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Jus Cogens: Compelling the Law of Human Rights

Karen Parker

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Jus Cogens: Compelling the Law of Human Rights

By Karen Parker

J.D., 1983, University of San Francisco School of Law; Diplôme (International and Comparative Law of Human Rights), Strasbourg. Private practice, international law.

and Lyn Beth Nylon*

J.D., 1988, University of California, Hastings College of the Law; B.G.S. 1985, Roosevelt University.

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I. INTRODUCTION

On June 27, 1986, the International Court of Justice issued its landmark decision Military and Paramilitary Activities in and Against Nicaragua. A welcome feature of the Court's decision was its reliance on the principle of jus cogens, a fundamental doctrine of international law.

1. (Nicar. v. U. S.) 1986 I.C.J. 14 [hereinafter Nicar. v. U.S. Case]. The International Court of Justice (ICJ) is the principle judicial organ of the United Nations. U.N. CHARTER art. 92; Statute of the ICJ, Oct. 24, 1945, art. 1 [hereinafter Stat. ICJ]. The ICJ has jurisdiction, inter alia, to interpret treaties and decide any question of international law. Id. art. 36 (2)(a),(b). To ascertain the law, the Court is bound to apply international conventions, customs, generally recognized principles of law, and decisions and teachings of judges, scholars and writers. Id. art. 38.

2. Nicar. v. U.S. Case, supra note 1, 1986 I.C.J. at 100-01, 113-15 (opinion of the Court), 151-53 (Singh, J., separate opinion), 199-200 (Sette-Camara, J., separate opinion). The ICJ has played a significant role in developing the principle of jus cogens. For a thorough discussion of the ICJ's role in developing international law, see Lauterpacht, The Development of International Law by the International Court 20-22 (1958) (ICJ decisions are both evidence of and a source of international law).
Despite its doctrinal preeminence, the term *jus cogens* defies simple definition. Its use in human rights litigation can be undermined by its mirage-like quality. To compound the problem, the term *jus cogens* is practically absent from the United States' legal arena, even in human rights actions.

Human rights law has unfolded dramatically since the promulgation of the Universal Declaration of Human Rights.\(^3\) Lawyers are becoming more accustomed to invoking international standards. Lawyers represent the legal rights of persons in other countries, especially when such persons are in countries with no effective judiciary to enforce rights. Even so, the failure of the United States to ratify the major human rights treaties has made some United States lawyers hesitant to utilize international standards.\(^4\) As a result, attorneys try to use domestic law in situations in which it is patently inadequate. Courts, on the other hand, are rarely presented with international human rights norms, and as a result, have little experience in adjudicating them. Additionally, in spite of modest success in utilizing United States courts to redress gross violations of international law occurring in other countries, the courts are chary of addressing alleged violations by the United States whether such violations occur domestically or abroad. Even with recognition of the gravity of certain alleged violations of human rights or humanitarian law or the existence of relevant United States treaties, courts have invoked doctrines such as the political question doctrine and standing to preclude redress for illegal government policy, be it domestic or foreign.

Most areas of great human rights concern—illegal treaties, humanitarian (armed conflict) law, *apartheid*, genocide, torture, violations of the

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right to life and the plight of refugees—are governed by *jus cogens*. One way to enhance protection of human rights in domestic actions is to incorporate *jus cogens*, because *jus cogens* norms exist and are enforceable independently of treaties, and are immune from many judicial doctrines that have frustrated redress.

This Article defines *jus cogens*, and discusses its accommodation into the scheme of international and domestic law. It shows how *jus cogens* has developed as a natural law concept while being incorporated as part of legal positivism and modern international law. It demonstrates that *jus cogens* is compatible with the major legal systems—common law, civil law and socialist law. This Article presents *jus cogens* as the highest category of customary international law, and enumerates some of its widely accepted substantive norms. Then the procedural aspects of *jus cogens* are developed, with emphasis on how *jus cogens* overcomes judicial doctrines that have been invoked by courts to preclude enforcement of rights. The Article concludes by showing that *jus cogens*, under a variety of other names, is no stranger to United States jurisprudence but has instead been a major influence on the development of human rights.

II. DEFINITIONS OF *JUS COGENS*

The definition of *jus cogens* has challenged the most expert of scholars. Some stress its substance, some its procedural effect, and some its character of upholding world order. The literal translation—cogent

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law⁹—provides meaningful guidance: a primary attribute of *jus cogens* is that it is “compelling.” The Vienna Convention on the Law of Treaties¹⁰ uses the most widely used English term for *jus cogens*: “peremptory norm.”¹¹ Other English language terms are “fundamental,” “inalienable” or “inherent.”¹² “Essential” or “overriding principles” are also frequently used.¹³ International human rights instruments usually contain these terms. For instance, the Universal Declaration of Human Rights¹⁴ uses “inherent dignity”¹⁵ and “equal and inalienable rights.”¹⁶ The American Convention on Human Rights¹⁷ uses “essential rights.”¹⁸

An influential modern definition of *jus cogens* was given by the Mexican delegate to the United Nations Conference on the Law of Treaties: “The rules of *jus cogens* [are] those rules which derive from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community.”¹⁹ The delegate’s emphasis on the importance of *jus cogens* in maintaining the existence of international

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12. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512 (3d ed. 1979) (“Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like ‘fundamental’ or, in respect to rights, ‘inalienable’ or ‘inherent’.”).

13. *Id.* at 513. Instead of “principle,” some scholars refer to *jus cogens* as a “notion” or “concept.”


15. *Id.* 1st preamb. para.

16. *Id.*


18. *Id.* 2d preamb. para.

19. U.N. Conference on the Law of Treaties, *supra* note 9, Statement of Mr. Suarez (Mexico) at 294; see Christenson, *supra* note 5.
law was echoed in an opinion of the German Federal Constitutional Court:

The quality of such peremptory norms \textit{jus cogens} may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order and the observance of which can be required by all members of the international community.\textsuperscript{20}

Other definitions emphasize the binding, mandatory nature of \textit{jus cogens} norms.\textsuperscript{21} If the will of a state conflicts with a \textit{jus cogens} norm, the operation of \textit{jus cogens} requires the state to acquiesce to the \textit{jus cogens} norm.\textsuperscript{22} The binding nature of \textit{jus cogens} limits the substance of valid treaties or international agreements\textsuperscript{23} and makes agreements that conflict with its norms void.\textsuperscript{24} The binding, peremptory nature of \textit{jus cogens} does not allow for derogation.\textsuperscript{25} For this reason, \textit{jus cogens} norms must invalidate any instrument, judicial order, executive order or legislative act that contravenes them.\textsuperscript{26}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} \textit{Jus cogens} "connot\[es] a rule of law which is peremptory in the sense that it is binding irrespective of the will of individual parties, in contrast to \textit{jus dispositivum}, a rule capable of being modified by contrary contractual engagements. . . ." \textsc{Encyclopaedic Dictionary of International Law} 201 (C. Parry ed. 1986) (quoting G. Schwarzenberger, \textit{International Law and Order} 5 (1971)). \textit{Jus cogens} are "rules universally recognized and so firmly established as to need no justification and as binding on all nations belonging to the community of nations." Paul, \textit{The Legal Consequences of Conflict Between a Treaty and an Imperative Norm of General International Law (Jus Cogens)}, 21 \textit{ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT} 19 (1971).
\item \textsuperscript{22} Gormley, \textit{supra} note 5, at 120 (\textit{jus cogens} norms restrict the will of states). M. Janis, \textit{An Introduction to International Law} 30-31 (1988): "\textit{Jus cogens} . . . is the notion that there exist some rules of international law so fundamental that they prohibit acts by states even if such conduct is expressly sanctioned by state consent."
\item \textsuperscript{23} 1 H. Lauterpacht, \textit{International Law} 113 (Lauterpacht ed. 1970) (Treaties cannot change customary law that is \textit{jus cogens}); Verdross, \textit{Jus Dispositivum and Jus Cogens in International Law}, 60 AM. J. INT'L L. 55, 59 (1966).
\item \textsuperscript{24} 1 L. Oppenheim, \textit{International Law: A Treatise} 555 (1909) ("\textit{Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through the progressive development of International Law they become inconsistent with the latter.}).
\item \textsuperscript{25} Vienna Convention, \textit{supra} note 10, art. 53 ("a peremptory norm . . . [is] 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."). J. Kunz, \textit{The Changing Law of Nations} 102 (1968) ("international \textit{jus cogens}, which cannot be derogated. ".")
\item \textsuperscript{26} International \textit{jus cogens} norms require modification of conflicting United States foreign policy. Regrettably, Congress has floundered in efforts to enforce existing human rights
\end{itemize}
\end{footnotesize}
A. *Jus Cogens as Customary Law*

*Jus cogens* norms are the highest rules of international law,\(^27\) and function essentially as "very strong rule[s] of customary international law."\(^28\) Customary international law is the general practice of states which, over a period of time, becomes binding law through repetition and adoption. Customary law is judicially enforceable in United States courts,\(^29\) and is found by studying the "customs and usages of civilized nations; and as evidence of these, the works of jurists and commentators."\(^30\) The elements of a norm of customary international law were set out by the Inter-American Commission on Human Rights:

a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; b) a continuation or repetition of the practice over a considerable period of time; c) a conception that the practice is required by or consistent with prevailing international law; and d) general acquiescence in the practice by other states.\(^31\)

There is no established rule for exactly how many countries must participate for a practice to become custom, though complete universality is not required.\(^32\) Nor must a state be in perfect conformity with the

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\(^{28}\) A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 n. 73 (1971).

\(^{29}\) United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (customary law regarding piracy); The Paquete Habana, 175 U.S. 677 (1900) (customary law regarding coastal fishing and war); Ex Parte Quirin, 317 U.S. 1 (1942) (customary rules of war); Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (customary law of torture).


