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POLITICAL CONSTRUCTIVISM AND REASONING ABOUT PEREMPTORY NORMS OF INTERNATIONAL LAW

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ABSTRACT

*All currently accepted peremptory norms of general international law represent principles that are of fundamental importance to the international community. Courts and tribunals often refer to an international legal norm's fundamental importance to the international community when identifying it as a norm that gives rise to peremptory legal consequences. This Article explores the potential of social contract theory and of political constructivism more generally as an approach to understanding what it means to say that a legal norm, particularly a human rights norm, is of fundamental importance to the international community. Taking John Rawls's *The Law of Peoples* as a starting point for this line of inquiry, the paper investigates whether social contract methods can shed light on those fundamental principles and policies that enjoy special protection through peremptory legal consequences in international law.*

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INTRODUCTION

“Peremptory norm” is a technical term in international law that describes a particular range of legal consequences associated with a small group of international legal norms. These consequences notably include non-derogability and particular consequences in the law of state responsibility. The term has, in less technical usage, become associated with those substantive rules and principles of international law that are of fundamental importance to the international community, since peremptory legal consequences are available in order potentially to safeguard those rules and principles that are fundamental because of their subject-matter. Peremptory norms—also referred to collectively as the *jus cogens*¹—impose negative obligations on states to refrain from certain forms of conduct. A breach of such an obligation gives rise to “peremptory” legal consequences. These peremptory legal consequences, among other things, deprive treaties and other transactions that derogate from one or more peremptory norm(s) of their legal validity and give rise to particular effects in the law of state responsibility, at least in the event of a serious breach, according to the conception of state responsibility put forward by the International Law Commission in its 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.² The doctrine of *jus cogens* has by now long been very widely accepted as a legal concept in international law.³ The precise range of its legal consequences however remains uncertain.⁴

1. This Article uses the terms “peremptory norms” and “*jus cogens*” more or less interchangeably, since this has become common usage in international law literature. Strictly speaking however the term “peremptory norm” refers to the particular range of legal consequences associated with this type of international legal norm, whereas the term “*jus cogens*” (or “the *jus cogens*”) more accurately refers to the body of peremptory international law that these norms collectively constitute.

2. See, e.g., *State Responsibility: Report for the International Law Commission on the Work of Its Fifty-Third Session (23 April–June and 2 July–August 2001): Chapter IV*, 2001 Y.B. Int’l Comm’n 20, 112–16, U.N. Doc. A/CN.4/SER.A/2001/Ass.1 (Part 2) [hereinafter *State Responsibility*] (referencing Articles 40 and 41).

3. See, e.g., *id.* at 112 (“The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.”).

4. See, e.g., Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!*, 6 CONN. J. INT’L L. 1 (1990); Dinah Shelton, *International Law and “Relative Normativity”*, in INTERNATIONAL LAW 150–51 (Malcolm D. Evans ed., 1st ed. 2003) (“The theory of *jus cogens* or peremptory norms posits that there are rules from which no derogation is permitted and which can be amended only by a new general norm of international law of the same value. . . . In national legal systems, it is a general principle of law that individual freedom of contract is limited by the general interest. Agreements that have an illegal objective are void and those against public policy will not be enforced. Private agreements, therefore, cannot derogate from public policy of the community. The international community remains divided over whether the same rules apply to the international legal system.”)

Peremptory norms are interesting, among other reasons, precisely because of their political and/or moral dimension.⁵ Accounting for this moral dimension in objective terms poses difficulties that raise tricky theoretical questions. Sir Robert Jennings's insight succinctly acknowledges the difficulty in making moral claims about the international community, recognizing that "[a]n international law which is indubitably European and Christian in its historical origins, has suddenly to cope with a community of States and peoples in which there is no longer a shared cultural tradition."⁶

This Article will argue that a contractarian approach may aid in the process of identifying⁷ which customary norms of international law protect

(footnotes omitted). Kelsen, writing in 1962, expressed doubt about the concept. See HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 483 (ROBERT W. TUCKER ed., 2d ed. 1966) ("Another question arising with respect to the material sphere of validity of treaties is whether by a treaty the application of norms of general international law can be excluded; or, as the question is usually formulated, whether a treaty at variance with norms of general international law is to be considered as valid. It is the question whether the norms of customary general international law have the character of *jus cogens* ('cogent law') or of *jus dispositivum* ('yielding law'). No clear answer to this question can be found in the traditional theory of international law. Some writers maintain that there exists complete, or almost complete, freedom of contract in this respect; others maintain that treaties which are at variance with universally recognized principles of international law are null and void. But they do not and cannot precisely designate the norms of general international law which have the character of *jus cogens*, that is to say, the application of which cannot be excluded by a treaty. It is probable that a treaty by which two or more states release one another from the obligations imposed upon them by the norm of general international law prohibiting occupation of parts of the open sea, would be declared null and void by an international tribunal competent to deal with this case. But it can hardly be denied that states may by a valid treaty renounce in their mutual relations the right of exercising protection over their own citizens, a right conferred upon them by general international law.") (footnote omitted).

5. All legal norms that are accepted as having peremptory legal consequences, including the prohibitions respectively of the use of force, of genocide, of war crimes, of torture, and of racial discrimination, as well as the right to popular self-determination, protect fundamental goals and interests of the international community.

6. Sir Robert Jennings, *Universal International Law in a Multicultural World*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 39, 40 (Maarten Bos & Ian Brownlie eds., 1987). See also *id.* at 44 ("Now, it is a fact of history that the fabric of modern international law was woven on the warp of a European tradition and nothing can alter that fact."); see generally *id.* at 40 ("It has to be able to comprehend not only different cultures and traditions, but also some that are even more ancient, and representative of larger populations than those that belong to the European tradition."); see generally *id.* at 44–45 ("Now it is also the case that the post-Second-World-War explosion of new nation-States which emerged from former colonial States, or at any rate from dependent States in one form or another, is in a significant sense a continuation and perhaps even a completion of that evolution of the nation-State world, which required and produced the original European international law. . . . The former colonial territories wanted to be as their masters had been. . . . Thus, it was, it is submitted, inescapable that the newly enlarged society of States should begin with the common stock of traditional international law, for historical and sociological reasons as well as reasons of legal principle.").

7. The Vienna Convention offers a widely endorsed procedure for the identification of peremptory norms. Vienna Convention on the Law of Treaties, Article 53, 1155 UNTS 331, 344 (May 23, 1969) [hereinafter VCLT]. The International Law Commission deemed it wisest not to specify

principles and policies that are of fundamental importance to the international community in the relevant sense, since it is customary norms with this quality that are widely associated with the body of peremptory international law. This approach is by no means offered as a full account of peremptory norms in international law, but rather in order to understand one particular aspect often associated with these norms.

After a brief doctrinal overview and an introduction to the central concepts in the debates surrounding peremptory norms in general international law, the paper will make the following claims: (1) Natural law theory is ill-suited to explain why the international legal system embraced peremptory norms. (2) Political constructivism in the tradition of John Rawls's presentation of social contract theory offers justificatory devices capable of supporting the fundamentality of those international legal norms that give rise to peremptory legal consequences. (3) Rawls's own formulation of the appropriate model of representation for international justice should be applied with caution, however, because Rawls may be asking different questions from the ones we are considering. A "cosmopolitan" initial choice situation may offer a more appropriate theoretical approach to understanding what we mean when we say that a legal norm protects a political or moral principle or policy that is fundamental to the international community.

One of the more sobering lessons of the twentieth and early twenty-first centuries is that value pluralism simply is a fact of life, *a fortiori* on a global scale. International political culture and the developments in international law since World War II have at times sought to portray humanity, as a community, unified in moral aims and equipped with a set of shared goals and projects. The question then becomes how to account for these supposedly universal concerns, bearing in mind that the "European" tradition in international law has been called into question by states that have emerged from the grip of former colonial masters.

Under certain conceptions of peremptory norms, such as that embodied in Article 53 VCLT, we look to states' acceptance and recognition of a legal norm's non-derogability as markers of whether the legal norm in

examples of peremptory norms, but rather to leave their identification to be worked out gradually. *See Reports of the Commission to the General Assembly*, 1966 Y.B. Int'l L. Comm'n 169, 249, U.N. Doc. A/CN.4/SER.A/1966/Add.1 ("The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.") (referencing the commentary on the Draft Articles in the Law of Treaties) [hereinafter *Reports of the Commission*].

question gives rise to peremptory legal consequences.⁸ In addition to state practice and *opinio juris* supporting a given norm's legal character, it must moreover support its peremptory character.⁹

The policy underlying a norm's peremptory character is often associated with the importance to the international community of the value(s) the legal norm seeks to safeguard. The practice of international courts and tribunals points to value considerations in association with the identification of peremptory norms. Consider merely two examples. The International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Anto Furundžija* noted, rhetorically, that it was states' "revulsion" against torture that had

led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination.¹⁰

The tribunal in an important passage further noted: "[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."¹¹ As a second example, the Inter-American Court of Human Rights in its *Juridical Condition and Rights of the Undocumented Migrants*

8. VCLT, Article 53, *supra* note 7 ("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 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.").

9. That means primarily its non-derogability and its immunity from change, save through a subsequent norm equal status. These are the characteristics of peremptory norms that are codified in Article 53 VCLT. *See, e.g.*, *Buell v. Mitchell*, 274 F.3d 337, 373 (6th Cir. 2001), for an application of this two-step reasoning:

There is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons. Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as *jus cogens*, or a norm from which no derogation is permitted. Therefore, we cannot conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of *jus cogens*.

Id.

10. *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/I-T, Judgment, ¶ 147 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

11. *Id.* ¶ 153.

advisory opinion noted: “this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”¹²

But can we ever reach agreement on the essentials of the political morality of the international legal system, should this indeed be a necessary step in identifying peremptory norms? There is strong empirical evidence to the contrary, and we may even question to what extent a *normative* international community exists.¹³ To provide an account of a legal norm’s fundamental importance to the community of states, we will consider a model of representation that situates parties equally and fairly in the Rawlsian sense¹⁴ and that arbitrates between competing conceptions about which rules and principles are fundamental in the relevant sense. The outcomes of such a model can be deemed universally acceptable to the extent they are adopted from an impartial point of view. By extending modern social contract theory to the global level we can eventually arrive at a political conception of the meaning of a principle’s or policy’s fundamental character that fits our considered judgments about the values, if any, that international law embodies today. Our task is to provide a theoretical, yet plausible, approach to the supposedly fundamental importance to the international community of states of norms with peremptory legal consequences, in a world of competing value preferences. The discussion will presuppose familiarity with some of the concepts in the work of John Rawls and, in particular, *The Law of Peoples* since this will serve as the main starting point for the discussion. Also, the discussion of the fundamental importance of principles and rules

12. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 1983).

13. See, e.g., David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85 (2004) (writing in the context of crimes against humanity, the prohibition of which is widely considered peremptory under international law). Luban notes that

only political communities can promulgate laws, and humanity does not form a political community. There is no world government (a good thing, too), nor do relationships exist among humanity as a whole that qualify it as a single people. Human groups are diverse, and diversity as such yields no basis for political community.

Id. at 126. Despite Luban’s assertions, there are developments that are driving the diverse peoples of the worlds into closer political association, certainly to a greater extent than has been the case in previous history. Also, the suggestion that diversity forms no basis for political community is misleading. Certainly it is not true that political community is not possible in the face of diversity, for many domestic societies, especially the United States, are highly diverse. The empirical evidence indicates that homogeneity is not a necessary condition for political community.

14. See JOHN RAWLS, *THE LAW OF PEOPLES* 32 (1999) [hereinafter RAWLS, PEOPLES].

associated with peremptory legal consequences is deliberately more abstract than the treatment this question tends to receive in much of the existing literature. However, some of the questions that peremptory norms raise call precisely for abstract theoretical discussion.

The so-called “content” of the body of peremptory international law—that is, the catalogue of customary norms that are identified as having peremptory character—raises probing questions, such as whether these legal norms are peremptory in part *because* of their fundamental importance to the international community. If we assume this to be the position, then the international legal order embodies specific substantive goals. We might, for instance, claim that the aim of international law lies in the promotion of peaceful relations and of human rights, though we have to advance independent arguments to support this suggestion. Further questions with respect to legal consequences arise where a government offends a peremptory norm that protects fundamental human rights—take for instance the stark example of the prohibition against genocide¹⁵—on its own territory and in its purely *domestic* affairs.¹⁶

I. SOME REMARKS ON THE NATURE OF PEREMPTORY NORMS

A. Character and Legal Consequences of Peremptory Norms

Norms belonging to the *jus cogens* are rules of customary international law¹⁷ that give rise to a particular range of legal consequences.¹⁸ Their peremptory character deprives inconsistent transactions between states of legal validity, and, in the case of the use of force, usually deprives unilateral state action of legality. “Peremptory” describes not the nature of a legal norm or its source of legal validity, but rather the particular legal consequences it gives rise to.

