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# JUS COGENS: THE HISTORY, CHALLENGES AND HOPE OF 'A GIANT ON STILTS'

**Stefano Congiu<sup>1</sup>**

## Abstract

This article broadly engages with international law and human rights protection. Its focus is on *jus cogens*, but it also considers universal jurisdiction and *erga omnes*. In its examination of *jus cogens*, this article analyses its history, trajectory and philosophical underpinnings.

**Keywords:** *jus cogens*, *erga omnes*, principles of international law, jurisprudence

## Introduction

Few and far between are the areas of law which have the capacity to invoke lively discussion in audiences of all colours. Whilst it may be onerous to find a non-lawyer debating fungible and non fungible assets à la *Hunter v Moss*<sup>2</sup>, the area which this article seeks to engage is one which inspires such debate. It goes to the heart of the law and also overtly trespasses into the realms of politics, morality and ethics. Christopher Hitchens might have been the most eloquent non-legal commentator when he stated that:

The next phase or epoch is already discernible; it is the fight to extend the concept of universal human rights, and to match the 'globalisation' of production by the globalisation of a common standard for justice and ethics<sup>3</sup>

Hitchens is referring to international law, which is framed by the principles of *jus cogens*, *erga omnes* and universal jurisdiction. While this paper will focus on *jus cogens*, we should keep in mind that these three principles are intertwined to an extent. *Erga omnes* obligations and *jus cogens* have been described both as forming part of 'core guarantees'<sup>4</sup> within human rights law; whilst universal jurisdiction could be surmised as a concept which allows transgressions against these principles to be prosecuted regardless of geographical limitations. Taken together, they solidify the notion that 'individuals have international duties which transcend the national obligations of obedience imposed by the respective State.'<sup>5</sup>

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<sup>1</sup> This author would like to acknowledge Dr. Nicholas Gervassis, who provided fantastic feedback to earlier drafts and recommended some excellent books for clarification of this article. Stefano has just returned to England after teaching English in Taiwan for one year. He wrote this article in the hope that it could encourage further interest and study in this area - [stefanostefano@hotmail.co.uk](mailto:stefanostefano@hotmail.co.uk)

<sup>2</sup> *Hunter v Moss* [1994] 1 WLR 452

<sup>3</sup> C. Hitchens, *Letters to a Young Contrarian*, (2001, New York, Basic Books) ch.XVIII, at para.20.

<sup>4</sup> *Coard et Al. v. United States*, Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999, at 39

<sup>5</sup> *Trial of the Major War Criminals before the International Military Tribunal*, vol.I, Nürnberg 1947, p.223.

This paper will explore these concepts incorporating a historical perspective and some of their formative ideas. As such, it is divided into several sections. Part I considers an overview of *jus cogens*, *erga omnes* and universal jurisdiction and attempts to provide some context. Part II examines natural law and the connection between it and *jus cogens*. Part III analyses legal positivism and its alternate claim to the formation of *jus cogens*. Part IV examines the influence of the Nuremberg trials on these phenomena. Part VI considers recent expansion of *jus cogens* and universal jurisdiction, commenting on the perceived advantages and disadvantages. Finally, part VII concludes and attempts to offer a contextualised prognosis for the shelf life of *jus cogens*, *erga omnes* and universal jurisdiction.

## 1 Setting the Stage

While not defining *jus cogens* itself, the Vienna Convention on the Law of Treaties does specify the effect of a *jus cogens* norm on a treaty. *Jus cogens* norms void treaties if they conflict,<sup>6</sup> including retroactive invalidation.<sup>7</sup> *Jus cogens* norms also possess a slightly amplified scope and according to *Bantekas* and *Oette* impose a more broad 'duty not to recognise (or contribute to the perpetuation of) situations resulting from violations of *jus cogens* norms and to take measures to bring such situations to an end'.<sup>8</sup> Furthermore, *jus cogens* binds the Security Council, with Judge Lauterpacht considering it 'as a matter of simple hierarchy of norms'<sup>9</sup>, with *jus cogens* outranking a Security Council resolution.

On the subject of universal jurisdiction, it allows for an offence to be tried in any country in the world, as the crime is deemed to be so egregious as to be one against humanity. An example of its operation would be that of the arrest (in London) of a Nepalese torturer.<sup>10</sup> The man in question was not held accountable in Nepal due to a lack of will to prosecute his alleged crimes, however, due to the status of torture as a crime with universal jurisdiction, the UK (or any other country) is able to prosecute him regardless of the geographical location of his alleged offence.

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<sup>6</sup> Article 53, Vienna Convention on the Law of Treaties 1969.

<sup>7</sup> Article 64, Vienna Convention on the Law of Treaties 1969.