\(^{31}\) Case 9647, Inter-Am. C.H.R. 147, 166, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) [hereinafter Roach Death Penalty Case]. The International Court of Justice considered what factors must be present to create customary law from a treaty or treaty provision in the North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.) 1969 I.C.J. 3, 41-43 [hereinafter North Sea Cases]. Denmark and Netherlands claimed that the boundary rule of the Convention on the Continental Shelf treaty had become customary law and therefore binding on non-party Germany. The Court, in disagreeing, gave the following test: the treaty or treaty provision must be norm-creating in character; there must be wide-spread and representative State practice even by non-party States; there must be indication of the norm in the *opinion juris*; and a sufficient lapse of time. *Id.* at 41-42. Time could be quite short if the other factors are strongly present. *Id.*

\(^{32}\) Roach Death Penalty Case, supra note 31, at 167. *See also*, Sohn, "Generally Ac-
law at all times to be held to recognize a rule as customary law.\textsuperscript{33} However, if a state consistently objects as a customary rule is emerging, it may, by becoming a persistent objector, prevent the rule from becoming binding upon it, although other states would still be bound.\textsuperscript{34}

Once an international norm becomes \textit{jus cogens}, it is absolutely binding on all states, whether they have persistently objected or not.\textsuperscript{35} The rule is very clear: when a norm acquires \textit{jus cogens} status, it is binding even on persistent objector states.\textsuperscript{36}

As a stronger than ordinary rule of customary law, \textit{jus cogens} nullifies acts and treaties that contravene its rules.\textsuperscript{37} This power is one of the most important attributes of \textit{jus cogens}. Because customary law evolves, acts by governments could ripen into customary international law or be

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\end{quote}

\textsuperscript{33} Nicar. v. U.S. Case, \textit{supra} note 1 at 98 (“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.”); see North Sea Cases, \textit{supra} note 31, at 229 (Lachs, J., dissenting on other grounds)(to become binding, a rule of international law “need not pass the test of universal acceptance”).

\textsuperscript{34} Roach Death Penalty Case, \textit{supra} note 31, at 167; see Sohn, \textit{supra} note 32, at 1074 (“The fact that a few states object to the establishment of a new rule or to a revision of an old one does not prevent the birth of the rule. At most, a persistent objector... is not bound by the rule; that state cannot, however, prevent the emergence of the rule binding all non-objecting states.”); Stein, \textit{The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law}, 26 HARV. INT’L L. J. 457 (1985); Colson, \textit{How Persistent Must the Objector Be?} 61 WASH. L. REV. 957 (1986).

\textsuperscript{35} Nicar. v. U.S. Case, \textit{supra} note 1 at 98 (“If a State acts in a way \textit{prima facie} incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself... the significance of that attitude is to confirm rather than weaken the rule.”). The Court found the United States bound by the \textit{jus cogens} principle prohibiting the use of force through the United States “objected” by claiming justifications. \textit{Id.} at 114, 238.

\textsuperscript{36} Roach Death Penalty Case, \textit{supra} note 31, at 168 (“For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of \textit{jus cogens}.”). The United States has been a persistent objector to the prohibition of the death penalty, including in its actions before the Organization of American States (OAS). The Commission found the application of the death penalty to children as a violation of a \textit{jus cogens} rule. Accordingly, the United States objections had no effect. International Court of Justice, Judge Lachs (dissenting), recognized the effect of this rule: “[n]or can a general rule [of customary international law] which is not of the nature of \textit{jus cogens} prevent some States from adopting an attitude apart. They may have opposed the rule from its inception and may... decide upon different solutions of the problem involved.” North Sea Cases, \textit{supra} note 31, at 229.

\textsuperscript{37} M. AKEHURST, \textit{A MODERN INTRODUCTION TO INTERNATIONAL LAW} 41 (5th ed. 1984) (“What is said [in the Convention on the Law of Treaties, art. 53] about treaties being void [if they conflict with a peremptory norm of general international law] would also probably apply equally to local custom. The reason why local custom is not mentioned is because the purpose of the Convention was to codify the law of \textit{treaties} only.”).
incorporated into treaties. However, when state practices, including judicial, executive or legislative acts, violate *jus cogens* principles, they are legally void and have no effect on the body of custom which becomes law. The nullifying characteristic of *jus cogens* also explains the emphasis on the non-derogability of certain customary principles in international law: non-derogability signals that a customary international rule is *jus cogens*.

An important requirement of customary law is that it fit into a variety of legal theories and regimes. *Jus cogens* not only is naturally compatible with major legal theories and domestic legal systems, it has played a key role in the development of a unified body of international law.

1. *Jus Cogens* and Natural Law

*Jus cogens* is sometimes explained as arising from or synonymous with principles of natural law. Whether or not synonymous, *jus cogens* is clearly an attribute of natural law. Natural law is a theory of law that acknowledges unwritten standards of behavior as a primary source of law. Natural law has either religious, secular or philosophical

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39. L. Oppenheim, *supra* note 24, at 555 (“Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through the progressive development of International Law they become inconsistent with the latter. . . .”). E. Vattel, *The Law of Nations* 55, § 9 (J. Chitty trans. 1870) (“Whence as this law is immutable and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct nor reciprocally release each other from the observance of it.”).

40. See T. Meron, *Human Rights in Internal Strife: Their International Protection* 58-60 (1987). There is no derogation permitted from certain articles in the International Covenant on Civil and Political Rights, in *force* Mar. 23, 1976, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) art. 4. The Covenant is widely viewed as a codification of customary international law. Therefore, those provisions at least are binding even on non-ratifying States. However, only one of the Covenant’s non-derogable rights, interdiction on debtor’s prison, may not yet be universally accepted as *jus cogens*. The Covenant’s other non-derogable rights are: life (art. 6); freedom from torture (art. 7); freedom from slavery and servitude (art. 8).

41. See McDougal, Lasswell, & Laisman, *supra* note 11; see M. Janis, *supra* note 22, at 53 (“Rather close to natural law is the notion of *jus cogens*, compelling law.”).

42. IV E. Burke, *Works*, 165-66 (1791) (“We have obligations to mankind at large, which are not in consequence of any special voluntary pact. They arise from the relation of man to man, and the relation of man to God, which relations are not matters of choice.”). E. Kant, *Perpetual Peace* 172-73, 183 (1915). (“In all these twistings and turnings of an immoral doctrine of expediency . . . men cannot get away from the idea of right in their private any more than in their public relations . . . . Right must be held sacred by man, however great the cost and sacrifice to the ruling power.”). R. Pound, *Law and Morals* 87 (1924) (“Already there is a revival of natural law . . . a creative natural law that would enable us to make
Secular natural law (*jus naturale*), the basis of many legal systems, is a universal standard based upon a common humanity that can be arrived at by reason and thought. European and European-based legal systems owe much to natural law philosophy of classical writers such as Plato, Sophocles and Cicero. The early legal authorities incorporated of our received legal materials, as systematized by the legal science of the last century, a living instrument of justice in the society of today and of tomorrow.

43. See generally, R. Pound, *An Introduction to the Philosophy of Law* (1922) (survey on nature of law). Religious natural law is the basis of many legal systems. Chinese Confucianism was a moral code that influenced Chinese and East Asian law and politics for centuries. Taoism was also very influential in China. The *Tao Te Ching* (attributed to Lao Tzu), the primary written authority of the Taoist school, teaches that there is a universal governing principle (Tao). Lao Tzu instructs rulers how to rule in harmony with the Tao. See W. De Bary, W. Chan & B. Watson, *Sources of Chinese Tradition* (1960). Early Japanese law developed from a strong religious tradition. Legal, social and religious rules were not distinguished, and the law was the will of the gods as declared by the ruler. Later, Codes modeled on Chinese codes were written, based on Confucian ethics. See Y. Noda, *Introduction to Japanese Law* (A. Angelo, trans. 1976). In Islam, the foundation of all law is the *shari'a*, the law of Allah. The basis of knowing the divine law is the Quran, accepted as the literal word of God as revealed to His prophet Muhammad. Many Muslims also consult the Traditions (*sunna*), which are the traditional ways in which the prophet or the community of believers follow the law; some also consult Consensus (*ijma*), which is the consensus of the companions of the prophet and their immediate successors regarding the law, and Analogy (*qias*), used to ascertain the law when a question is similar to one already answered in the Quran. A. Lambton, *State and Government in Medieval Islam* 1-12 (1981). Traditional Jewish law (*Halakha*) is based on the Torah. Christian precepts were incorporated into Canon Law and early common-law and used widely in Europe by the seventeenth and eighteenth centuries.


45. J. Martinain, *The Rights of Man and Natural Law* 61 (D.C. Anson trans., 1943) ("[Natural law is] an order or a disposition which human reason can discover and according to which the human will must act in order to attain itself to the necessary ends of the human being.").

46. Plato, *Laws* in *The Collected Dialogues of Plato* 1445 (Hamilton & Cairns eds. 1963) ("[Some people wrongly] declare that the really and naturally laudable is one thing and the conventionally laudable quite another, while as for right, there is absolutely no such thing as a real and natural right, that mankind are eternally disputing about rights and altering them, and that every change thus made, once made, is from that moment valid, though it owes its being to artifice and legislation, not to anything you could call nature.").

47. Sophocles, *Antigone*, lines 451-457 (Antigone to King Creon in response to Creon’s decree to leave her brother Polyneices’ corpse unburied) ("Nor did I think your orders were so strong that you, a mortal man, could overrun the gods’ unwritten and unfailing laws. Not now, nor yesterday’s, they always live, and no one knows their origin in time.").

48. Cicero, *De Officiis*, Book 3, Ch. 4, quoted in Vattel, *supra* note 39, at 139 ("All mankind should lay it down as their constant rule of action, that individual and general advantage should be the same: for, if each man strives to grasp every advantage for himself, all the ties of human society will be broken. And, if nature ordains that man should feel interested in
rated classical natural law into their treatises on the law of nations.\textsuperscript{49} The major thesis of Grotius was the natural law basis of international law,\textsuperscript{50} a theme heavily relied upon by Vattel.\textsuperscript{51} Concern over whether nations with different cultural and religious bases could participate in a common international law was minimized when secular natural law became predominant over religious natural law in the 19th and 20th centuries. The basis for international relations was universally accepted to be the commonality of humankind and the mutual benefit of states.\textsuperscript{52} All cultures were viewed as acknowledging the same fundamental principles.

\begin{quote}
[I]t is by virtue of natural law that the Law of Nations and positive law take on the force of law, and impose themselves upon the conscience . . . . There is a dynamism which impels the unwritten law to flower forth in human law and to render the latter ever more perfect and just . . . . It is in accordance with this dynamism that the rights of the human person take political and social form in the community.\textsuperscript{53}
\end{quote}

the welfare of his fellow-man, whoever he be, and for the single reason that he is a man,—it necessarily follows, that, according to the intentions of nature, all mankind must have one common interest."). For other, slightly more interpretive translations, see \textit{ON MORAL OBLIGATION} (J. Higginbotham trans. 1967) and \textit{ON DUTIES} (H. Edinger trans. 1974).

