'Here Be Dragons': Mapping the Legal Contours of *Jus Cogens* in International Law

Francisco Lobo*
DOI: 10.21827/GroJIL.10.2.72-90

Keywords:
JUS COGENS, LEGAL THEORY, SECONDARY RULES, PUBLIC ORDER, HUMAN SECURITY

Abstract:
The purpose of this article is to demystify *jus cogens* rules by trying to map their legal contours. After defining *jus cogens* and providing a theoretical scaffolding drawn from elementary works on legal theory, the household *jus cogens* prohibition of genocide is analysed in light of such notions. As a result, *jus cogens* norms are characterised both as primary rules of behaviour and as secondary rules of change for legal production, constituting an international public order that serves as a tool for international law to safeguard human security.

I. Introduction: A tale of snakes and dragons

'Here Be Dragons'. Such is the way early cartographers would warn sailors about the dangers of venturing into uncharted waters, back when our modern world was just beginning to be discovered and carved out in the fashion of European conceptions – much as modern international law was, which not accidentally was born as *Jus Publicum Europaeum* around the same time Europe set out to expand in a world that now could be measured, mapped, and conquered.[1]

Centuries later, a most noteworthy exchange took place at one of the erstwhile European outposts of the New World, first christened as New Amsterdam, and later known the world over as New York.

It was a hot May afternoon inside the United Nations building. The experts who composed the International Law Commission (ILC) had been required to trade their regular venue in Geneva for the Organization's headquarters in New York, as the celebration of a special occasion, the seventieth anniversary of the Commission, was in order that year. The formal etiquette of the morning session had receded and some of the (male) members had succumbed to rolled up sleeves and unbuttoned shirts. Suddenly, in the midst of a heated discussion, one of the commissioners illustrated his disagreement with one of his colleagues in the following way: 'You, sir, remind me of a folk tale about a painter, who was so good at his trade that he always finished his work before his colleagues. When he was once asked to

* Doctoral Researcher, Department of War Studies, King's College London. LLM in International Legal Studies, NYU. LLM in International Law, LLB, University of Chile. Lecturer of Legal Theory and International Law. Email address: jfl383@nyu.edu

1 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (*Telos Press 2006) 70, 86-100; See also Martti Koskenniemi, *To the Uttermost Parts of the Earth* (Cambridge University Press 2021).

portray a snake, after doing it faster than any other painter, he was still not satisfied and felt the need to add legs to his snake. So do you with international law, sir. Myself, I prefer to depict the law as it is, and not as I would like it to be'. His colleague's response followed shortly after: 'Well, you know, I also strive to depict the law as I believe it stands in the present. As for your story, let me say that a snake with legs is but a dragon, and they can be quite real; we even name people after them'. A relieved general laughter from the weary audience ensued, and right after, the first commissioner rejoined: 'Well, sir, I finally understand why we are usually at odds with each other in matters of international law. Whereas I pursue the Commission's objective of codifying international law, I see you favour the objective of progressive development'.

And thus it was, how a witty exchange at the headquarters of the organisation that represented the apex of centuries of international law development summarised the existential tension engraved in the ILC's genetic code, between codification and progressive development of international law,[2] between snakes and dragons.

What are peremptory norms of general international law, better known as *jus cogens,* then? Are they snakes or dragons? Since they work as veritable checks on the autonomy of the will of states, we may say that they resemble the *non plus ultra* exhortation conveyed by cartographers to sailors to prevent them from going into places that are off limits: 'Here Be Dragons'. On the other hand, characterising *jus cogens* solely as a dragon that is yet to be progressively developed risks ignoring the very important fact that states already acknowledge the existence of such norms as a reality of international law, as verifiable as the existence of snakes in the world. In fact, sometimes states rely on the same examples of *jus cogens* norms to advance opposite political agendas, as evidenced by the ongoing legal dispute regarding genocide between Russia and Ukraine at the International Court of Justice (ICJ).[3] This form of 'legal polytheism'[4] bears out the contestability, as well as the currency, of this particular normative standard.

As a result of this ambiguity surrounding the concept of peremptory norms of international law, the legal nature – yet not the existence – of *jus cogens* is still heavily debated, as evidenced by the current work of the ILC on the topic propelled by the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Professor Dire Tladi.[5]

This investigation purports to map the legal contours of *jus cogens* norms, so as to contribute to their demystification by providing a better analytical understanding of their complex normative reality. It is only by 'venturing into the *terra nova* of international *jus*

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[2] UNGA Res 174 (21 November 1947) UN Doc A/RES/174(II) 105. Annexed to this resolution is the Statute of the International Law Commission 1947, art 1(1): '[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.'

[3] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Request for the Indication of Provisional Measures: Order) [2022] ICJ Rep 211.

[4] Francisco Lobo, 'Return to Mount Olympus: "Legal Polytheism", Jus Cogens Norms, and the Conflict in Ukraine' (*RCIR: Research Centre in International Relations*, 2022) <https://kclrcir.org/2022/07/05/return-to-mount-olympus/> accessed 24 September 2023.

[5] See generally the documents at the ILC website on the topic, including the works of the Special Rapporteur, materials produced by the ILC, and commentaries submitted so far by governments: 'Analytical Guide to the Work of the International Law Commission: Peremptory norms of general international law (*Jus cogens*)' (*ILC*) <https://legal.un.org/ilc/guide/1_14.shtml#top> accessed 20 December 2023.

cogens',[6] to quote Judge Cançado Trindade, that we might reach a clearer comprehension of this complex legal phenomenon.

In that spirit, this analysis aims at overcoming prior derisive portrayals of *jus cogens* as 'mysterious',[7] 'magic',[8] 'Sherlock Holmes',[9] 'Superman',[10] or as a 'giant on stilts'.[11] What all these trenchant images have in common is that they question the very existence of *jus cogens* as a legal category, in line with the aforementioned characterisation of it as a mythological dragon. Much of this debate has unfolded in the midst of international law scholarship. In this article, however, I would like to take a step back and approach the phenomenon from the perspective of elementary legal theory, that an 'integrated legal and philosophical research method'[12] may shed light on the conceptual contours of *jus cogens* and, hopefully, provide some analytical clarity.

Much as cartographers were once aided by the sciences of geography and topography, this endeavour will draw on the analytical tools that can be found in legal theory. Where states cannot trespass due to political considerations, legal theory can and must freely explore the nature and contours of *jus cogens.* Thus, whereas some have chosen a more practical approach steering clear of theoretical elucubrations,[13] while more recent contributions have even prioritised the moral importance of *jus cogens* rules thus subordinating its legal aspects to such significance,[14] this inquiry will endeavour to make use to the utmost of all the analytical tools that legal theory has to offer and that have been so far mostly neglected in the *jus cogens* literature. Indeed, for all the debate that the topic of *jus cogens* has prompted in international law since the adoption of the Vienna Convention on the Law of Treaties (VCLT), it is astonishing how little international scholars have relied on foundational notions of legal theory and legal philosophy.[15] This is symptomatic of the regrettable lack of communication

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6 Inter-American Court of Human Rights *Advisory Opinion OC-18*, *Juridical Condition and Rights of Undocumented Migrants* (2003) (Concurring Opinion of Judge Antonio Cançado Trindade) IHRL 3237 [69].

