

JUS COGENS: THEORY, CASE STUDIES, JUSTIFICATIONS AND PROBLEMS OF INTERNATIONAL PEREMPTORY NORMS

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ABSTRACT: The concept of sovereignty in international law entails that states are only limited by international law with their consent; if states do not consent to a rule, they are not bound by it. The theory of jus cogens, or peremptory norms, seeks to carve out an exception to this general requirement, binding states regardless of their consent. Despite the popularity of the goals of jus cogens, no consensus yet exists about how to identify or justify peremptory norms. This article employs three case studies – the alleged jus cogens norms against genocide and juvenile capital punishment – to illustrate some of the issues typical to the debate. It then addresses several major theories of jus cogens and examines the advantages and failings of each.

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The concept of peremptory norms, or binding higher law, is hardly a novel notion in the legal realm. However, the theory of *jus cogens* in international law is deeply debated, with its foundations uncertain and its substance unclear. *Jus cogens* norms have the potential to serve as a vital minimum standard in the realm of international law, providing legal warrant for intervention to prevent atrocities. Yet until the justifications, criteria, content, and mechanisms of international peremptory norms are far more settled than at present, they cannot fulfill their purpose effectively. Despite widespread acceptance of the concept of *jus cogens*,² no consensus exists about how to justify or to determine these peremptory norms, leaving some scholars to remark that “*jus cogens* remains a popular concept in search of a viable theory.”³ The examination of three case studies – the asserted *jus cogens* prohibitions on genocide, the threat or use of nuclear weapons, and juvenile capital punishment – clarifies the contours of the modern debate and reveals the outworking of several conflicting theories of *jus cogens* norms.

The intended goal of *jus cogens* norms is straightforward: peremptory norms invalidate any contrary treaties or agreements. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) declares any treaty which violates a peremptory norm “at the time of its conclusion” void *ab initio*,⁴ while Article 64 of the

2 Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT’L L., 95 (1987).

3 Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L., 345 (2009).

4 Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875.

VCLT states that any provisions of a treaty which conflict with a subsequently emergent peremptory norm “become void and terminate.”⁵ Thus, in theory, rules of *jus cogens* serve as limitations on the freedom of states to conduct their international affairs: nations may only create contractual obligations through the use of treaties and other international agreements within the framework of peremptory norms.

The prohibition on genocide is one of the most foundational and accepted peremptory norms.⁶ Even the Convention on the Prevention and Punishment of the Crime of Genocide says that it exists only to “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law” (emphasis added).⁷ The prohibition on acts of genocide illustrates the potential of *jus cogens* norms to create a baseline for international actors and to provide a legal justification for international actions to counter violations.

Still, the practical utility of a *jus cogens* prohibition on

5 *Id.* at 64

6 See e.g. International Law Commission, *Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006)*, ¶188 (2006); Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW AND CONTEMPORARY PROBLEMS 68 (1996); Kamrul Hossain, *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 3, 84-85 (2005). Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, 11 NOTRE DAME LEGAL STUDIES PAPER, 84-86 (2012); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 82 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 95 (1988).

7 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, art 1.

genocide has been critiqued.⁸ Schwelb argues that such a prohibition would only be meaningful if several states concluded a treaty agreeing to commit genocide, one of the parties subsequently refused to fulfill their obligations under the treaty, and one of the other parties to the treaty sued the refusing state for non-performance. In such a situation, *jus cogens* would render the agreement void. Obviously, this type of hypothetical situation seems far-fetched at best. Schwelb also points out that any treaty that violated a peremptory norm forbidding genocide would already have run afoul of Articles 55 and 56 of the UN Charter, making it invalid under Article 103 of the Charter, which invalidates any treaty that conflicts with an Article of the UN Charter.⁹ Thus, the invocation of *jus cogens* would be redundant.¹⁰ Naturally, if *jus cogens* norms were applied to states' *internal* affairs, Schwelb's objection would be answered,¹¹ although this approach renders the *international* law character of *jus cogens* even more tenuous. The International Law Commission has also noted that *jus cogens* norms place substantive limitations on resolutions of the UN Security Council which would otherwise be absent. Chapter

8 Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AMERICAN SOCIETY OF INTERNATIONAL LAW, 955 (1967).

9 U.N. Charter art. 55, para. C.

10 Schwelb, *supra* note 7, at 955.

11 Kha Q. Nguyen, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS, 420 (1995). See Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AMERICAN SOCIETY OF INTERNATIONAL LAW, 100-101 (January 2007). *But see* Criddle & Fox-Decent, *supra* note 2, at 345; Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L., 297-298 (2006).

