

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Thomas Weatherall

Frontmatter

[More information](#)

the work of Hugo Grotius.<sup>5</sup> Universal values that could command the force of law without positive enactment persisted. This included values relating to the worth and dignity of the human person. Indeed, the communitarian vision of a *civitas maxima* found its high point in the writings of Christian Wolff, reaching well into the ‘Westphalian age’. His *Grundsätze des Natur- und Völkerrchts* appeared in 1754. He postulated that the *obligatio universalis* ‘connects all human beings as they are human beings. General law (*jus universale*) flows from this and consists of that which is owed to all human beings, because they are human beings.’<sup>6</sup>

However, only four years after the appearance of Wolff’s book, Emer de Vattel published his own text on the *Laws of Nations or the Principles of Natural Law*. Vattel accepted that there existed a natural law of nations, or a necessary law of nations. Nevertheless, he expressly opposed Wolff’s vision of a *civitas maxima* united under one law. Instead, in substantive terms, Vattel’s treatise emphasized the voluntary law of nations. He argued that nations were born free and equal, and endowed with the fullest freedom of action. So long as they had not voluntarily submitted to other men or other nations, they ‘remain absolutely free and independent’.<sup>7</sup>

Vattel is generally seen as the harbinger of unrestrained positivism—as the man who broke the common bond of mankind and helped bury the remnants of what had been an unbroken adherence to universalism and natural law argument since antiquity.<sup>8</sup> And yet he accepted that the voluntary law of nations was circumscribed by natural law. Hence, there was a distinction between ‘lawful and unlawful treaties or conventions and between customs which are innocent and reasonable and which are unjust and deserving of condemnation’.<sup>9</sup> States would only be ‘permitted’ by the necessary law of nations to conclude agreements or establish rules of customary law that complied with the necessary law of nations.<sup>10</sup> While Vattel acknowledged that individuals had formed themselves into

<sup>5</sup> Hugo Grotius, *DE JURE BELLI AC PACIS LIBRI TRES* (James B. Scott ed., Francis Kelsey trans., 1925) (1646).

<sup>6</sup> Christian Wolff, *GRUNDSÄTZE DES NATUR-UND VÖLKERRCHTS* 43 (1754) translation by author.

<sup>7</sup> Emer de Vattel, *LE DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE APPLIQUÉS A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 3 (James B. Scott ed., Charles G. Ferwick trans., 1916) (1797).

<sup>8</sup> Phillip Allott, *Josephine Onoh Memorial Lecture* (Hull University Press 1989).

<sup>9</sup> *Ibid.* at 4. <sup>10</sup> *Ibid.*

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## FOREWORD

xiii

sovereign states, he did not accept that this process had broken the bonds of common humanity. He asserted that 'no convention or special agreement can release' man from the duty to comply with the requirements of the 'universal society of the human race'.<sup>11</sup>

It is true though that the subsequent turn towards positivism emphasized state sovereignty at the expense of the recognition of the individual as a holder of rights at the international level. The rights of individuals were increasingly submerged within the metaphysical person of the state. The state was no longer seen as being embedded in a naturalist legal order circumscribing its competences and conduct. Instead of universal rules, international law could increasingly only reach as far as the consent of individual states would carry it.

It was only after World War II and the horrors visited upon countless populations that the concept of human dignity as a principle of law started to surface again. And, it took the hard slog of establishing human rights in positive law to give meaning to the 'elementary principles of humanity' that had been boldly proclaimed by the International Court of Justice in 1949.<sup>12</sup> That hard slog during the years of ideological division of the Cold War commenced with the adoption of the Universal Declaration of Human Rights in 1948, and reached its zenith with the entry into force of the 'Bill' of Human Rights of the two UN Covenants in 1976. The UN Declaration, and with it the Bill of Rights, were clearly dedicated to the universal protection of human dignity.