7 Asif Hameed, 'Unravelling the Mystery of *Jus Cogens* in International Law' (2014) 84(1) British Yearbook of International Law 52-102.

8 Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19(3) European Journal of International Law 491-508.

9 Dinah Shelton, 'Sherlock Holmes and the Mystery of *Jus Cogens*' (2015) 46 Netherlands Yearbook of International Law 23-50.

10 Anthony D'Amato, 'It's a Bird, it's a Plane, it's Jus Cogens!' (1990) 6(1) Connecticut Journal of International Law 1-6.

11 Stefano Congiu, 'The History, Challenges and Hope of a "Giant on Stilts"' (2015) 7 Plymouth Law and Criminal Justice Review 47-60.

12 Claudio Corradetti and Mattias Kumm, 'Why *Jus Cogens*? Why a New Journal?' (2019) 1(1-4) Jus Cogens 1-4.

13 ILC, 'First Report on *Jus Cogens* by Dire Tladi, Special Rapporteur' (2 May-10 June and 4 July-12 August 2016) UN Doc A/CN.4/693, 23.

14 Adil Ahmad Haque, 'Peremptory Norms and Fundamental Values' (Talk at the North South University Department of Law, 16 August 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192022> accessed 25 January 2023.

15 Robert Kolb being somewhat an exception. See Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Hart Publishing 2015) 1-14; See also Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 163-185.

that has of old existed between legal theorists and international lawyers,[16] which has only started to recede timidly in recent years.[17] This theoretical inquiry purports to be another modest step in the right path of reconciliation between legal theory and international law.

The investigation will be divided as follows: First, *jus cogens* will be briefly defined and characterised as a normative category that belongs to contemporary public international law (II). Second, some basic notions of normative theory will be offered (III). Building on this theoretical scaffolding, *jus cogens* will be ascribed to the category of norms of legal production, also known as secondary rules of change, as well as to the more traditional primary rules (IV). After that, the function of *jus cogens* as a limit to the contractual freedom of states will be explained as a dimension of an international *ordre public* (V). Such an international public order will be further explored in light of the purpose of international law, including the fundamental values that it aims to safeguard (VI). Finally, some concluding remarks will be offered (VII).

II. Peremptory norms of general international law (*jus cogens*)

This is not the place for a reconstruction of the history of *jus cogens,* modest as this contribution aims to be and thorough as previous studies have already been published on the subject.[18] Suffice it to state that albeit formulated as a Latin formula, *jus cogens* is essentially a modern concoction of which Roman law had no notice. To be sure, Roman law did have a body of rules which private citizens could not dispose of in their particular pacts, but they correspond to 'public law' as opposed to 'private law', the *summa divisio* of Roman law as envisaged in the Institutes of Justinian.[19]

Following what has been dubbed the 'pre-history' of *jus cogens,* from Roman law to modern codification, the proper 'legislative history' of *jus cogens* begins not so long ago, in the 1950s, with the works of successive Special Rapporteurs commissioned by the ILC to study the topic of the law of treaties.[20] The outcome of such a Herculean task came finally in 1969, with the signing of the VCLT, perhaps one of the most authoritative legal texts as far as the ILC practice is concerned, since it is relied on profusely in most debates held within that body.

The Vienna Convention for the first time mentions and defines the concept of *jus cogens,* in its Article 53, which reads as follows:

> Treaties conflicting with a Peremptory Norm of General International Law (*Jus Cogens*)
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States

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16 John Austin is partly to blame due to his characterisation of international law as 'international morality' early in the 19th century. See John Austin, *The Province of Jurisprudence Determined* (1832) 1-30, 281. Hart is also accountable for this, as he characterised international law as an underdeveloped legal order. See Herbert L A Hart, *The Concept of Law* (3rd ed, Oxford University Press 2012) 213-237.

17 See Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41(1) Philosophy and Public Affairs 16 et seq; Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) 28(1) European Journal of International Law 203-232.

18 Antonio Gómez Robledo, *El Jus Cogens Internacional: Estudio Histórico-Crítico* (Universidad Nacional Autónoma de México 2003) 1-52; ILC, 'First Report on *Jus Cogens'* (n 13) 9-22; Carnegie Endowment for International Peace, *The Concept of Jus Cogens in Public International Law: Papers and Proceedings Conference in Lagonissi, Greece* (Carnegie Endowment for International Peace 1967).

19 Gómez Robledo (n 18) 2.

20 ibid 21-52.

> 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.

Despite the fact that the shorthand *jus cogens* is also used in some domestic legal systems to refer to non-disposable rules of public law,[21] today it is broadly recognised as a typical normative category of international law, not only by scholars, but also by states and international bodies.[22]

As formulated in the VCLT, its function is very clear, at least so far as the law of treaties is concerned: it is a limit on the kind of treaties states can sign with each other, out of respect for what the international community of states as a whole deems peremptory and therefore non-derogable. Its importance to other sources of international law, namely custom, principles, unilateral acts, and resolutions by international organisations, has also been actively debated at the ILC.[23] However, this study will focus only on the least disputed function of *jus cogens* as it pertains to the law of treaties.

But whether relating to treaties or to other sources of public international law, *jus cogens* rules belong to the broader category of legal norms, and therefore they share the same ontological traits with any other kind of legal rule. Such features need to be ascertained and clarified before moving on further in this inquiry on the legal contours of *jus cogens.*

III. Basic notions of normative theory

As stated in the introduction, we will now draw on the rich language of legal theory to try to map the legal contours of *jus cogens* rules more precisely.

A 'norm' or 'rule'[24] is the basic unit of study of legal science, much as a cell is the basic unit of study of biology, or an atom is the basic unit of study of physics.[25] But, what is a norm? Anecdotal history has it that the foremost legal positivists of the twentieth century, Hans Kelsen and HLA Hart, were once arguing about the nature of norms during a seminar at Berkeley University. After Hart inquired to exhaustion 'what is a norm?', Kelsen finally lost his temper and yelled: 'A norm is a norm!'[26]

However, Kelsen had elsewhere provided a more satisfactory definition of a norm as a command to regulate human behaviour,[27] following in the footsteps of another renowned legal positivist of the European tradition, John Austin.[28] More precisely, the norm is the *meaning*

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21 ILC, 'Second Report on *Jus Cogens* by Dire Tladi, Special Rapporteur' (1 May-2 June and 3 July-4 August 2017) UN Doc A/CN.4/706, 4; Kolb (n 15) 2.