VII actions of the Security Council are normally preeminent under Article 103 of the UN Charter, so if the UN Security Council were to pass a resolution that implicitly or explicitly violated the prohibition on genocide, or any other peremptory norm, it would be void under *jus cogens* theory.¹²

The debate over the existence of a *jus cogens* prohibition on the threat or use of nuclear weapons reveals the difficulties in determining the substance of specific *jus cogens* norms. The central authority on this topic is an advisory opinion provided by the International Court of Justice (ICJ) in response to a request by the U.N. General Assembly.¹³ In 1996, a number of non-nuclear states asserted that any threat or use of nuclear weapons would violate international law, which would also make the possession of such weapons illegal.¹⁴ The ICJ first dealt with two preliminary questions, holding that neither treaty obligations nor a rule of customary international law rendered nuclear weapons per se illegal under international law,¹⁵ leaving the opposing states to argue that the nature of nuclear weapons violated a norm of *jus cogens*.¹⁶

Two arguments were advanced to justify invoking *jus cogens*. First, nuclear weapons are inherently non-discriminating

12 International Law Commission, *supra* note 5, at 176; see Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, II-3544, para. 281.

13 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 228 (July 8).

14 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246, para. 47 (July 8).

15 *Id.*, at 252-253, para. 60-62, 67.

16 *Id.*, at 254, para. 67.

and therefore violate the peremptory norm requiring distinction between combatants and civilians.¹⁷ Second, nuclear weapons have effects well beyond the territory of the belligerents, affecting third parties and violating the principle of neutrality.¹⁸ The ICJ held that the use of nuclear weapons in practice seemed “scarcely reconcilable” with the principle of discrimination, and it could not “conclude with certainty” that the use of nuclear weapons would *always* be impermissible.¹⁹ Notably, while the nuclear states ceded that most uses envisioned for nuclear weapons, such as targeting enemy cities as a matter of deterrence, would be clearly illegal, they instead relied upon hypothetical situations where smaller, low yield, tactical nuclear weapons were employed specifically against enemy combatants.²⁰ Finally, the Court also declined to hold that the effects on third parties, although certainly troubling, were enough to create a *jus cogens* prohibition on all nuclear weapons.²¹

While the ICJ ultimately held that the use or threat of nuclear weapons was not *always* illegal, and thus responded in the negative to the question posed, its ruling raises serious questions about the legality of most conceivable uses of nuclear weapons. Significantly, the ICJ was evenly split, 7-7, and the President’s vote served as the tiebreaker.²² In its concluding remarks, the ICJ unanimously declared the fulfillment of the “long promised com-

17 *Id.*, at 257, para. 78; 262.

18 *Id.*, at 261, para. 89-90.

19 *Id.*, at 262-263, para. 95.

20 *Id.*, at 262, para. 92-94.

21 *Id.*, at 261, para. 89-90.

22 *Id.*, at 266, para. 105(2)(E).

plete nuclear disarmament” as “the most appropriate means” of settling such divisive issues.²³ The ICJ’s decision implicates serious quandaries of ethics and public policy regarding the threat or use of nuclear weapons, but it also calls attention to the potential disconnect between international law jurisprudence and actual state practice by declaring all threats of nuclear retaliation upon cities for the purpose of deterring enemy attacks to be *per se* illegal.

Capital punishment, particularly for juveniles, has caused significant opposition and sparked claims that it violates a rule of *jus cogens*. The decision of the Inter-American Commission on Human Rights (Inter-American Commission) in the case of *Michael Domingues v. United States* is one of the most notable discussions of this alleged norm of *jus cogens*. The Inter-American Commission was unequivocal in its assertion that “the [United States] has acted contrary to an international norm of *jus cogens* by sentencing Michael Domingues to the death penalty for a crime that he committed when he was 16 years of age.”²⁴ Michael Domingues committed two homicides, for which he was sentenced to death by a jury in Nevada in 1993.²⁵

The Inter-American Commission discussed the treaty obligations of the United States in depth during its decision. It noted that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, prohibits juvenile

23 *Id.* at 263, para. 99.

24 *Michael Domingues v. U.S.*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, ¶ 5 (2002).