15. See *Armed Activities on the Territory of the Congo (New Application: 2002)* (Dem. Rep. Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, 2006 I.C.J. 6, 30–31 (Feb. 3); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo. (Serb. and Mont.))*, Judgment, 2007 I.C.J. 7 (Feb. 3).

16. The facts surrounding the breach of a peremptory norm may also bring into operation international criminal law.

17. RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 reporter’s note 6: “[The concept of *jus cogens*] is now widely accepted, however, as a principle of customary law (albeit of higher status).” On the Restatement’s position on the content of this sub-set, see also RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702(n) (1987). See generally *State Responsibility supra* note 2, at 85.

18. Article 53 VCLT equates a norm’s non-derogability with its peremptory character for the purposes of that instrument. VCLT, Article 53, *supra* note 7.

Peremptory norms are usually conceived of as constituting part of the body of customary law applying to all states commonly referred to as “general international law.”¹⁹ Indeed, it would seem that only if a norm is of general application to all states can it be of sufficient weight to become accepted as a peremptory norm of international law. Kolb, in his treatment of the *jus cogens*, suggests that peremptory norms are not necessarily part of general international law, but rather that peremptory norms can likewise exist at the regional level.²⁰ However, the majority view is that peremptory norms are part of general international law. Custom, on the contrary, is not always general. States can on some views resist the binding force of customary rules of international law by persistently objecting during a customary rule’s period of formation.²¹ Also, international law probably acknowledges the possibility of *regional*²² and even of *local*²³ customary law, the latter perhaps even between as few as two states.²⁴

What follows is not an exhaustive exegesis of *jus cogens* in legal and academic opinion. The discussion’s aim is to discern some of the criteria for an international legal norm’s peremptory character. The discussion will also consider the relationship between a legal norm’s fundamental importance to the community of states and its peremptory character.²⁵ This

19. Weil is critical of the use of this term. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 436–37 (1983).

20. ROBERT KOLB, *THEORIE DU IUS COGENS INTERNATIONAL: ESSAI DE RELECTURE DU CONCEPT* 139, 177, 189 (2001).

21. According to the persistent objector doctrine, a state that through its practice consistently objects to an emerging rule of customary international law during that rule’s period of formation will not be considered bound by that rule. For an articulation of the persistent objector doctrine by the ICJ, see *Fisheries (U.K. v. Nor.)*, Judgment, 1951 I.C.J. 116, 131. See also *Asylum (Colom. v. Peru)*, Judgment, 1950 I.C.J. 266, 277–78 (Nov. 20). Some scholars are skeptical about the persistent objector doctrine. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538–42 (1993).

22. See *Asylum*, 1950 I.C.J. at 276–77 (for suggestion to the effect that regional custom is in principle possible).

23. See *Right of Passage over Indian Territory (Port. v. India)*, Judgment, 1960 I.C.J. 6 (Apr. 12).

24. *Id.* at 39 (“It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two.”).

25. See ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 106 (2006) (“[It] is broadly accepted that *jus cogens* reflecting community values should bind all States without exception notwithstanding their possible dissent.”). See also *id.* at 108–09 (“Traditional sources of international law such as treaty and custom are generally regarded as the product of the consent of States. This could work against the conclusion that those sources give rise to peremptory norms. The conceptual difficulty thus arising is how consensual sources can give rise to norms that apply to States despite their consent and are concerned with the *a priori* hierarchy of norms which can operate despite and above the will of States expressed in traditional sources of law. These concerns could entail a logical necessity to consider that peremptory norms are not subsumable under traditional sources but can only be based on a specific source of international law which covers only those norms which the international community considers so fundamental that it endows them with the superior

is an important aspect. The International Law Commission in 1966 for instance noted that “[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.”²⁶

The development of peremptory norms took its most concrete shape with the codification of this concept in the 1969 Vienna Convention of the Law of Treaties (“VCLT”). Yet it is the International Law Commission’s preparatory work that is perhaps of equal interest for tracing the development of this legal concept. The International Law Commission, in its 1966 commentary to the Draft Articles on the Law of Treaties, noted with respect to Article 50 of the Draft Articles, which would become Article 53 VCLT:

The view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain. . . . [I]f some Governments in their comments have expressed doubts as to the advisability of this article . . . [.] only one questioned the existence of rules of *jus cogens* in the international law of to-day.²⁷

Norms of *jus cogens* are widely regarded as giving rise to obligations *erga omnes*,²⁸ that is, obligations owed not bilaterally to one or more particular state or states, but to the community of states as a whole. However, the International Court of Justice (“ICJ”) in *Armed Activities (New Application: 2002)* deemed this *erga omnes* character alone insufficient to confer jurisdiction on the Court to hear cases arising out of the breach of a *jus cogens* norm.²⁹ The Court’s jurisdiction remains firmly consensual.

peremptory status. . . . Therefore, it may be suggested that *jus cogens* is based on an autonomous body of superior rules, independent of any source of international law. This suggestion is intended not to provoke a discussion on the relationship between natural and positive law, but to emphasize the special character of peremptory norms. Also, the affirmation that peremptory norms can be created through the autonomous source does not necessarily operate to the exclusion of the relevance of other sources in the same process. It is only meant to address the question of possible lack of relevance of the traditional sources of law in giving rise to peremptory norms, and suggest the viable alternatives of comprehending the international public order in the context of the process of international law-making.”)

26. *Reports of the Commission, supra* note 7, at 248.

27. *Id.* at 247.

28. While the notions of peremptory norms and obligations *erga omnes* are related, there is still some disagreement about the nature of the relationship.

29. *Armed Activities on the Territory of the Congo (New Application: 2002)*, 2006 I.C.J. at 52 (“Finally, the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in

The widely accepted catalogue of peremptory norms notably includes customary rules of international law that protect against grave human rights abuses. Indeed, the concept of norms giving rise to peremptory legal consequences emerged parallel to the development of customary international human rights law and international criminal law. The catalogue of peremptory norms has obvious moral overtones.³⁰

Orakhelashvili underlines the formal and substantive dimensions of peremptory norms:

The identification of the peremptory character of a norm requires a multi-level analysis: the categorical argument focuses on the basic nature of peremptory norms, on factors that make a norm peremptory; the normative argument examines whether a norm categorically qualifying as part of *jus cogens* is so recognized under international law. . . .

. . . .

. . . There is strong doctrinal support for the idea that *jus cogens* has its roots in the natural law doctrine of classical international law, or embodies natural law propositions applicable to all legal systems.³¹

Not all scholars would go this far, yet the idea that a legal norm's fundamental importance to the international community is associated with its peremptory character is likewise reflected in many judicial dicta on peremptory norms in international courts and tribunals.³² In the thicket of

itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.”). In the context of state immunity in claims alleging the breach of one or more peremptory norm(s) it will be interesting to follow the developments in Jurisdictional Immunities of the State (Germany v. Italy), currently before the International Court of Justice.

30. See ORAKHELASHVILI, *supra* note 25, at 48–49 (“Although the starting-point distinction can be made between the mere concept of morality and peremptory norms mentioned in Article 53 of the Vienna Convention as legal norms, the crucial question is the relevance of the morality factor in conferring the peremptory character to legal norms. . . . Morality can arguably itself explain a norm’s peremptory character.”) (footnote omitted).

31. *Id.* at 36 (footnote omitted). The author further notes:

The concept of *jus cogens* requires re-examination of the positivist approach, and this is likewise affirmed by those who oppose the concept of international public order. Verdross observed that the existence of *jus cogens* was not doubted before the positivist doctrinal takeover. Arguably, “the conception of *jus cogens* will remain incomplete as long as it is not based on philosophy of values like natural law” as *jus cogens* grew out of the naturalist school. Alternatively, *jus cogens* is not natural law but the expression of common legal order within the community of nations reflecting their historically created common conviction.

Id. at 37–38 (footnotes omitted) (quoting Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT’L L. 33, 51–54 (1995)).

32. See *above* discussions of ICTY and Inter-American Court dicta.

disagreement about the nature of peremptory legal consequences in international law, there is at least agreement on the proposition that all international legal norms accepted as giving rise to such consequences enjoy a significant moral *imprimatur*. Furthermore, some courts and scholars suggest that it is at least in part *because* of these moral credentials that a norm gives rise to peremptory legal consequences. This idea of fundamental importance is habitually invoked in the human rights context, notably in contemporary debates surrounding the question whether the customary norm imposing a legal obligation on governments to refrain from acts of torture gives rise to peremptory legal consequences.³³ The normative argument underpinning substantive human rights norms' peremptory character lies at the crossroads between legal doctrine and political philosophy, and raises theoretical questions:

Rather close to natural law is the notion of *jus cogens*, compelling law. *Jus cogens* is a norm thought to be so fundamental that it invalidates rules consented to by states in treaties or custom. Needless to say, the very possibility of such a fundamental law is hotly controverted by positivists who rely exclusively on state consent for the making of international law. *Jus cogens* postulates an international public order potent enough to invalidate some norms that particular states might otherwise establish for themselves.³⁴

It may however be misleading to cast the debate over peremptory norms as one that opposes natural law theorists and legal positivists. In the end, we can explain the range of peremptory legal consequences satisfactorily without appealing to broader theories about the nature of law. The interesting theoretical questions that do however arise in this context are why the international legal system embraced the concept of peremptory norms in the first place and why it did so around the time following World War II, and moreover why these particular legal consequences almost invariably attach to customary norms of international law that are fundamental in some sense because they safeguard basic human rights or international peace and security. Peremptory legal consequences originally only extended to treaties. A treaty that conflicts with a peremptory norm is

33. See, e.g., *Al-Adsani v. United Kingdom*, 32 Eur.Ct. H.R. 11 (2002) (discussing the crystallization of this norm).

34. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 53 (1988).

void *ab initio* as a matter of international law.³⁵ This legal consequence is codified in Article 53 VCLT³⁶ and, according to the International Law Commission's preparatory work, entails an obligation for treaty-parties of non-compliance with the offending provision(s) of the relevant treaty.³⁷ The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force) likewise codifies peremptory norms by incorporating, verbatim, Article 53 VCLT.³⁸ The relatively large number of parties to the 1969 VCLT (111 parties³⁹) provides some evidence of endorsement by states⁴⁰ of the concept of *jus cogens*, and perhaps also for the formal mode of identification that Article 53 spells out.⁴¹ However the VCLT remains a treaty and cannot bind non-parties. Moreover, the VCLT only governs the law of treaties, and it would be a mistake in any event to read Articles 53 and 64 as exhaustive statements on peremptory norms and their legal consequences in international law.

35. Article 53 of the VCLT textually requires invalidation of the offending treaty in its entirety, if it offends a peremptory norm at the moment it is concluded, and this approach is supported by the official commentary. *See Reports to the Commission, supra* note 7, at 248. However, as the commentary to the ILC's Articles on Responsibility of States for Internationally Wrongful Acts indicates:

The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

State Responsibility, supra note 2, at 85 (footnote omitted). There appears to be ambiguity on this point; however it also does not seem to be of significant practical import.

36. VCLT, Article 53, *supra* note 7.

37. *Law of Treaties, Fourth report by Sir Gerald Fitzmaurice, Special Rapporteur*, 1959 Y.B. Int'l Comm'n 37, 46, U.N. Doc. A/CN.4/SER.A/1959.ADD.1, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, VOLUME II 37, 46 (1959).

38. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Article 53 (1986, not yet in force), Doc.A/CONF.129/15.

39. *See* Law of Treaties (Nov. 9, 2011), http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSOnline&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en (listing the membership to the VCLT as of Nov. 9, 2011).

40. With the notable exception of the objections by France to the codification of the *jus cogens* concept at the 1969 Vienna Treaty Conference, and its vote against the Convention text. *See generally* Olivier Deleau, *Les positions françaises à la conférence de Vienne sur le droit des traités [France's Positions at the Vienna Treaty Conference]*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7, 14–17 (1969).

41. VCLT, Article 64, *supra* note 7, at 347 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

The *jus cogens* as a body of peremptory international law is sometimes associated with the idea of “*ordre public*,” which, while originally a term of art, can be translated as “public order” or “public policy.” In international law, “[p]ublic order is meant as a restriction upon acts which are thought to be harmful to the community.”⁴² In domestic legal systems, the term describes the body of law that parties cannot contract out of by private agreement because of the public interest.

Peremptory legal consequences extend beyond treaties because they extend to all other transactions, such as the formation of custom, and to unilateral action, such as the use of force or certain human rights violations: “various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.”⁴³ Moreover, a state’s serious breach of a peremptory norm of general international law gives rise to an obligations on the part of other states not to recognize as lawful a situation created by a serious breach of a peremptory norm, nor to offer aid or assistance in maintaining that situation, as well as a collective obligation to bring the situation to a lawful end. This is the position in Article 41 of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts.⁴⁴

In the 2006 *Armed Activities* judgment the ICJ for the first time openly espoused the concept of *jus cogens* and acknowledged the prohibition of genocide as a particular peremptory norm (thereby lending substance to the concept).⁴⁵ Thus *Armed Activities* in a sense did for peremptory norms what the *Barcelona Traction* judgment did for obligations *erga omnes* in international law.⁴⁶ Moreover, the Court confirmed the prohibition of genocide in international law as a peremptory norm in 2007 in *Application*

42. ORAKHELASHVILI, *supra* note 25, at 46 (footnote omitted).

43. *State Responsibility*, *supra* note 2, at 85.