<sup>8</sup> B. Ilias and L. Oette, *International Human Rights Law and Practice*, (2013, Cambridge University Press, Kindle version), ch.II, s.2.2.6, at para.VI

<sup>9</sup> Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. 325, 408, (Further Request for the Indication of Provisional Measures Order of Sept. 13), Separate Opinion of J Lauterpacht, p.440, at 100.

<sup>10</sup> 'Press Releases', Amnesty International Website, 4 January 2013, accessed at <http://www.amnesty.org/en/for-media/press-releases/uk-arrest-highlights-nepal-s-failure-address-torture-2013-01-04> on 12/10/2014.

Considering *erga omnes*, it is simply an obligation all States hold toward all other States. In *Furundzija*,<sup>11</sup> *erga omnes* obligations were described as 'obligations owed towards all the other members of the international community, each of which then has a correlative right.'<sup>12</sup> This right can be invoked if an *erga omnes* obligation is violated, which then allows for any member to 'insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.'<sup>13</sup>

These doctrines apply to the protection of human rights. We are now at a stage in history in which human rights have huge cultural capital. Hopgood even argues that perhaps the best hope for international human rights is for them to be consumed as part of 'aspirational Western norms.'<sup>14</sup> Nonetheless, the capital is potent - the most populous country in the world, China, has gone from one in which human rights were 'dismissed outright as bourgeois'<sup>15</sup> to one which has to claim to adhere to these values. Even a State like North Korea, which is almost universally regarded as having an atrocious record with human rights, has to pretend to uphold them (recently defending its human rights record at the UN<sup>16</sup>).

The legal constructs of *jus cogens*, *erga omnes* and universal jurisdiction could be seen as an attempt to unify a State's words and actions in certain areas of human rights law, and as such have attracted much attention. In recent years the whole edifice supporting *jus cogens* has been described in quasi-religious terms as a 'secular monotheism'<sup>17</sup> for a decaying Europe to cling to in a brave new world. Or, conversely as part of the integral framework which constitutes the 'law of humanity'<sup>18</sup> or even as a new '*jus gentium*'<sup>19</sup>. Strong conviction is the easy bedfellow of change, and as such, it is to be expected that the twenty-first century will bring much transformation to the aforementioned doctrines. We entered this century holding a set of tools which attempted to embody the idea that there are some values which cannot be infringed, and which place a collective burden on all to uphold them.

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<sup>11</sup> *Prosecutor v Furundzija*, Case No. IT-95-17/1, Judgment (International Criminal Tribunal for the former Yugoslavia, 10th December 1998).

<sup>12</sup> *Ibid*, at para.151.

<sup>13</sup> *Ibid*.

<sup>14</sup> S. Hopgood, *The Endtimes of Human Rights*, (2013, Ithaca and London: Cornell University Press, Kindle version), ch.VIII, s.III, at para.IV.

<sup>15</sup> M. Svensson, *Debating Human Rights in China: A Conceptual and Political History*, (2002, Maryland: Rowman & Littlefield Publishers,), p.315.

<sup>16</sup> 'North Korea defends human rights record in report to UN', *BBC News Website*, 8 October 2014, accessed at <http://www.bbc.com/news/world-asia-29531969> 10 October 2014.

<sup>17</sup> Hopgood, *The Endtimes of Human Rights* at para.VI.

<sup>18</sup> R. Tietel, *Humanity's Law* (2011, New York: Oxford University Press) p.4.

<sup>19</sup> Trindade, Augusto, 'Jus Cogens The determination and the gradual expansion of its material content in contemporary international case-law', in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – OAS (2008), 3-29, at p.5.

In order to grapple with the offered potential for legal globalisation, it is imperative to examine *jus cogens* as a tool for its realisation as well as its underlying ideas.

## 2 Natural Origins

The origins of *jus cogens* are difficult to clearly pin down. According to Bianchi, 'Before its sanctioning by judicial decisions in the 1990s, *jus cogens* had been largely developed by international legal scholarship.'<sup>20</sup> At its roots *jus cogens* also draws upon elements of natural law and the two do share some overt similarities, notably as being ostensibly 'moral' doctrines and wielding a large amount of power. These considerations, also impact upon *erga omnes* and universal jurisdiction as they too, draw from 'moral' elements and possess much potency, seemingly sharing a similar genealogy.

It must be kept in mind that 'Natural law theory is a broad tradition,'<sup>21</sup> and there are a pantheon of views from which to take. However, its adherents often try to ground claims in objectivity, as such, 'moral realism is an important component of this tradition.'<sup>22</sup> Objectivity in a moral sense then leads to an ability to create an objectively correct law. This objectivity plateau can be reached by following a number of routes which Bix identifies, namely: human reason, human nature, or being expressed in nature.<sup>23</sup>

The human reason argument is often based upon the idea that there are some things, discoverable by use of reason, which are self-evidently desirable, and acting or legislating contrary to these would be undesirable. For Finnis, they are things that 'any sane person is capable of seeing' and are akin to 'mathematical principles' in the sense that they would be true even if they were not understood.<sup>24</sup> For him at least, this would include things like friendship or knowledge. In recent years, the neuroscientist Dr. Harris has argued that the highest point of well-being for everyone would be moral goodness in and of itself, and the most possible suffering would be immoral in parallel. Adding that 'it seems like the only legitimate context in which to conceive of values and moral norms.'<sup>25</sup>

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<sup>20</sup> A. Bianchi, 'Human Rights and The Magic of Jus Cogens', (2008), *European Journal of International Law*, 19(3), 491-508, at 493.