25 *Id.* at ¶ 3.

executions.²⁶ While the United States had taken a reservation to that provision of the ICCPR²⁷ and no domestic U.S. court even discussed the potential that that reservation was invalid,²⁸ the Inter-American Commission ignored the reservation.²⁹ Eleven European States Parties to the ICCPR had filed objections declaring the United States' reservation invalid, and the 1995 U.N. Human Rights Committee declared the reservation to be contrary to the object and purpose of the ICCPR and urged the United States to withdraw its reservation.³⁰ Thus, even though the U.S. ratified the ICCPR with the specific understanding that it did not preclude the application of capital punishment to juveniles, its status as a party to the ICCPR was employed to justify holding that a binding norm of *jus cogens* was violated by the execution of any juvenile.

The Inter-American Commission also relied on Article 68 of the Fourth Geneva Convention of 1949, to which the United States is also a party, which prohibits juvenile capital punishment during times of armed conflict or occupation.³¹ The United States took no reservation against Article 68 of that treaty. Thus, the Inter-American Commission reasoned that if the United States' international treaty obligations prohibited it from imposing capital punishment on juveniles during times of occupation, it hardly made sense to permit such a punishment to be inflicted on US

26 *Id.* at ¶ 13.

27 *Id.*

28 *Id.*, ¶ 31, 32.

29 *Id.*, ¶ 85.

30 *Id.*, ¶ 62.

31 *Id.*, ¶ 19.

citizens during times of peace.³² While the intent of the United States in ratifying the Fourth Geneva Convention was clearly not to render domestic capital punishment of juveniles illegal given its subsequent reservations to treaties such as the ICCPR, the Inter-American Commission's line of logic is at least plausible. However, even despite accepting the Inter-American Commission's treaty analysis *arguendo*, it does nothing to establish the existence of a rule of *jus cogens* forbidding juvenile capital punishment. The explicit purpose of *jus cogens* theory is that peremptory norms exist independent of voluntary obligations, such as treaties.

Beyond the Inter-American Commission's ruling in *Domingues v. United States*, various scholars have asserted the existence of *jus cogens* norms prohibiting, at minimum, the execution of juveniles.³³ The justifications advanced by Nguyen to demonstrate a *jus cogens* prohibition against juvenile capital punishment are revealing. She asserts that "most nations have outlawed the capital punishment of children either by law or by practice," noting that 34 countries have abolished the death penalty for all crimes and another 84, by signing the ICCPR, are presumed to have limited the application of capital punishment to only those aged 18 or older.³⁴ Yet, as Nguyen admits, this statistic leaves roughly 100 nations which still may legally execute juveniles.³⁵ However, she asserts that since only seven states are known to have executed juveniles in the prior decade, a common practice

32 *Id.* ¶ 67.

33 Nguyen, *supra* note 10, at 402.

34 *Id.* 423-424.

35 *Id.*

against juvenile capital punishment existed, and the “nearly universal character of this opposition indicates that this prohibition is a *jus cogens* norm.”³⁶ But Nguyen never shows how this absence of executions, even assuming that the reporting is reliable, evinces the necessary *opinio juris* requisite to render the norm customary international law, much less a peremptory norm. Critically, to constitute the necessary *opinio juris*, the state practice must stem from a feeling of obligation from *international law*; Nguyen fails to offer any evidence that these states are eliminating juvenile executions out of a sense of international legal obligation rather than domestic policy.

Yet, at the same time as Nguyen claims that a rule of *jus cogens* prohibits all juvenile executions, for any reason, at any time, in any place, she admits, “This rule is arguably unenforceable in U.S. courts.”³⁷ The existence of “unenforceable” peremptory norms seems self-contradictory and reveals the potential dangers of extending *jus cogens* to cover highly contested norms such as those prohibiting juvenile capital punishment. Shelton warns that when human rights institutions assert supremacy over state practice, wholly apart from the actual state practice, it weakens the entire system.³⁸ Employing a “conventional constructivist” theory of social-structural constraints on state actors and decision-making agents, Shannon asserts that such ambiguity undermines

36 *Id.* 423-424.

37 *Id.* 402.

38 Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L., 292 (2006).

the efficacy of *all* norms.³⁹ When human rights institutions attempt to assert binding authority over the actions of states in contested realms of public policy, they threaten their own legitimacy, with scholars expressing “considerable misgivings about the means used” even when they fully agree with the end result.⁴⁰

At the end of the day, it appears that fears of international institutions losing legitimacy through overstretch have significant warrant. As the United States Supreme Court held in *Graham v. Florida* concerning life sentences without parole for juvenile offenders convicted of non-homicide offenses:

The debate between petitioner’s and respondent’s *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.⁴¹

According to international *jus cogens* theory, the Supreme Court’s

39 Vaughn P. Shannon, *Norms Are What States Make Of Them: The Political Psychology of Norm Violation*, 44 INTERNATIONAL STUDIES QUARTERLY, 304 (2000).