22 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Request for the Indication of Provisional Measures: Order) (n 3).

23 ILC, 'Third Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur' (30 April–1 June and 2 July–10 August 2018) UN Doc A/CN.4/714.

24 In what follows these two terms shall be used as interchangeable notions, unless otherwise stated.

25 Hans Kelsen, *Pure Theory of Law*, (2nd ed, University of California Press 1967) 4, 70.

26 Agustin Squella Narducci, *Introducción al Derecho* (Editorial Jurídica de Chile 1999) 37-38.

27 Kelsen (n 25) 4.

28 Austin (n 16) 5-6.

enclosed within a normative statement reached through interpretation,[29] and in that sense, a normative statement can be characterised as a 'normative container'.[30]

Now, the concept of a 'norm' can be classified into several different categories, following the works of Georg von Wright and of Max Black in deontic logic.

According to von Wright, when we talk about a 'norm' we can be referring to several different entities, including: 'rules', 'prescriptions', 'directives', 'customs', 'moral principles', and 'ideal rules'.[31] Alternatively, Black identifies four main categories of rules: 'regulations', 'instructions', 'maxims', and 'principles'.[32] Not surprisingly, then, Black concludes that the word rule 'is like a playing card used in many different games'.[33]

In what matters here, insofar as this is an inquiry into the nature of *jus cogens* rules as a type of legal norm , the most relevant categories from each taxonomy are what von Wright calls 'prescriptions' and what Black calls 'regulations'. Both categories comprise the essential components of what is usually understood as a legal norm.

A 'prescription' is a norm aimed at regulating human behaviour. It is issued by an authority, it is addressed at a subject, it has to be promulgated, and it is backed with a sanction in case of non-compliance.[34] Thus, what von Wright calls the 'normative kernel' of a prescription includes the *authority* that issues the norm, the *subject* at whom it is addressed, and the *occasion*, ie the time and place for the norm to be observed. Other elements of a prescription are its *character* (whether it mandates, prohibits or allows certain conduct), its *content* (the specific act or activity being regulated), and its *condition of application* (ie the logical state of affairs that must exist for the rule to make sense).[35]

Thus, prescriptions or regulations correspond to what we know as legal rules. As we shall see when we illustrate all these categories with an example, *jus cogens* rules are legal norms in this sense, at least *prima facie*. Thereby, we can speak properly of '*jus cogens* prescriptions or regulations'.

Finally, in order to better understand the legal phenomenon, it is worth mentioning HLA Hart's masterful critique of John Austin's imperative theory of legal rules.[36] According to Hart, Austin focused solely on commands that prescribe or prohibit a given physical action, which Hart calls 'primary rules'. Yet, there are other kinds of legal rules which do not refer to physical actions but to other rules, thereby receiving the name of 'secondary rules'[37] which we will analyse in the next section.

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[29] Jerzy Wroblebski, *Constitución y Teoría General de la Interpretación Jurídica* (Civitas 1985) 23; Isabel Lifante Vidal 'Un Mapa de Problemas Sobre la Interpretación Jurídica' in Isabel Lifante Vidal (ed), *Interpretación Jurídica y Teoría del Derecho* (Palestra Editores 2010) 37-64; See also Riccardo Guastini, 'Legal Interpretation: the Realistic View' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2019) 1-9; Riccardo Guastini, *Teoría e Ideología de la Interpretación Constitucional* (Trotta 2010) 29-37.

[30] Squella Narducci (n 26) 215.

[31] Georg Henrik von Wright, 'Norm and Action' (*The Gifford Lectures*, 1963) <www.giffordlectures.org/books/norm-and-action> accessed 5 May 2021, Ch I.

[32] Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Cornell University Press 1962) 109-113.

[33] ibid 106.

[34] von Wright (n 31) Ch I, para 5.

[35] ibid Ch V.

[36] Austin (n 16) 30.

[37] Hart, *The Concept of Law* (n 16) 79-99.

IV. The legal theory of *jus cogens* norms

It is time now to apply the theoretical scaffolding laid down in the previous section to a rule of *jus cogens* from real state practice. For that purpose, the quintessential rule of *jus cogens* concerning what has been dubbed 'the crime of crimes', the prohibition of genocide, shall be used as a pedagogical device. This does not preclude the application of the legal theory undergirding *jus cogens* to other such prohibitions as they may be found in existing case law.[38] But for this limited analytical endeavour, the examination of one household prohibition will suffice to illustrate the theoretical concepts used here and satisfy the purposes of this inquiry.

The prohibition of genocide enjoys today an undisputed status as a *jus cogens* rule, as acknowledged by states, courts, international organisations, and scholars alike.[39] It has also been included on first reading, and preserved upon second reading, by the ILC in its illustrative

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[38] The prohibitive overtones of the ILC's non-exhaustive list calls to mind what Lon Fuller dubs the minimalist 'morality of duty,' as opposed to a more maximalist 'morality of aspiration'. See Lon Fuller, *The Morality of Law* (Yale University Press 1969) 5-6; As for case law, some examples regarding traditional rules of *jus cogens* include: for the prohibition of piracy, see High Court of Australia *The Queen v Tang* [2008] HCA 39 [111]; for the prohibition of slavery, see United States Court of Appeals for the Seventh Circuit *Sampson v Federal Republic of Germany* [2001] 250 F.3d 1145, 1154, n 5; for the prohibition of war crimes, see Supreme Court of Justice of Argentina *Chile v Arancibia Clavel* [2004] ILDC 1082 [28]; for the prohibition of crimes against humanity, see Supreme Court of Chile *Víctor Raúl Pinto v Relatives of Tomás Rojas* (Decision on Annulment, No 3125-04) [2007] ILDC 1093 [29]–[31]; for the prohibition of genocide, see Supreme Court of The Philippines *Muna et al v Romulo et al* [2011] GR No 159618, ILDC 2059 [40]–[50], [89]–[94]; for the prohibition of torture, see Supreme Court of New Zealand *Attorney General v Ahmed Zaoui and ors* [2005] ILDC 81 [51]; for the right of self-determination, see Case C-104/16 P *Council of the European Union v Front populaire pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario)* [2016] ECR 953 [21]; the prohibition of aggression, see House of Lords *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19 [114].
Some examples concerning less traditionally accepted rules of *jus cogens* include: for the right to life, see Federal Supreme Court of Switzerland [BGer] *Nada (Youssef) v State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (Administrative Appeal Judgment) [2007] Case No 1A 45/2007, BGE 133 II 450, ILDC 461 (CH 2007) [7.3]; for respect for human dignity, see Special Court for Sierra Leone *Prosecutor v Kallon and Kamara* [2004] (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) [2004] SCSL-04-15-PT-060-I [71]; for enforced disappearance, see Inter-American Court of Human Rights *La Cantuta v Perú* (Judgment) [2006] Series C No. 162 [160]; for the prohibition of terrorism, see Court of Cassation of France (Civil Division) *Réunion Aérienne v Socialist People's Libyan Arab Jamahiriya* [2011] No 09-14743, 150 ILR 630, 634–5 [9].