44. The Articles are generally viewed as an authoritative statement on the law of state responsibility.

45. *Armed Activities on the Territory of the Congo (New Application: 2002)*, 2006 I.C.J. at 32.

46. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) (New Application: 1962, Second Phase)*, Judgment, 1970 I.C.J. 3, 32 (Feb. 5). However, the introduction of the term obligations *erga omnes* in this 1970 judgment generated confusion, not least because the VCLT had in 1969 codified the notion of peremptory norms. The Court was probably reluctant to use the term “peremptory norms,” because it did not wish to create an embarrassment for states opposed to the notion.

of the Convention on the Prevention and Punishment of the Crime of Genocide:⁴⁷

The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).⁴⁸

These are the ICJ's most straightforward acknowledgments of the concept of peremptory norms in international law.

Earlier ICJ references to peremptory norms had been tentative. The ICJ's judgment in *Military and Paramilitary Activities* in 1986 was the time the Court explicitly considered the concept of peremptory norms.⁴⁹ The Court cited the International Law Commission's commentary to Article 50 of the Draft Articles on the Law of Treaties of 1966 and the memorial on the merits and the counter-memorial on the question of jurisdiction and admissibility of Nicaragua and of the United States, respectively, to the effect that the prohibition of the use of force in international law possibly had peremptory character.⁵⁰ The Court previously showed unwillingness to address any questions with respect to the *jus cogens* in the 1969 *North Sea Continental Shelf* cases, although it did mention the concept by name.⁵¹

The VCLT mode of identification, which grounds a legal norm's peremptory character in states' acceptance and recognition of its non-derogability, textually requires unanimity among states, that is, the legal norm in question must be "accepted and recognized by the international

47. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. at 111.

48. *Id.* at 61.

49. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment on the Merits, 1986 I.C.J. 14, 100 (June 27) ("A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.'").

50. The Court did not however take a definite position on the question whether the prohibition of the use of force qualified as a peremptory norm.

51. *North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.)*, Judgment, 1967 I.C.J. 3, 42 (Feb. 20).

community of States as a whole⁵² as one from which no derogation is permitted. However, one view suggests that strict unanimity is not required, since otherwise all states would effectively wield an unfair veto power.⁵³ This view, however, on the other hand gives rise to the concern that a majority of states could potentially impose a catalogue of peremptory norms on an objecting minority of states.

A doctrinally less rigorous albeit widely used mode of identifying international legal norms with peremptory consequences traces a norm's peremptory status to state acceptance and recognition but also looks to the pronouncements of international and possibly national judicial organs as a subsidiary means for the identification of these norms. In practice, this mode of identification seems to allow judicial bodies, in practice notably the ICJ, to play a role in the development of an international legal norm's peremptory character.⁵⁴ This mode of identification places a premium on decisions of courts and tribunals and seems closer to the realities surrounding the identification of peremptory norms in practice. However, this approach to the identification of peremptory norms does not square with the fact that under Article 38 of its Statute, that the ICJ has no institutional mandate to create new rules of law, but rather is limited to deciding cases in accordance with existing rules of international law.⁵⁵ Moreover under the approach adopted in Article 38(1)(d) of its Statute, judicial decisions and writings of the most highly qualified publicists can serve merely as a "subsidiary means for the determination of rules of law."⁵⁶ Thus, judicial pronouncements and scholarly writings do play a role, albeit a limited and merely material one, in the identification of peremptory norms within the Article 38 regime. *A fortiori*, the decisions of regional human rights courts (such as the Inter-American Court of Human

52. VCLT, Article 53.

53. See *State Responsibility, Report of the International Law Commission on the Work of its Twenty-Eighth Session*, 1976 Y.B. Int'l L. Comm'n 69, 119, A/CN.4/SER.A./1976/Add.1(Part 1) (discussing the effective veto in its commentary to the subsequently removed Draft Article 19 on "[i]nternational crimes and delicts" of the Draft articles on State responsibility, and noting that the same reasoning applies to the text of Article 53 VCLT).

54. The *Armed Activities* case is the only ICJ decision which explicitly identifies one particular international legal norm, the prohibition of genocide, as a peremptory norm. *Armed Activities on the Territory of the Congo (New Application: 2002)*, 2006 I.C.J. at 32. The suggestion in *Military and Paramilitary Activities in and against Nicaragua* that the prohibition of the use of force was peremptory was far more tentative. *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. at 97.

55. Under Article 38(1) of the ICJ Statute the Court's "function is to decide in accordance with international law such disputes as are submitted to it." Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993.

56. *Id.* (referring to Article 38(1)(d) of the ICJ statute).

Rights or the European Court of Human Rights), and even more so of domestic courts, only play a limited role in the development of peremptory norms, and must therefore be relied on with caution.

Post-War international political culture initially opened a hopeful chapter in international legal developments, which notably saw the birth and growth of the United Nations system. International law today is experiencing a degree of tension between the institutional mandates of certain international organizations and traditional incidents of sovereignty. If we follow the VCLT Article 53 procedure for identifying international legal norms that give rise to peremptory legal consequences we want to be satisfied that the procedure gives *prima facie* weight to each state's posture towards the status of the legal norm in question. The United Nations General Assembly may be the likeliest deliberative body in which states could express their positions. However, this is only one avenue for ascertaining states' postures, and, in any event, General Assembly resolutions by themselves enjoy no legally binding force, although they might reflect *opinio juris*.

B. Human Rights Norms and Peremptory Character

The peremptory norms “clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”⁵⁷ Beyond this narrow class, however, the body of peremptory international law lacks precision. The Inter-American Court of Human Rights for instance has suggested that the principle of equality before the law has peremptory character,⁵⁸ and the Inter-American Commission on Human Rights has maintained that there exists under international law a peremptory human rights principle that prohibits the execution of minors.⁵⁹ Moreover, there have been suggestions that there exists under customary international law a principle prohibiting gender discrimination that meets the conditions in order to be peremptory in its legal consequences.⁶⁰

57. *State Responsibility*, *supra* note 2, at 85.

58. *See* Juridical Condition and Rights of the Undocumented Migrants, *supra* note 12.

59. Michael Domingues/United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc.1, rev. 1 (2002).

60. *See* Guglielmo Verdirame, *Testing the Effectiveness of International Norms: The Provision of Humanitarian Assistance by the UN and Sexual Apartheid in Afghanistan*, 23 HUM. RTS. Q. 733, 762, 765 (2001).

How are human rights principles related to the body of peremptory international law? Schachter has suggested that all international human rights norms should have peremptory legal consequences, but the point remains controversial.⁶¹ It seems, as the concept developed over the twentieth century, that an international legal norm's fundamental importance to the international community *might* support the conclusion that it is peremptory. It is likely that only legal norms that are fundamental in this sense would ever become accepted and recognized by the community of states as being non-derogable. There may or may not be conceptual kinship between political or moral fundamentality and legal non-derogability, but there is a close association between these features in the way peremptory norms developed in practice. Given developments in this area of international law to date, it is indeed difficult to imagine anything other than a politically or morally fundamental legal norm becoming accepted as one that gives rise to peremptory legal consequences.⁶² Recall, for example, the ICTY's dictum in *Prosecutor v. Furundžija* noted above.⁶³ Even if there is no sufficient or even necessary connection in international law between peremptoriness and human rights considerations, dicta such as this and the abovementioned catalogue of widely accepted peremptory norms show that there is at least a close association in legal practice between peremptory norms and human rights.

61. See, e.g., OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 342 (1991) (discussing the possibility of human rights as *jus cogens*). See also ORAKHELASHVILI, *supra* note 25, at 55–56 (“[T]he doctrinal treatment of the subject reveals the need to have independent criteria for identifying peremptory human rights, especially in terms of the doctrinal debate as to whether all human rights are peremptory or only some of them possess such status. . . . There is a doctrinal view that peremptory norms cover all human rights . . .”).

62. *Quaere*, for instance, whether environmental norms could realistically become peremptory norms; certainly they could be of fundamental interest to the international community, yet we would not characterize environmental norms as human rights norms. See ORAKHELASHVILI, *supra* note 25, at 65 (discussing the current lack of peremptory character of any international environmental norms, including the principle of harm prevention). The responsiveness of peremptory norms to the moral imperatives of the moment can also cut the other way:

There is nothing in [the] effects of *jus cogens* to require for their viability the existence of some centralized government or authority that would be authorized to create and administer international law. If, on the other hand, the accepted structure of international law means the paramount validity of certain principles and institutions in the scope and shape in which they exist at the certain fixed period of time or stage of development, it is beyond doubt that most if not all legal institutions are subject to change and modification in terms of what the prevailing community needs may require. Consequently, certain principles that were at some stage considered as fundamental to the character of international law need not be so considered forever.

Id. at 79.

63. *Furundžija*, Case No. IT-95-17/I-T ¶ 153.

C. *The Reception of Peremptory Norms in the Federal Courts*

The Federal Courts have repeatedly discussed the concept of peremptory norms, notably in the context of Alien Tort Claims Act litigation. Two of the most widely-cited cases containing dicta on the nature of peremptory norms are *Siderman de Blake v. Republic of Argentina*⁶⁴ and *Committee of U.S. Citizens Living in Nicaragua v. Reagan* (“*CUSCLIN*”).⁶⁵ The Ninth Circuit in *Siderman de Blake* noted:

Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. . . . Indeed, the supremacy of *jus cogens* extends over all rules of international law.⁶⁶

The Ninth Circuit’s bold dictum suggests that a legal norm’s fundamentality and universality are necessarily part of its peremptory legal character. Further, the dictum suggests that this peremptory character is independent of a state’s consent or non-consent. If peremptory norms did indeed dispense with the requirement of consent to such an extent,⁶⁷ we would have to reappraise the consensual nature of international law.⁶⁸ However, the Ninth Circuit in *Siderman de Blake* may well have gone too far in its assessment of the nature of peremptory norms.

The D.C. Circuit in *CUSCLIN*⁶⁹ likewise made relatively bold suggestions when discussing peremptory legal consequences associated with, and states’ obligations arising under, peremptory norms of general international law. According to the D.C. Circuit, peremptory norms

may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court

64. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992).

65. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).

66. *Siderman de Blake*, 965 F.2d at 715–16.

67. At the least peremptory international law would restrict states’ freedom to derogate from these peremptory norms in their various transactions.

68. This issue raises many questions about sovereignty that we cannot even attempt to answer here; suffice it to highlight that we will likely be driven to espouse a more nuanced understanding of sovereignty in light of peremptory norms’ compelling legal consequences under international law.

69. *Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d 929.

under international law. Such a conclusion was indeed implicit in the landmark decision in *Filartiga v. Pena-Irala* [sic].⁷⁰

The Court also noted that if “Congress and the President violate a peremptory norm (or *jus cogens*), the domestic legal consequences are unclear. We need not resolve this uncertainty.”⁷¹

The Court in *Siderman de Blake* regards norms with peremptory legal consequences as normatively superior to other international legal rules.⁷² It is in the sense that peremptory norms rule out the possibility of any conflicting norm possessing legal validity that they are “superior” rules of law. However the range of peremptory legal consequences remains uncertain, according to the D.C. Circuit in *CUSCLIN*,⁷³ although the Court does not rule out the possibility that peremptory norms may have certain domestic effects.

D. The Compellingness of the Principles and Policies Protected by Peremptory Norms

Ascertaining which international legal norms are fundamental—assuming that this is a relevant question to ask in this context—raises questions of objectivity. Kadelbach, for instance, includes peremptory norms in the category of fundamental norms in international law. Fundamental norms are distinct by virtue of their legal consequences.⁷⁴ He notes that the criteria for identifying peremptory norms remain somewhat unclear, but that fundamental norms in international law are identified inductively “by referring to concrete, intuitively convincing candidate rules of primary law.”⁷⁵ Such an approach, while appealing, still leaves open exactly on what basis states and courts identify those intuitively convincing primary norms. Like all rules of customary international law, those particular rules that give rise to peremptory legal consequences are

70. *Id.* at 941. Notably, *Filartiga* does not mention “peremptory norms” or “*jus cogens*.” See generally *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d. Cir. 1980).

71. *Id.* at 935.

72. *Siderman de Blake*, 965 F.2d at 715–16.

73. *Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d at 935–36.

74. Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules—The Identification of Fundamental Norms*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER* 40 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006). See also STEFAN KADELBACH, *ZWINGENDES VÖLKERRECHT [COMPELLING INTERNATIONAL LAW]* 133 (1992).

75. Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules—The Identification of Fundamental Norms*, *supra* note 74, at 28, 40.

not enacted in any meaningful way. Their peremptory nature arises gradually over time through the practice and legal attitudes of states.⁷⁶

II. ORIGINAL CONCEPTIONS OF PEREMPTORY NORMS: NATURAL LAW ARGUMENTS

Conceptions of international law that drew on natural right and justice slowly yielded to the broadly positivist conception, still dominant in many ways, that regards the social facts of state behavior as the norm-creating source of international legal obligation.⁷⁷ Verdross, an early champion of the notion of the *jus cogens*,⁷⁸ saw a system of international law as a practical necessity and as a creation of practical moral reasoning, writing in 1937 that “every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.”⁷⁹ He notes the role of an ethical minimum presupposed by processes of international legal norm-creation.⁸⁰ He notes that the law of treaties presupposes principles that are themselves not formulated by the positive international law, and that among these was “the principle that every treaty presupposes free consent on a lawful object, and therefore may never contain provisions contrary to good morals.”⁸¹

76. Probably only fundamental legal norms can be considered non-derogable in the relevant sense. To forgo some difficulties associated with the identification of fundamental norms, the 1998 Rome Statute of the International Criminal Court, for example, codifies some of those fundamental norms for the purposes of individual criminal responsibility under that Court’s jurisdiction. Within the Court’s jurisdiction are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90. The Statute contains lengthy provisions on the elements of the first three of these crimes in Articles 6, 7 and 8. *Id.* art. 6, art. 7, art. 8.

77. See, e.g., JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 12–13 (1954) (“The positivist preoccupation with treaties and other evidence of State practice, and the Vattelian preoccupation with each State’s fundamental rights, both pointed to the consent of States as the source of international legal obligations.”).

78. See Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937).

79. *Id.* at 572. See further works by the same author: Alfred von Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 55, 58 (1966); Alfred von Verdross, *Les principes généraux du droit dans la jurisprudence internationale* [*General Principles of Law in International Jurisprudence*], 62 RECUEIL DES COURS, VOLUME 52 204 (1935).

80. Verdross, *supra* note 78, at 574.

81. Alfred von Verdross, *Les principes généraux du droit dans la jurisprudence internationale* [*General Principles of Law in International Jurisprudence*], *supra* note 79, at 204 (“le principe que chaque convention suppose un consentement libre sur un objet licite, et ne peut donc jamais avoir un contenu contraire aux bonnes mœurs.”). See further Hersch Lauterpacht, *Règles générales du droit de*

The concept of peremptory norms gradually saw increased acceptance by states. Moreover, peremptory norms and international criminal law developed in parallel. The war crimes tribunals following World War II set an important precedent for the development of international criminal law.⁸² The best explanation for the progressive development of peremptory norms as a legal concept of international law and the concept's close association with human rights norms is at least in part historical.⁸³ The idea of a non-derogable body of rules and principles is, however, older. Emer de Vattel, who stands at the transition from classical tradition⁸⁴ in international law to a more secular understanding of international law, defended the notion of a "compelling" body of law from which states enjoyed no freedom to depart in their transactions.⁸⁵

Vattel's approach echoes Article 53 VCLT in that provision's emphasis on the feature non-derogability as equal to a norm's peremptory character. However, Articles 53 and 64 VCLT describe the possibility of a changing "content" of the *jus cogens* that is simply a function of state acceptance and recognition. By specifying a procedure for the identification and modification of peremptory norms based on state acceptance and recognition, the VCLT envisions peremptory norms as a concept with an evolving "content," which changes as a function of developments in international legal practice. It does not associate peremptory norms with a fixed set of natural law propositions.

For much of the history of political thought through the Middle Ages, for instance, the prevailing view was that if the sovereignty of the ruler was limited, it was limited by virtue of the natural law: "The Medieval notion of Sovereignty, it is true, always differed in principle from that exalted notion which prevailed in after times. For one thing, there was unanimous agreement that the Sovereign Power, though raised above all Positive, is limited by Natural Law."⁸⁶

la paix [General Rules of the Law of Peace], 62 RECUEIL DES COURS, VOLUME 62 100, 306–08 (1937).

82. *See In re Göring and Others*, 13 I.L.R. 203 (Int'l Mil. Trib. 1946).

83. The same may be said of the development of individual criminal responsibility under international law.

84. *See* Stephen C. Neff, *A Short History of International Law*, in INTERNATIONAL LAW 31, 39 (Malcolm D. Evans ed., 1st. ed. 2003). The classical tradition includes writers active roughly between 1615 and 1800, and notably includes such scholars as Grotius, Wolff and Pufendorf. *See also* V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 25–29 (1997).

85. EMER DE VATTEL, DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS [THE LAW OF NATIONS, OR PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS], Préliminaires § 9 (James B. Scott ed., 1916).

86. OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 93 (FREDERIC WILLIAM

Theorists of international law have at times celebrated the *jus cogens* as a vindication, or at least a re-emergence, of natural law argument in international law, especially in response to nineteenth-century positivism and twentieth-century militarism. Despite the school's ancient roots, however, "[n]atural law is one of the many parts of international law that has never received the systematic study that it merits."⁸⁷ There are however critical voices. David Luban, for instance, notes with respect to the notion of "laws of mankind," a notion that overlaps and at times is indistinguishable in substance from human-rights-protecting customary norms with peremptory legal consequences, that it may well stem from "an embarrassed reluctance by twentieth-century jurists to invoke natural law, or to invoke more old-fashioned phrases like 'laws of God' or even the Enlightenment's favorite 'laws of reason.'"⁸⁸

According to the early conceptions of the *jus cogens* in the tradition of Verdross peremptory norms in international law can be accounted for fully only once we invoke natural law premises. No doubt the overwhelming moral significance of those legal norms that have become accepted and

MAITLAND, trans. 1958). See also THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT C. 350–C.1450 454–55 (J.H. Burns ed., 1988) ("That these jurists should have accepted such a normative structure was only to be expected: it was, after all, a basic presupposition of the juristic tradition and of medieval thought about law and society with, as we shall see, the possible and notorious exception of the views of Marsilius of Padua. Thus in all juristic works divine law, natural law, and the *ius gentium* provided necessary criteria according to which human positive law could be judged."). See also Thomas Baldwin, *The Territorial State*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 207, 210–11 (Hyman Gross & Ross Harrison eds., 1992) ("It is often said that this conception [of sovereignty] is characteristic of post-medieval Europe, of the decline of the Holy Roman Empire and the rejection of the juridical claims of the Papacy; and that the Peace of Westphalia of 1648, which brought and end to the Thirty Years War, is held to be especially significant in this respect. . . . On further inspection, however, the situation appears more complex. The basic idea that politico-legal authority is territorial is at least medieval. . . . Another respect in which the familiar appeal to the Peace of Westphalia needs to be qualified arises from an implication to which it gives rise, namely that the conception of the state to be found in the classic texts of early modern political theory should be of an intrinsically territorial entity. The trouble in this case arises from the fact that if one turns to the classic texts, one finds little, if any, reference to the territorial nature of the state.").

87. See Neff, *supra* note 84, at 34.

88. See Luban, *supra* note 13, at 125. The author further notes:

Offenses against important community norms are domestic crimes tried by the state, the domestic community. In the same way, offenses against "the laws of humanity" are international crimes and as such, they must be tried by the international community. . . .

. . . .

. . . The phrase "laws of humanity". . . comes from the most important precursors to the Nuremberg Charter's terminology—the so-called "Martens Clause" in the Preambles to the 1899 and 1907 Hague Conventions. The phrase was used as well in a 1919 report to the Versailles Treaty drafters proposing to try the Turkish perpetrators of the Armenian genocide for "offenses against the laws of humanity". . . .

Id. at 124–25. Some of these criticisms can also be leveled against the use of the term international "public order."

recognized as giving rise to peremptory legal consequences raises the question whether a political or moral criterion is inherent in the concept of *jus cogens*. The prevailing view today is that it is not. But if it is, international law today would be “moralized” and not a set of value-neutral rules governing states’ co-existence. It would embody substantive political and/or moral pursuits.

In order to retain its legitimacy, the international legal order must, one might argue along the above lines, afford a privileged status to politically and/or morally significant legal norms by attaching special legal consequences to them, in order to afford heightened protection to the ends and values they incorporate. For instance, these legal consequences could include precisely the invalidity of transactions that conflict with a peremptory norm and particular effects in the law of state responsibility in the event of a serious breach of one or more such norms.

By no means can we here do justice to the rich and varied tradition of natural law thinking in international law. This Article introduces these arguments at this juncture because natural law is sometimes associated with *jus cogens* without much argument or justification.⁸⁹ However, there is nothing mysterious about peremptory legal consequences in international law in the way that certain appeals to natural law arguments might suggest. Rather, natural law thinking primarily provides a way of approaching the question why international law embraced the notion of peremptory legal consequences in the second half of the twentieth century.

III. APPROACHING THE FUNDAMENTALITY OF THE PRINCIPLES PROTECTED BY PEREMPTORY NORMS THROUGH SOCIAL CONTRACT THEORY

We will now consider one approach to the claim that an international legal norm represents a principle that is fundamental to the international community, where conflicting values are a fact of political life.

Liberalism, a term with a variety of meanings, must, if anything, make the claim that coercive legal rules should be acceptable to those on whom they are imposed. At the global level, the legal compellingness of rules of international law stems from states’ commitment to legal ordering, rather than from centralized processes of rule-making that are institutionally authoritative. The meaning of liberalism’s demand gains force against the background of value-pluralism among states and societies. In *The Law of*

89. See, e.g., South West Africa (Second Phase) (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6 (July 18); *id.* at 250 (Tanaka, J., dissenting).

Peoples, Rawls writes with respect to principles of international justice: “A (reasonable) Law of Peoples must be acceptable to reasonable peoples who are thus diverse; and it must be fair between them and effective in shaping the larger schemes of their cooperation. This fact of reasonable pluralism limits what is practically possible here and now. . . .”⁹⁰

The social contract enjoys distinguished lineage not only in the domestic but also in the international realm, partially owing to the Kantian project in *Perpetual Peace*.⁹¹ Analytically, the application of the social contract method does not differ in its respective domestic and global applications. In application the difference turns largely on the choice of participants⁹² and on the principles that these participants deliberate and articulate in the initial choice situation. These participants may be social (peoples) or individual (persons). Ultimately we must set up an initial choice situation⁹³ with a choice of participants that reflects the best

90. RAWLS, PEOPLES, *supra* note 14, at 11–12. The law of peoples must not be confused with the Roman law notion of *jus gentium*. Beitz underscores the distinction between the law of peoples and *jus gentium* traditionally understood. See Charles R. Beitz, *Rawls’s Law of Peoples*, 110 ETHICS 669, 676 (2000) (“The Law of Peoples is therefore not to be confused with the *jus gentium*: it is not a body of principles universally accepted by states, nor is it intended necessarily to constitute a reasonable basis for the cooperation (or for that matter the peaceful coexistence) of all existing states.”).

91. Immanuel Kant, *Zum ewigen Frieden: Ein philosophischer Entwurf [Towards Perpetual Peace]*, in IMMANUEL KANT, IMMANUEL KANTS WERKE VI, SCHRIFTEN VON 1790–1796 [WORKS OF IMMANUEL KANT VI, WRITINGS FROM 1790–1796] 470 (A. BUCHENAU, E. CASSIRER, B. KELLERMANN eds., 1973). On Kant’s contribution to international social contract theory, see David Boucher, *Uniting What Right Permits with What Interest Prescribes: Rawls’s Law of Peoples in Context*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 19, 28 (Rex Martin & David A. Reidy eds., 2006) (“It is the very emphasis upon conscience in the state of nature (including the international ‘state of nature’) by natural law and law of nations theorists that convinced Kant that unless such informality of conscience was replaced by the formality of international contracts and agreements to establish a peaceful federation with explicitly agreed rules, then nations in their relations with each other would continue acting according to their own interpretation of international right, and exercise their so-called right to war.”). The turmoil of the twentieth century should not, Rawls believes, undermine our hope that Kant’s vision of a peaceful international federation can realistically be achieved. See RAWLS, PEOPLES, *supra* note 14, at 21 (“The fact of the Holocaust and our now knowing that human society admits of this demonic possibility, however, should not affect our hopes as expressed by the idea of a realistic utopia and Kant’s *foedus pacificum*.”).

92. See, e.g., RAWLS, PEOPLES, *supra* note 14, at 32–33 (“Though they do know that reasonably favorable conditions obtain that make constitutional democracy possible—since they know they represent liberal societies—they do not know the extent of their natural resources, or the level of their economic development, or other such information. As members of societies well-ordered by liberal conceptions of justice, we conjecture that these features model what we would accept as fair—you and I, here and now—in specifying the basic terms of cooperation among peoples who, as liberal peoples, see themselves as free and equal. This makes the use of the original position at the second level a model of representation in exactly the same way as it is at the first.”). Beitz, however, points out a central distinguishing feature. See Beitz, *supra* note 90, at 675 (“In the domestic case, the object is to choose principles of justice for institutions that will include and apply to everyone. In the international case, by contrast, the object is not precisely to choose principles for international institutions.”).

93. The idea of an initial choice situation describes a philosophical device that models

interpretation of the “history and usages of international law and practice.”⁹⁴ The procedure involves constructing a hypothetical bargaining position that models basic convictions about the kind of circumstances in which it would be fair for basic political principles of justice to be adopted. These convictions most likely include the equal position of the parties, a requirement of unanimity, and the shielding of a certain amount of knowledge of a party’s position in the world.