40 Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 82 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 85 (1988).

41 *Graham v. Florida*, 130 U.S. 2011, 2034 (2010).

reasoning is simply wrong; *jus cogens* norms are binding and may not be set aside by any nation for any reason. Yet as O'Connell has noted, "With the rise of litigation in international law, especially in the area of human rights, expansive claims are being made respecting *jus cogens* norms that have little support."⁴² The perceived authority of international law is weakened even when states reach the same conclusion as international institutions; for instance, in *Roper v. Simmons*, the U.S. Supreme Court held that juvenile executions violate the Eighth Amendment, but explicitly stated that the "international opinion against the juvenile death penalty" was "not controlling."⁴³ When international institutions overstep the bounds of their powers, such as by declaring the existence of *jus cogens* norms prohibiting juvenile capital punishment, their theoretical authority remains actualized only in theory.

Thus, the debate over the possibility of a peremptory norm prohibiting capital punishment of juveniles displays the necessity of clearly defining the hierarchy of international norms and their interaction with domestic law systems. As Friedmann remarks in his influential *The Changing Structure of International Law*, "In due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish."⁴⁴ The need for theoretical clarity and crystallization, especially for rules of *jus cogens*, has been echoed among numerous interna-

42 Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms*, 11 NOTRE DAME LEGAL STUDIES PAPER, 79-80 (2012).

43 *Roper v. Simmons*, 543 U.S. 551, 579 (2005).

44 WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, 88 (Columbia University Press, 1964).

tional law scholars. As Hossain warns, “There is a growing danger that in the absence of clearly defined procedures for the creation of peremptory norms, their emergence and subsequent identification may become a matter of conflicting assertions reflecting political preference of different groups or states.”⁴⁵ This fear has already been at least partially realized; Simma and Alston note that many American lawyers and experts have simply premised that “internationally recognized human rights” are identical to and coextensive to the United States Bill of Rights,⁴⁶ and they opine that “it is possible to view [that practice] as an instance of what might be termed normative chauvinism, albeit of an unintentional or subconscious variety.”⁴⁷ Reassuring speculations about the intent behind this “normative chauvinism” aside, the absence of a widely agreed upon framework for identifying and defining *jus cogens* norms threatens to embroil and to possibly destroy the theory of peremptory norms in the realm of politics. With experts wondering “whether the *jus cogens* concept is anything other than a club with which academics beat each other,”⁴⁸ the importance of finding a viable, comprehensive theory of *jus cogens* cannot be overstated.

Several overarching philosophical and legal theories have been advanced to justify the existence and substance of binding rules of *jus cogens*. Any viable theory must discern a coherent

45 Kamrul Hossain, *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 3, 85 (2005).

46 Simma & Alston, *supra* note 39, at 94-95.

47 *Id.* at 95.

48 A. Mark Weisburd, *American Judges and International Law*, 36 VANDERBILT JOURNAL OF TRANSNATIONAL LAW, 1502-1503 (2003).

method both to justify that peremptory norms bind states even against their consent and to uncover the precise substance of these peremptory norms. Positivism is currently the general predominant school of thought in international law and arguably so in the sphere of *jus cogens*.⁴⁹ The other primary approach relies on natural law theories, which perceive the law as a manifestation of moral principles.⁵⁰ Natural law formed the original foundation for conceptions of *jus cogens*⁵¹ and remained central during the early codification of peremptory norms,⁵² although natural law justifications have since fallen into general disfavor.⁵³ Other schools of thought assert that *jus cogens* norms may be justified by considerations of public order⁵⁴ or by fiduciary theories of governmental legitimacy.⁵⁵ In short, the marketplace of ideas is filled with theories attempting to solve the problems facing *jus cogens*, but so far none have managed to obtain a monopoly.

Positivism has many advantages as a foundational theory for *jus cogens*. By holding that all rules of international law derive their authority from sovereign consent, positivism aligns

49 Criddle & Fox-Decent, *supra* note 2, at 78. See O'Connell, *supra* note 41, at 33. *But see* O'Connell *supra* note 31, at 78.