[39] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd ed, Cambridge University Press 2009); Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd ed, Oxford University Press 2014) 289-326; Antonio Cassese and Paola Gaeta, *International Criminal Law* (3rd ed, Oxford University Press 2013) 109-130; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 377-387; ILC, 'Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur' (29 April–7 June and 8 July–9 August 2019) UN Doc A/CN.4/727, paras 78-83. Alongside the prohibition of genocide, Dire Tladi proposed the following norms as examples of *jus cogens* to the ILC in 2019: (i) Norms previously recognised by the ILC as possessing a peremptory character, whether in its comments to the draft articles on the law of treaties (1966) or its comments on the draft articles on state responsibility (2001): the prohibition of aggression; the prohibition of slavery; the prohibition of apartheid and racial discrimination; the prohibition of crimes against humanity; the prohibition of torture; the right to self-determination; and the basic rules of international humanitarian law or the prohibition of war crimes (para 60); (ii) Other possible norms of *jus cogens*: the prohibition of enforced disappearance; the right to life or the prohibition of arbitrary deprivation thereof; the principle of non-refoulement; the prohibition of arbitrary arrest; the right to due process of law; and the prohibition of terrorism (paras 122-136).

list of *jus cogens* norms.[40] Further, the contemporary relevance of the prohibition of genocide is evinced by recent developments in the international arena,[41] including: the initiation of procedures at the ICJ by Gambia against Myanmar in November 2019, for breaches of the 1948 Genocide Convention; the eleventh-hour decision by the former Trump administration in January 2021 to label as genocide the acts being committed by the Chinese government against the Uyghurs in Xinjiang; the acknowledgement in April 2021 by the United States of the Armenian genocide perpetrated by Turkey in the early twentieth century; and more recently, the institution of proceedings by Ukraine against Russia at the ICJ for the misapplication of the 1948 Genocide Convention in 2022. In this last dispute, some intervening third states, such as Malta, have underscored the importance to interpret the 1948 Genocide Convention (including its compromissory clause) in light of the peremptory nature of the prohibition.[42]

Now, beyond its colloquial, and somewhat trite use in common speech, 'genocide' is a term of art in international law that has a precise legal definition, which can be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As it sets forth the meaning of a legal term, such a treaty can be classified as what has been previously characterised as a 'definitional' legal rule.

Article II of the Convention defines genocide in the following terms:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

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[40] ILC, 'Report of the International Law Commission: Seventy-first session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10 para 56; ILC, 'Peremptory Norms of General International Law (*jus cogens*): Seventy-third session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/CN.4/L.967, 6:

Conclusion 23: Non-exhaustive list

> Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(a) The prohibition of aggression;
(b) The prohibition of genocide;
(c) The prohibition of crimes against humanity;
(d) The basic rules of international humanitarian law;
(e) The prohibition of racial discrimination and apartheid;
(f) The prohibition of slavery;
(g) The prohibition of torture;
(h) The right of self-determination.

[41] Simon Tisdall, 'China, Myanmar and now Darfur…the horror of genocide is here again' (*Guardian*, 2023) <https://www.theguardian.com/commentisfree/2023/jul/02/china-myanmar-and-now-darfur-the-horror-of-genocide-is-here-again> accessed 26 December 2023.

[42] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Verbatim Record, 20 September 2023) <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230920-ora-02-00-bi.pdf> accessed 24 September 2023, 38-41.

The previous normative statement, when interpreted in search for its meaning, yields the following type of norm: it is what Black calls a 'regulation' and von Wright calls a 'prescription', aimed at ruling human behaviour. Continuing with von Wright's categories, we identify the following elements in the genocide prescription. First, the *authority* that issues the norm corresponds to all those states that have ratified the Genocide Convention, plus all those states that have adhered to the contents therefrom by way of customary international law. Moreover, it is the 'international community of states as a whole' the normative authority who has elevated this prescription to the rank of *jus cogens*, following Article 53 of the VCLT.

Second, the *subject* is also the international community of states as a whole, as well as other actors who could commit genocide – eg irregular non-state armed groups, and of course, individuals who can be held accountable through international criminal law instruments, such as the Rome Statute of the International Criminal Court.[43] Although for Hobbes and Austin the notion of a self-addressed rule made no sense, Hart successfully disproved their hypothesis by characterising legal rules that bind also the normative authority as something akin to promises.[44] It is worth mentioning that this prohibition, as well as *jus cogens* rules in general, have an *erga omnes* character when it comes to its subjects, which means they are addressed to the entire community of states.[45] Yet, this does not mean that every *erga omnes* rule is at the same time a *jus cogens* rule,[46] although the opposite is true, as *erga omnes* merely refers to a universe of subjects at whom the rule is addressed, not to its contents or rank.[47] For instance, respect for the high seas and outer space as common heritage of humankind, although an *erga omnes* obligation, does not amount to a rule of *jus cogens.*[48] Arguably, other environmental obligations enjoying an *erga omnes* status have not yet reached the *jus cogens* threshold.[49]

Third, the *occasion* of this rule pertains to every possible place and every possible time since its adoption, as it is a peremptory rule of general international law.[50] Fourth, the *character*

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[43] Rome Statute of the International Criminal Court (adopted 7 July 1998, entered into force 1 July 2002) 1287 UNTS 3, art. 6: 'For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.'

[44] Hart, *The Concept of Law* (n 16) 43. See also Jochen von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law' (2012) 4(3) Goettingen Journal of International Law 659-675.

[45] *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3 [33].

[46] Besson (n 15) 174-175.

[47] Rosalyn Higgins, *Problems and Process: International Law and How We Use It'* (Oxford University Press 1994) 167; M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga* Omnes' (1996) 59(4) Law and Contemporary Problems 63-74; Gonzalo Aguilar Cavallo, 'El Reconocimiento Jurisprudencial de la Tortura y de la Desaparición Forzada de Personas Como Normas Imperativas de Derecho Internacional Público' (2006) 12(1) Ius et Praxis 127, 128.

[48] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) 255-258.

[49] ILC, 'Fourth Report on *Jus Cogens*' (n 39) para 136.