The contractarian method, which itself falls within the broader philosophical field of political constructivism, may be particularly useful as an approach to understanding the fundamentality to the international community of those international legal norms associated with peremptory legal consequences in international law. As indicated above, Courts and tribunals have when discussing and identifying peremptory norms repeatedly stressed the association of peremptory legal consequences with legal norms that are of fundamental importance to the international community. The contractarian approach offers a way of thinking about and scrutinizing the idea of a norm’s being fundamental to the international community in this relevant respect. It does so for the purposes of identifying and justifying which principles are of fundamental importance. Legal norms that are fundamental in this sense typically would govern the most basic aspects of the relationship between states in the international community, as well as between states and peoples and states and individuals.

Of course, we could see in those rules accepted as part of the *jus cogens* in international law (prohibitions of genocide, war crimes, torture, crimes against humanity, etc.) a comprehensive conception of the good that reflects Western biases or traditions. The contractarian task, however, is to see whether we can do more than this, that is, whether the principles of political morality underlying the accepted catalogue of peremptory norms represent principles of international justice which all states or peoples can reasonably accept.⁹⁵

deliberating participants in conditions that reflect conditions of impartiality. In this situation, participants typically formulate and agree upon political principles of justice.

94. See RAWLS, PEOPLES, *supra* note 14, at 41.

95. On this point, see also Rawls’s notion of “stability for the right reasons.” *Id.* at 45 (“Stability for the right reasons describes a situation in which, over the course of time, citizens acquire a sense of justice that inclines them not only to accept but to act upon the principles of justice.”). Rawls’s law of peoples makes no demands of distributive justice among peoples. While this will not be a central theme of the present Article and will receive mention only in passing, certain authors have picked up on this dimension of Rawls’s work. See, e.g., Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. PUB. AFF. 195 (1994).

A. *The Rawlsian International Project*

Rawls in *The Law of Peoples* adapts the original position, the initial choice situation underlying his broader theoretical framework, to the “law of nations.”⁹⁶ The substance of his “eight principles” of right and justice in international conduct,⁹⁷ which peoples’ representatives deliberate and articulate in this “second,” i.e. global, original position,⁹⁸ to some extent overlap in substance with accepted preemptory norms. The second original position is an initial choice situation in most relevant respects analogous to that which Rawls offers in *A Theory of Justice*: “the original position at the second level [is] a model of representation in exactly the same way it is at the first.”⁹⁹

In Rawls’s account of the contractarian hypothetical, the thought experiment operates to develop his law of peoples “within political liberalism,” as an “extension of a liberal conception of justice for a domestic regime to a Society of Peoples,”¹⁰⁰ that is, to the realms of international law and relations. The initial choice situation yields principles of political morality that arbitrate neutrally between competing conceptions of the good. These principles are acceptable to liberal and to “decent” peoples.¹⁰¹ This law of peoples is reasonable in the sense that

96. The term “law of nations” is hardly in use today, and Rawls’s use of the term is misleading since he does not discuss rules of law but principles of political justice. Previously there was an overlap between that term and “international law.” Henry Wheaton’s 1836 work bore the title *Elements of International Law*. Neff, *supra* note 84, at 43. Théophile Funck-Brentano and Albert Sorel’s *Précis du droit des gens* appeared in 1877. *Id.* at 43–44. In 1894, however, Henry Bonfils published his *Manuel de droit international public*. *Id.*

97. See RAWLS, PEOPLES, *supra* note 14, at 37. The eight principles are:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.

Id. (footnote omitted).

98. The “first” original position is domestic and sees parties choosing principles of justice for a domestic society. *Id.* at 30.

99. *Id.* at 33.

100. *Id.* at 9.

101. *Id.* at 63.

peoples that affirm it respect the principle of reciprocity. Peoples that are not “well-ordered,” that is those that do not satisfy the criteria to be liberal or decent people, are, however, not allowed to the bargaining table.¹⁰² Rawls defines regimes that refuse to comply with a reasonable law of peoples as outlaw states.¹⁰³ Indeed, in Rawls’s account liberal and decent peoples owe no duty of toleration to outlaw states. According to Rawls, “liberal and decent peoples have the right, under the Law of Peoples, not to tolerate outlaw states.”¹⁰⁴ It is, of course, a well-rehearsed criticism of Rawls that liberal (and also decent) peoples are the rule-setters, and that they moreover enforce these rules against societies that refuse to accept them.

The effect of the law of peoples is to limit the sovereign autonomy that states have historically enjoyed. Reasonable peoples, he believes, would agree to such limitations. Thus, in *The Law of Peoples*, Rawls recognizes that international law has become stricter in the post-World War II age, and that an extension of political liberalism to the international realm invites us to adopt a sterner posture towards the scope of sovereign power.¹⁰⁵ According to Rawls, “[t]he powers of sovereignty also grant a state a certain autonomy . . . in dealing with its own people. From [Rawls’s] perspective this autonomy is wrong.”¹⁰⁶ A liberal law of peoples under Rawls’s account “will restrict a state’s internal sovereignty or (political) autonomy, its alleged right to do as it wills with people within

102. Rawls introduces a typology of peoples:

I propose considering five types of domestic societies. The first is *reasonable liberal peoples*; the second, *decent peoples* . . . The basic structure of one kind of decent people has what I call a “decent consultation hierarchy,” and these peoples I call “decent hierarchical peoples.” Other possible kinds of decent peoples I do not try to describe, but simply leave in reserve, allowing that there may be other decent peoples whose basic structure does not fit my description of a consultation hierarchy, but who are worthy of membership in a Society of Peoples. (Liberal peoples and decent peoples I refer to together as “well-ordered peoples.”) There are, third, *outlaw states* and, fourth, *societies burdened by unfavorable conditions*. Finally, fifth, we have societies that are *benevolent absolutisms*: they honor human rights; but, because their members are denied a meaningful role in making political decisions, they are not well-ordered.

RAWLS, PEOPLES, *supra* note 14, at 4 (footnote omitted). The ideal conception of the law of peoples only extends to well-ordered peoples, that is, to liberal and decent peoples, and only these peoples are allowed to bargain in the second original position. Nonideal theory is the portion of the law of peoples that specifies how well-ordered peoples are to behave towards outlaw states or towards burdened societies. *Id.* at 90.

103. *Id.* at 5.

104. *Id.* at 81. He adds that “[t]his refusal to tolerate those states is a consequence of liberalism and decency.” *Id.*

105. *Id.* at 25–27.

106. RAWLS, PEOPLES, *supra* note 14, at 25–26.

its own borders.”¹⁰⁷ Peremptory legal consequences in international law likewise delineate the range of lawfully available incidents of sovereignty. Human rights norms in general but especially those with peremptory character restrict the manners in which it is legally permissible for a government and its officials to treat its population with impunity. The restrictions that human rights place on sovereignty under international law are central in Rawls’s account:

Since World War II international law has become stricter. It tends to limit a state’s right to wage war to instances of self-defense (also in the interests of collective security), and it also tends to restrict a state’s right to internal sovereignty. The role of human rights connects most obviously with the latter change as part of the effort to provide a suitable definition of, and limits on, a government’s internal sovereignty.¹⁰⁸

Rawls provides a list of eight principles of international conduct, “familiar and traditional principles of justice among free and democratic peoples.”¹⁰⁹ *The Law of Peoples* is an extension of political liberalism to the relations of peoples or states also in a wider sense, that is, as an effort to justify a set of principles governing international conduct that both “liberal” and “decent” peoples alike can reasonably accept.¹¹⁰ Decent peoples, Rawls believes, would accept the second original position as fair, and would agree on the same principles in the second original position as liberal peoples would.¹¹¹ According to Rawls “decent” peoples have this important characteristic:

Liberal peoples cannot say that decent peoples deny human rights, since . . . such peoples recognize and protect these rights; nor can

107. *Id.* at 26.

108. *Id.* at 27. Human rights play a key normative role in Rawls’s liberal law of peoples in that they “restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.” *Id.* at 79. Similarly peremptory norms limit states’ sovereign powers under international law to derogate from legal norms accepted as peremptory, a power they would otherwise hold with respect to other legal norms. *See id.* at 79 (discussing the role of human rights as affecting state autonomy). Rawls admits that not only liberal but also decent peoples and *benevolent absolutisms* possess the right to self-defense: “any society that is nonaggressive and that honors human rights has the right of self-defense. Its level of spiritual life and culture may not be high in our eyes, but it always has the right to defend itself against invasion of its territory.” *Id.* at 92.

109. RAWLS, PEOPLES, *supra* note 14, at 37 n.42 (citing J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF PEACE (6th ed. 1963) and TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1983)). He mentions in a footnote that Brierly and Nardin offer similar lists.

110. *See id.* at 62–70.

111. *Id.* at 68–70.

liberal peoples say that decent peoples deny their members the right to be consulted or a substantial political role in making decisions, since the basic structure of these societies will be seen to include a *decent consultation hierarchy* or its equivalent.¹¹²

Thus decent peoples, while *hierarchical* and not liberal, still largely offer their citizenry human rights protections. They moreover have no aggressive aims vis-à-vis other peoples. They are, in Rawls's terms, *bona fide* members of the Society of Peoples.¹¹³ Extending the law of peoples in a way so that decent peoples can reasonably accept it leads to a more inclusive model of international relations that, to an extent, defers to the reality that various forms of government exist. Rawls writes of the extension of the law of peoples to decent societies, a move that is still within what Rawls calls "ideal theory": "[t]he second step of ideal theory is more difficult: it challenges us to specify a second kind of society—a decent, though not liberal society—to be recognized as a *bona fide* member of a politically reasonable Society of Peoples and in this sense 'tolerated.'"¹¹⁴ Rawls again underlines decent peoples' rights-honoring characteristics: "one condition of a decent hierarchical society is that its legal system and social order do not violate human rights."¹¹⁵ Another important condition is that decent peoples, as opposed to what Rawls calls "benevolent absolutisms" (which also honor human rights), have in place what he labels a "decent consultation hierarchy."¹¹⁶ It is Rawls's contention that liberal and decent peoples would agree on some interpretation of the eight principles, which would include limitations upon their sovereign autonomy grounded in human rights concerns: "parties representing decent hierarchical societies adopt the same Law of Peoples that the parties representing liberal societies adopt."¹¹⁷ One of Rawls's premises is the "fact of liberal democratic peace," that is, the idea that well-ordered peoples, both liberal and decent, in principle do not initiate war against other well-ordered peoples.¹¹⁸

112. *Id.* at 61. Rawls spells out the criteria of decency in a people. *See also id.* at 64–67.

113. *Id.* at 61, 63.

114. *Id.* at 63.

115. RAWLS, PEOPLES, *supra* note 14, at 75.

116. *Id.* at 4.

117. *Id.* at 64.

118. *Id.* at 51–54. *See also id.* at 90–91 ("Well-ordered peoples, both liberal and decent, do not initiate war against one another; they go to war only when they sincerely and reasonably believe that their safety and security are seriously endangered by the expansionist policies of outlaw states."). This claim relies on empirical research about the war-proneness of democratic states towards one another (however, democratic states do use military force against non-democratic states). *But see* Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983).

Granted the plausibility of the Rawlsian endeavor, it seems possible for us to draw on this liberal, political—as opposed to comprehensively moral—and ultimately constructivist conception of fundamental principles of the international community to understand and justify the notion that certain legal norms embody principles that are fundamental to the international community. The legal norms that are fundamental in the relevant sense would, under the present conception, be precisely those that parties agree to under conditions of fairness and impartiality in a constructed initial choice situation that models precisely these circumstances. The principles they would articulate in this situation would likely to a large extent overlap with those fundamental principles protected by customary rules of international law that have come to be accepted as giving rise to preemptory legal consequences.

This initial choice situation pays deference to what may justly be called a global political culture that is grounded in the statist reality of international law and politics. It does so by representing these circumstances in the choice of peoples¹¹⁹ as deliberating parties, and in the principles of which they deliberate the interpretation, that is, those stemming from the history and usages of international law and practice. Rawls draws on the history and usages of international law and practice as a stockpile of principles and ideas from which to start the process of adjustment that leads to eventual reflective equilibrium and articulation of the eight principles.¹²⁰ In order to arrive at reflective equilibrium we adjust a principle so as to agree with our considered moral intuitions, and revisit

119. Rawls uses the term “a people” as a term of art. This will be explained further below.

120. RAWLS, PEOPLES, *supra* note 14, at 41–41:

Thus, in the argument in the original position at the second level I consider the merits of only the eight principles of the Law of Peoples These familiar and largely traditional principles I take from the history and usages of international law and practice. The parties are not given a menu of alternative principles and ideals from which to select, as they are in *Political Liberalism*, or in *A Theory of Justice*. Rather, the representatives of well-ordered peoples simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives. These principles must, of course, satisfy the criterion of reciprocity, since this criterion holds at both levels—both between citizens as citizens and peoples as peoples

. . . .