<sup>21</sup> B. Bix, 'On the dividing line between natural law theory and legal positivism', (2000), *Notre Dame Law Review*, 75(5), 1613-1624, at 1613.

<sup>22</sup> *Ibid*, at 1617.

<sup>23</sup> B. Bix., *Jurisprudence: Theory and Context* (2012, London: Sweet and Maxwell, Kindle version) ch.V, s.II, at para.VI

<sup>24</sup> J. Finnis, *Natural Law and Natural Rights* (2011: New York, Oxford University Press, 2<sup>nd</sup> edn) at pp.30, 24.

<sup>25</sup> S. Harris, *The Moral Landscape*, (2010, New York: Free Press, Kindle version) ch.I, s.II, at para.VII

The human nature argument has been described as one relating to our “essence” or “purpose”<sup>26</sup>. As such, natural law is dependent upon the nature of man. This can be seen as far back as Cicero's *De Legibus*: ‘we shall have to explain the true nature of moral justice, which is congenial and correspondent with the true nature of man.’<sup>27</sup> The other route is that of being expressed in nature, which would include divine mandate. This is a long-lived branch of natural law which at least stretches over two millennia. To illustrate, scholars have analysed Sophocles' 5th century tragedy *Antigone* as a tension between ‘legitimate commands... and the obligation to the laws of Heaven’<sup>28</sup>. For some thinkers who ascribe to the divine mandate theory, such natural law could permit of change by a god (as in Aquinas' *Summa Theologica* - ‘whatever is commanded by God is right; but also in natural things, whatever is done by God, is, in some way, natural’<sup>29</sup>). Or alternatively, as for Grotius, it could be ‘so unalterable, that it cannot be changed even by God himself.’<sup>30</sup> Perhaps, one such dividing line could well be the question of to whom, or what, is owed highest allegiance - only Aquinas' train of thought allowing for a God to justly command what would otherwise be against natural law.

For natural law theorists, arriving at such objectivity, natural law would bind all, regardless of consent. A good summation would be the US Declaration of Independence which speaks of men being ‘endowed by their Creator with certain unalienable Rights,’<sup>31</sup> these are the calibre of rights that would supersede sovereignty. Here in part, can be glimpsed a pitfall of the natural law argument; the argument is rooted in belief in one of its bases. Thus, it is then subject to the interpreter's belief in it, rendering it ‘nonsense upon stilts’<sup>32</sup> for some, or to be regarded as ‘emotive language concealed in assertive forms’.<sup>33</sup> As an example, someone who chose a position of non-belief in a law of nature (e.g. gravity) is likely to face very real, immediate problems acting upon this. However, the consequences for disobeying natural law are not in the same vein, as any consequences for breaking law are manmade and do not have to necessarily exist, although they may be desirable. Societies have functioned for

<sup>26</sup> B. Bix., *Jurisprudence: Theory and Context*.

<sup>27</sup> Cicero, ‘*The Republic and the Laws*’, translation by Niall Rudd, (2008, Oxford University Press, 2<sup>nd</sup> edn, vol.3), at p.67, per Marcus.

<sup>28</sup> W. Morrison, *Jurisprudence: From the Greeks to post-modernism*, (1997, London: Cavendish publishing Ltd.), at p. 22.

<sup>29</sup> Thomas Aquinas, ‘*Summa Theologica*’, Of the Natural Law, Prima Secundae partis, Article 5, reply to objection 2

<sup>30</sup> H. Grotius, *De jure belli ac pacis*, Book 1, Chapter 1, Paragraph X, 1625, translated by AC Campbell, (1815), accessed at [http://www.constitution.org/gro/djbp\\_101.htm](http://www.constitution.org/gro/djbp_101.htm), on 10/10/2014

<sup>31</sup> US Declaration of Independence 1776.

<sup>32</sup> J. Bentham and J. Bowring, *Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution*, (1843: Kindle version) Article II, at sentence IX.