[50] ibid para 21. The possibility of a regional *jus cogens* is a matter of debate at the ILC and is dealt with by Dire Tladi, Special Rapporteur.

of this rule is clearly prohibitive, as are most *jus cogens* rules,[51] with the exception of a few positive imperatives such as respect for the self-determination of peoples. Fifth, the *content* of the rule is also very straightforward: the conducts that are forbidden include the killing, causing serious bodily or mental harm, imposing conditions to bring about the physical destruction in whole or in part, imposing measures aimed at preventing births, and forcibly transferring children from a national, ethnical, racial, or religious group as such. Finally, the *condition of application* of the rule includes the fact that there exist in practice different national, ethnical, racial, and religious groups; as well as all the other 'truisms'[52] about those human groups, including their mortality, their need to feed, to reproduce, and to have all the other material and spiritual conditions for their subsistence as a discrete group.

As per the legal sources of this particular prescription, the material source is of course the direct antecedent of the 1948 Convention, that is, the Holocaust perpetrated by the Nazi regime against Jewish, Polish, Roma, and other peoples, although the roots of totalitarianism go deeper back into Western history.[53] The formal sources, on the other hand, are all those legal procedures that have resulted in this rule, as well as the normative statements or normative containers where this prescription is enclosed. This comprises, *lato sensu,* the 1948 Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Rome Statute, and all the expressions of customary law, general principles of law, judicial decisions, legal writings, unilateral acts, and resolutions of international organisations, that refer to the same contents. Indeed, it is important to underscore that it is not these formal sources that reach the status of *jus cogens,* but rather the norms or contents (namely the meanings) that they encapsulate as normative containers.[54]

As a legal rule, the prohibition of genocide can be classified as a prescription governing physical or kinetic state behaviour, as well as a norm used for the creation of other abstract legal rules, a double nature that we may ascertain according to the different legal consequences arising from the breach of this important standard.

Indeed, every prescription entails the imposition of a sanction in case of non-compliance,[55] so much so that towering positivists, such as John Austin and Hans Kelsen, identified sanctions, and the possibility of resorting to force in particular, as the essence of a proper or complete legal rule.[56] However, as we said before, Hart challenged this assumption and showed that there are some rules whose breach does not entail the imposition of a sanction by force, and they are not any less legal for that: 'secondary rules'.

According to Hart, a legal system is the union of 'primary rules,' ie rules referring to physical acts whose breach entails forcible legal measures or sanctions; and 'secondary rules', ie those rules referring to primary rules and conferring legal powers upon certain agents. Secondary rules are further divided into 'rules of adjudication' (for settling legal disputes about the application of primary rules), the master 'rule of recognition' (to identify, unify and confer

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51 For instance, the prohibition of piracy, the prohibition of slavery, the prohibition of aggressive war, and the prohibition of torture. See M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42(1) Virginia Journal of International Law 81-162; Cezary Mik, '*Jus Cogens* in Contemporary International Law' (2013) 33 Polish Yearbook of International Law 27-93.

52 Hart, *The Concept of Law* (n 16) 193-200.

53 Hannah Arendt, *The Origins of Totalitarianism* (Harvest Books 1973); Sven Lindqvist, *Exterminate All the Brutes* (Granta 2018).

54 Besson (n 15) 171; Aguilar Cavallo (n 47) 126.

55 von Wright (n 31) Ch I, para 5.

56 Austin (n 16) 8; Kelsen (n 25) 33, 50-51.

validity upon a legal system), and 'rules of change' (enabling private and public agents to create, modify, and extinguish legal rules, also referred to as 'rules of legal production').[57] Hart clarifies that these rules of change do not entail a sanction when they are not duly observed, but a different kind of consequence: nullity. Just as when in a game the consequence of not following the right procedure to score a goal is not a 'non-goal' or 'minus-one-goal' or the expulsion of the ineffective player from the field, but only the (mathematical) fact that no goal has been scored, the same happens with nullity for breaching a secondary rule of change. Thus, Hart explains that nullity is not a sanction, like imprisonment or death, but only the logical consequence of not having followed correctly the procedure set forth in the law to produce the desired legal result.[58]

Applying all this to *jus cogens* norms, we obtain that they cannot be so readily classified merely as prescriptions or primary rules of behaviour. They can also be characterised as secondary rules of change, or rules of legal production, on account of the consequences that follow whenever they are breached.[59] Indeed, as explained in the Special Rapporteur's Third Report on Peremptory Norms of General International Law (*Jus Cogens*), discussed during the seventieth session of the ILC, nullity is the chief consequence for the breach of a rule of *jus cogens.*[60] As a matter of fact, said consequence was recently discussed at the ILC under the understanding that only matters of secondary rules would be dealt with on that occasion, excluding primary rules pertaining to the international criminal responsibility of individuals.[61]

To be sure, the primary rule prohibiting the perpetration of genocide entails sanctions properly so called under international law, both for individuals (as punishment for an international crime), and for states (as remedies to redress an internationally wrongful act). Yet, when it comes to legal production, *jus cogens* rules can be also characterised as secondary rules of change whose breach entails the nullity of a given legal instrument. It is depending on the legal consequence at hand, whether sanctions or nullity, that we may characterise *jus cogens* rules alternatively as Hartian primary or secondary rules of international law.

V. International public order

'Public order', also referred to in English as 'public policy',[62] is an operational notion in contract law that has existed at least since the times of the Code Napoléon. Its main function is to limit the free will of the parties to engage in contracts. Its original formulation can be found in Article 6 of the Code Napoléon, which sets forth: '[i]t is not lawful to escape by private contract the application of laws which concern public order and *bonos mores*'.[63]

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57 Hart, *The Concept of Law* (n 16) 91-99.

58 ibid 33-35. In this sense, secondary rules of change are the closest to what von Wright calls 'directives' and Black calls 'instructions' that we can find within the legal system.

59 Ulf Linderfalk, 'The Source of *Jus Cogens* Obligations – How Legal Positivism Copes with Peremptory International Law' (2013) 82(3) Nordic Journal of International Law 369, 375.

60 ILC, 'Third Report on *Jus Cogens*' (n 23) para 30.

61 ILC, ' Report of the International Law Commission: Seventieth Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 para 141.

62 G Husserl, 'Public Policy and Ordre Public' (1938) 25(1) Virginia Law Review 37.

63 From the original: 'On ne peut déroger par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs.' See Maître J B Bernier, 'Public and Ordre Public' (1929) 15 Transactions of the Grotius Society 84, 89.