. . . [T]he eight principles are open to different interpretations. It is these *interpretations*, of which there are many, that are to be debated in the second-level original position.

Id. Compare the availability of a “menu” in the domestic original position and the original position as a “selection device.” See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 83 (ERIN KELLY ed., 2001). See generally JOHN RAWLS, POLITICAL LIBERALISM (1993). See also Beitz, *supra* note 90, at 675 (discussing choosing principles of justice).

our intuition where it seems aberrant from the principle.¹²¹ We adjust the conditions of the initial choice situation until we agree, in wide and general reflective equilibrium, how to situate the participants in the bargaining situation.¹²²

The position in the law of peoples is *realistic* (but not to be confused with Rawls's presentation of the law of peoples as a "realistic utopia"¹²³) to the extent that it is modeled to apply to an international "basic structure" that most certainly would contain national borders and political associations. The existence of borders is desirable in certain ways:

[I]t is surely . . . a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. . . .

. . . .

. . . [This] argues for preserving significant room for the idea of a people's self-determination and for some kind of loose or confederative form of a Society of Peoples.¹²⁴

On one view the policies that peremptory legal consequences in international law seek to protect have historical and cultural roots that mirror the European tradition. Jennings, for instance, saw these traditions mirrored in much of the entire corpus of international law.¹²⁵ The political constructivist conception of international justice in the Rawlsian tradition requires reflection on the history and usages of international law and practice as we find it. Yet this initial stockpile of principles stemming from history and usage in international law sits within a European heritage that long controlled the development of international law.¹²⁶ That much seems clear as a historical fact. However, this circumstance is not objectionable in itself, and does not provide a knock-out argument against Rawls's method, so long as we agree on a modeling of the initial choice situation that yields an articulation of the law of peoples that all peoples' representatives can endorse from within their respective traditions.

121. See JOHN RAWLS, A THEORY OF JUSTICE 18–19 (rev. ed. 1999).

122. *Id.*

123. See RAWLS, PEOPLES, *supra* note 14, at 6 ("The idea of this society is realistically utopian in that it depicts an achievable social world that combines political right and justice for all liberal and decent peoples in a Society of Peoples.").

124. *Id.* at 61. See generally Leif Wenar, *Why Rawls is Not a Cosmopolitan Egalitarian*, in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA 95, 102–04 (Rex Martin and David A. Reidy eds., 2006).

125. See generally Jennings, *supra* note 6.

126. *Id.*

Rawls is also careful to set up the second original position so as to represent peoples and not states.¹²⁷ In Rawls's view, peoples conceive themselves as free and equal and possess the moral character¹²⁸ necessary to permit participation through their representatives in the second original position, and to choose principles that are reasonable rather than merely rational. States, says Rawls, are rationally motivated but do not act reasonably.¹²⁹ Peoples—a normative concept in Rawls's account—also “lack traditional sovereignty” in the sense that international law has conceived of sovereignty “for the three centuries after the Thirty Years' War (1618–1648).”¹³⁰ All the while, Rawls uses the term “a people” as a term of art,¹³¹ that is, as a normative idea rather than as a physical description.

The second original position mirrors the first in its fair and equal situation of representatives: “[b]oth the parties as representatives and the peoples they represent are situated symmetrically and therefore fairly.”¹³² The choice of peoples as the relevant moral unit leads to a form of *liberal statism*.¹³³ There are conceptual arguments that justify this connection. According to Wenar:

A global original position will select principles for institutions of the global basic structure. Since these global institutions will be coercive, they will also have to meet the fundamental standard of legitimacy. . . . [T]he global public political culture is primarily *international*, not interpersonal. The ideas that regulate the institutions of global society are concerned primarily with the nature of nations and their proper relations—not with the nature of persons and their proper relations. . . . It is peoples, not individuals, that

127. RAWLS, PEOPLES, *supra* note 14, at 17. See also Beitz, *supra* note 90, at 679 (“The idea of a people is part of an ideal conception of the social world and not simply a redescription of a familiar phenomenon. . . . States qua states are concerned with the advancement of their rational interests, whereas peoples have a moral nature that limits the pursuit of these interests. For peoples, as for moral persons, the reasonable constrains the rational. Peoples, therefore, also differ from states in not claiming the traditional powers of sovereignty.”).

128. RAWLS, PEOPLES, *supra* note 14, at 27–30, 33.

129. *Id.*

130. *Id.* at 25.

131. Alyssa Bernstein, *Kant, Rawls and Cosmopolitanism: Toward Perpetual Peace and the Law of Peoples*, 17 JAHRBUCH FÜR RECHT UND ETHIK [ANNUAL REVIEW OF LAW AND ETHICS] 3, 42–43 (2009).

132. RAWLS, PEOPLES, *supra* note 14, at 32.

133. However this term is slightly misleading because Rawls specifically does *not* represent the political scientist's conception of a state in the initial choice situation.

international political institutions regard as free and equal, and this is why Rawls makes peoples the subject of his global political theory.¹³⁴

There is something to be said for the articulation of a model of representation that pays deference to the history and continued reality of international law and relations. Going beyond Rawls's use of "a people" as a normative term of art, the notion of a *people* as a unit with legal identity today occupies a place in international law, specifically since peoples are the direct beneficiaries of the legal right to self-determination. This right has "become one of the most potent political slogans of our time,"¹³⁵ though not without generating political and academic controversy.¹³⁶ Notable among judicial pronouncements upon the status of self-determination in international law is the ICJ's *East Timor*¹³⁷ judgment, as well as the Court's advisory opinions in *South West Africa*,¹³⁸ *Western Sahara*¹³⁹ and *Construction of a Wall in the Occupied Palestinian Territory*.¹⁴⁰ The notion of a *people* as a morally relevant social unit

134. Wenar, *supra* note 124, at 102–03.

135. Michla Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal*, 19 ISR. L. REV. 310, 310 (1984).

136. *Id.* ("It is perhaps not surprising that discussions of self-determination in the media and the UN have been characterized by confusion, misunderstandings and oversimplification. But woolly thinking on the subject is also common in academic circles, where one might expect more rigorous analysis to prevail. At root, the misunderstandings derive from a common basic premise: that to invoke the right of self-determination is to give the solution to a problem. This premise, however, is fallacious.") (footnote omitted).

137. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, 102 (June 30) ("In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . it is one of the essential principles of contemporary international law.")

138. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 30–31 (June 21).

139. *Western Sahara*, Advisory Opinion, 1974 I.C.J. 12, 31–32 (Oct. 16) ("The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV). In this resolution the General Assembly proclaims 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.' . . . The above provisions [of the Declaration], in particular paragraph 2, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.")

140. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 184 (July 9) ("That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."). *See also id.* at 197 ("The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory Consequently,

arguably also played a controlling role in the twentieth-century decolonization efforts.¹⁴¹

Political constructivism provides a method by which we can account for the suggestion that certain legal norms protect fundamental principles of the international community. International law embraced the concept and operation of peremptory legal consequences in order to offer possible means for the special legal protection of these fundamental principles. There is thus a relationship between the policy of legally safeguarding fundamental international principles and a basic charter of such principles. However, we must be able to say with confidence which principles are of fundamental importance to the international community. Social contract theory and political constructivism more generally offer a starting point for reasoning in this direction.

B. Some Shortcomings in Rawls's Law of Peoples as an Approach

Human rights play a fundamental role in Rawls's law of peoples and, ultimately, in his interpretation of the development of international law. Certain commentators have raised the question whether Rawls's modeling of the second original position may, while fitting the assumptions about international society that focus on social collectivities as basic building blocks, rely on a unit of deliberation that overlooks the primacy of the individual.¹⁴² The increasing relevance of the individual in international

Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.”).

141. See especially Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/L.323) (Dec. 14, 1960). See also Claudia Saladin, *Self-Determination, Minority Rights, and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic*, Note, 13 MICH. J. INT'L L. 172, 179–80 (1991–1992) (“Self-determination and minority rights became prominent in international relations in the aftermath of World War I. President Wilson believed that the concepts of self-determination and democracy were intimately related. He considered external freedom from alien sovereignty meaningless without a continuing process of self-government internally. Conversely, if a regime were democratic, then external self-determination became peripheral. To Wilson’s mind the minority regime became necessary only in the absence of true self-government. As he conceived it, the principle of self-determination had the protection of minorities as a corollary. He originally proposed that an article on minorities be inserted in the League of Nations Covenant but, instead, minority rights were dealt with in territorial treaties guaranteed by the League.”) (footnotes omitted).

142. See Beitz, *supra* note 90, at 681. The author further notes:

Even if we agree about the state’s significance as a mechanism for the efficient management of resources over time and the resulting need to elicit peoples’ willing support, it does not follow that domestic societies have an ethical status separate from that of their members taken severally. All that follows is that domestic societies, or at least societies of a certain limited scale and internal composition, are advantageous constituent elements of global society. . . . It

law is reflected in human rights concerns that take shape in the various multilateral human rights instruments. Something may be amiss in a law of peoples in which the basic participants with primary relevance in the initial choice situation are social constructs with a corporate identity.¹⁴³ Although peoples guarantee human rights domestically (by stipulation), the result is a law of peoples in which a human rights principle is presupposed, so that it is not necessary, strictly speaking, to formulate such a principle as part of the law of peoples itself. Rawls himself says that the principle of the law of peoples that “peoples ought to honor human rights” is superfluous, because all subjects of the law of peoples do so as a condition of being a participant in the law of peoples.¹⁴⁴ The law of peoples, in ideal theory at least, becomes a body of principles governing the interaction of rights-protecting collectivities, rather than a set of principles in which a human rights principle is free-standing. That is not to say that individuals are not of moral concern. Indeed, moral concern for the individual domestically provides a people with its entitlement to the rights of members of the Society of Peoples. Thus ultimately Rawls’s law of peoples is based on respect for the individual.¹⁴⁵ Human rights, as understood in the law of peoples, are particularly urgent rights. Among other things they “restrict the justifying reasons for war and its conduct

is a commonplace that the size of the circle of affinity is historically variable and that, under favorable institutional and cultural circumstances, the range of sympathetic concern can extend well beyond those with whom people share any particular ascriptive characteristics . . . But if motivational capacities are variable and subject to change with the development of institutions and cultures, then it gets things backward to assume any particular limitations on these capacities in the structure of a political theory. This is what occurs, perhaps nonobviously, when the primacy of peoples is built into the original position. Alternatively, a theory could treat motivational constraints as variables to which a theory should be sensitive in its application to the nonideal world. But on that approach, the rationale for beginning with peoples would disappear.

Id. at 683 (internal citations omitted). See also Allen Buchanan, *Rawls’s Law of Peoples: Rules for a Vanished Westphalian World*, 110 ETHICS 697, 698 (2000) (“To say that the parties represent peoples is, in effect, to ensure that the fundamental principles of international law that will be chosen reflect the interest of those who support the dominant or official conception of the good or of justice in the society, and this may mean that the interests of dissident individuals or minorities are utterly disregarded.”).

143. See Boucher, *supra* note 91, at 25 (“For Pufendorf, Wolff and Vattel states are corporate moral persons with rights and duties different from those of individual persons. They are the creation of the individuals who comprise them, and states exercise on their behalf the duties that those individuals have to humankind as a whole. For Vattel the state is a deliberative agent having ‘an understanding and a will peculiar to itself’. For Rawls it is peoples, acting through their representatives, who have this moral capacity.”) (footnotes omitted).

144. RAWLS, PEOPLES, *supra* note 14, at 37.

145. See Bernstein, *supra* note 131, at 16.

and specify limits to a regime's internal autonomy."¹⁴⁶ Moreover, the force of human rights as political/moral rights binds outlaw states as well, since when they violate human rights they expose themselves to condemnation and intervention.¹⁴⁷ Thus peoples are methodologically primary, but not morally primary. All that granted, there may yet be something to be said for a law of peoples in which individuals are also methodologically primary.

There is a further issue raised by Rawls's method. In the deliberative stage of the second original position, peoples' representatives do not pursue the articulation of principles from a full menu of available options from which they are free to choose some and reject others.¹⁴⁸ Their deliberation, which merely involves deciding upon an interpretation of principles that are given to them, is intimately tied to the "history and usages of international law and practice,"¹⁴⁹ and peoples' representatives only deliberate the interpretation of these eight given principles. Peoples' options are far more limited than are those of their equivalents at the domestic level, and Rawls gives peoples no latitude fully to recast the basic principles of international law even should they so agree.

Again, as Rawls conceives of his "eight principles" of the law of peoples, they partially overlap with preemptory norms. However, these principles may reflect the inequality of power relations that are possibly part of the international law tradition—after all these biases may well be embedded in this initial stockpile of principles of which peoples' representatives merely deliberate the interpretation.

The second original position represents peoples; thus, for purposes of developing the law of peoples Rawls methodologically subordinates, in a certain sense, individual natural persons. However, individuals are not thereby subordinated morally, because the modeling assumes that liberal peoples and decent peoples offer sufficient human rights guarantees domestically. Therefore, the law of peoples can properly be described as *liberal*. Of course, setting up a device of representation that models peoples as the basic unit is a function of the questions Rawls is asking, namely: (1) How are we to arrive at principles of justice appropriate to govern the relations between well-ordered peoples? (2) How are we to secure peace and respect for human rights? (3) When is intervention on humanitarian grounds justified? In Rawls's "non-ideal" theory, a further

146. *Id.* at 37.