\textsuperscript{49}. U.N. Conference on the Law of Treaties, \textit{supra} note 9, Statement of Mr. Suarez (Mexico) at 294 ("In international law the earliest writers, including the great Spanish forerunners of Grotius, had been deeply imbued with the principles of the then prevailing natural law. They had therefore postulated the existence of principles that were derived from reason, principles which were of absolute and permanent validity and from which human compacts could not derogate.").

\textsuperscript{50}. H. \textit{GROTIUS, DE JURE BELLi AC PACIS LIBRI TRES PROLEGOMENA, §§ 8, 9, \& 30 at 12-13, 21 (F. Kelsey trans. 1964) (1925) ("This maintenance of the social order . . . which is consonant with human intelligence, is the source of law properly so called. . . . [I]t is meet for the nature of man, within the limitations of human intelligence, to follow the direction of a well-tempered judgement, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse. Whatever is clearly at variance with such judgement is understood to be contrary also to the law of nature, that is, to the nature of man. . . . For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are."). See Lauterpacht, \textit{The Grotian Tradition in International Law}, 1946 Brit. Y.B. Int'l L. 1.

\textsuperscript{51}. E. \textit{VATTTEL, supra} note 39, at 381 ("The law of nature, whose object it is to promote the welfare of human society, and to protect the liberties of all nations . . . recommends the observance of the voluntary law of nations, for the common advantage of states . . . ."").

\textsuperscript{52}. \textit{Id.} at 138-39 ("From the manner in which we have established the obligation of performing the offices of humanity, it plainly appears to be solely founded on the nature of man. Wherefore, no nation can refuse them to another, under pretence of its professing a different religion: to be entitled to them, it is sufficient that the claimant is our fellow-creature.").

\textsuperscript{53}. J. \textit{MARTAIN, supra} note 45, at 70-71. \textit{See}, e.g., The Venus, 12 U.S. (8 Cranch) 253, 297 (1814) (Marshall, C.J., concurring in part and dissenting in part) ("The law of nations is a law founded on the great and immutable principles of equity and natural justice.").
Modern human rights law is based on the natural law tenet that human beings have rights by virtue of being human. The human rights instruments do not create rights, they merely recognize them.54

2. Jus Cogens and Legal Positivism

At first glance, legal positivism appears to be hostile to *jus cogens*: legal positivism in its pure form regards as law only specifically enacted rules.55 Unwritten rules or standards are invalid. An extreme positivist argues that every law requires a remedy: the sovereign must have the ability to implement a law and impose penalties on law-breakers for it to be law.56 Wide acceptance of positivism in international law could defeat the operation of *jus cogens* principles except those specifically set out in treaties, and then only as against ratifying states.

Positivism reacted against excessive use of unwritten laws, defended by arbitrary references to custom or by unrestrained judicial power.57 Positivists believe written rules avoid vagueness and arbitrary judgments, and make the law and its implementation more just. Positivists stress that laws are value-neutral.58

There has been increasing erosion of adamant positivist influence in international law. Even the value-neutral claim has been substantially refuted by many authors.59 It is now accepted even by the strictest positivists that positivism necessarily requires using moral considerations or value judgments as to which is the better theory about the nature of law.60

56. H.L.A. Hart, * supra* note 55, at 18-25 (laws are orders backed by threats); T. Hobbes, *The Leviathan* 86 (M. Oakeshott ed. 1947) ("BONDS, by which men are bound, and obliged . . . have their strength, not from their own nature . . . but from fear of some evil consequence upon the rupture.").
3. *Jus Cogens* and the Merging of Natural Law and Positive Law Theories in Modern History

Positivist and natural law theories are increasingly viewed as complementary, rather than oppositional.\(^1\) This has had a favorable effect on the development of customary international law as a whole, and *jus cogens* in particular. The positivist view that all sovereign-made law is law and must be obeyed has yielded to analysis of the underlying justice of law in determining its validity.\(^2\) Legal systems function under a positivist approach until confronted with an unjust law. Then the natural law principle, especially one that is *jus cogens*, overrides the unjust law. The result, even for a positivist, is that the unjust law is not valid law—it has no authority behind it and need not be obeyed.\(^3\)

Modern international law has merged theories of natural and positive law; in part because natural law concepts of a superior order have been transformed into positive law through treaties and in part because of the development of customary international law.

4. Universality of *Jus Cogens* in Legal Systems

An aspect of the universality of *jus cogens* is its presence in national legal systems regardless of the type of national legal system. The three major legal systems—common law, civil law and socialist law—all incorporate principles of *jus cogens*.

a. The Common Law System

The common law legal system utilizes judicial rulings rather than Codes to determine the law. In England, there is not even a written Con-

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2. *Id.* at 784, (quoting OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 201 (H. Shriver ed. 1936)) (“Today, even ardent defenders of positivism concede that it is a legitimate function not only of the law student and law professor, but also of the judge and, above all, the legislator, to ask of a legal rule.... ‘Is it just?’.”).
Berman then presents the importance of historical jurisprudence in the development of law as an integration of positivist and naturalist theories as the better approach. He suggests that positivism is best used during periods of reform, when changing unjust laws could lead to improved social conditions, and that a natural law theory is more appropriate to revolutionary situations, where the legitimacy of the laws and the sovereign that made them are being challenged. *Id.* at 787-88.
3. See North Sea Cases, *supra* note 31, at 193 (Tanaka, J., dissenting) (“Natural law does not venture to interfere with positive law except in the case that positive law rules are manifestly immoral and violate the principles of natural law....”).
stitution. Constitutional issues are resolved by invoking an unwritten Constitution composed of common-law decisions of the courts and acts of Parliament. The most influential commentators stress natural law as the basis for that unwritten law. Blackstone, in his famous Commentaries, wrote: "This law of nature being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe in all countries, and at all times."\(^6\)

\textit{Jus cogens} is uniquely compatible with the United States' common law system. This is in part because of the heavy reliance on natural law principles in the Declaration of Independence\(^6\) and in the Constitution,\(^6\) and in part because American judges have always used customary international law, including \textit{jus cogens} principles, even those pre-dating the American nation.\(^6\)

Common law courts have the power to curb abuses of fundamental rights by the government and its officials through writs of habeas corpus, certiorari, mandamus and prohibition. As a further protection of rights, individuals may bring tort actions against public officials in their private and official capacities.\(^6\)

b. \textit{The Civil Law System}

The civil law system, modeled on ancient Roman law,\(^6\) is code-

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\(^6\) W. Blackstone, Commentaries 27-31 (Lewis ed. 1897).

\(^6\) The Declaration of Independence, preamble (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness... ").

\(^6\) U.S. Const. amend. I-X, XIV.

\(^6\) See L. Oppenheim, supra note 24 and accompanying text; U.S. v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (then-existing common law and international law definition of piracy incorporated into domestic laws); and The Paquete Habana, 175 U.S. 677 (1900) (rules found, \textit{inter alia}, in royal orders of 1403, in treaties of 1521 and in scholarly works from 1661 to be binding on the United States).


\(^6\) The \textit{CORPUS JURIS CIVILIS} is the codification of Roman law by a succession of legal
The law is found in codes and constitutions rather than in judicial precedents. Civil law is positivist in approach. Nonetheless, most constitutions of contemporary civil law states assert such natural law concepts as "human dignity," "rules of morality" and "inalienable human rights." The codes of civil law countries contain principles such as contra bonos mores (against community standards) in the private law, which imply a common morality and expected norm of conduct.

Most civil law countries also have public law remedies which can be used by citizens alleging, inter alia, jus cogens violations. In Latin American countries, a common remedy is the writ of amparo. In Mexico, for example, amparo is used against judges, police, legislators and the exec-


70. See generally J. MERRYMAN, THE CIVIL LAW TRADITION (1969); R. SCHLESINGER, supra note 69.

71. Most European (with the exception of Ireland and the United Kingdom), Latin American, Asian and African countries that are not former colonies of England use the civil law system. However, some Asian and North African states are heavily influenced by Muslim law. Some other African states have legal traditions based on conciliation. These systems rely heavily on principles analogous to jus cogens. See M'Baye, Le droit africain, ses vices et ses vertus, REV. SENEGALAISE DE DROIT 5 (1970).

72. GRUNDEGESETZ [GG] art. I(1) (W. Ger.).

73. Id. art. II (1).

74. Id. art. I(2). See LA CONSTITUTION preamble (France) (natural rights, inalienable and sacred); CONSTITUCIÓN (Spain) (protection of the exercise of human rights). See also KENPÔ (Constitution) preamble (Japan) ("We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.").

75. BURGERLICHES GESETZBUCH [BGB] art. 138(1) (W. Ger.) ("A juristic act that is contra bonos mores is void."). An example of such an act is a usurious contract, i.e., where one party, acquiring some disproportionate advantage, unfairly exploits the other. See Dawson, Unconscious Coercion: the German Version, 89 HARV. L. REV. 1041 (1976). See U.C.C. § 2-302 for a similar treatment of unconscionable contracts. In French private law there is no general provision analogous to the German Civil Code, art. 138. French courts have used a variety of doctrines to prevent gross unfairness. See THE CIVIL LAW SYSTEM 824-27, 1024-26 (A. T. von Mehren & J. Gordley eds. 1977).

76. In Germany, "jus cogens" is a concept applied in contract law and to the written law in general as well. R. SCHLESINGER, supra note 70 at 587-88 ("In civilian terminology, a distinction is drawn between cogent rules (ius cogens), which cannot be abrogated by the parties and render all contrary agreements null and void, and yielding rules (ius dispositivum), which are subject to the autonomy of the parties in the sense that the parties have the power to make agreements contrary to the rule.").

77. The writ of amparo provides citizens protection for a wide range of government acts or laws that violate individual freedoms. It is broader than the writ of habeas corpus, which requires bodily restraint or imprisonment. Amparo developed in Mexico, where it has constitutional status. See J. MERRYMAN & D. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 339-40 (1978).
tive for illegal or fundamentally unfair acts.\textsuperscript{78} Direct \textit{amparo} may reverse the final judgment of a state or federal court; indirect \textit{amparo} may enjoin or compel specific actions of police and other non-judicial authorities.\textsuperscript{79} \textit{Amparo contra leyes} allows citizen attacks on statutes, decrees, or regulations.\textsuperscript{80} A similar writ, called \textit{mandado de segurança} is used in Brazil.\textsuperscript{81} In France and Germany, almost every governmental administrative act is subject to review by the administrative courts. An act found to be illegal or an abuse of discretion may be annulled.\textsuperscript{82}

c. The Socialist Law System

Socialist law can be considered a variety of civil law, and hence, positivist.\textsuperscript{83} In the socialist law system the state embodies and expresses the will of its citizens. The will of the people becomes law through the state. Without state recognition and implementation there are only social interactions and customs, not law. By definition, the law is that which the state has accepted as such. It follows that therefore there are no laws without the existence and participation of the state.