According to JB Bernier, Article 6 is the necessary corollary of Article 1134 of the same Code, which enshrines the principle of contractual freedom.[64]

Now, Bernier defines 'public order' in the legal sense as:

> […] the collection of conditions – legislative, departmental, and judicial – which assure, by the normal and regular functioning of the national institutions, the state of affairs necessary to the life, the progress, and to the prosperity of the country and of its inhabitants.
>
> *It may, therefore, rightly be said that the whole of the law has as its chief object the organisation and the maintenance of public order* (original emphasis).[65]

In what matters here, public order as a limit on contractual freedom has been projected from private law into other areas of the law, including international law, both private and public.[66] Regarding the former, Kent Murphy explains: '[p]ublic policy in private international law functions to reject foreign laws repugnant to the forum's sense of morality and decency, to prevent injustice in the special circumstances of the parties before the court, and to affect choice of law'.[67]

As for public international law, in 1926 Hersch Lauterpacht wrote in his doctoral thesis titled *Private law analogies in international law*: '[t]he fundamental structure of private law contracts and international law treaties is essentially the same'.[68] He then adhered to another author's comparison between contracts that are void due to public policy considerations as defined in municipal law, and treaties that are void because they infringe upon 'public morality' as defined by international law.[69]

Years later, in his 1953 report to the ILC as Special Rapporteur on the Law of Treaties, Lauterpacht commented the topic of the 'legality of the object of a treaty' in the following terms:

> It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallised in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilised nations which the International Court of Justice is bound to apply by virtue of Article 38 (3) of its Statute.[70]

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64 Bernier (n 63) 89. Art 1134: Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi. ('Contracts legally entered into take the place of law for those who have entered into them. They can only be abrogated by mutual consent. They must be entered into in good faith').

65 ibid 84.

66 Catherine Kessedjian, 'Public Order in European Law' (2007)1(1) Erasmus Law Review 26.

67 Kent Murphy, 'The Traditional View of Public Policy and *Ordre Public* in Private International Law' (1981) 11(3) Georgia Journal of International and Comparative Law 591, 607.

68 Hersch Lauterpacht, *Private Law Analogies in International Law* (PhD Thesis) (LSE 1926) 67.

69 ibid 68.

70 ILC, 'Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur' (24 March 1953) UN DOC A/CN.4/63, 155.

As we can see, Lauterpacht indirectly refers here to *jus cogens* rules as limits to the contractual freedom of states celebrating treaties, when he mentions standards of 'international morality so cogent' that might render a treaty illegal, and therefore, void.

A more explicit connection between international public order and *jus cogens* has been later suggested by Catherine Kessedjian: '[t]hese mandatory rules have different sources. They are either created by the states unilaterally to protect the fundamental values of their society, or they are created at the regional level, or even at an international/multilateral level. If created within the international legal order, they may qualify as *jus cogens* rules'.[71] However, we must pay heed to the conditional formulation used by Kessedjian, as not every rule of the so called 'international public order', as understood, for instance, in international arbitration law, amounts to a *jus cogens* norm, such as minimum standards of due process of law.[72]

In sum, the main function that *jus cogens* rules have regarding the law of treaties, as secondary rules of change, is to act as a limit on the contractual freedom of states, much as *ordre public* standards operate in domestic contract law. It is in this sense that we may characterise *jus cogens* as a veritable limit of international public order upon the free will of states, in the form of what is known as 'contractual *jus cogens*'.[73]

At this point, it is worth pointing out that Robert Kolb resists the public order theory and instead characterises *jus cogens* as a legal technique used to avoid fragmentation of domestic and international law, by preventing the principle of *lex specialis derogat generali* from operating.[74] In this sense, Kolb conceives of *jus cogens* as something akin to Hart's secondary rule of recognition, which holds the entire normative system together. However, Kolb expressly rejects the implication of *jus cogens* entailing some kind of normative hierarchy, which is essential to the master rule of recognition. Moreover, for Kolb *jus cogens* is but the reverse of the *lex specialis* principle, thus amounting to a technique for solving antinomies or conflicts of norms.[75] Yet, it is important to bear in mind that *jus cogens* operates precisely before a new rule is born into the legal life, as a public order limit at the genetic stage of legal production, so the issue of conflict of norms does not have a chance to arise. Therefore, *jus cogens* cannot be characterised as a legal technique for solving antinomies – for which we already have the hierarchical, chronological, and speciality principles,[76] but rather as a legal device to thwart normative acts that contravene international public order from becoming legal rules.

Now, a corollary of the secondary rule thesis explained in the previous section pertains to another heavily debated topic in international law, one that is closely related to the public order role of *jus cogens*: immunity of state officials for acts in breach of *jus cogens* norms. There is agreement that so-called 'personal immunity' is always applicable since it is but a procedural defence aimed at enabling the performance of functions that are important for international relations, including those of heads of state and government, and ministers of foreign affairs. It

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71 Kessedjian (n 66) 26.

72 Juan Carlos Marín González and Rolando García Mirón, 'El Concepto de Orden Público como Causal de Nulidad de un Laudo Tratándose de un Arbitraje Comercial Internacional' (2011) 24(1) Revista de Derecho 117-131.

73 Kolb (n 15) 13.

74 ibid 3.

75 ibid.

76 Riccardo Guastini R, 'Antinomias y Lagunas' (1999) 29 Revista Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana 437-450.

does not refer to the substance of the legal claim levelled against the defendant.[77] On the other hand, some authors, Special Rapporteur Tladi included,[78] believe that immunity *ratione materiae* can never apply for breaches of *jus cogens,* due to the heinousness of the acts involved. In fact, this position can also be explained from the perspective of *jus cogens* norms as secondary rules for legal production. Indeed, the purpose of immunity *ratione materiae* is to protect acts performed by every public official of a state because they are 'official or public acts'.[79] But it is only by virtue of secondary rules for legal production that such acts acquire the category of 'official' in the first place, at least from a purely legal (not a political) perspective. Without the legality conferred upon those material acts by secondary rules of change they would just not be registered by the legal system, namely they would not exist in the eyes of the law. Rules for legal production include certain criteria, including a normative authority, a procedure, and some limits of content that the new rule must respect.[80] Such limits are provided for by what has been here characterised as public order. If a public official breaches a *jus cogens* rule, then the logical result can only be that the new act is not born into the legal life, thereby never gaining the category of 'official' and therefore not warranting the application of immunity *ratione materiae.* It is not a 'non-goal' scored by the official and their state, but merely a failed goal of no normative consequence, not registered or recognised by the law. This idea was already recognised in the 1998 *Pinochet* case, where the British Lords determined that acts contrary to *jus cogens,* in particular torture, fall 'outside what international law would regard as functions of a head of state' and therefore could not be deemed to be official acts.[81]

Finally, there are two points that must be raised before moving on to the next section of this article. First, the characterisation of *jus cogens* rules as norms of public order that limit the contractual freedom of states does not amount to saying that *jus cogens* rules are equal to an international constitution. Much has been written about global constitutionalism,[82] and it is not the purpose of this article to linger in that area. Suffice it to say that public order and constitutional law are not the same, and that international law has so far developed only the former in a sufficiently operational fashion – what Robert Kolb calls the 'narrowest sense' of the international public order argument.[83]

Second, Lauterpacht's remarks on the international *ordre public* remind us that *jus cogens* rules can have several formal sources, including treaty law, customary law, and general principles of law, the former being but the content enclosed within such normative containers. It is now to these contents of *jus cogens* that we must turn, in order to ascertain the importance of peremptory rules for international law as a teleological normative system.