The end of the Cold War was celebrated in human rights terms with the 1993 Vienna *World Conference on Human Rights*. The conference was somewhat side-tracked by the attempt of some Asian and developing states to argue that human rights were not, after all, fully universal, but in fact, subject to what was called 'national particularities'. However, in the end, the Conference adopted a Declaration which confirmed, in its opening Article, that 'the universal nature of these rights and freedoms is beyond question'.<sup>13</sup> The Preamble echoed the wording of the Universal Declaration, confirming that 'all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms'.

<sup>11</sup> *Ibid.* at 5.

<sup>12</sup> The *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949, p. 4) 22.

<sup>13</sup> The World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993.

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Frontmatter

[More information](#)

Arguably, at this point the legal community of mankind had returned to a fully universal belief in common characteristics of human beings. That belief supported the claim of universal rights and fundamental freedoms—a claim directly based on the inherent dignity of the human person.

By this time, the international legal system had undergone a number of structural developments. The International Court of Justice had recognized since 1970 that there exist legal obligations owed to the international community as a whole.<sup>14</sup> These ‘*erga omnes*’ obligations give all states a legal interest in the performance of key obligations of international constitutional standing by all other states.

In addition, the 1969 Vienna Convention on the Law of Treaties had recognized the doctrine of *jus cogens*. A rule of *jus cogens*, or a peremptory norm of general international law, 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.<sup>15</sup>

Hence, states cannot exempt themselves from having to comply with rules of *jus cogens*, which require compliance under all circumstances. In addition, the *Articles on State Responsibility* put forward by the International Law Commission introduced the concept of serious violations of peremptory norms (*jus cogens*). Such serious violations would trigger an obligation by all other states not to recognize the outcome of the transgression, not to assist the offender in keeping it in place, and to cooperate with a view to overturning it.<sup>16</sup> Moreover, under the doctrine of universal criminal jurisdiction, the commissioning of such violations might trigger individual criminal responsibility directly under international law.

In short, as rules of general international law, *jus cogens* rules are universal. They must be complied with by all under all circumstances. An infraction legally affects all other members of the organized international community as a whole. Indeed, they are legally obliged to

<sup>14</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3, 32.

<sup>15</sup> Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, Article 53 (entered into force 27 January 1980).

<sup>16</sup> International Law Commission, Draft Articles on Responsibility of States for Intentionally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session, [2001] II(2) YBILC 26 *et seq.*, Articles 40–41.

oppose serious violations. Moreover, individual perpetrators face criminal sanction.

It might be argued that the 19th and early 20th centuries something of an aberration. They key elements of natural law doctrine described above appear to have resurfaced:

Item	300 BC–late 18th century	19th to mid 20th century	Mid 20th century to present
<b>Reach</b>	Universal	Binds only consenting states	Universal
<b>Made by</b>	<i>A priori</i> , inherent rule of natural law	Strict state consent	Universal consensus
<b>Stability of the Rule</b>	Eternal	Changes frequently, according to changing interests of states	Can change/expand if a new rule is recognized as a rule of <i>jus cogens</i> by the international community as a whole
<b>Substantive Content</b>	Transports values	Advances interests	Transports values
<b>Applies to</b>	All levels	States only	States and individuals
<b>Legal Effect</b>	Cannot be contracted out of	Inferior to state sovereignty	<i>Jus cogens, erga omnes, etc.</i>

The exact catalogue of *jus cogens* rules is subject to controversy. They are generally believed to include the prohibition of the threat or use of force, or of aggression, the prohibitions of slavery, genocide, ethnic cleansing, apartheid, torture, crimes against humanity including sexual violence, grave breaches of humanitarian law and fundamental human rights law. Self-determination and the protection of diplomatic agents are also at times proposed for inclusion in the list.

All of the items listed are focused on the protection of the human person from acts of war or from grave abuse in times of peace. With the exception of the final item, these protections apply to all persons. One might see in this development the positive enactment of previous natural law thinking at the international level. Alternatively, one might content oneself with the

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Thomas Weatherall

Frontmatter

[More information](#)

observation that a minimum catalogue of legal rules for the protection of the human person now enjoys the protection of the international legal order as a matter of positive law, without the need to refer back to any natural law roots connected with the idea of human dignity.