50 Nguyen, *supra* note 10, at 417.

51 International Law Commission, *Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006)*, ¶190 (2006).

52 Shelton, *supra* note 37, at 295-297.

53 Criddle & Fox-Decent, *supra* note 2, at 78. See O'Connell, *supra* note 41, at 33. *But see* O'Connell *supra* note 31, at 86.

54 Shelton, *supra* note 37, at 291. *But See* Criddle & Fox-Decent, *supra* note 2, at 78. See O'Connell, *supra* note 41, at 33. *But see* O'Connell *supra* note 31, at 344; Schwelb, *supra* note 7, at 948.

55 Criddle & Fox-Decent, *supra* note 2, at 347.

directly with the Westphalian emphasis on state sovereignty.⁵⁶ As the Permanent Court of International Justice held, “The rules of law binding upon States . . . emanate from their own free will.”⁵⁷ Positivism also ensures that legal theory and state practice remain closely aligned.⁵⁸ Normative views based on sources aside outside of “hard law,” such as natural law theories, lead to “an enormous gap between asserted customs and state practice.”⁵⁹ Since positivism derives the content of its norms from state practice and affirmative voluntary agreements,⁶⁰ states are more likely to comply with the norms established through such a process.⁶¹

But perhaps positivism’s greatest asset in the debate over rules of *jus cogens* is its capacity to offer clarity.⁶² As Simma and Paulus note, positivism avoids the debate over “international law as it is” versus “international law how it should be.”⁶³ Weiler and Paulus state that the question which positivism seeks to answer, “*Is there a hierarchy of norms in international law,*” focuses on objective reality, rather than on whether there *ought* to be such a hier-

56 Shelton, *supra* note 37, at 291.

57 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). See also Shelton, *supra* note 37, at 299.

58 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 92 AM. SOC. INT’L L., 758 (2001).

59 *Id.* at 769.

60 Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L., 303-304 (April 1999).

61 See Christenson, *supra* note 1, at 100.

62 Simma & Paulus, *supra* note 59, at 303.

63 *Id.*

archy.⁶⁴ Still, debate remains over whether so-called “soft-law,” such as “the teachings of the most highly qualified publicists,”⁶⁵ has a place in positivist views, with some scholars declaring that “classical positivism” rejects all soft law⁶⁶ and others arguing that “enlightened positivism” permits the use of soft-law as a subsidiary source beneath state practice and agreements.⁶⁷ Nonetheless, positivism’s emphasis on providing answers based on actual state practice and the text of legal agreements enables positivism to provide decision-makers of all types with enhanced clarity.⁶⁸

However, positivism also faces significant objections. The New Haven school of international law rejects positivism’s assertion that law can be value neutral, instead declaring that the purpose of law must be protecting “the inherent and equal value of every human being.”⁶⁹ Reliance upon positivism also appears problematic in practice. Simma and Alston characterize treaty law as providing “an ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many states largely untouched.”⁷⁰ As Weisburd alleges, “The only examples of state practice apparently embodying the *jus cogens* concept are rhetorical.”⁷¹ Further, the prohibitive nature of most *jus cogens*

64 J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?*, 8 EUR. J. INT’L L., 549 (1997).

65 Statute of the International Court of Justice art. 38, para. 1(d).

66 Simma & Paulus, *supra* note 59, at 304.

67 *Id.* at 307-308.

68 *Id.* at 304-305.

69 Weiler & Paulus, *supra* note 63, at 549.

70 Simma & Alston, *supra* note 39, at 82.

71 Weisburd, *supra* note 47, at 1491.

norms makes identifying any form of *opinio juris* difficult; how can international institutions distinguish a state that upholds an allegedly *jus cogens* norm for wholly domestic reasons from one that does so because it believes that international law obligates it to act in that particular way? ⁷² With “the gap between legal expectations and legal reality [remaining] quite wide,”⁷³ even in subjects covered by positive law agreements, whether positivism works in practice at justifying *jus cogens* norms remains questionable.

But the strongest objection to positivism is its inability to justify the existence of *peremptory* norms. Since positivism is a consensualist theory, how can it warrant overriding states’ consent, claiming that rules of *jus cogens* apply to all states whether they agree? The term *jus cogens* literally means “the compelling law,”⁷⁴ so state consent may not be relied upon for justification.⁷⁵ In addition, as Hossain explains, rules of *jus cogens* cannot be derived from treaties for two reasons. First, a treaty cannot bind its parties’ ability to modify the treaty terms or remove obligations through subsequent treaties. Second, none of the treaties that codify the various *jus cogens* norms have been universally ratified.⁷⁶ Custom is also insufficient, since persistent objection creates an

72 Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. SOC. INT’L L., 446-501 (July 2009).