<sup>33</sup> J. Burns, *Bentham's critique of Political fallacies*, taken from B. Parekh, *Jeremy Bentham Ten Critical Essays*, (1974, London: Frank Cass and Company Ltd.), at p.165.

long periods of time without following them - a good example here would be the Assyrian empire, which routinely acted contrary to what is often accepted to be natural law principles<sup>34</sup> and yet lasted for around 1,700 years.<sup>35</sup> *Jus Cogens*, *erga omnes* and universal jurisdiction provide some level of practical ramifications to actions which violate these norms. In fact, *jus cogens* concerns itself with abuses which are also high moral outrages (and would likely violate natural law at its basest level) such as 'aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture'.<sup>36</sup>

### 3 Positivism's Challenge

Those who would ascribe to the stilts line of thinking may well be legal positivists. Legal positivism generally holds that 'a descriptive, or at least morally neutral, theory of law is both possible and valuable'.<sup>37</sup> Consequently, many believe that it is 'fundamentally irreconcilable'<sup>38</sup> with natural law. Using this doctrine, *jus cogens* evolves from State assent, thereby retaining sovereignty. When *jus cogens* was being laid out in the Vienna Convention, the expert consultant for the delegates Sir Humphrey Waldcock 'explained that the International Law Commission had based its approach to the question of *jus cogens* on positive law much more than on natural law'<sup>39</sup>. Sir Waldock's approach would be necessary in the international arena, as States may well be concerned about any opening of floodgates to being bound without their consent, especially as Westphalian sovereignty has been a guiding principle for so long. Furthermore, the international arena requires cooperation and simply being told that 'X is now the law' is unlikely to facilitate progress. Unfortunately, a debilitating critique of positivism as an explanation is that there is no pinpoint location for the birth of *jus cogens*.<sup>40</sup>

Unfortunately for legal positivism, by the time *jus cogens* was being expressed the Vienna Convention on the Law of Treaties was largely accepted as existing, casting doubt on

<sup>34</sup>As an example, the cruel way they treated rebelling cities - 'Many within the border of my own land I flayed, and I spread their skins upon the walls' and I cut off the limbs of the officers'. Daniel David Luckenbill, *Ancient records of Assyria and Babylonia*, (1926, Chicago), Vol.I, p.145, per Assur-Nasir-Pal. Accessed at <http://rbedrosian.com/Classic/Luck/arabtoc.html>, on 15 November 2014.

<sup>34</sup> P. White, 'Law and Moral Obligation', (1982) *The University of Chicago Law Review*, 49(1) (Winter 1982), pp.249-259, at p.249.

<sup>35</sup> D. Carlin, *Judgment at Niveneh*, Hardcore History (Audio Podcast, 14/12/2009), retrieved from <http://www.dancarlin.com/product/hardcore-history-17-judgment-at-nineveh/>

<sup>36</sup> Bassiouni, M, Cherif, 'International crimes: *jus cogens* and *obligatio erga omnes*', (1996) *Law and Contemporary Problems*, 59(4) 63-74, at 68.

<sup>37</sup> Bix, *Jurisprudence: Theory and Context*, ch.III, s.I, at para.I.

<sup>38</sup> P. White, 'Law and Moral Obligation', (1982) *The University of Chicago Law Review*, 49(1)(Winter 1982), 249-259, at 249.

<sup>39</sup> United Nations Conventions on the Law of Treaties, First Session, Vienna, 26/03/1968 - 24/05/1968, Summary record of the plenary meetings and of the Committee as a Whole, A/CONF.39/11., at p.327.

<sup>40</sup> Arguably, as it grew organically, based on legal scholarship - *supra*, at n.19

positivism as it had seemingly been summoned without going through any real legislative channels. Indeed the Argentinean delegate stated that 'to recognize the existence of international norms of *jus cogens* was merely to acknowledge reality.'<sup>41</sup> In the twenty-first century, uncertainty still dogs *jus cogens*, for example, it remains uncertain as to when a norm will gain the status of *jus cogens*. In fact, it is so unclear as to precisely when a provision will become *jus cogens*, that it has been stated that 'it appears that judges and scholars simply consult their own consciences'<sup>42</sup> in finding a *jus cogens* norm. If anything, this summation helps tie *jus cogens* more solidly into natural law theory by making the moral heritage of *jus cogens* highly explicit.

Paradoxically, what can really be gleaned from the drafting of the Convention is the confusion that surrounds the origins of *jus cogens*. Whilst some delegates highlight the similarities of *jus cogens* and natural law, i.e. by using them almost interchangeably (Monaco's delegate<sup>43</sup>) or stating that they were 'in a sense comparable'<sup>44</sup>. It was acknowledged that: 'the various schools of thought did not agree on the origin of those norms; some held that it lay in natural law, others that it came from the will of States as expressed in treaties or in custom.'<sup>45</sup> In the sense that *jus cogens* exists and yet it is so uncertain as to how it came into being, it seems that it had attained a kind of emperor's new clothes quality.