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77 Cassese and Gaeta (n 39) 318-319.

78 ILC, 'Third Report on *Jus Cogens*' (n 23) para 123.

79 Cassese and Gaeta (n 39) 318.

80 Kelsen (n 25) 230; 271.

81 *Regina v Bow St Metro* [1998] 3 WLR 1457; See also Anita Johnson, 'The Extradition Proceedings Against General Augusto Pinochet: Is Justice Being Met Under International Law?' (2000) 29(1) Georgia Journal of International and Comparative Law 203-222.

82 Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 727-760; Mattias Kumm, 'Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law' (2016) 14(4) International Journal of Constitutional Law 697-711; Martti Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8(1) Theoretical Inquiries in Law 9-36.

83 Kolb (n 15) 32.

VI. The purpose of international law

Among the many differences of opinion that HLA Hart and Ronald Dworkin had, one stands out for the purposes of our inquiry. It does not directly pertain to *jus cogens* rules, not even to international law as a normative system. It rather refers to the law more generally, and in particular, to its purpose. According to Dworkin – who, in this point oddly enough agreed with a hard-core positivist such as Hans Kelsen – the 'point' or purpose of the law is to justify coercion.[84] Hart, on the other hand, did not agree that there is a purpose to the law as a normative system. Rather, his reply to Dworkin on this point was that the law merely provides 'guides to human conduct and standards of criticism of such conduct'.[85] As applied to international law, Hart's reply would read that 'international law provides guides to state conduct and criticism of such conduct'.

Yet, the question remains: to what end does the law provide such guides to human conduct? Hart himself gives us a hint of what is the ultimate purpose of any legal system. According to him, the law is a social arrangement for the continuance existence of a human group, not a set of rules for a 'suicide club'.[86] Hart states that 'there are certain rules of conduct which any social organisation must contain if it is to be viable'.[87] Here *must* means *ought to,*[88] ie a 'necessary' means to attain an end (in Kant, 'hypothetical imperatives', or in von Wright, 'anankastic statements'[89]). Hart calls these principles of practical reason based on basic truths about human nature 'the minimum content of natural law', a somewhat unfortunate expression that tends to confuse students of his work. These truisms about human nature are: human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will.[90]

In sum, the ultimate point or purpose of the law as a set of guides to human conduct is to keep its subjects alive, duly paying heed to all their needs and vulnerabilities. Is this conclusion transferrable to international law?

In a posthumous essay titled *A New Philosophy for International Law,* Ronald Dworkin tries to answer the question about the justification of coercive political power as applied to international law.[91] The 'basic interpretive principle' underlying international law is, according to Dworkin, the need for states to accept feasible and shared constraints on their own power, so as to protect the human rights of citizens and foreign nationals.[92] He concludes that the goals of international law, as may be found in the Charter of the United Nations being interpreted in its best light, are: (i) the protection of political communities from external aggression; (ii) the protection of their citizens from domestic barbarism; (ii) enabling coordination among states; and (iv) allowing people to participate in their own governance.[93]

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84 Ronald Dworkin, *Law's Empire* (Hart Publishing 2012) 93; Kelsen (n 25) 33.

85 Hart, *The Concept of Law* (n 16) 248-249.

86 ibid 192. For a similar development of the following argument as applied to contemporary nuclear power, see Francisco Lobo, 'Abolishing atomic warfare? Nuclear power and natural-international law in the twenty-first century' (2019) 10(2) Transnational Legal Theory 1-27.

87 Hart, *The Concept of Law* (n 16) 193.

88 Herbert L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 593, 613; see also Hart, *The Concept of Law* (n 16) 190.

89 von Wright (n 31) Ch I, para 7.

90 Hart, *The Concept of Law* (n 16) 193-200.

91 Dworkin, 'A New Philosophy for International Law' (n 17) 2-30.

92 ibid. 17.

93 ibid 22.

Thus, Dworkin arguably endorses the modern doctrine that reinterprets sovereignty as the 'responsibility to protect',[94] which is also in line with Jeremy Waldron's and Eyal Benvenisti's notion of sovereign states as true 'trustees of humanity' charged with safeguarding the wellbeing of their citizens.[95]

Further, Richard Epstein has argued that what Hart proposed was a 'not-so-minimum content of natural law', after all, for the law is also concerned with maximising human flourishing and wellbeing, and that includes international law.[96] In this sense, even before the Second World War, Alfred Verdross had already concluded: '[…] the following tasks most certainly devolve upon a state recognized by the modern international community: *maintenance of law and order within the states, defence against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad*'.[97] (original emphasis)

In the same vein, James Crawford has advocated for the existence of the 'rule of law' in international law, whereby human flourishing can be attained.[98] Like Joseph Raz, Crawford believes that the rule of law is a virtue of the legal system, including the international legal system.[99] Similarly, Jeremy Waldron thinks that the purpose of the rule of law as applied to the international realm is the protection of populations committed to the charge of states.[100]

In sum, building on the ideas of all these towering scholars of legal philosophy and international law, we can conclude that the point or purpose of international law is, at the very least, to preserve human life, and even more so, to attain human flourishing and wellbeing (or prosperity in Bernier's formula), states and their sovereignty being but the vehicle through which such goals can be reached.

This conclusion echoes the reconstruction that sovereignty has experienced during the past decades as 'responsibility', which has paved the way for the doctrine of the responsibility to protect to emerge and gain acceptance in the international community.[101] Preceding and underlying such reconstruction we find the doctrine of 'human security' first mentioned in the

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94 International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (2001); Alex J Bellamy, *The Responsibility to Protect: A defence* (Oxford University Press 2014).

95 Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) European Journal of International Law 315-343; Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) American Journal of International Law 295-333.

96 Richard A Epstein, 'The Not So Minimum Content of Natural Law' (2005) 25(2) Oxford Journal of Legal Studies 219, 226, 228; John Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press 2011) 149-150.

97 Alfred von Verdross, 'Forbidden Treaties in International Law' (1937) 31 American Journal of International Law 571, 574.

98 James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014) 468.

99 ibid 353; Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 208.

100 Waldron, 'Sovereigns' (n 95) 325; Jeremy Waldron, 'The Rule of International Law' (2006) 30(1) Harvard Journal of Law and Public Policy 15-30. On the two families within the rule of law literature, ie the instrumental or formal version vis-à-vis the substantive version, see Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69(4) Boston University Law Review 783-791; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 91-113; On the 'international rule of law' see further Stéphane Beaulac, 'Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Bloomsbury Publishing 2009) 197, 204; Simon Chesterman, 'An International Rule of Law?' (2008) 70 New York University Public Law and Legal Theory Working Papers 14-25; Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Virginia Journal of International Law 19-32.