A third, and exciting, explanation is proposed in the present book. This is the idea of a social contract as the source of, or explanation for, the elevation of elementary human rights to the level of *jus cogens*. This idea implies a global social compact made by humanity as such with a view to safeguarding a common set of rights flowing directly from the concept of human dignity shared by all.

Of course, the concept of the social contract has been put forward in a number of different variants. To Hobbes, the social contract described the process whereby individuals gave up all their rights in exchange for protection from life in a brutal state of nature. An almighty state would provide security, but demanded unquestioned obedience.

To Rousseau, the social contract offered an opportunity to secure radically direct democratic governance. The individual would renounce his or her autonomy and subject him or herself to the 'general will' of society. Rather than denying their own identity by subjecting it to majority governance, Rousseau thought that individuals can only fulfil themselves through such action within a greater collective.

Rawls has proposed more recently that a social contract can aim to establish greater social or material equality among individuals. In addition to security from one's fellow human beings, to direct democracy or to egalitarian aims, a fourth type of social contract was of course proposed by John Locke. According to Locke, human beings do not enter an organized society with a view to abandoning all their rights, or to achieve equality among all. Instead, the very essence of the social contract is that individuals subscribe to societal organizations precisely because they wish to see their rights protected by a central authority, and because they wish to be able to accumulate unequal levels of wealth.

For Locke, pre-state societies were inherently unstable as all its members enjoyed the power to enforce their own rights. Opting into the state meant a certain loss of freedom on the part of individuals, but it also meant that the organs of the state would now ensure stable and predictable relations with the society. In particular, individuals could be confident in their right to hold property and not to be arbitrarily deprived of it.

Locke's conception was therefore not quite the same as modern arguments concerning human rights. The struggles for human rights and fundamental freedoms of the 19th century and the first half of the

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978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## FOREWORD

xvii

20th century have led to a concept of human rights as a defence against arbitrary and abusive action of the state. While Locke would also oppose such action, his principal aim was to preserve and protect individuals from arbitrary or violent action among themselves.

But can we see the operationalization of the concept of human dignity, and the enshrinement of key human rights among the highest order rules of the positive system of international law, as a modern form of social contract? This view is certainly an attractive one from a number of angles.

Liberal international law scholars tend to focus on what happens within states when considering how international law works. The idea of the self-constituting of mankind through a global social contract, and through invisible and highly complex global networking, seems consistent with such an approach.

Those interested in constructing a constitutional or public law view of international law will also likely applaud this concept. Constitutions tend to promote certain core values, and provide mechanisms to entrench and privilege these within the legal system. The global social contract can help explain this function at the international level.

The advance in social contract theory offered in this book must also strike a chord with those who take a cosmopolitan view of the international system. The universal values they seek to defend can finally be grounded in an act of positive will. As this is a general and universal will, the global social contract theory helps cosmopolitans to extricate themselves from the allegation that they contribute to value-imperialism.

Finally, strictly positivist international lawyers, and international relations 'realists', can maintain that the state remains relevant and indeed dominant within the international system. However, it is now impossible to deny the reality of the existence of a concept of the organized international community 'as a whole'. Social contract theory can help clarify the somewhat murky identity of that concept. The international community 'as a whole' consists of all global constituents. They may often, or indeed, mainly, continue to act through the medium of the state. However, increasingly, these constituencies will demand that states and other dominant actors at the international level will deliver to them what they demand.

It is certain that this book will be received with great anticipation. This is not only due to the recently revived interest in the doctrine of *jus cogens*. The value of this splendid book lies in the originality of thought and in the clarity and depth of the presentation by its author.

Marc Weller  
Cambridge, England

## ACKNOWLEDGMENTS

This book is based on my doctoral thesis completed at the University of Cambridge in 2012 under the supervision of Professor Marc Weller. The project was possible only through a great deal of support.