#### **4 The Nuremberg Fallout**

It was not certain that there would necessarily be a trial following an Allied victory as elements within the Allied administrations were pushing for summary executions of high ranking Nazis. It has since emerged how close history was to not having the Nuremberg trials, since there was a time when: 'Henry Morgenthau Jnr, a close personal friend and adviser to Roosevelt, had even managed to persuade the President and Winston Churchill to sign an agreement to execute captured Nazi leaders.'<sup>46</sup> For a number of reasons, this did not come to fruition and the Nuremberg trials became a huge milestone in the expansion of a universal, or higher law. It was recognised by the justices that they had convened to try

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<sup>41</sup> United Nations Conventions on the Law of Treaties, 54th meeting of the committee as a whole, at 22.

<sup>42</sup> M. O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms', (April 19, 2011). The Role Of Ethics In International Law, Donald Earl Childress, III, ed., (2012, Cambridge University Press) Notre Dame Legal Studies Paper No. 11-19, at 79.

<sup>43</sup> *supra* n.37, at page 324, at para. 32.

<sup>44</sup> United Nations Conventions on the Law of Treaties, Summary record, at p.320, at para.43.

<sup>45</sup> *Ibid* at p.298, at para.53

<sup>46</sup> R. Paul, *The Nuremberg Trials: The Nazis and Their Crimes Against Humanity*, (2012, London: Arcturus Publishing, Kindle version), ch.I, s.II, at para.IV.



crimes which 'have no particular geographical location'.<sup>47</sup> In the course of this duty there were many blows to the idea of legal positivism. Justice Jackson expounded that the crux would not concern 'mere technical or incidental transgression of international conventions',<sup>48</sup> but rather would be grounded in 'guilt on planned and intended conduct that involves moral as well as legal wrong'.<sup>49</sup>

Clearly, this heralded an era in which an offence could exist independent of a clear statute or State consent with which to contextualise it, but rather that the crimes tried had 'often been interpreted to go beyond conventional or consent-based foundations in international law, and arguably represent an expansion of *jus cogens*'.<sup>50</sup> However, it seemed that jurisdiction for the Nuremberg trials was not entirely universal. One dissenting judge, Radhabinod Pal had decried the atomic bombings of Hiroshima and Nagasaki by the United States as the worst atrocities of the war, comparable with Nazi crimes.<sup>51</sup> This has been furthered by Chomsky who opined that if the principles of the Nuremberg trials were universal then 'every post-war American president would have been hanged'.<sup>52</sup> It is here that we can see the intertwining of politics and law that posed, and will pose great challenges for the doctrine. Moving forward, the degree to which a Head of State can be liable to *jus cogens* is still not entirely clear. Whilst *Pinochet*<sup>53</sup> clearly shows that Heads of State are not entirely immune to *jus cogens*, *Al-Adsani v UK*<sup>54</sup> shows that State Immunity overcomes *jus cogens* on civil claims. While *jus cogens* has is a potent doctrine which can supersede much international law, it 'should not be seen as a trump card that can be played against all other international legal obligations'.<sup>55</sup>

## 5 Doctrinal Challenges

Perhaps the most glaring problem for advocates of *jus cogens* is that no one knows exactly when a norm will become a *jus cogens* one. In fact, the view that *jus cogens* exists is not

<sup>47</sup> Nuremberg trials proceedings, Vol. 22, 267th day, 30/09/1946, Justice Jackson at 410.

<sup>48</sup> Nuremberg trials proceedings, Vol. 2, 2nd day, 21/11/1945, Justice Jackson, at 102.

<sup>49</sup> Ibid.

<sup>50</sup> Tietel, *Humanity's Law* ch.V, s.II, at para.VI..

<sup>51</sup> N. Onishi, N, 'Decades after war trials, Japan still honors dissenting judge', *NY Times Website*, 31/08/2007, accessed at [http://www.nytimes.com/2007/08/31/world/asia/31memo.html?\\_r=0](http://www.nytimes.com/2007/08/31/world/asia/31memo.html?_r=0), on 11/10/2014

<sup>52</sup> N. Chomsky, 'If the Nuremberg Rules Were Applied...', Lecture at St.Michael's College Vermont, exact date unknown delivered in1990, Noam Chomsky Website, accessed at <http://www.chomsky.info/talks/1990.htm>, on 11 October 2014.

<sup>53</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No.1) [2000] 1 AC 61.

<sup>54</sup> *Al-Adsani v UK* (2002) 34 EHRR 11.

<sup>55</sup> J. Vidmar, 'Rethinking Jus Cogens After Germany v Italy: Back to Article 53?' (2013), *Netherlands International Law Review*, 1-25, at 3.

universal, but rather is 'overwhelming'<sup>56</sup> and is a doctrine which not all, but 'most international lawyers recognize'.<sup>57</sup> The Vienna Convention states that in terms of the Convention, *jus cogens* is a 'norm of general international law ... accepted and recognized by the international community of States as a whole'.<sup>58</sup> Here lies a core problem with the doctrine since it was recognised in the Convention, namely that of deciding when a norm would gain the status of *jus cogens*. This was discussed at the time, the Irish delegate stated that it is 'essential to establish independent machinery for adjudicating on alleged violations of *jus cogens*'.<sup>59</sup> Currently, the only real machinery that adjudicates on *jus cogens* would be judges and the International Criminal Court of Justice.