Yet, even the extreme positivism of socialist legal thinking has now incorporated \textit{jus cogens}.\textsuperscript{84} A question that concerns jurists is how socialist and non-socialist states can have a mutually accepted, binding international law, given the conflicting ideological bases of the nature of law.\textsuperscript{85} The typical response of scholars in the 1940s emphasized treaties as the only source of binding law between capitalist and socialist countries.\textsuperscript{86} This response rejected custom as a source of international law;

\textsuperscript{78} Clark, \textit{Judicial Protection of the Constitution in Latin America}, 2 HASTINGS CONST. L. Q. 405, 419 (1975).
\textsuperscript{79} Id. at 432.
\textsuperscript{80} Id. at 432-33. \textit{See} J. MERRYMAN, \textit{supra} note 77, at 776-77.
\textsuperscript{81} Clark, \textit{supra} note 78, at 419.
\textsuperscript{82} R. SCHLESINGER, \textit{supra} note 69, at 501 n.14.
\textsuperscript{85} \textit{See, e.g.}, Tunkin, \textit{supra} note 6, at 182-83. (criticizing E. McWhinney's concern as indicating lack of understanding of Marxist-Leninist theory).
\textsuperscript{86} Vyshinskii, \textit{International Law and International Organization}, 1 SOVIET STATE AND LAW 22 (1948) (“[S]olid international law and order can be assured only on the basis of understanding and the recognition of the mutual needs, interests and rights of sovereign states. That is why the Soviet theory of international law regards the treaty ... as the basic source of international law. This secures ... full moral as well as juridical force, since at their base will
viewing custom as necessarily a struggle between capitalist and socialist ideologies. Contemporary Soviet law emphasizes the importance of custom as a source of international law, and reinforces the compelling quality of *jus cogens* in international rule making. It supports the evolution of one international system of law, influenced by coexisting capitalist and socialist systems.

Socialist legal scholars, however, may interpret the content of *jus cogens* differently than capitalist scholars because of the emphasis on economic rights in socialist law. Socialist goals of social and economic progress comprise the higher law of *jus cogens*. The domestic effect of *jus cogens* is clear:

Marxist social science discovers their relevance in their harmony with the universal, objective laws of social progress... Even in case of lack of actual law regulation [these principles] bind the hand of the legislator and the user of the law in a way, namely, the result of their activity may not contradict those values, which are expressed in the basic guiding principles of the socialist society. In such way the basic principles certainly mean a sort of "upgrading" of the positive law: a higher level in the system of positive law.

**III. SUBSTANTIVE JUS COGENS**

The content of *jus cogens* is constantly evolving. This is because

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87. See U.N. Conference on the Law of Treaties, *supra* note 9, Statement of Mr. Khlestov (USSR) at 294 ( *jus cogens* article one of most important) and Statement of Mr. Kudryavtsev (Byelorussia S.S.R.) *id.* at 307 ("ample evidence" of *jus cogens* norms). Some Soviet scholars maintain that the U.S.S.R. has played a major role in developing international law. See, e.g., Blishchenko, *International Treaties and Their Application on the Territory of the USSR*, 69 AM. J. INT'L L. 819, 827 (1975) ("Because of the nature of the socialist system, the influence of the socialist legal order on the development of present day international law is always progressive.").


89. Soviet jurists emphasize the freedom from exploitation and colonialism, calling contemporary international law "anti-colonial." Tunkin, *supra* note 6. The right to peace and self-determination are also imperative in the Soviet view. *Id.*


91. See U.N. Conference on the Law of Treaties, *supra* note 9, Statement of Mr. Suarez (Mexico) at 294 ("There had always been principles of *jus cogens*. Although few in number at the time when inter-state obligations were equally few, they had been increasing since and would continue to increase with the expansion of human, economic, social and political relations. The norms of *jus cogens* were variable in content and new ones were bound to emerge in the future... Others might cease in due course to have the character of *jus cogens*, as had
jus cogens norms reflect the developing interests of the international community as a whole, not the narrow interests of a particular state. Human rights in particular concern not only states but the whole of civilization. Legal duties are owed by states, not only to their own subjects, but to the international community as well.

Customary international law becomes jus cogens because of the subject matter: the content of jus cogens principles make them different from other rules of international law. Jus cogens norms protect humankind and the existence of the international community in a profound way. Certain standards can become jus cogens almost immediately, while others evolve slowly. For example, Soviet legal authority Tunkin claims the prohibition of war crimes is an "old norm which [has] acquired the character of jus cogens," but the prohibition of crimes against peace is "relatively new and yet [has] had the jus cogens character from the very beginning."

The drafters of the Vienna Convention purposely omitted an enumeration of jus cogens rules in the Convention itself because of their evolving nature. Agreement on existing jus cogens norms is very broad,
though jurists frequently disagree on norms that are developing. At least one commentator has expressed concern that enumeration of established norms in a time-fixed treaty might restrict the evolution of other norms into \textit{jus cogens}.\textsuperscript{100}

In spite of the reluctance to enumerate \textit{jus cogens} norms in the Vienna Convention, there is wide agreement on past and current \textit{jus cogens} norms. The oldest recognized \textit{jus cogens} norms are the prohibition of piracy,\textsuperscript{101} and slavery.\textsuperscript{102} International Court of Justice Judge Manfred Lachs, citing early writers, posits that \textit{jus cogens} as a principle of law evolved to address the special gravity of piracy and slavery.\textsuperscript{103}

English authority Ian Brownlie, stressing the indelibility of \textit{jus cogens} rules, lists these examples of \textit{jus cogens}: "the prohibition of aggressive war, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy."\textsuperscript{104} Most authorities agree with former International Court of Justice Judge Fitzmaurice's enumeration of \textit{jus cogens} norms: recognition of the rule against the use of force and non-recognition of situations brought about by the use of force; the rule that treaties imposed by force are void; rules prohibiting crimes against peace and humanity, including genocide, near-genocide, and acts in the nature of genocide; the rule that a plea of superior orders is \textit{prima facie} no answer to a charge of crime against peace and humanity or of a war crime; the principle of the non-derogability of \textit{jus cogens} rules; policies and actions of a state having negative consequences to the international community; and the duty to help other countries for the general welfare of themselves and the international community as a whole.\textsuperscript{105}

\textsuperscript{100} Paul, \textit{supra} note 21, at 33 ("[E]numeration [of \textit{jus cogens} norms]... would restrict the possibilities of their future development.").

\textsuperscript{101} L. Oppenheim, \textit{supra} note 24, at 528; See A. McNair, \textit{The Law of Treaties} 215 (1961). In United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820), Justice Story utilizes the standard customary law test to determine that piracy violates the law of nations. He also uses \textit{jus cogens} language. ("There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature... [piracy is] an offence against the universal law of society, a pirate being deemed an enemy of the human race.").


\textsuperscript{104} I. Brownlie, \textit{supra} note 12, at 513.

\textsuperscript{105} Fitzmaurice, \textit{supra} note 6, at 323. Fitzmaurice's call to the duty to help other coun-
Former Secretary of State Henry Kissinger told the Organization of American States that "there are standards below which no government can fall without offending fundamental values, such as genocide, officially tolerated torture, mass imprisonment or murder, or the comprehensive denial of basic rights to racial, religious, political, or ethnic groups. Any government engaging in such practices must face adverse international judgment."\(^{106}\) The Restatement of Foreign Relations Law of the United States lists six prohibitions affecting human rights as *jus cogens*: a) genocide, b) slavery or slave trade, c) the murder or causing the disappearance of individuals, d) torture or other cruel, inhuman, or degrading treatment or punishment, e) prolonged arbitrary detention, and f) systematic racial discrimination.\(^{107}\) In addition, the Restatement accepts that a rule of *jus cogens* will void a conflicting treaty,\(^{108}\) and that "the principles of the United Nations Charter prohibiting the use of force (Comment h) have the character of *jus cogens*.\(^{109}\)

A. Prohibition of Genocide as *Jus Cogens*

Genocide is universally recognized as violating *jus cogens*:\(^{110}\) genocide is a crime against humanity.\(^{111}\) At its first session the United Nations General Assembly declared genocide a crime against international law.\(^{112}\) Genocide "shocks the conscience... [Its prohibition is a principle] recognized by civilized nations as binding on States, even without a conventional [treaty-based] obligation."\(^{113}\) Its prohibition imposes *erga

\(^{106}\) Hastings Int'l and Comparative Law Review

\(^{107}\) "Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void.") *Id.*, comment n. *See also*, *id.*, § 702 comment m regarding consistent patterns of gross violations of human rights.

\(^{108}\) *Id.*, § 702 comment n.

\(^{109}\) *Id.*, § 102, comment k; *see id.* comment h.

\(^{110}\) For a definition of genocide, *see* Genocide Convention, *supra* note 4.


\(^{112}\) G.A. Res. 96 (1), Dec. 11, 1946.

omnes obligations on states. The Inter-American Commission on Human Rights declares that genocide "achieves the status of jus cogens precisely because it is the kind of rule that it would shock the conscience of mankind . . . for a State to protest."

While genocide clearly violates jus cogens, there has been little judicial guidance on what acts constitute genocide. One key issue is the removal of indigenous peoples from their lands or the destruction of their lands. In the United States, for instance, these acts cause physical and cultural annihilation because land is an integral part of American Indian religion and cultural cohesiveness.

B. The Right to Life as Jus Cogens

The right to life, called the most fundamental human right, is a jus cogens rule. The right to life is positioned prominently in virtually every major international human rights instrument. As one scholar states, "[T]he right to life . . . is one of the rights universally recognized as forming part of jus cogens and entailing, on the part of States, obligations erga omnes toward the international community as a whole."