First and foremost, I owe the privilege of undertaking this project to Professor Weller, who gave me the opportunity to study at Cambridge. From the moment he took me on as his doctoral student, Professor Weller remained confident in my ability to carry this project to fruition. I also owe a debt of gratitude to those who were kind enough to read my work at various stages of completion and provide commentary, most notably Professors John Dunn, Mads Andenas, and Philip Allott. I also wish to thank Judge Cançado-Trindade, who kindly met with me at The Hague during the final stages of my doctoral studies.

I wish to thank my thesis examiners, James Crawford and Alexander Orakhelashvili, for their genuine interest in seeing that this work might make the greatest possible contribution to the study of *jus cogens*. I am also grateful to the anonymous reviewers of this book, whose feedback was invaluable in preparing it for publication.

During my time at Georgetown University, I benefited greatly from a diversity of perspectives that influenced the contours of this work. In this respect, Professors David Stewart, Don Wallace, and Michel Paradis deserve special recognition; so too Judge Francis Allegra and Representative Eleanor Holmes Norton. Each had occasion to comment on various topics related to this book, and I am grateful that their influences have found expression at various points.

My three years in Cambridge were generously supported by the Cambridge Overseas Trust, to which I am deeply grateful for making my research possible. I must also thank King's College for supporting me in various ways throughout my time at Cambridge, and the Lauterpacht Centre for International Law, which supported me as a research assistant.

The production of this book would not have been possible without the expertise and professionalism of the team at Cambridge University Press.

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

ACKNOWLEDGMENTS

xix

Richard Woodham and David Mackenzie ensured that the book moved smoothly through its various stages of production, and I thank them for making that process a painless one. I am grateful to Maureen MacGlashan for her meticulous compilation of the index, and to Jacqueline French for her thorough copy-editing. Most of all, Elizabeth Spicer was instrumental in shepherding my manuscript through its early stages at the Press, and remained positive and encouraging throughout that process – I am indebted to her for that support, without which this book might not exist.

Finally, I am grateful for my friends in Cambridge, especially Josh Keeler, and the Cambridge University Cycling Club. I also wish to recognize Dr Gleider Hernandez, who supervised my first course in public international law at Oxford, and Mr G. H. L. LeMay, whose tutorials at Worcester College will forever shape my intellectual endeavours. Lastly, I am grateful to the unending support and encouragement of my dad Dr James Weatherall, my mom Kate, my sister Claire, and, of course Emily.

*Thomas Weatherall*  
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Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## TABLE OF CASES

### Decisions of international courts and tribunals

#### *Permanent Court of International Justice (PCIJ)*

*The Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment, 1927 PCIJ (ser. A) No. 10 (7 Sept.).

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*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403.

*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, p. 324.

*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, ICJ Reports 1996, p. 595.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, p. 3.

*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70.

*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports 2006, p. 3.

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## TABLE OF CASES

xxi

- Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 3.
- Asylum Case (Colombia v. Peru)*, Judgment, ICJ Reports 1950, p. 266.
- Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 3.
- Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, p. 13.
- The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949, p. 4.
- East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90.
- Fisheries Case (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, p. 116.
- Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7.
- Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, p. 39.
- LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466.
- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16.
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136.
- Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.
- Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, p. 761.
- Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, p. 916.
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392.
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14.
- North Sea Continental Shelf (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, p. 3.
- Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase)*, Judgment, ICJ Reports 1955, p. 4.
- Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Application Instituting Proceedings, 24 April 2013.
- Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422.
- Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, ICJ Reports 2009, p. 139.
- Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15.

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

xxii

TABLE OF CASES

*South West Africa Cases (Ethiopia v. South Africa / Liberia v. South Africa) (Second Phase)*, Judgment, ICJ Reports 1966, p. 6.

*International Centre for Settlement of Investment Disputes (ICSID)*

*Azurix Corporation v. Argentina*, Decision on Application for Annulment, No. ARB/01/12 (2009).

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*Prosecutor v. Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, No. ICC-02/05-01/09-195 (2014).

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Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

TABLE OF CASES

xxiii

*Permanent Court of Arbitration (PCA)*

*Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention*  
(Ireland v. United Kingdom), Final Award, 42 ILM 1118 (2003).