For many the idea of *jus cogens* along with international human rights standards seems to embody European values which poses a secondary problem. Perhaps these are values that are being foisted on other States without their consent - a sort of legal imperialism. In their auspiciously titled *Eastphalia Rising*, Fidler and Ganguly note the rise of the BRIC countries who would guard their sovereignty against this kind of infringement. The twenty-first century presents a power shift and 'past western sermonizing about how other countries should follow the Western models now seems quaint'<sup>60</sup>. This idea seems to create a level of friction which is not just one way between States. A notable example would be that some commentators have suggested that the joint Russia and China veto of military action in Syria is an example of a breach of a *jus cogens* to prevent war crimes.<sup>61</sup> From this vantage point, a worry is that *jus cogens* could be marching into a BRIC wall and the dynamics of international law could change. According to Hopgood:

The BRICS are not necessarily against international law as such, but this regime with rules they did not write will be more about sovereignty as prerogative than as responsibility. In such a system reciprocity will reassume its historical importance as the key mechanism for making norms effective.<sup>62</sup>

In light of this, perhaps one symptom of such a decline could be the recognition of regional *jus cogens*, in which a norm can paradoxically enjoy *jus cogens* status in one region and not

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<sup>56</sup> Rafael Nieto-Navia, 2001, The Hague, accessed at

<http://www.iccnw.org/documents/WritingColombiaEng.pdf>,

<sup>57</sup> O'Connell, '*Jus Cogens: International Law's Higher Ethical Norms*', at 11.

<sup>58</sup> Art. 53 Vienna Convention on the Law of Treaties (1969).

<sup>59</sup> United Nations Conventions on the Law of Treaties, Summary record at p.472, at para.10.

<sup>60</sup> DP. Fidler, SW. Kim, S. Ganguly, 'Eastphalia rising? Asian influence and the fate of human security', (2009) *World Policy Journal*, Summer Paper 1 14, pp.53-64, at p.53.

<sup>61</sup> J. Heieck, 'Emerging voices - illegal vetoes in the Security Council - How Russia and China breached their duty under *jus cogens* to prevent war crimes in Syria', *Opinio Juris* website, 14 August 2013, accessed at <http://opiniojuris.org/2013/08/14/emerging-voices-illegal-vetoes-in-the-security-council-how-russia-and-china-breached-their-duty-under-jus-cogens-to-prevent-war-crimes-in-syria/>, on 11 October 2014.

<sup>62</sup> Hopgood, *The Endtimes of Human Rights*, ch.I, s.V, at para.VIII.

in another. Hasmath asserts this in relation to sentencing juvenile offenders to the death penalty. It was held to violate a regional *jus cogens* norm in the Americas in 1987 but was not recognised in full by the UN in 2002:

In other words, this norm was not universally fixed within the international legal system, but was slowly gathering momentum. In the interim, it effectively enjoyed the status of a regional *jus cogens* norm in OAS member states<sup>63</sup> (OAS - Organization of American States).

Whilst the author of that article concludes regional *jus cogens* could be useful in facilitating an expansion of *jus cogens* norms in different regions this is seemingly problematic. In particular, if *jus cogens* does stem from natural law and is formed by moral values, the idea of regional *jus cogens* could be the start of a slippery slope by which *jus cogens* becomes relative and moves away from this basis. Consequently, a State could argue a *jus cogens* rule does not apply on the basis that it is *regional jus cogens* and does not extend its cover to the particular State.

For at least some of the delegates to the *Vienna Convention*, the idea of regional *jus cogens* would be missing the point of *jus cogens* and it seems that it is organically evolving away from much of their intent. One delegate stated that 'The moral and spiritual values inherent in *jus cogens* could only assert themselves with the desired peremptory force if no geographical limits were placed on their applicability.'<sup>64</sup>

The inherent problem that the doctrine is faced with is that it is (to paraphrase *Bentham*) something of a 'giant on stilts'. It possesses huge power, but at the same time, very shaky foundations. By allowing for regional *jus cogens*, *jus cogens* as a whole loses a level of philosophical underpinning and appeal. Part of the attraction of *jus cogens* is that it is universal, this is also a core characteristic of the doctrine. Violations then shift from the more natural law influenced affronts to humanity, to an affront to particular humans in a particular time and space. The natural law foundations are picked away at (even if *regional jus cogens* has positive pragmatic connotations in terms of acceptance) leaving the whole edifice precariously balanced more than ever.