73 Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW AND CONTEMPORARY PROBLEMS ,66 (1996).

74 *Id.* at 67.

75 See, e.g., O’Connell, *supra* note 31, at 84.

76 Hossain, *supra* note 44, at 77-78.

exception to rules of customary international law.⁷⁷

Some positivist scholars have interpreted Article 53 of the VCLT to require general, rather than unanimous, consent. Since Article 53 of the VCLT describes peremptory norms as “a norm accepted and recognized by the international community of States *as a whole* as a norm from which no derogation is permitted” (emphasis added),⁷⁸ *jus cogens* norms may be imposed even if some objectors remain in the international community.⁷⁹ However, while consensus theories, based on the agreement of a representative supermajority,⁸⁰ may eliminate the need for unanimous individualized state consent, it does not explain why one group (even an extremely large group) may impose obligations on other states against their consent.⁸¹ This objection threatens to render the concept of positivist peremptory norms that override state consent virtually incoherent: either all rules of international law derive from state consent (positivism) or some rules override state consent (non-positivism).⁸² Thus, while positivism may offer greater clarity on the content of *jus cogens* norms than do other approaches, it cannot successfully justify why peremptory norms exist at all.

77 *Id.* at 78.

78 Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875.

79 E.g. Hossain, *supra* note 31, at 80-81; Geoffrey Sawyer, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency*, 22 PENN ST. INT'L L. REV., 469-470 (Summer 2004); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. SOC. INT'L L., 537-538 (1970).

80 Hossain, *supra* note 44, at 80-81.

81 Criddle & Fox-Decent, *supra* note 2, at 341-342.

82 O'Connell, *supra* note 31, at 83-84.

Unlike positivism, natural law offers the ability to clearly justify the existence of *jus cogens* norms. O'Connell asserts that "positivism-plus" is the currently the primary theory of *jus cogens*, and since positivism cannot succeed, it is necessary to rely upon natural law.⁸³ Natural law offers a straightforward answer to the question of the origin of *jus cogens* norms: higher law.⁸⁴ The International Military Tribunal in Nuremberg after World War II is generally agreed to have derived its justification from natural law theories.⁸⁵ If law truly is a manifestation of moral principles,⁸⁶ the binding nature of *jus cogens* rules upon all states irrespective of consent seems logically consistent.

However, natural law faces the precise difficulty that positivism avoids: how is the exact content of *jus cogens* norms determined? Without a clear authority to decide what constitutes a valid rule derived from natural law, or to determine which rules amount to peremptory norms, natural law faces a dangerous slide into subjectivism. As O'Connell explains:

The bigger challenge lies in understanding what natural law theory says about identifying particular *jus cogens* norms (or general principles). Because natural law scholars failed to develop answers as to how natural law functions in a secular age, study and discussion of natural law theory has almost disappeared from the work of legal theorists. The classic problem associ-

83 *Id.* at 83-84.

84 *Id.* at 86.

85 *Id.* at 87-88.

86 Nguyen, *supra* note 10, at 417.

ated with natural law is this: Who decides? At one time, natural law answers provided by the Church were respected. The rise of secularism and scientific method in the eighteenth and nineteenth centuries meant that, by the end of the nineteenth century, natural law theory was largely dismissed because it was viewed as hopelessly subjective.⁸⁷

The difficulties involved in trying to justify that a particular natural law rule is genuinely an objective, universal principle have caused the number of adherents to natural law theories to dwindle.⁸⁸ Separating the idea of binding norms from treaty frameworks poses destabilizing risks to the international institutions, with some commentators fearing that states will simply refuse jurisdiction to courts relying on such approaches.⁸⁹ Even if it largely mirrors the modern state of *jus cogens* theory in actuality,⁹⁰ natural law's ability to justify that some peremptory norms exist, but inability to define them, constitutes a terminal deficiency.