101 Bellamy (n 94).

1994 Development Report published by the United Nations Development Program.[102] Thus, we can reformulate the characterisation of international law as a teleological system whose main purpose is to safeguard human security, states being the vehicles and agents responsible for making it so.

As an anthropocentric doctrine,[103] the notion of human security entails respect for human dignity and non-discrimination, both values that are deeply entrenched in the spirit and instruments of modern public international law.[104]

Now, how can we connect *jus cogens* rules to this teleological account of international law? Special Rapporteur Tladi had already proposed the following Draft Conclusion No 3 in his very first report on *jus cogens*: '[…] 2. Norms of jus cogens protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable'.[105] But, which values are those?

Thomas Weatherall has recently suggested a connection between the value/principle of human dignity and *jus cogens* rules. According to him, 'safeguarding the dignity of the human being represents the ultimate goal of legal and social order'.[106] Yet, the connection between human dignity and *jus cogens* has not been thoroughly studied, he thinks.[107] His own account of human dignity as a foundation of *jus cogens* rules is compelling, although it conflates dignity with 'humanity' and 'human rights',[108] which are arguably intertwined, yet not identical, notions.[109] Hence, we must find the appropriate link between *jus cogens* and the purpose of international law outside of the already challenging area of 'dignitarian jurisprudence'.[110]

We have stated that, beyond their *prima facie* characterisation as primary rules of behaviour, *jus cogens* norms have also a very important function as secondary rules of change in relation to the law of treaties. They operate as a limit on the contractual freedom of states, the same way *ordre public* works as a limit in domestic contract law. Thus, *jus cogens* rules constitute a veritable 'international public order', to quote Lauterpacht, that sets boundaries

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[102] United Nations Development Programme, *Human Development Report 1994* (Oxford University Press 1994) 22 et seq.

[103] Gerd Oberletiner, 'Human Security: A Challenge to International Law?' (2005) 11(2) Global Governance 185-187.

[104] See, among others, the Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III); American Declaration of the Rights and Duties of Man (adopted 2 May 1948); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 999 UNTS 171; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; Arab Charter on Human Rights (adopted 15 September 1994); Convention for the Protection of Human Rights and Dignity of the Human Being in Biomedicine (adopted 4 April 1997, entered into force 1 December 1999) ETS 164; Protocol No. 13 to the European Convention on Human Rights (adopted 3 May 2002, entered into force 1 July 2003) ETS 187; ASEAN Human Rights Declaration (adopted 18 November 2012).

[105] ILC, 'First Report on *Jus Cogens*' (n 13) 74.

[106] Weatherall (n 48) 41.

[107] ibid 54.

[108] ibid 54-66.

[109] David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law 85, 109-116.

[110] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012) 15.

on what states can freely agree on. Or as Judge Cançado Trindade once put it when addressing the permissibility of waivers of jurisdiction among states and *jus cogens*: 'any purported waiver by a State of the rights inherent to the human person would, in my understanding, be against the international *ordre public*, and would be deprived of any juridical effects'.[111]

But *jus cogens* rules are also part of the teleological system of international law. Therefore, *jus cogens* rules share the same ultimate goal or purpose with the rest of international legal institutions, that is, the promotion of human security. A cursory overview of the foremost examples of *jus cogens* rules should suffice to confirm this statement: the prohibition of genocide, the prohibition of crimes against humanity, the prohibition of aggressive war, the prohibition of slavery, the prohibition of torture, and the promotion of the self-determination of peoples. All of them can be said to safeguard human security in the end.

The international public order represented by *jus cogens* requirements as secondary rules of change, therefore, is but another normative tool – alongside judicial settlement of disputes and international law enforcement of primary rules of behaviour – that the international legal system uses to ensure the fulfilment of its ultimate goal, the protection of human security. Thus, it seems appropriate to conclude this section paraphrasing Bernier's definition of public order as 'the collection of conditions – legislative, departmental, and judicial – which assure, by the normal and regular functioning of the [inter) national institutions, the state of affairs necessary to the life, the progress, and to the prosperity of the country [t he world] and of its inhabitant'.

VII. Concluding remarks

In this article we have set out on a journey to try and map the legal contours of *jus cogens* rules, so as to demystify them as a heavily used political tool and try to ascertain the true meaning of their *non plus ultra* message for states not to venture into forbidden normative waters.

Building on the theoretical scaffolding provided by rudimentary notions of legal theory, as applied to one of the foremost peremptory prohibitions in contemporary international law, the ban on genocide, we have concluded that *jus cogens* norms are legal rules that amount to prescriptions or regulations. Further, depending on their legal consequences, whether sanctions or nullity, we have found that *jus cogens* rules can be alternatively characterised as Hartian primary or secondary rules of international law.

As Hartian secondary rules of change for legal production, their main function is to work as a limit on the contractual freedom of states, much as *ordre public* standards operate in domestic contract law. It is in this sense that we have characterised *jus cogens* rules as a veritable limit of 'international public order' upon the free will of states – including that of the permanent members of the UN Security Council.[112]

Furthermore, building on the ideas of towering scholars of legal philosophy and international law, we have found that the point or purpose of international law is, at the very least, to preserve human life, and even further, to attain human flourishing and wellbeing (or prosperity in Bernier's formula). Hence, international law has been characterised here as a teleological system whose main purpose is to safeguard human security. States are the agents upon whom the responsibility to protect human security bears. As an anthropocentric

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[111] *Jurisdictional Immunities of the State (Germany v Italy)* (Dissenting Opinion of Judge Cançado Trindade) [2009) ICJ Rep 136 [124].

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Separate Opinion of Judge ad hoc Elihu Lauterpacht) [1993] ICJ Rep 440 [100].

doctrine, human security entails respect for the values/principles of human dignity and non-discrimination.

As an integral part of this teleological normative system, *jus cogens* rules of international public order share the same ultimate goal or purpose with the rest of international legal institutions, that is, the promotion of human security. Indeed, a cursory overview of the main examples of *jus cogens* rules suffices to confirm this statement: the prohibition of genocide, the prohibition of crimes against humanity, the prohibition of aggressive war, the prohibition of slavery, the prohibition of torture, and the promotion of the self-determination of peoples. All these *jus cogens* rules aim at safeguarding human security, and therefore, the values/principles of human dignity and non-discrimination.

In conclusion, the international public order constituted by *jus cogens* standards as secondary rules of change for legal production is but another normative tool – besides judicial settlement of disputes and international law enforcement of primary rules of behaviour – that the international legal system uses to ensure the fulfilment of its ultimate purpose, the protection of human security. Such is the creature that states may not disregard when navigating the vast and agitated waters of international law in the twenty-first century.

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