This edifice also has a large limitation as it was one which was codified primarily in order to void treaty law. It has been observed that States almost never conclude treaties with

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<sup>63</sup> R. Hasmath, 'The Utility of Regional Jus Cogens', Paper Presented at American Political Science Association Annual Meeting (New Orleans, USA), August 30-September 2, at p.10.

<sup>64</sup> United Nations Conference on the Law of Treaties, Vienna, Austria, 26/03/1968 to 24/05/1968, First Session, 56th meeting of the Committee as a whole, A/CONF.39/C.1/SR.56, at 73.

'obligations to torture, commit genocide, institutionalize slavery or apartheid.'<sup>65</sup> These functions are performed outside of the scope of treaties. Furthermore, when domestic law or executive power runs contrary to a *jus cogens* principle the State may attempt to define the problem away. A notable example would be the issue of waterboarding in the United States and the attempt of *Yoo* and *Bybee* to place it outside of the scope of torture.<sup>66</sup> It is with this in mind, that the natural law principles behind *jus cogens* work best in tandem with *erga omnes* and universal jurisdiction, as together they provide a more effective cover. On its own, *jus cogens* is just one tool in the box in enforcing a form of natural law.

There is also one last final consideration that we could take on board: what would happen if a *jus cogens* norm conflicted with another *jus cogens* norm? For scholars like Kleien, this could be a future problem in attempting to place *jus cogens* at the top of a hierarchy as it may become 'impossible to solve a conflict between competing rights in a convincing manner'<sup>67</sup>. In globalising human rights standards this conflict seems inevitable, and any way around it seemingly weakens the doctrine itself. One *jus cogens* right would presumably have to beat the other, in which case would this mean that a hierarchy needs to be re-established? Interestingly, this problem is also one faced by natural law theorists with one conclusion being that adjudicating on which should supersede which would be akin to 'comparing one object's weight with another's length'<sup>68</sup>. Even if this problem is navigated, the language of absolute, non-derogable human rights in this area does not lend itself well to doing so and it would seemingly weaken the doctrine.

## **6 Expansion and Growing Pains**

*Jus cogens* has emerged as a doctrine that, by its nature, expands according to the zeitgeist of the international community. As an example of what could be considered reaching a new high-water mark in terms of *jus cogens* cover, The Inter-American Court of Human Rights affirmed that workplace rights exist as a *jus cogens* for everyone once an employment relationship is established - disregarding workers' migratory status. This means that in terms of the workplace, 'the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*'.<sup>69</sup> In the same case *Justice Trindade* stated that:

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<sup>65</sup> Vidmar, 'Rethinking Jus Cogens', p.2.

<sup>66</sup> 'Obama publishes torture memos', BBC News Website, 16/04/2009, accessed at <http://news.bbc.co.uk/2/hi/8003023.stm> , on 23/11/2013

<sup>67</sup> E. Klein, 'Establishing a hierarchy of human rights: Ideal solution or fallacy?', (2008), *Israel Law Review*, 41, 477-488 at 487.

<sup>68</sup> J. Crowe, 'Natural Law Beyond Finnis', (2011), *Jurisprudence*, 2(2), 293-308 at 300.

<sup>69</sup> *Juridical Condition and Rights of the Undocumented Migrants* , Advisory Opinion, Inter-American Court of Human Rights (ser. A) No. 18 (2003), at 101.

*jus cogens*, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation.<sup>70</sup>

It is here that we can see both the power, and weakness of the doctrine. The fact that Justice Trindade expresses the scope of *jus cogens* in terms of how *awake* the universal juridical conscience is shows that it is a theory that has potential for greatly expanding the application of human rights. On the other hand, to its detractors, this kind of expansion unfairly serves the interest of the judiciary at the expense of democratically elected Government. Arguably, *jus cogens* and its power to supersede State sovereignty were intended for the grossest of human rights abuses in order to mark them out. Is employment law as pertaining to undocumented migrants such an abuse worthy of bypassing the democratic process in the country in question? The US Supreme Court Judge Hon. Antonin Scalia stated that judges deciding questions of public policy through case law seemed 'anti-democratic'<sup>71</sup>. Indeed, especially regarding questions of ethics and morality, he has argued that 'These aren't a lawyer's questions'<sup>72</sup>.

As an illustrative example of what might not be considered 'a lawyer's question', recent case law has shown the doctrine of *jus cogens* evolve and perhaps overreach itself. The case of *Soering*<sup>73</sup> held that the United Kingdom could not extradite to a country where those being extradited would experience the 'death row phenomenon' as to do so would breach the torture law which has *jus cogens* status. The death row phenomenon has been described as 'prolonged incarceration on death row'<sup>74</sup> and the accompanying mental distress. If this were to continue to evolve, then perhaps it could infringe upon a country's domestic affairs. Whilst arguably, in this example, use of the ballot box could constitute a form of *ostrakophoria*,<sup>75</sup> the fundamental questions of where legal power lies have to be answered if unelected judges try to prevent a death sentence being carried out in the US on *jus cogens* grounds. These questions have been posited for some time, and reappear in relation to *jus cogens* and its

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<sup>70</sup> Ibid, at 68.