The public order theory offers a third alternative for justifying *jus cogens* norms. Public order theories have attained a measure of prominence in scholarly circles, even if their number of adherents is limited.⁹¹ Public order theory says that all peremptory norms serve one of two functions: "They either safeguard the peaceful coexistence of states as a community or honor the inter-

87 O'Connell, *supra* note 31, at 86.

88 Criddle & Fox-Decent, *supra* note 2, at 343.

89 Christenson, *supra* note 1, at 100.

90 E.g. Hossain, *supra* note 44, at 74; Bassiouni, *supra* note 72, at 67.

91 Shelton, *supra* note 37, at 291.

national system's core normative commitments."⁹² Christenson argues that an "ordering function lies at the heart of the conceptual development of *jus cogens*."⁹³ Other scholars assert that if *jus cogens* norms are derived from conceptions of public order, they may legitimately be applied to intra-state actions as well as international agreements.⁹⁴ Thus, public order theory seeks to ground peremptory norms in the necessary principles required to preserve the international system as a functioning entity.

However, public order theory faces strong criticism on several fronts. Schwelb asserts that "The concepts of *ordre public* or *public policy*, which are known to the civil law and to the common law systems, do not entirely coincide with the concept of *jus cogens*."⁹⁵ In national legal systems, public order justifications may invalidate an agreement between citizens because a clear hierarchy exists within the domestic judicial system. The state is empowered by the citizens to ensure the well-being of the society, justifying the placement of restrictions on the freedom to contract. However, no analogous supranational entity exists in the international sphere. Thus, the public order theory conflicts with the traditional views of state sovereignty.⁹⁶ Public order theory also faces difficulty explaining why prohibited actions, such as systematic racial discrimination, harms the community of states as to render

92 Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of *Jus Cogens*," 344.

93 Christenson, *supra* note 1, at 94.

94 Kha Q. Nguyen, "In Defense of the Child: A *Jus Cogens* Approach to the Capital Punishment of Juveniles in the United States," 420.

95 Schwelb, *supra* note 7, at 948.

96 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

the offending states' internal actions a violation of international law.⁹⁷ Public order theory further struggles to justify why rules of *jus cogens* are binding on all nations and detailing the criteria to objectively determine which constitutive principles amount to peremptory norms.⁹⁸ This situation leads to a heightened danger that *jus cogens* theory will simply be transformed into a ploy for power politics.⁹⁹

The theory of *jus cogens* norms as derived from fiduciary obligations constitutes a novel approach to resolving the dilemma facing theorists. The fiduciary theory seeks to resolve the twin difficulties of justifying the existence of *jus cogens* norms and defining their precise content by examining the moral duties intrinsic to state sovereignty.¹⁰⁰ As Criddle and Fox-Decent posit, the fiduciary theory argues that “*jus cogens* norms are constitutive of a state’s authority to exercise sovereign powers domestically and to claim sovereign status as an international legal actor.”¹⁰¹ By deriving *jus cogens* rules from the relationship between the state and subject, the fiduciary theory wholly avoids the difficulty which plagues positivism of justifying why peremptory norms are binding even when states do not consent.

To explain their theory, Criddle and Fox-Decent analogize the state to a parent. Fiduciary relations arise from circumstances in which one party holds discretionary power of an administrative

97 Criddle & Fox-Decent, *supra* note 2, at 345.

98 *Id.*

99 Hossain, *supra* note 44, at 74; Bassiouni, *supra* note 72, at 85.

100 Criddle & Fox-Decent, *supra* note 2, at 347.

101 *Id.*

nature over the legal or practical interests of another party.¹⁰² Any such discretionary authority is to be other-regarding, purposive, and institutional; the authority must be vested in an institutionally legitimate party who intentionally undertakes to employ this discretionary authority solely for the good of the party for whom the fiduciary relationship was established.¹⁰³ With reference to Kant's theories of fiduciary obligation, Criddle and Fox-Decent argue that states are fiduciary entities whose purpose is to ensure well-being.¹⁰⁴ They contend that "the minimal substantive content of the state's fiduciary obligation is compliance with *jus cogens*, an obligation that remains in place whether or not the state has ratified a convention that signals a commitment to such norms."¹⁰⁵ Disregard of fiduciary obligations de-legitimizes the entrusted party's authority, permitting fiduciary theory to assert that "the ultimate basis of *jus cogens* rests within the very concept that tends to be pitted against it: sovereignty."¹⁰⁶ States may only be legitimately sovereign if they fulfill their fiduciary duties to respect *jus cogens* norms. Fiduciary theory thus places substantive limitations upon state actors in both the international and domestic spheres.

Several objections may be raised to the fiduciary theory of *jus cogens*. First, its justifications clearly constitute a break from the methodology for recognizing peremptory norms listed in

102 *Id.* at 349-350.

