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.

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JUS COGENS

International Law and Social Contract

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CONTENTS

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.[1]

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

[1] 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'. Artistotle, THE POLITICS 163 (Stephen Everson, ed., Cambridge University Press 1988).

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.[2]

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.'[3] 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.[4]

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

[2] Marcus Tulius Cicero, On the Commonwealth and On the Laws 115 (James E. G. Zetzel ed., Cambridge University Press 1999).
[3] Id. at 71. [4] 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

the work of Hugo Grotius.[5] 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 *Grundsaetze des Natur- und Voelkerrchts* 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.'[6]

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'.[7]

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.[8] 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'.[9] 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.[10] While Vattel acknowledged that individuals had formed themselves into

[5] Hugo Grotius, De Jure Belli ac Pacis Libri Tres (James B. Scott ed., Francis Kelsey trans., 1925) (1646).
[6] Christian Wolff, Grundsaetze des Natur-und Voelkerrechts 43 (1754) translation by author.
[7] Emer de Vattel, Le Droit des gens, ou, Principes de la loi naturelle appliqués a la conduite et aux affaires des nations er des souverains 3 (James B. Scott ed., Charles G. Ferwick trans., 1916) (1797).
[8] Phillip Allott, *Josephine Onoh Memerial Lecture* (Hull University Press 1989).
[9] *Ibid.* at 4. [10] *Ibid.*

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'.[11]

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.[12] 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'.[13] 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'.

[11] *Ibid.* at 5.
[12] The *Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgment, ICJ Reports 1949, p. 4) 22.
[13] The World Conference on Human Rights, Vienna Declaration and Programme of Action, *adopted* 25 June 1993.

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.[14] 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.[15]

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.[16] 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

[14] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3, 32.

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

[16] International Law Commission, Draft Articles on Responsibility of States for Internationally 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
Reach	Universal	Binds only consenting states	Universal
Made by	*A priori*, inherent rule of natural law	Strict state consent	Universal consensus
Stability of the Rule	Eternal	Changes frequently, according to changing interests of states	Can change/expand if a new rule is recognized as a rule of *jus cogens* by the international community as a whole
Substantive Content	Transports values	Advances interests	Transports values
Applies to	All levels	States only	States and individuals
Legal Effect	Cannot be contracted out of	Inferior to state sovereignty	*Jus cogens, erga omnes, etc.*

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

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

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.

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TABLE OF CASES

Decisions of international courts and tribunals

Permanent Court of International Justice (PCIJ)

International Court of Justice (ICJ)

International Centre for Settlement of Investment Disputes (ICSID)

International Criminal Court (ICC)

International Tribunal for the Law of the Sea (ITLOS)

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Argentina

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Austria

Belgium

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