In spite of its jus cogens character, there are exceptions to the right to life. For example, states have the right to maintain armies and to order soldiers into combat. Incidental civilian casualties are not necessarily violations, though casualties resulting from violations of the rules of war do violate the right to life. Additionally, national constitutions

114. See Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 ("Erga omnes . . . obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.").
117. See Gormley, supra note 5.
118. See, e.g., Universal Declaration of Human Rights, supra note 3, art. 3 ("Everyone has the right to life, liberty and the security of the person."); the International Covenant on Civil & Political Rights, supra note 40, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").
120. Case 9213, INTER-AM. C.H.R. 184, OEA/ser. L/V/II.74, doc. 9 rev. 1 (1987) (Com-
and international instruments allow the death penalty. But use of the death penalty has been subject to strictest scrutiny in international forums. In a recent case the Inter-American Commission on Human Rights found that the United States Government violated the right to life in imposing the death penalty on two juveniles. The Commission found juvenile execution proscribed by a regional norm of *jus cogens*.

Other aspects of the right to life have also been scrutinized. For example, legal abortions have been found not to violate the right to life. Summary or arbitrary deprivations of life, addressed regularly by the United Nations, are clearly prohibited. Some legal experts suggest that the right to life incorporates the right to peace, the right to a safe environment and the right to living.

C. Humanitarian Law as *Jus Cogens*

Humanitarian law governs the conduct of armed conflict and the protection of victims of armed conflict. The primary sources of humanitarian law are: 1) the Geneva Conventions and Protocols Additional; 2) the Hague Convention of 1907; 3) United Nations

mission found prima facie violation of right to life in respondent government's bombing of hospital in Grenada).

121. *See, e.g.,* International Covenant on Civil and Political Rights, *supra* note 40, art. 6.

resolutions; and 4) rules of customary international law, which include principals of the law of civilized nations, principles of humanity and the dictates of public conscience.

The codification of natural law concepts relating to warfare began in 1864. The Geneva Convention of 1864 provided protection for sick and wounded combatants including medical personnel who treated them, and enemy wounded. The Hague Convention of 1907 established rules governing the conduct of armed conflict. The concepts of crimes against humanity and war crimes (crimes against enemy combatants or civilians) developed further when the peace treaty concluding World War I (the Treaty of Versailles) imposed individual responsibility on the Emperor and war criminals.

At the end of World War II, in response to the Holocaust, international criminal law was further codified by the Charter of the International Military Tribunal which created an ad hoc international court. The Nuremberg Charter recognizes international peremptory norms that
neither states nor individuals may abrogate. War crimes and crimes against humanity for which individuals are held personally responsible are acts that violate these universal standards, and include:

Murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal [i.e., either crimes against peace or war crimes], whether or not in violation of the domestic law of the country where perpetrated.\(^\text{138}\)

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity\(^\text{139}\) also identifies grave breaches of the Geneva Conventions of 1949\(^\text{140}\) as war crimes.\(^\text{141}\) The *jus cogens* character of these crimes is reinforced by the acknowledgment that they "are among the gravest of crimes in international law."\(^\text{142}\) Most scholars acknowledge international consensus that humanitarian law as a whole is *jus cogens*,\(^\text{143}\) though there is some merit to the view that breaches such as improper withholding of writing material to a prisoner of war be considered a mere infraction, and not a war crime.\(^\text{144}\)

The International Court of Justice recognized the *jus cogens* status of common articles one and three of the Geneva Conventions\(^\text{145}\) in the case *Military and Paramilitary Activities in and Against Nicaragua*.\(^\text{146}\)
The Court declared that common articles one and three “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which . . . reflect what the Court in 1949 called ‘elementary considerations of humanity’ [in the Corfu Channel case].”\textsuperscript{147} The Court held:

[T]here is an obligation on the United States Government, in the term of Art. 1 of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances’, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.\textsuperscript{148}

This aspect of international responsibility for compliance with humanitarian law and the Geneva Conventions, even if a state is not a signatory to them, or a party to the conflict, reinforces their \textit{jus cogens} status.

D. \textit{Non-refoulement} as \textit{jus cogens}

Closely related to the right to life and principles of humanitarian law is the right of \textit{non-refoulement}.\textsuperscript{149} Many persons who have fled their country of origin today have done so because of war, civil strife, gross violations of human rights, and natural disasters such as drought, famine and earthquake. Some are denied asylum rights under refugee criteria.\textsuperscript{150} Return to their home country would place their right to life and security of person and other fundamental human rights at substantial risk. In these circumstances, the international principle of \textit{non-refoulement} ap-

\textsuperscript{147}. \textit{Id} at 114.
\textsuperscript{148}. \textit{Id}.
\textsuperscript{149}. The principle of \textit{non-refoulement}, from the French \textit{refouler} (to return), provides that a person has a right to not be returned to the country of origin under certain circumstances. While often arising because of persecution, and therefore governed by \textit{non-refoulement} sections in refugee treaties, the right also exists when a person has suffered, \textit{inter alia}, the dangers of war or gross violations of human rights. \textit{See}, e.g., Report of the U.N. High Commissioner for Refugees, 40 U.N. GAOR Supp. (No. 12) at 6, U.N. Doc. A/40/12 (1985) (“The principle [of \textit{non-refoulement}] requires that no person shall be subject to such measures as rejection at the frontier . . . or compulsory return to any country where he may have reason to fear . . . serious danger resulting from unsettled conditions or civil strife.”). \textit{See also} Goodwin-Gill, \textit{Non-refoulement and the New Asylum Seekers}, 26 VA. J. INT’L L. 897 (1986); Parker, \textit{Geneva Convention Protection of Salvadoran Refugees}, 13 IMM. NEWS 1 (1984); Parker, \textit{Human Rights and Humanitarian Law}, 7 WHITTIER L. REV. 675 (1985).
\textsuperscript{150}. Refugee law provides for asylum for a person who is unable or unwilling to return to his or her former country of origin or residence “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . .” 8 U.S.C. § 1101 (a)(42)(A), implementing the Protocol Relating to the Status of Refugees, \textit{supra} note 4. \textit{See also}, Convention Relating to the Status of Refugees, \textit{in force} Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter Refugee Convention].
plies. The principle of non-refoulement, usually referred to only in its refugee law application,151 is also part of human rights law152 and humanitarian law,153 and is acknowledged as a jus cogens norm.154 The jus cogens nature of the right of non-refoulement is especially apparent because the later doctrine imposes obligations on states not involved in the acts that lead to the flight of the victim. Respect for the right of non-refoulement as jus cogens under humanitarian law is especially imperative because a wartime violation is a grave breach.155 Grave breaches are war crimes.156 However, in all its applications, the right of non-refoulement, like all jus cogens norms, exists outside of treaties, and is non-derogable, binding and judicially enforceable.

E. The Prohibition Against the Use of Force as Jus Cogens

The most recent pronouncement on the substantive content of jus cogens by the International Court of Justice has been the condemnation of the use or threat of force by one country against another as a violation of jus cogens. In Military and Paramilitary Activities in and Against Nicaragua,157 the Court made clear that the international rule prohibiting the use of force as expressed in article two, paragraph four of the United

151. See, e.g., Refugee Convention, supra note 150, art. 33.
152. See, e.g., Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in force June 26, 1987, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985), reprinted in 23 I.L.M. 1027 (1984) [hereinafter Torture Convention]. Article 3 provides: "1. No State Party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" (emphasis added).
153. Hague Convention, supra note 4, 8th preamb. para. (civilians protected by principles of humanity and "dictates of public conscience"); Geneva Conventions, supra note 4 (civilians), art. 45.
154. Report of U.N. High Commissioner for Refugees, 40 U.N. GAOR Supp. (No. 12) at 6, U.N. Doc. A/40/12 (1985) ("Due to its repeated reaffirmation at the universal, regional and national levels, the principle of non-refoulement has now come to be characterized as a peremptory norm of international law."); INTER-AM. C.H.R. 132-35, OEA/ser. L/V/ll.57, doe. 6 rev. 1 (1982); Cartegena Declaration on Refugees (Geneva, United Nations High Commissioner for Refugees 1984), conclusion 3 ("[Refugees include] persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which have seriously disturbed public order") and conclusion 5 ("[Non-refoulement] is imperative in regard to refugees . . . as a rule of jus cogens.").
155. Geneva Conventions supra note 4 (civilians), art. 147.
156. War Crimes Convention, supra note 111, art. I (a).
Nations Charter is a *jus cogens* standard, admitting no conduct in contravention to it. The Court stated:

A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force . . . 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*".

The Court then noted that both Nicaragua and the United States had referred to the prohibition of the use of force as *jus cogens*.

In his separate opinion, Judge Nagendra Singh emphasized that "the principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife." Judge Sette-Camara, in his separate opinion, stated he firmly believe[s] that the non-use of force as well as non-intervention—the latter as a corollary of equality of States and self-determination—are not only cardinal principles of customary international law, but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States.

### F. Prohibition of Torture as *Jus Cogens*

Torture is widely recognized as contravening *jus cogens*. All major human rights agreements and instruments contain a prohibition against torture. In the relevant treaties, the prohibition is non-derog-
Torture in time of war is a grave breach of humanitarian law. To reinforce the prohibitions against torture, the United Nations General Assembly promulgated the Torture Convention. Because of the universal concern about the widespread occurrence of torture, the United Nations Commission on Human Rights appointed a special rapporteur on torture, Peter Kooijmans, to "promote the full implementation of the prohibition under international and national law of the practice of torture and other cruel, inhuman, or degrading treatment or punishment." In Mr. Kooijmans' 1986 report, he emphasized the *jus cogens* nature of the prohibition against torture:

Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes* . . . which every State has a legal interest [to implement]. The International Law Commission . . . has labelled serious violations of these basic human rights as 'international crimes,' giving rise to the specific responsibility of the States concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon

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166. *See*, e.g., International Covenant on Civil and Political Rights, *supra* note 40, art. 4.
167. Geneva Conventions, *supra* note 4, (armed forces in the field), art. 50; (armed forces at sea), art. 51; (prisoners of war), art. 130; (civilians), art. 147.
168. Torture Convention, *supra* note 152. Paragraph 5 emphasizes the Assembly's intention to achieve "a more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment" *Id.* at 197 (emphasis added). G.A. Res. 39/118, passed Dec. 14, 1984, again included the reference to "the existing prohibition under international law of every form of cruel, inhuman or degrading treatment or punishment," making it clear that the Assembly recognized an existing customary law standard independent of the resolutions.
was outlawed unreservedly and unequivocally it is torture.\textsuperscript{170}