147. *Id.* at 33.

148. RAWLS, PEOPLES, *supra* note 14, at 41.

149. *Id.*

question arises: how are we to articulate principles of international justice to govern the relationship of well-ordered peoples towards non-well-ordered peoples? For an international legal order that is increasingly cognizant of individuals as relevant subjects, it may be necessary to nuance Rawls's questions to reflect the less state-centric realities of international law.

International human rights instruments—especially regional human rights treaties and courts, notably the European Convention on Human Rights¹⁵⁰ (“ECHR”) and the European Court of Human Rights (“ECtHR”)—create more subject-inclusive regimes in international law, in which individuals in certain circumstances have the legal capacity to qualify as right-holders. In the case of the ECHR, individuals also enjoy standing to bring cases to the ECtHR, thus granting them powers to enforce their claims.¹⁵¹

Although the outcome may be the same (since, again, liberal and decent peoples guarantee human rights domestically) there is something more immediate in an original position that takes individuals as the basic unit of representation. Perhaps it would even better reflect the aspirational state of development in international human rights law today. Moreover, the policies underlying norms with peremptory character, all foster basic forms of human well-being. Again, peremptory legal consequences typically attach to basic human rights norms and norms protecting international peace and security.

Perhaps the essential question, and one open to endless interpretation, is what this international “basic structure” looks like.¹⁵² A century ago we could have answered this question with great confidence: states and their legal relations constituted the international basic structure. Perhaps the state of limbo we find ourselves in concerning the basic structure of international law today may make Rawls's position appear comparatively conservative in its method.¹⁵³ His is a more traditional starting position,

150. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

151. In the case of most other human rights instruments, including the International Covenant on Civil and Political Rights, individuals do not have legal capacity to initiate proceedings against states directly or to bring claims in international courts. The Universal Declaration of Human Rights of 1948, moreover, is not a legally binding instrument. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/777 (Dec. 10, 1948).

152. Rawls discusses the idea of the international basic structure. See RAWLS, PEOPLES, *supra* note 14, at 61–62.

153. However recall that Rawls makes a deliberate choice to represent peoples rather than states, precisely because of peoples' moral characteristics.

but one from which he takes us to where we would like to end up as far as human rights are concerned.

The bottom line for the purposes of shedding light on the fundamentality of certain principles to the international community is that an initial choice situation that is not realistic enough to fit the basic tenets of the international legal and political order may also turn out unsatisfactory as means for understanding the fundamentality of principles underlying those legal norms typically associated with peremptory legal consequences. After all, too great a focus on the role of the individual in international relations may simply take insufficient account of the primordial role of the state in the progressive development of international legal rules and principles.¹⁵⁴

On the other hand, in a world in which J.S. Mill's "common sympathies,"¹⁵⁵ one of the criteria on which Rawls bases the moral characteristics of peoples as opposed to states, are perhaps slowly being eroded,¹⁵⁶ we might question the meaningfulness of peoples as the basic

154. See, e.g., Philip Pettit, *Rawls's Peoples*, in *RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA* 38, 38 (Rex Martin & David A. Reidy eds., 2006).

155. See *RAWLS, PEOPLES*, *supra* note 14, at 23–24 ("Liberal peoples have three basic features: a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by what Mill called "common sympathies"; and finally, a moral nature."). See *id.* at 24 ("As for a liberal people being united by common sympathies and a desire to be under the same democratic government, if those sympathies were entirely dependent upon a common language, history, and political culture, with a shared historical consciousness, this feature would rarely, if ever, be fully satisfied. Historical conquests and immigration have caused the intermingling of groups with different cultures and historical memories who now reside within the territory of most contemporary democratic governments. Notwithstanding, the Law of Peoples starts with the need for common sympathies, no matter what their source may be."). If Rawls is ready to concede the "weakness" of this criterion and the uncertainty of its source, why is he not willing to doubt the criterion itself? It is not clear why common sympathies should be presumed to be a binding force, the strength of which is liable to erosion.

156. See, e.g., Beitz, *supra* note 90, at 680. Increasing social mobility and the associated movement of persons through immigration and emigration may undermine the plausibility of a people's "moral" character, indeed weakens the idea of a people itself, even as a term of art. See also Pomerance, *supra* note 135, at 311–12 ("First and foremost, there is need to define the bearer of the right. Who is the 'self' to whom self-determination attaches? Is it Biafra or Nigeria? Northern Ireland, Ireland or the United Kingdom together with Northern Ireland? The present population of Taiwan (consisting mainly of Nationalist Chinese), the indigenous islanders, or Communist China? Gibraltar or Spain? The Falkland Islanders or the Argentine nation which claims the Islands as part of its patrimony? The Kurds, or, respectively, Iraq, Iran, the Soviet Union, and Turkey?"). The fact of reasonable pluralism, which the Rawlsian liberal theory of international political justice seeks to accommodate, will produce disagreement over the *idea* of a people—though admittedly the same uncertainty surrounds the individual person "politically conceived." The suggested above criteria for the ascertainment of social cohesion sufficient to warrant the label "people" are comparatively "weak" compared to the more immediately reasonable and innate moral character of the individual in the liberal perspective. See also Buchanan, *supra* note 142, at 698 ("The problem is not simply that by having the parties represent peoples (or rather dominant societal views), Rawls gives short shrift to

units of representation, even where that term is used as a term of art. Many ideas of a people will in some way be based on an arbitrary choice of criteria. Pettit, for instance, argues that Rawls builds a “geography [in]to justice.”¹⁵⁷ This is not true though, since geography is not necessary to understand Rawls’s conception of a people as a representational unit in the original position. Moreover, peoples in actual fact need not be geographically defined. Again, Rawls uses the term “people” as a normative term of art.¹⁵⁸ Nevertheless, the idea must be grounded in some political reality in order to remain meaningful.

Reasonable differences in value-preferences are clearly a fact of international political life.¹⁵⁹ These values can clash. The “fact of reasonable pluralism” is a circumstance of the international community.¹⁶⁰ If pluralism is more pronounced internationally than domestically, we must be all the more careful before we can claim of a legal norm that it is representative of a principle of fundamental importance to the international community, as courts and scholars habitually do when discussing peremptory norms. Rawls offers us one way of thinking about what it means to say that a principle is of fundamental importance to the

dissenting individuals and minorities. There is, in fact, an additional reason why a moral theory of international law that only reflects the perspective of ‘peoples’ must be inadequate. At least in the modern world, individuals often do not live their whole lives in the society into which they are born. What this means is that there is a need for principles that track individuals across borders—principles that specify the rights that individuals have irrespective of which society they happen to belong to, and which reflect the independence of individuals from any particular society.”) *See also* Pogge, *supra* note 95, at 197–98 (“I do not believe that the notion of ‘a people’ is clear enough and significant enough in the human world to play the conceptual role and to have the moral significance that Rawls assigns to it. In many parts of the globe, official borders do not correlate with the main characteristics that are normally held to identify a people or a nation—such as common ethnicity, language, culture, history, tradition. Moreover, whether some group does or does not constitute a people would seem, in important ways, to be a matter of more-or-less rather than either-or. . . . Second, I do not believe that Rawls has an adequate response to the historical arbitrariness of national borders—to the fact that most borders have come about through violence and coercion.”).

157. *See* Pettit, *supra* note 154, at 49, 46–47.

158. *See* Bernstein, *supra* note 131.

159. RAWLS, PEOPLES, *supra* note 14, at 11.

160. *Id.* (“In the Society of Peoples, the parallel to reasonable pluralism is the diversity among reasonable peoples with their different cultures and traditions of thought, both religious and nonreligious.”) *See also id.* at 16 (“Because religious, philosophical, or moral unity is neither possible nor necessary for social unity, if social stability is not merely a *modus vivendi*, it must be rooted in a reasonable political conception of right and justice affirmed by an overlapping consensus of comprehensive doctrines.”). Rawls speaks of an overlapping consensus as an element of a *political* theory of liberalism that is capable of finding endorsement by individuals of a society who have reasonable disagreements on the appropriate roles for institutions stemming from the “fact of reasonable pluralism,” including differing conceptions of the good. *See generally* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUD. 1 (1987).

international community. Let us now explore more fully a contractarian alternative that focuses on the primacy of the individual.

IV. "COSMOPOLITAN LIBERALISM"

A. *International Law and the Individual*

The transition from the term "law of nations" to "international law" became complete in the decades following World War II. Under classical international law theory, only states are considered subjects of international law. With the rise of international organizations, notably the United Nations, international organizations came to be recognized as possessing international legal personality even vis-à-vis non-member states of the relevant organization.¹⁶¹ Individuals are not subjects of international law in classical international law theory. Under this view they generally do not enjoy the legal capacity to qualify as potential right-holders under international law, except in treaty-created exceptions, where a treaty-regime expressly vests potential claims and powers of enforcement in an individual. The ECtHR offers an example. Article 34 of the ECHR, added by Protocol 11, which entered into force in 1998, establishes the right of individual petition to the Court.¹⁶² Also, individuals are the beneficiaries of customary international human rights norms.

Is the acknowledgment of individual human rights claims sufficiently developed to warrant reflecting the role of the individual in the basic structure of the international legal order, and of international political

161. *See* *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (April 11) ("In the opinion of the Court, the Organization [the United Nations] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person. . . . [I]t is a subject of international law and capable of possessing international rights and duties, and . . . it has capacity to maintain its rights by bringing international claims.").

162. Article 34 reads:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 1, 1998, E.T.S. no. 155.

society more broadly? Human rights law, international criminal law, and international humanitarian law are all premised on the need for international law to recognize the moral claims of individual persons and, where necessary, to offer legal mechanisms for their enforcement.

The development of human rights constraints on states is arguably unintelligible without reference to a concern for the moral worth of the individual. The special legal status accorded to a small group of legal norms, all with an overwhelmingly significant moral dimension, by attaching stringent legal consequences to them and thereby granting them the status of peremptory norms, broadly reflects this legal and political evolution. These international legal norms all protect basic human well-being, either directly¹⁶³ or indirectly.¹⁶⁴ The fact that international law embraced the concept of peremptory legal consequences and that these consequences in practice almost invariably attach to human rights norms or norms protecting international peace and security supports the claim that one goal of international law in practice today is to promote human rights, and that this aim is not the sum of, but rather demands, the domestic protection of human rights.

B. An Argument from Humanity about the Fundamental Principles of the International Community

The type of philosophically informed argument about the basic principles of international law that builds upon egalitarian individualism and the moral irrelevance of nationality and borders is in certain respects associated with the school of cosmopolitanism.¹⁶⁵ Colloquially, the word

163. For instance, the prohibitions under international law respectively of torture or of genocide protect human well-being directly. See for example, *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, for pronouncements on the peremptory character of the prohibition of torture under international law. See also *Armed Activities on the Territory of the Congo (New Application: 2002)*, 2006 I.C.J. at 30–31 (noting that the prohibition of genocide under international law has peremptory character).

164. For instance, the right to self-determination of peoples or the prohibition of the use of force under international law protect human well-being in a more indirect sense. See *State Responsibility*, *supra* note 2, at 85 (suggesting that the right to self-determination is peremptory); *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. at 100 (suggesting that the prohibition of the use of force may have peremptory character).

165. See Beitz, *supra* note 90, at 677 (“At the deepest level, cosmopolitan liberalism regards the social world as composed of persons, not collectivities like societies or peoples, and insists that principles for the relations of societies should be based on a consideration of the fundamental interests of persons.”). On the notion and origins of cosmopolitanism, see generally KWAME A. APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006).

Cosmopolitanism dates at least to the Cynics of the fourth century BC, who first coined the expression cosmopolitan, “citizen of the cosmos.” The formulation was meant to be

cosmopolitan “can suggest an unpleasant posture of superiority toward the putative provincial.”¹⁶⁶ However, the term also has relevant philosophical significance. Appiah, for instance, writes:

So there are two strands that intertwine in the notion of cosmopolitanism. One is the idea that we have obligations to others, obligations that stretch beyond those to whom we are related by the ties of kith and kind, or even the more formal ties of a shared citizenship. The other is that we take seriously the value not just of human life but of particular human lives, which means taking an interest in the practices and beliefs that lend them significance.¹⁶⁷

Appiah further notes that “cosmopolitanism shouldn’t be seen as some exalted attainment: it begins with the simple idea that in the human community, as in national communities, we need to develop habits of coexistence. . . .”¹⁶⁸ In contractarianism, the cosmopolitan position can describe a posture that endows the individual with primary moral and methodological relevance, notably, where applicable, in the initial choice situation that leads to the articulation of basic principles of justice.