*United Nations Human Rights Committee (UNHRC)*

*Wackenheim v. France*, No. 854/1999, CCPR/C/75/D/854/1999 (2002).

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*Agiza v. Sweden*, No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005).

*M.B.B. v. Sweden*, No. 104/1998, UN Doc. CAT/C/22/D/104/1998 (1999).

*Tapia Paez v. Sweden*, No. 39/1996, UN Doc. CAT/C/18/D/39/1996 (1997).

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*International Criminal Tribunal for the former Yugoslavia (ICTY)*

*Prosecutor v. Aleksovski*, Judgment, IT-95-14/1-T (1999).

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Trial Chamber II of 18 July 1997, IT-95-14-AR108bis (1997).

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Appeals Chamber Judgment, IT-94-2-AR73, (2003).

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*Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T (1998).

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Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

xxiv

## TABLE OF CASES

*Prosecutor v. Kambanda*, Judgment and Sentence, ICTR-97-23-S (1998).

*Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T (1999).

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*Prosecutor v. Sesay et al.*, Judgment, SCSL-04-15-T (2009).

*Prosecutor v. Norman et al.*, Judgment, SCSL-04-14-T (2007).

*Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, No. SCSL-03-01-I-059 (2004).

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## Decisions of regional courts

### *African Commission of Human and Peoples' Rights (ACHPR)*

*Modise v. Botswana*, Comm. No. 97/93, 2000 AHRLR 25 (1996).

### *African Court of Human and Peoples' Rights (ACtPHR)*

*African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order for Provisional Measures, Application No. 004/2011 (2011).

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## TABLE OF CASES

XXV

*European Court of Human Rights (ECtHR)*

- A. v. United Kingdom*, No. 25599/94 (1998).  
*Ahmed v. Austria*, No. 25964/94 (1996).  
*Al-Adsani v. United Kingdom*, No. 35763/97 (2001).  
*Chahal v. United Kingdom*, No. 22414/93 (1996).  
*Demir and Baykara v. Turkey*, No. 34503/97 (2008).  
*Jones v. United Kingdom*, Nos. 34356/06 & 40528/06 (2014).  
*Kalogeropoulou and Others v. Greece and Germany*, No. 59021/00 (2002).  
*Othman v. United Kingdom*, No. 8139/09 (2012).  
*Ould Dah v. France*, No. 13113/03 (2009).  
*Soering v. United Kingdom*, No. 14038/88 (1989).  
*S.W. v. United Kingdom / C.R. v. United Kingdom*, Nos. 20166/92 & 20190/92 (1995).  
*Z. and Others v. United Kingdom*, No. 29392/95 (2001).

*European Court of Justice (ECJ)*

- Kadi et al. v. Council of the European Union et al.*, C-402/05 P / C-415/05 P, [2008] ECR I-6351 (2008).  
*Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, [2004] ECR I-9609 (2004).

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- Thomas v. United States*, Case 12.240, Report No. 100/03 (2003).  
*Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87 (1987).  
*Domingues v. United States*, Case 12.285, Report No. 62/02 (2002).  
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*Baldeón García v. Peru*, Judgment, Series C No. 147 (2006).  
*Barrios Altos Case*, Judgment, Series C No. 75 (2001).  
*Bayarri v. Argentina*, Judgment, Series C No. 187 (2008).  
*Brothers Gomez Paquiyauri v. Peru*, Judgment, Series C No. 110 (2004).  
*Bueno Alves v. Argentina*, Judgment, Series C No. 164 (2007).  
*Ceaser v. Trinidad and Tobago*, Judgment, Series C No. 123 (2005).  
*Gelman v. Uruguay*, Judgment, Series C No. 221 (2011).  
*Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Judgment, Series C No. 219 (2010).

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

xxvi

## TABLE OF CASES

*The Juridical Condition and the Rights of Undocumented Migrants*, Advisory Opinion, OC-18/03, Series A No. 18 (2003).

*La Cantuta v. Peru*, Judgment, Series C No. 162 (2006).

*Miguel Castro-Castro Prison v. Peru*, Judgment, Series C No. 160 (2006).