G. The Prohibition of \textit{Apartheid} as \textit{Jus Cogens}

\textit{Apartheid}, the system of institutionalized racial segregation and discrimination, began evolving as a crime against \textit{jus cogens} virtually since its introduction into South Africa in 1948.\textsuperscript{171} Prior to the introduction of \textit{apartheid}, the treatment of South Africans of South Asian ancestry was one of the first human rights issues addressed by the United Nations General Assembly.\textsuperscript{172} The United Nations has regularly condemned \textit{apartheid} as a grave threat to world order, peace and security,\textsuperscript{173} underscoring the understanding that violations of \textit{jus cogens} norms in and of themselves upset world order and the operation of international law. The United Nations Security Council has adopted numerous resolutions to isolate and put pressure on the racist regime of South Africa to conform to international standards because of the South African government's egregious violations of international law.\textsuperscript{174} The General Assembly indicated that the \textit{apartheid} regime in South Africa "has few parallels in history for its inhumanity."\textsuperscript{175}

There is widespread acceptance that \textit{apartheid} is a crime against humanity.\textsuperscript{176} To emphasize its repugnance of \textit{apartheid} and to provide relief to the system's victims, the United Nations promulgated the International Convention on the Suppression and Punishment of the Crime of \textit{Apartheid}.\textsuperscript{177} This convention reinforces the international com-

\begin{itemize}
\item \textsuperscript{172} See Treatment of Indians in the Union of South Africa, G.A. Res. 44 (I), U.N. Doc. A/64/Add. 1 at 69 (1947).
\item \textsuperscript{176} See, e.g., War Crimes Convention, \textit{supra} note 111, art. 1(b); G.A. Res. 41/35, 41 U.N. GAOR Supp. (No. 53) at 26, U.N. Doc. A/41/53 (1987); G.A.Res. 40/64, 40 U.N. GAOR Supp. (No. 53) at 32, U.N. Doc. A/40/53 (1986); UNESCO Declaration on Race and Racial Prejudice, adopted Nov. 27, 1978, art. 4 ("apartheid, . . . is a crime against humanity, and gravely disturbs international peace and security.").
\end{itemize}
munity's recognition that apartheid is crime against humanity, and that certain attributes of apartheid constitute genocide.

H. Self-Determination as Jus Cogens

The right to self-determination, the collective right of a people to freely determine their own political status and to pursue economic, social and cultural development, is a jus cogens norm. The right to self-determination is the first right set out in the two major international human rights treaties. In the definitive work on the right of self-determination, United Nations special rapporteur Hector Gros Espiell repeatedly emphasizes the jus cogens nature of this right. Originally applied in a political context to colonized peoples, the right to economic self-determination has become equally important. Political independence must be coupled with permanent sovereignty over natural resources to truly realize self-determination. Cultural rights, such as habitat, language, religion, and traditions, are also recognized in this jus cogens norm.

178. Id., art. I and 6th and 7th preamb. paras.
179. Id., 5th preamb. para., citing Genocide Convention, supra note 4.
180. Modern international law attributes the right to peoples, as opposed to states. See the Western Sahara Case, 1975 I.C.J. 12, 31 “the principle of self-determination as a right of peoples....” Special rapporteur Gros Espiell elaborated this point: “Self-determination is a right of peoples... of a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future.” H. Gros Espiell, Report on the Right of Self-Determination, E/CN.4/Sub.2/405/rev.1 (1980) at 9. The right to self-determination may also be considered an individual right. Id at 10.
182. H. Gros Espiell, supra note 180, at 11-13. “[N]o one can challenge the fact that, in the light of contemporary international realities, the principle of self-determination necessarily possesses the character of jus cogens.” Id. at 12. Gros Espiell also indicates numerous instances in United Nations human rights bodies where mention is made of the jus cogens nature of self-determination. Id. at 11-13.
186. H. Gros Espiell, supra note 180, at 28; see Draft Declaration of Principles on the Rights of Indigenous Peoples, E/CN.4/Sub.2/AC.4/1985/WP.5 and Add.4:

Indigenous nations and peoples continue to own and control their material culture,
In the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) notwithstanding Security Council Resolution 276*, Judge Ammoun called the right of self-determination a "norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances." A consequence of the denial of the right to self-determination is wars of national liberation. In 1970, Judge Ammoun recognized the lawfulness of armed struggle to achieve the right to self-determination. Subsequently, Protocol Additional I to the Geneva Conventions of 1949 was promulgated, which sanctions:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Ian Brownlie reinforces this interpretation of Protocol Additional I in noting that the *jus cogens* nature of the right to self-determination requires recognition of a special combatant status for armed defenders of the right to self-determination.

I. The Whole of Human Rights as *Jus Cogens*

The International Court of Justice Judge Tanaka has forcibly made the case for the whole of human rights law being *jus cogens*:

If we can introduce in the international field a category of law, namely

including archaeological, historical, and sacred sites, artifacts, designs, knowledge, and works of art. They have the right to retain items of major cultural significance and, in all cases, to the return of the human remains of their ancestors for burial in accordance with their tradition... [they] have the right to be educated and conduct business with states in their own language, and to establish their own educational situations.

See also supra note 116 and accompanying text (cultural genocide).


189. Protocol Additional I, supra note 130.

190. Id. art. 1.

191. I. BROWNIE, supra note 12, at 83 ("[O]ne aspect of *jus cogens*, the principle of self-determination, may justify the granting of a higher status to certain types of belligerent entities and exile governments than would otherwise be the case.").
jus cogens, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum* . . . surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*. As an interpretation of Article 38, paragraph 1 (c) [Statute of the ICJ], we consider that the concept of human rights and of their protection is included in the general principles mentioned in the Article [as a source of international law].”

International Court of Justice Judge Ammoun called the protection of human rights “an obligatory legal norm,” and insisted that human rights principles appearing in the preamble of the United Nations Charter are *jus cogens*. Scholar Louis Sohn agrees, writing that the Charter’s basic human rights provisions constitute *jus cogens*. The Universal Declaration of Human Rights is the authoritative interpretation of human rights provisions of the United Nations Charter. The Universal Declaration as a whole is itself customary international law, and is rapidly establishing itself as *jus cogens*.

Not all commentators agree that the whole of human rights law presently constitutes imperative rules of *jus cogens*. However, scholars

194. Id. at 304. The preamble states, in pertinent part: “We the Peoples of the United Nations, determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . and to establish conditions under which justice and respect for the obligations arising from . . . international law can be maintained . . . have resolved to combine our efforts and accomplish these aims.” U.N. CHARTER, preamble. See H. Gros Espiell, supra note 180, at 12 (“[E]ven if it is accepted that the Declaration . . . is heterogeneous, and thus not of the nature of *jus cogens* in every one of its propositions, the fundamental principles of the Charter embodied in it . . . are nevertheless of the nature of *jus cogens*.”).
196. Universal Declaration of Human Rights, supra note 3.
200. Higgins, supra note 164, at 282 (“[C]ertain rights . . . are so fundamental that no derogation can be made. And international human rights treaties undoubtedly contain elements that are binding as principles which are recognized . . . not only as mutual treaty commitments . . . [but this does not lead] to the view that all human rights are *jus cogens*.”). See T. MERON, supra note 40, 58-60 (derogable human rights in treaties are not *jus cogens*).
stress that the implementation of human rights is an international obligation, and that international human rights instruments are acquiring *jus cogens* status and becoming a "global bill of rights."201

### IV. PROCEDURAL EFFECTS OF *JUS COGENS*

#### A. *Jus Cogens* and Treaties

The Vienna Convention on the Law of Treaties202 codifies the customary international law rules relating to treaties. Article 53 sets out the international law of *jus cogens* as it relates to treaties:

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.203

Article 64 of the Vienna Convention addresses the effect of a new *jus cogens* norm on a preexisting treaty.204 Article 64 states: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."205 Articles 69 through 72 set out the consequences of invalid, terminated or

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201. M. McDOUGAL, supra note 199, at 185. The authors conclude "that the great bulk of the contemporary human rights prescriptions [are] clearly identifiable as *jus cogens.*" *Id.* at 345.


203. *Id.* art. 53.

204. *Id.* art. 64. Article 71 states:

1. In the case of a treaty which is void under article 53 the parties shall:
   (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
   (b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

205. *Id.* art. 64.
suspended treaties. The parties may submit an application for interpretation of *jus cogens* under articles 53 and 64 to the International Court of Justice.

Countries which are not signatories to the Vienna Convention, such as the United States, are nonetheless bound by its *jus cogens* provisions as a matter of customary international law, because the binding, non-derogable nature of *jus cogens* rules has long been accepted as part of the customary law of treaties. The Restatement accepts the Vienna Convention rules relating to *jus cogens*. Professor Nahlik of the University of Cracow acknowledges the contemporary consensus:

Even though it may appear new to supporters of traditional doctrines, the provision of the Vienna Convention declaring void treaties which are contrary to a norm of international *jus cogens* is not an invention of either the International Law Commission or the Vienna Conference. It reflects a state of affairs which was slowly coming into being at a much earlier date and which, with the entry into force of the United Nations Charter, is no longer subject to any doubt.

206. *Id.* art. 69-72. Article 71 specifically addresses treaties void because of *jus cogens*, requiring parties to, *inter alia*, bring their conduct into conformity with the *jus cogens* norm.

207. *Id.* art. 66.

208. L. OPPENHEIM, *supra* note 24, at 897 ("It is a unanimously recognized customary rule of International Law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty. If, for instance, a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the Open Sea, or should command its vessels to commit piratical acts on the Open Sea, such treaty would be null and void, because it is a principle of International Law that no part of the Open Sea can be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the High Seas."); W. HALL, *TREATISE ON INTERNATIONAL LAW* 319 (7th ed. 1917) ("A treaty becomes [void] . . . by incompatibility with the general obligations of states, when a change has taken place in undisputed law or in views universally held with respect to morals."); see also Verdross, *Forbidden Treaties In International Law*, 31 AM. J. INT'L L. 571 (1937); Elias, *Problems Concerning the Validity of Treaties*, 134 RECUEIL DES COURS 388 (1971); A. D'AMATO, *supra* note 7 at 96 ("Even international rules of *jus cogens*, or peremptory norms, are . . . simply rules that deny the validity of certain substantive provisions that might be included in treaties."). This point was emphatically stressed at the Lagonissi Conference on the Concept of *Jus Cogens* in International Law, sponsored by the Carnegie Endowment for International Peace, April 3-8, 1966. See, e.g., Abl-Saab, *supra* note 7, at 10 ("in the case of treaties [contrary to *jus cogens*] the sanction is always an absolute nullity, even in the *inter se* relations of the parties. A treaty contravening a *jus cogens* rule would be void *ab initio* and not simply voidable, inoperative or inopposable.").