103 *Id.*

104 *Id.* at 352.

105 *Id.*

106 Criddle & Fox-Decent, *supra* note 2, at 356.

the VCLT.¹⁰⁷ Criddle and Fox-Decent embrace this, arguing that Article 53 of the VCLT is superfluous since states are bound by *jus cogens* whether they have ratified the VCLT or not.¹⁰⁸ Another potential critique arising from positivists is that fiduciary theory removes the state's primary role.¹⁰⁹ However, states do retain the primary role in *operationalizing* peremptory norms, although fiduciary theory separates the consensus that certain acts are wrongful and illegal from the normative basis for declaring them to be so.¹¹⁰

Since fiduciary theory relies on a transcendent ethical framework and a particular view of state-citizen relations to derive its legal conclusions, it seems potentially susceptible to the same objections as natural law. However, this attack is not necessarily valid. While Criddle and Fox-Decent admit that the fiduciary theory "relies explicitly on a moral idea of dignity" and the legal significance of that dignity,¹¹¹ it appears impossible to justify any meaningful form of morality or peremptory norm if *all* human dignity is denied. Further, fiduciary theory attempts to avoid invalidity through overextension by affirmatively accepting that many objectionable actions, ranging from corporate abuses to domestic violence, are outside its purview; its sole purpose is to provide a viable framework to shape rules of *jus cogens* placing non-derogable limitations on states.¹¹² The theory so far remains

107 Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875.

108 Criddle & Fox-Decent, *supra* note 2, at 355.

109 *Id.* at 377-378.

110 *Id.*

111 *Id.* at 348.

112 *Id.* at 377-378.

largely untested, since Criddle and Fox-Decent only published their article in 2009,¹¹³ and the theory does not yet appear to have sparked a significant scholarly response, either positive or negative. Nonetheless, fiduciary theory offers a unique and potentially compelling mechanism to justify and define the role and scope of preemptory norms in international law.

The current state of *jus cogens* is hardly reassuring. Virtually every aspect of *jus cogens* theory is debated.¹¹⁴ Unsurprisingly, the disputes over the theory of *jus cogens* have harmed its practical effectiveness. While many scholars argue that egregious violations of *jus cogens* rules of human rights ought to remove state immunity,¹¹⁵ the actual practice of the courts is “decidedly in favor of the immunity rule.”¹¹⁶ Thus, in current international law, state officials may lose immunity for criminal prosecutions of *jus cogens* violations, but states themselves remain immune from such suits.¹¹⁷ Yet, a comparison to treaty law reveals the potential for improvement. According to Kearney and Dalton, as late as 1935, eminent scholars were arguing “that there is no clear and well-defined law of treaties,” and a 1948 study prepared by the

113 *Id.* at 331.

114 *See, e.g.,* Bassiouni, *supra* note 72, at 67.

115 Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*. Order No. 14201, 103 AM. J. INT’L L., 125-126 (2009).

116 *Id.* at 127.

117 International Law Commission, *supra* note 11. *See* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. Case C-402/05 and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-06351. *See also* O’Connell, *supra* note 31, at 90-92. Criddle & Fox-Decent, *supra* note 2, at 346-347. Shelton, *supra* note 37, at 309-310. *But see* Focarelli, *supra* note 114, at 112-123.

UN Secretariat to assist the ILC “found that there was scarcely a topic in the entire field [of treaties] that was ‘free from doubt, and, in some cases, from confusion.’”¹¹⁸ Nonetheless, while the VCLT has not solved all debates, it has served to significantly clarify the realm of treaty law. The potential remains for *jus cogens* to develop far greater import if a clear theory can be presented and the contours of peremptory norms clearly marked.

The modern international community is extraordinarily diverse. Given pressing transnational and global issues, ranging from terrorism to environmental problems, the importance of international cooperation has never been higher. The horrors of past human rights abuses also urge the necessity of establishing a minimum framework to limit the actions of states. *Jus cogens* possess the potential to serve a critical role in the international sphere. Still, since rules of *jus cogens* explicitly do not rely upon consent, their validity must derive from universally binding philosophical justifications. Formulating a theory of peremptory norms in the modern multicultural international realm thus requires the universal acceptance of at least some minimum ethical norms. *Jus cogens* may be reconcilable with cultural pluralism, but it seems unlikely to coexist with the emergence of radical ethical pluralism.

118 Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. SOC. INT'L L., 496 (1970).