*Ramírez v. Guatemala*, Judgment, Series C No. 126 (2005).

*Servellón García and ors v. Honduras*, Judgment, Series C No. 152 (2006).

*Tibi v. Ecuador*, Judgment, Series C No. 114 (2004).

*Velásquez-Rodríguez v. Honduras*, Judgment, Series C No. 4 (1988).

*Ximenes-Lopes v. Brazil*, Judgment, Series C No. 149 (2006).

*Yatama v. Nicaragua*, Judgment, Series C No. 127 (2005).

## National court decisions

*Argentina*

*Chile v. Arancibia Clavel*, Supreme Court of Justice (Argentina), A/533/XXXVIII, ILDC 1082 (2004).

*Office of the Prosecutor v. Priebke*, Supreme Court of Justice (Argentina), P/457/XXXI, ILDC 1599 (1995).

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*Simón v. Office of the Public Prosecutor*, Supreme Court of Justice (Argentina), S/1767/XXXVIII, ILDC 579 (2005).

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*Australia*

*Habib v. Australia*, Federal Court of Australia, [2010] FCAFC 12, ILDC 1518 (2010).

*Nulyarimma and Others v. Thompson / Buzzacott v. Minister for the Environment and Others*, Federal Court of Australia, [1999] FCA 1192, 120 ILR 353 (1999).

*R. v. Tang*, High Court of Australia, [2008] HCA 39 (2008).

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*Austria*

*A.A. v. Austria*, Supreme Court (Austria), No. 1Ob225/07f (2008).

*Anita W. v. John Adam II (Prince of Liechtenstein)*, Supreme Court (Austria), No. 7Ob316/00x, ILDC 1 (2001).

Decision No. 11Os139/98, Supreme Court (Austria) (1998).

Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## TABLE OF CASES

xxvii

*Belgium*

*Jugoslovenski Aerotransport v. Belgium*, Court of Appeal (Bruxelles) (Belgium), No. 1998/KR/528 (1999).

*R.D. v. Belgium*, Court of Cassation (Belgium), No. P.04.1211.N, JT 2005, 322, ILDC 6 (2004).

*Re Sharon and Yaron*, Court of Cassation (Belgium), No. P.02.1139.F/2, JT 2003, 243, ILDC 5 (2003); Court of Appeal (Bruxelles), 127 ILR 110 (2002).

*Société Anonyme des Chemins de Fer Liégeois-Luxembourgeois v. The Netherlands*, Supreme Court (Belgium), Pasicrisie Belge, I, p. 294 (1903).

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*Prosecutor's Office v. Anić*, Court of Bosnia and Herzegovina (Section I for War Crimes), S1 1 K 005596 11 Kro, ILDC 1907 (2011).

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*Bouzari v. Islamic Republic of Iran*, Court of Appeal for Ontario (Canada), 71 OR (3d) 675 (2004).

*R. v. Finta*, Supreme Court (Canada), [1994] 1 SCR 701 (1994).

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*Victoria (City) v. Adams*, Supreme Court of British Columbia (Canada), [2008] BCSC 1363 (2008).

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*Peru v. Chile*, Supreme Court (Chile), No. 2242-06, ILDC 1443 (2007).

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Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

xxviii

## TABLE OF CASES

*Review of the Constitutionality of the Rome Statute of the International Criminal Court*, Constitutional Court (Colombia), No. C-578/2002 (2002).

*Segovia Massacre Case*, Supreme Court of Justice (Colombia), No. 156 (2010)  
(reproduced in *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, IACtHR Series C No. 219 (2010)).

*Czech Republic*

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Cambridge University Press

978-1-107-08176-5 - Jus Cogens: International Law and Social Contract

Thomas Weatherall

Frontmatter

[More information](#)

## TABLE OF CASES

xxix

*Greece*

*Margellos and Others v. Federal Republic of Germany*, Special Supreme Court (Anotato Eidiko Dikastirio) (Greece), No. 6/2002, 129 ILR 525 (2007).

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*New Zealand*

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