209. *RESTATEMENT, supra* note 107, § 331 comments e, f, g; § 102 comment k. This Restatement in particular is extremely authoritative and heavily relied upon because of judges' unfamiliarity with international law and its sources. Because the Restatement is written by experts in the field, it is itself a contribution to, as well as evidence of, international law. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 972 n. 8 (1986).

Contemporary treaties that directly conflict with *jus cogens* norms are rare. Yet, a recent treaty between the United States and Haiti, relevant to the holding in *Haitian Refugee Center v. Gracey*, allowed the United States to capture vessels on the high seas carrying Haitians fleeing from human rights violations in Haiti, and forcibly return vessels and persons to Haiti. This treaty, on its face, arguably conflicts with peremptory norms against piracy and the right of *non-refoulement*. The executive order directing the Secretary of State to enter into this void agreement is also void under the analogous rule that government acts in contravention of *jus cogens* are void.

B. Judicial Advantages of *Jus Cogens*

1. *Jus Cogens* Avoids Judicial Doctrines

The use of *jus cogens* can help relieve plaintiffs' burden of overcoming judicial doctrines that have previously appeared to be insurmountable barriers to human rights actions. Among these are the: act of state doctrine; political question doctrine; various treaty doctrines such as the self-execution doctrine and the last in time rule; and the requirements for standing.

   a. *Jus Cogens Precludes the Act of State Doctrine*

   The act of state doctrine, articulated in *Underhill v. Hernandez*, requires courts of one nation to refrain from ruling on or providing relief for acts done by another nation in its own territory. The act of state doctrine has its basis in the idea of sovereignty of nations and international comity. Many victims of human rights abuses, however, are unable to seek relief in their own country, even when the act contravenes *jus cogens*. Thus the act of state doctrine could serve to bar effective

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213. See supra note 101 and accompanying text on piracy.
214. See supra notes 149-156 and accompanying text on *non-refoulement*.
216. Chief Justice Muhammad Haleem of the Supreme Court of Pakistan states "If these courts cannot be harnessed, the prospects of effective enforcement of human rights are bleak... Terms such as 'act of state,' 'political question,'... have required a different status in the context of human rights." Haleem, *The Domestic Application of International Human Rights*, in DEVELOPING HUMAN RIGHTS JURISPRUDENCE 92, 106 (1988).
217. 168 U.S. 250 (1897).
218. Id. at 252.
remedy anywhere.\textsuperscript{220} A case arising from a violation of a \textit{jus cogens} norm would prohibit a court from deferring to the act of state doctrine, and would require it to supply an appropriate remedy when jurisdictional requirements are met.\textsuperscript{221}

The act of state doctrine was successfully invoked to bar relief in \textit{Banco Nacional de Cuba v. Sabbatino}.\textsuperscript{222} Cuba had nationalized property belonging to private businesses. The plaintiffs argued that nationalization violated customary international law; Cuba claimed it was an act of state, and thus not justiciable by United States courts. The Court found that nationalization is not a violation of customary international law, but stated that if it were, Cuba could not bar the action.\textsuperscript{223} The Court acknowledged it possessed the power of judicial review in "areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies."\textsuperscript{224} As a definitional matter, \textit{jus cogens} rules meet that requirement. The Court, faced with an act of state defense when the underlying state action violates a \textit{jus cogens} norm, would be compelled by its own reasoning to provide appropriate relief.\textsuperscript{225}

International human rights law as a whole abrogates traditional notions of state sovereignty: states do not have the sovereign right to violate human rights.\textsuperscript{226} The Restatement acknowledges the relationship between international human rights law and the act of state doctrine: "A claim arising out of an alleged violation of fundamental human rights—for instance a claim on behalf of a victim of torture or genocide—would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts."\textsuperscript{227} State acts violating \textit{jus cogens} norms would not be barred by the act of state doctrine.

\textsuperscript{220} The Universal Declaration of Human Rights requires that victims have available an effective remedy for violations of rights. Universal Declaration of Human Rights, \textit{supra} note 3, art. 8.

\textsuperscript{221} The United Nations Charter obliges members to take unilateral action to defend human rights. U.N. \textit{CHARTER}, art. 56.

\textsuperscript{222} 376 U.S. 398 (1964).

\textsuperscript{223} \textit{Id.} at 431.

\textsuperscript{224} \textit{Id.} at 430, n.34.

\textsuperscript{225} In \textit{Filartiga v. Peña-Irala}, the court noted that torture committed by a Paraguayan official in violation of international law could not be characterized as an act of state. 630 F.2d at 889-90. Citing \textit{Sabbatino}, the court would not have allowed the act of state doctrine, had it been raised in defense, to bar relief to a victim of torture in a United States court.


\textsuperscript{227} \textit{Restatement, supra} note 107, § 443 comment c.
Jus Cogens standards should preclude the use of the act of state or other immunity doctrines to bar suits.

b. Jus Cogens Avoids the Political Question Doctrine

A claim based on a jus cogens rule is justiciable and avoids the barrier of the political question doctrine because peremptory norms are mandatory and do not allow courts to decline judicial review. The political question doctrine requires judicial abstention in cases raising issues more properly resolved by the executive or legislative branches of government.\(^\text{228}\) In Baker v. Carr,\(^\text{229}\) the United States Supreme Court identified the factors mandating judicial abstention: 1) explicit constitutional authority given to another branch of government; 2) no judicially discoverable and manageable standards; 3) the need for an initial policy (as opposed to judicial) determination; 4) the impossibility of independent resolution without impliedly undermining constitutional authority of another branch; 5) an unusual need to follow a political decision already made by the executive or legislative branches without question; or 6) the potential for embarrassment from conflicting pronouncements by various departments on an issue.\(^\text{230}\)

A jus cogens rule would not present any of these factors: jus cogens is ipso jure a legal, not a political question. The United States Constitution gives judicial authority to the courts.\(^\text{231}\) Jus cogens is judicially discoverable—United States courts have regularly utilized the customary law, a task made easier because of the compelling nature of jus cogens. There is no need to pre-ascertain issues of policy because conflicting political policy necessarily would be void. A judicial opinion, even one affecting foreign policy, could not undermine the authority of the executive or legislative branches, because neither has authority to contravene jus cogens. Even under unusual circumstances (national security, war), jus cogens norms are not subject to derogation.

In Crockett v. Reagan\(^\text{232}\) the court invoked the Baker factors in a suit by twenty-nine members of Congress against then-President Reagan, challenging the legality of the United States' military presence in and assistance to El Salvador under the War Powers Resolution\(^\text{233}\) and the

\(^{229}\) Id.
\(^{230}\) Id.
\(^{231}\) U.S. CONST. art. III, § 1.
war powers clause of the Constitution. The court dismissed plaintiffs' claims primarily on the ground that the claims posed nonjusticiable political questions. The court asserted it had no judicially discoverable and manageable standards because of its inability, due to lack of resources and expertise available to Congress, to resolve the factual disputes of the case as to the amount and nature of United States involvement in El Salvador. However, the court did not lack legal standards: the facts, as presented, raised serious humanitarian law violations and other violations governed by *jus cogens*. The court focused on inadequate facts, conceding it could make a determination in a case with "less elusive" facts. While the whole truth of the Salvadoran situation is elusive, facts necessary for the requested relief were presented and could have been supplemented had the court ordered discovery. *Jus cogens* violations, as presented in *Crockett*, should not permit judges to invoke the political question doctrine.

The court in *Sanchez-Espinoza v. Reagan* also invoked the political question doctrine in dismissing all federal claims by a variety of plaintiffs. The suit was brought by three groups: citizens and former residents of Nicaragua suing in tort for injuries to themselves and their families caused by actions of the counter-revolutionary forces in Nicaragua funded by and trained in the United States; members of Congress suing to end the defendants' disregard for their right to participate in the decision to wage war; and residents of Florida suing to enjoin the nuisance of the operation of at least five paramilitary camps located in their state. Defendants included United States executive officials in their official and individual capacities, and the operators of the paramilitary camps. The plaintiffs alleged that United States assistance to the counter-revolutionary forces was used for attacks on innocent Nicara-

234. U.S. CONST. art. 1, § 8, cl. 11.
235. 558 F. Supp. at 898.
236. *Id*.
237. The allegations included monetary and military aid to the junta then in power in violation of the prohibition of the use of force (*id.* at 895, 897) and gross violations of human rights and war crimes. *Id.* at 902. The *Crockett* plaintiffs also made a claim under the Foreign Assistance Act of 1961, which specifies that no "security assistance be given to any country . . . which engages in a consistent pattern of gross violations of internationally recognized human rights." Foreign Assistance Act of 1961, § 502B as amended, 22 U.S.C.A. section 2304, quoted in 558 F. Supp. at 902. The court, noting that plaintiffs' claim was supported with "voluminous documentation," denied relief based on equitable discretion rather than on political question. *Id.* Because of the peremptory nature of *jus cogens*, judges have no discretion when a *jus cogens* violation is alleged. On appeal, Circuit Court Judge Bork rejected the equitable discretion doctrine and based his concurring opinion on the issue of standing. 720 F.2d 1355, at 1357 (Bork, J., concurring).
238. 770 F.2d 202 (D.C. Cir. 1985).
guan civilians, resulting in the summary execution, murder, abduction, torture, rape, and physical injury of people and property, and sought relief under the Alien Tort Claims Act. The court invoked the act of state doctrine and sovereign immunity on the ground that the officials named, in their capacity as private parties, did not violate international law. The court, disregarding the jus cogens implications of the alleged acts, never reached the international law rule making government officials personally responsible for their acts. The court held that defendants, as government agents, could invoke sovereign immunity as a bar to the suit, thus impermissibly depriving the plaintiffs of any remedy against possible jus cogens violations.

c. Jus Cogens Avoids the Self-Execution Doctrine and the Last in Time Rule

The self-execution doctrine requires that treaties (or clauses of treaties) "operate of [themselves], without the aid of any legislative provisions" for them to be justiciable. The best current test for self-execution was formulated by Professor Stephan Riesenfeld: self-execution is favored when treaties grant rights to persons, when the parties lack discretion to fulfill an obligation and when no further Congressional action is necessary to fulfill the treaty obligations.