<sup>71</sup> *A conversation on the constitution: Perspectives from Active Liberty and a Matter of Interpretation*, held at the Capitol Hill Ballroom Washington D.C., 5th December 2006, per Antonin Scalia, accessed at <http://www.fed-soc.org/multimedia/detail/a-conversation-on-the-constitution-with-supreme-court-justices-stephen-breyer-and-antonin-scalia-event-audio>, on 23 November 2014.

<sup>72</sup> Ibid.

<sup>73</sup> *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur.Ct.H.R. (ser. A) 439 (1989).

<sup>74</sup> 'The death row phenomenon', The Death Penalty Worldwide, Cornell University Law school, Updated 21 February 2012, accessed at <http://www.deathpenaltyworldwide.org/death-row-phenomenon.cfm>, on 23/11/2013.

<sup>75</sup> The Athenian practice of putting particularly unpopular figures into exile by vote -Aristotle, translated and introduced by P.J. Rhodes, *The Athenian Constitution*, (1984, The Chaucer Press, Suffolk), at 22.3, p.64.

interplay with universal jurisdiction. According to Kissinger, 'Universal jurisdiction risks creating universal tyranny – that of judges.'<sup>76</sup> Whilst Kissinger makes good points, including the idea that it unfairly asks the defendant to bring witnesses/evidence a very long distance, it should be noted that his particular criticisms could be arguably resulting from the negative exposure he had personally received while serving as US Secretary of State during times of controversial US involvement with tense international political developments.<sup>77</sup>

## Conclusion

To conclude, *jus cogens* is a unique tool with an uncertain past and future. It has been at the forefront of many of the most fundamental debates surrounding the will of the State and human rights issues. Indeed, to think of human rights and *jus cogens* together has been described as a 'natural intellectual reflex'.<sup>78</sup> Whilst its roots have been said to stretch to natural law or even Stoicism, the doctrine itself was seemingly conjured out of nowhere, leading one commentator to suggest that its future is in the hands of 'The magicians'.<sup>79</sup> It has seen rapid expansion and whilst there have been examples of *jus cogens* being trumped recently, it is important to note that these are not uncontroversial. In *Adsani*, for instance, the ECtHR held by only 9 to 8 (a borderline majority) that *jus cogens* did not overcome State immunity from civil claims. As such, this author thinks that the expansion of *jus cogens* has not been halted per se, but certainly remains a contentious issue. The coming century's battles for *jus cogens* will likely be close, and not without difficulty, however, confidence in its continued expansion is not unwarranted.

What can perhaps be gleaned the most is that whilst there are several big challenges awaiting the doctrine, the ideas behind *jus cogens* (and also *erga omnes*/ universal jurisdiction) are very persistent. In fact, the values driving these doctrines (in this author's view they stem from the value of a person) are human values. The idea that there have always been 'rules of the game' and that the State does not possess absolute power has seemingly cropped up organically in a multitude of contexts. As contemporary political commentator Dan Carlin has contested, observing a historically consistent pattern of massive legal restructuring during post-war periods with a view for peace/higher ethical standards.<sup>80</sup> *Jus Cogens* has certainly benefited from this process. As such, were *jus*

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<sup>76</sup> H. Kissinger, 'The pitfalls of Universal Jurisdiction', Global Policy Website, July/August 2001, accessed at <https://www.globalpolicy.org/component/content/article/163/28174.html>, on 12/10/2014.

<sup>77</sup> J. Franklin, 'Kissinger may face extradition to Chile', *Guardian* Website, accessed at <http://www.theguardian.com/world/2002/jun/12/chile.pinochet>, 12<sup>th</sup> June 2002, on 12/10/2014.

<sup>78</sup> Bianchi, '*Human Rights and The Magic of Jus Cogens*', at 495.

<sup>79</sup> Ibid, at 508.

<sup>80</sup> Carlin makes links between the 30 years war and the Treaty of Westphalia, The Napoleonic wars and the Congress of Vienna, The First World War and the League of Nations and The Second World

*cogens* eventually to lose some of its potency to a more multi-polar or democratic world, we may confidently expect it to re-appear in another guise, as it is a symptom of our collective moral leaning. It fits the idea that there must be something to temper the black letter of the law, by way of analogy, pruning one branch would not kill the tree. To conclude, as Martin Luther King said, 'The arc of the moral universe is long, but it bends towards justice.'<sup>81</sup>

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<sup>81</sup> Martin Luther King Jr., *Our God is Marching on speech*, delivered at the State Capitol of Montgomery Alabama, 25/03/1965, transcript accessed at [http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/our\\_god\\_is\\_marching\\_on/](http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/our_god_is_marching_on/) on 23rd November 2014.