The cosmopolitan conviction, which treats the commonalities between individuals as more deserving than the largely necessary but coincidental state, ethnic or other cultural or political borders,¹⁶⁹ may lead to a different

paradoxical, and reflected the general Cynic skepticism toward custom and tradition. A citizen—a *politēs*—belonged to a particular *polis*, a city to which he or she owed loyalty. The cosmos referred to the world, not in the sense of the earth, but in the sense of the universe. Talk of cosmopolitanism originally signaled, then, a rejection of the conventional view that every civilized person belonged to a community among communities. The creed was taken up and elaborated by the Stoics, beginning in the third century BC, and that fact proved of critical importance in its subsequent intellectual history. For the Stoicism of the Romans—Cicero, Seneca, Epictetus, and the emperor Marcus Aurelius—proved congenial to many Christian intellectuals, once Christianity became the religion of the Roman Empire. . . . Cosmopolitanism’s later career wasn’t without distinction. It underwrote some of the great moral achievements of the Enlightenment, including the 1789 “Declaration of the Rights of Man” and Immanuel Kant’s work proposing a “league of nations.”

Id. at xiv.

166. *Id.* at xiii.

167. *Id.* at xv. Historically the attitudes associated with cosmopolitanism have been rendered the object of celebration and of scorn:

Both Hitler and Stalin—who agreed about little else, save that murder was the first instrument of politics—launched regular invectives against “rootless cosmopolitans”; and while, for both, anti-cosmopolitanism was often just a euphemism for anti-Semitism, they were right to see cosmopolitanism as their enemy. For they both required a kind of loyalty to one portion of humanity—a nation, a class—that ruled out loyalty to all of humanity.

Id. at xvi.

168. *Id.* at xviii–xix.

169. See RAWLS, PEOPLES, *supra* note 14, at 39.

approach to the international original position in the social contract theory approach. The cosmopolitan would set up an international original position that places the individual at the center of the method, by making individuals the basic participants in this initial choice situation. By contrast, in Rawls's account of the law of peoples, writes Beitz, "peoples are . . . ethically primary: it is peoples, not persons, which are represented in the international original position, and it is the interests of peoples considered as collective entities, not those of individual persons, that determine the choice of principles for the international conduct of states."¹⁷⁰ While this claim is too broad, since Rawls's law of peoples is supremely concerned with individual human rights, the initial choice situation that represents individuals offers an alternative way to incorporate human rights principles into a theoretical framework of principles of international justice.

Rawls argues that an original position in which individuals are the basic units of deliberation—i.e., a strictly cosmopolitan one—risks yielding principles of international justice that would not admit of anything less than liberal peoples. Rawls further claims that it would then be morally permissible for liberal peoples to adopt foreign policy choices the aim of which would be "to shape all not yet liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal."¹⁷¹ Nonetheless, it is not clear that a moral license to espouse foreign policies that target non-liberal peoples would be a necessary consequence of the cosmopolitan position. Nor is it fully clear, as Rawls suggests, that cosmopolitan justice assumes that all persons should have the rights they enjoy as citizens in a constitutional democracy and that for that reason the cosmopolitan position assumes that any less-than-liberal people cannot be tolerated.¹⁷² Moreover, there are well-founded pragmatic concerns that any moral license to intervene against any other non-liberal people (or state) either on its territory or through other policies for humanitarian purposes is open to abuse. It is of course possible to restrict any such moral license through procedural and institutional safeguards.

The legal position on the lawfulness of humanitarian intervention in international law remains ambiguous. To take one example of this argument in practice, in the ICJ proceedings brought by Serbia and Montenegro in connection with NATO's 1999 bombing campaign in

170. See Beitz, *supra* note 90, at 678.

171. RAWLS, PEOPLES, *supra* note 14, at 60, 82.

172. *Id.* at 82–83. Some commentators do regard Rawls's law of peoples as cosmopolitan in relevant respects. See, e.g., Bernstein, *supra* note 131, at 59.

Kosovo Belgium argued as a one reason why the Court should not in any event indicate provisional measures the “serious effects which such measures would have on the outcome of the humanitarian crisis caused by the Federal Republic of Yugoslavia in Kosovo and in neighbouring countries.”¹⁷³

At times intervention clearly seems justified from a *moral* point of view to the extent that intervention may actually *protect* a population’s human rights.¹⁷⁴ There seems at times to be a gap between the moral justification for intervention and its legal permissibility. The emerging international law doctrine of the “responsibility to protect” seeks to narrow this gap.¹⁷⁵ The legal notion of a “responsibility to protect” was arguably applied in the 2011 military intervention in Libya under Security Council Resolution 1973.

While it is uncertain whether, from a legal point of view, humanitarian grounds offer an intervening state a defense against what would otherwise be a breach of the prohibition of the use of force—a peremptory norm no less—and of the principle of non-intervention in the domestic affairs of another state,¹⁷⁶ any such defense as there may be becomes somewhat more credible where the mandate for intervention is channeled through an international organ, such as the United Nations Security Council.

Cosmopolitan liberalism privileges human rights out of respect for the individual over collective or social concerns. The cosmopolitan initial choice situation, in which representatives of individuals deliberate

173. *Legality of the Use of Force (Serb. & Mont. v. Belg.)*, Order, 1999 I.C.J. 124, 131 (June 2). The Court however did not address this argument.

174. See FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 26–31 (1988). See generally *id.* at 29–30 (“Many communities have conquered their freedom with outside help—history abounds in examples. Conversely, all too frequently peoples are subjugated and subject to unspeakable suffering as the result of processes of pure self-determination. Take the example of the 1971 takeover in Uganda by Idi Amin. . . . The ‘self’ (the Ugandan people) did not ‘determine’ anything. The ‘self’ here is not the real people, but some mystical entity called the ‘nation’ which ‘determines itself’ through the ‘political process’. . . . Many persons enjoy human rights as a result of liberating foreign intervention. Consequently, the assertion that without self-determination (that is, with foreign intervention) the rest of human rights are meaningless is contradicted by the facts.”) (footnotes omitted).

175. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

176. Both rules are restated, notably, in the U.N. General Assembly Declaration on Principles of Friendly Relations. See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), at 122, U.N. Doc. A/5217 (Oct. 24, 1970) (“States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”). Article 1 also codifies the principle of self-determination: “Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.” *Id.* at 123.

principles of justice for the international community, need not assume individual rights in the way a natural law theorist might. Indeed, showing that rights are the outcome of the bargaining process under conditions of fairness, rather than a presupposition, would greatly bolster their philosophical credibility.¹⁷⁷ Again, it is not evident why a conception of liberal cosmopolitan justice would direct the foreign policy of liberal peoples towards the liberalization of all non-liberal peoples through the formers' foreign policies.¹⁷⁸

Cosmopolitan liberalism appeals to our intuitions and initial assumptions in several ways as a manner of thinking about the fundamental nature of those principles afforded special protection through peremptory legal consequences in international law. But skeptical voices remain with respect to the possibility of cosmopolitan values. Luban, for instance, notes:

[A]s a matter of principle, states owe it to their people to favor national interests over cosmopolitan ones—and so states will advance international human rights only to the extent that the advancement of human rights is widely perceived by their people as a national interest. By its very nature, the community of states cannot properly accommodate the interests of humanity.¹⁷⁹

177. See Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 *YALE J. INT'L L.* 84, 110–11 (1990).

178. See RAWLS, PEOPLES, *supra* note 14, at 48 (“The Society of Peoples needs to develop new institutions and practices under the Law of Peoples to constrain outlaw states when they appear. Among these new practices should be the promotion of human rights: it should be a fixed concern of the foreign policy of all just and decent regimes.”). See also *id.* at 60 (“[T]he guiding principle of liberal foreign policy is gradually to shape all not yet liberal societies in a liberal direction . . .”). It is here that the limits of the principle of toleration, which must be a feature of the law of peoples, are generally tested. *Id.* at 19 (“The effect of extending a liberal conception of justice to the Society of Peoples, which encompasses many more religious and other comprehensive doctrines than any single people, makes it inevitable that, if member peoples employ public reason in their dealings with one another, toleration must follow.”). On Rawls’s understanding of the principle of toleration in the law of peoples, see *id.* at 59 (“To tolerate also means to recognize these nonliberal societies as equal participating members in good standing of the Society of Peoples, with certain rights and obligations, including the duty of civility requiring that they offer other peoples public reasons appropriate to the Society of Peoples for their actions.”).

179. Luban, *supra* note 13, at 131. See also *id.* at 132–33 (“[I]t is one thing to place a premium on human rights in one’s own society, another to place a premium on human rights in someone else’s, and a third thing altogether to insist on an international law principle of human rights—a principle that might constrain foreign policy decisions reached through democratic means . . . Every liberal society will honor human rights; that is what makes it liberal. But it does not follow that the principle of honoring human rights must belong to the Law of Peoples rather than to the domestic laws of peoples. . . . But why will I have reason to insist that other nations respect the human rights of their own nationals? . . . [I]t is far from self-evident, to say the least, that any liberal democratic people would

As the various approaches to the hypothetical contracting situation above have indicated, such a skeptical approach with respect to human rights interests and national vis-à-vis international interests is not a trump card. So far, we have seen that a social contract approach can help us understand what it means to say that an international legal norm embodies a principle that is of fundamental importance to the international community. We have also seen that political constructivism offers tools that enable us to determine which norms are fundamental to the international community given the fact of reasonable pluralism in international society. At the same time, one must recognize the central importance that basic human rights norms play, regardless of what model of the initial choice situation—“cosmopolitan” or “social”—we espouse.¹⁸⁰

V. SOME CONSTITUTIONAL CHARACTERISTICS OF PEREMPTORY NORMS

Peremptory norms in international law do not form a “constitution” of international law. Rather, the term “peremptory norm” is a technical one that describes the special range of legal consequences that certain norms of customary international law give rise to. These legal consequences are available so that certain customary norms can enjoy a greater degree of legal protection. We have used the tools of social contract theory and of political constructivism generally to approach the question of what it means to claim that a norm is fundamental in the way associated with all currently accepted peremptory norms.¹⁸¹ We have not used the tools of social contract theory and of political constructivism to offer a theory of peremptory norms generally, or of international law generally, notably with respect to the reasons for states’ obligations or to the constitution of the international legal system.

Any “constitution,” so to speak, in international law would bear precious little resemblance to domestic constitutions both in form and in substance. Verdross and Simma suggest the possibility of an international “constitution,” based on implicit “formless consent” at the emergence of the community of independent and sovereign states.¹⁸² Some suggest the

actually choose this as a clause in the social contract, let alone that the clause is a requirement of reason.”).

180. *See generally* Beitz, *supra* note 90.

181. We must bear in mind that this political constructivist approach by no means answers all questions. Nor does it allow us to disregard the central role that state practice plays, especially from an evidentiary point of view, in the development of peremptory norms and in the identification of particular peremptory norms.

182. *See* ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND*

U.N. Charter as a possible formal constitution.¹⁸³ However, even an important multilateral treaty with near-universal membership such as the Charter cannot serve as a formally entrenched constitution because to look at it in this way would offend the *pacta tertiis* principle.¹⁸⁴

Verdross had already proposed the concept of a material constitution of international law as early as 1927.¹⁸⁵ According to him the constitution of international law involves some form of political and legal morality against which all rules of public international law must be measured. Today, those principles that count as *constitutive* of the international legal system notably include the principle of formal equality of states, the principle that treaties generate legal obligations for parties to them and that these obligations must be executed by them in good faith, the principle that custom is a source of law and legal obligation and the fact that custom gains legal force through state practice and *opinio juris*.¹⁸⁶

Today, rules created by treaty and customary rules in international law are legally valid only so long as they do not run afoul of those customary norms of general international law that give rise to peremptory legal consequences. It is therefore with respect to these legal effects that peremptory norms possess characteristics that in domestic legal systems we tend to associate with the superior legal force of certain forms of legislation over others, and of constitutional rules over all other legal rules.

PRAXIS [UNIVERSAL INTERNATIONAL LAW: THEORY AND PRACTICE] 59–61 (3d ed. 1984).

183. See, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 533 (1998).

184. The *pacta tertiis nec nocent nec prosunt* principle is the legal principle according to which two or more parties cannot by agreement impose one or more obligations or benefits upon a third party without its consent. The principle is codified in Article 34 of the Vienna Convention on the Law of Treaties 1969: "A treaty does not create either obligations or rights for a third State without its consent." VCLT, Article 34, May 24, 1969, 1155 U.N.T.S. 331.

185. ALFRED VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT V* (1926).

186. See ORAKHELASHVILI, *supra* note 25, at 45 ("[P]rinciples such as *pacta sunt servanda*, recognition, consent and good faith are portrayed as part of *jus cogens*"). The author, however, does not endorse a difference in kind, indeed denies that *systemic* norms have peremptory character:

There is little utility in considering 'structural' norms such as consent or good faith as part of public order. Not all rules which are important or even indispensable for the existence and operation of international law belong to the category of peremptory norms. These norms do not need to be qualified as peremptory in order to fulfil their functions. For example, to consider *pacta sunt servanda* as part of *jus cogens* would make little sense, since a treaty can hardly be concluded denying the very norm serving as a basis of the bindingness of treaties.

Id.