A claim based on a jus cogens violation is actionable independently of a treaty. It is therefore irrelevant whether the government in question has ratified a particular treaty, whether the treaty is self-executing or not, or whether there is implementing legislation.

In Diggs v. Richardson the use of jus cogens might have overcome the court's reliance on the self-execution doctrine to deny judicial enforcement of prohibitions against apartheid. In Diggs, the court dismissed a suit by multiple plaintiffs seeking judicial enforcement of

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240. 770 F.2d at 206-07.
241. The facts indicate, inter alia, violations constituting grave breaches of humanitarian law. See supra notes 129-148 and accompanying text.
242. See, e.g., supra note 137 and accompanying text.
243. 770 F.2d at 206-07.
246. 555 F.2d 848 (D.C. Cir. 1976).
247. Members of Congress, a Namibian refugee, the South West Africa People's Organization. Id. at n.1.
United Nations Security Council Resolution 301. The United States voted for this resolution. The resolution calls on states to abstain from any diplomatic or economic relationships with South Africa on behalf of or concerning Namibia because of South Africa's continued illegal presence there. The plaintiffs contended that this resolution was legally binding on the United States, and that therefore negotiations by the United States Department of Commerce regarding the importation of seal furs from Namibia were illegal. The court held that the Security Council resolution is not self-executing, and as a result, plaintiffs had no standing to enforce it.

The issues raised in Diggs involved a number of *jus cogens* norms: *apartheid*, the illegal use of force by South Africa to occupy Namibia, and South Africa's violation of the Namibian peoples' right to self-determination. *Jus cogens* rules should confer on plaintiffs an enforceable cause of action against its violator and those who enable the violation, regardless of a court's determination that Security Council resolutions are not self-executing.

In *Haitian Refugee Center v. Gracey*, the court denied relief to Haitian refugees for the harm caused by the United States' interdiction program, in part on its determination that the relevant provisions of the 1967 Protocol Relating to the Status of Refugees were not self-executing. The court believed that without legislation to implement the treaty, plaintiffs had no justiciable rights. The court disregarded the *jus cogens* nature of the right of *non-refoulement* and the prohibition against piracy, which are binding and enforceable apart from the treaty.

The last in time rule addresses the situation in which a treaty and domestic law obviously conflict: the rule holds that the later expres-

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249. *Id*.
250. 555 F.2d at 851.
251. *See supra* notes 171-179 and accompanying text.
252. *See supra* notes 157-163 and accompanying text.
253. *See supra* note 180-191 and accompanying text. Some commentators claim that the obligation to respect the non-derogability of *jus cogens* is a *jus cogens* norm.
256. *Supra* notes 211-215 and accompanying text (Haitian interdiction program).
258. 600 F. Supp. at 1405-06.
This rule can have no effect on a *jus cogens* norm, for the obvious reason that *jus cogens* norms exist and are enforceable apart from treaties. Equally obvious, any act or treaty that conflicts with a *jus cogens* norm is void—such a conflicting document does not legally exist. Furthermore, an existing treaty (or provision of a treaty), or an existing legislative act that does not, on its face, violate *jus cogens* norms, can not be used to justify upholding laws or acts that do violate *jus cogens* norms.

The Board of Immigration Appeals misapplied the last in time rule in *In Re Medina.* The board, denying an order to withhold deportation of a woman who fled armed conflict in El Salvador and sought relief based on her right of *non-refoulement,* refused to recognize that the right of *non-refoulement* is a norm of customary international law. Even more disturbing, the board also found that even if the right of *non-refoulement* were a norm of customary international law, the board considered the later Refugee Act of 1980 as controlling legislation. The use of subsequent legislation to defeat customary international law, particularly law that has become *jus cogens,* demonstrates a misunderstanding of the nature of *jus cogens.* *Jus cogens* norms, like all customary law, is "made" every day, and hence is always the last in time. Even if the board tried to join in the administration’s effort to persistently object to the norm of *non-refoulement,* its present *jus cogens* character overrides all such attempts.

Attempts to characterize the Refugee Act of 1980 as the last in time in order to defeat provisions of the Geneva Conventions of 1949, whether considered self-executing or not, are also invalid. The 1980 act is silent about abrogating United States obligations under the Geneva

260. The later act must openly conflict with the earlier one. Reid v. Covert, 354 U.S. 1, 18 n.34 (1957).
262. See supra note 149.
263. In its argument, the board cited reports of the United Nations High Commissioner for Refugees only up to Spring 1985. *Medina,* slip op. at 13. The board appears to purposefully disregard the subsequent reports of the High Commissioner indicating that *non-refoulement,* as applied to persons fleeing armed conflicts, is not only binding customary law, but *jus cogens.* *Jus cogens* norms, like all customary law, is "made" every day, and hence is always the last in time. Even if the board tried to join in the administration’s effort to persistently object to the norm of *non-refoulement,* its present *jus cogens* character overrides all such attempts.
264. 94 STAT. 102.
266. See supra note 35 and accompanying text.
268. The *Medina* board also appears to purposefully disregard the prior findings of the International Court of Justice regarding the obligations arising under Article 1 of the Geneva Conventions of *all* parties to respect the rights of victims of armed conflicts in all circum-
Though it has not yet done so, the United States is free to denounce the Geneva Conventions. In order to do so effectively, it must comply with the denunciation procedure set out in the conventions; denunciation "shall be notified in writing to the Swiss Federal Government, which shall transmit it to governments of all the High Contracting Parties." Such a denunciation, however, would not relieve the United States of its obligations under *jus cogens* norms of humanitarian law. Moreover, the Geneva Conventions and the Refugee Act in no way conflict, because under the rule of *Whitney v. Robertson*, they can clearly be construed in conformity with each other. In *Medina*, the board, assuming *arguendo* that *non-refoulement* is a norm of customary law, found it inconsistent with their claim that the Refugee Act limits immigration judges' authority to grant *non-refoulement*. While the Refugee Act does intend to "establish a single, comprehensive basis" to meet obligations regarding refugees, it does not repudiate the provision granting immigration judges authority "to take any... action consistent with applicable law and regulations as may be appropriate." Immigration judges are bound to apply the whole of immigration law, which "includes... all laws, conventions, and treaties of the United States relating to... deportation, or expulsion of aliens."

d. *Jus Cogens Provides Standing*

The harm caused by violations of *jus cogens* affect all persons, whether actual victims, or incidental ones. Because all persons are harmed, each should have standing to bring a suit for redress. The standing requirement, as used in United States courts, has clearly frustrated attempts to remedy alleged human rights violations. Direct victims of a violation of *jus cogens* are often not in a position to bring suit...
themselves, and must rely on third parties to seek judicial relief. Such was the case in *Haitian Refugee Center v. Gracey*, where the direct victims of the United States' interdiction program had been forcibly repatriated to Haiti, and were not able to bring an action in any court themselves. Judge Bork, in a separate opinion of a divided panel denying standing, wrote that the plaintiff Refugee Center, whose purpose it was to help Haitian refugees, was not within the "zone of interest" necessary for standing to bring an action on behalf of the Haitians injured by the interdiction program.

In *Warth v. Seldin*, a town's zoning ordinance banning low income residences was alleged to be racially discriminatory because it excluded minorities from the town. Plaintiffs included two non-profit corporations which helped low and moderate income people with housing problems, area taxpayers, low-income and minority residents, and an association of area construction firms, all alleging monetary or other injury caused by the discriminatory ordinance. The Court dismissed each plaintiff's claim for lack of standing because of a failure to show individual harm, effectively eliminating the possibility of a remedy for this insidious use of zoning.

The requirement of individual harm was set out in *Sierra Club v. Morton*. A conservation group sought to prevent federal approval of an extensive skiing development in a secluded valley in Sequoia National Forest, on the grounds that the development would irreparably damage the area's ecology and aesthetics. The Court dismissed the case, claiming the Sierra Club could not show individualized harm. Judge Black-

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278. The actual victims may be in other countries, may be dead, injured, or otherwise unable to bring an action. In the case brought to the Inter-American Commission on Human Rights on behalf of institutionalized mental patients, nineteen of the victims were dead and the others were under commitment with no legal power to act. See *Case 9213 (United States)*, supra note 121.


280. See interdiction program, supra note 211-215.

281. 809 F.2d at 811.

282. Compare id. at 811-16 with *Case 9213 (United States)*, supra note 120 (standing found for Disabled Peoples' International and International Disability Law on behalf of Grenadan mentally disabled victims of United States bombing attack on hospital).

283. 422 U.S. 490 (1975).

284. Id. at 508-11, 514, 517-18. J. Brennan, joined by J. White and J. Marshall in his dissent, wrote that "the opinion . . . tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity . . ." Id. at 520. Racial discrimination is widely acknowledged to violate *jus cogens*. See notes 105-108 and accompanying text. Zoning as illustrated by the *Warth* facts is arguably *apartheid*.


286. Id. As early as 1955, some members of the Human Rights Commission agreed that
mun, frustrated by the majority’s use of standing as a barrier to legal remedies for general, universal harm, wrote in his dissenting opinion: “Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?”

Some judges take a restrictive view of the concept of standing and consider it to be similar to that of possessing a recognizable cause of action. International Court of Justice Judge Ammoun has stated that in international law, an action to safeguard *jus cogens* rights does not require a plaintiff’s personal and direct interest for judicial action. Because rights protected by *jus cogens* rules are held by all in common, every person has individualized harm by their violation. Accordingly, every person has a right to seek redress.

The right to life requires States to take positive steps to protect the environment. 10 U.N. GAOR Annex (Agenda item 28 (Part II)) at 1, U.N. Doc. A/2929 (1955). (annotation of draft international covenants on human rights prepared by the Secretary-General).

287. 405 U.S. at 755-56 (Blackmun, J., dissenting).


290. In addition to clearing away some judicial barriers, *jus cogens* may provide protection for persons or classes of persons whose rights under international instruments are not fully recognized in domestic law. Racial discrimination is widely considered to violate *jus cogens*, yet gender-based discrimination is as offensive to human rights as discrimination on any other ground. The United Nations Charter itself especially addresses gender-based discrimination. U.N. CHARTER, 2d declar. para. and art. 1(3). Realization of the equality of women has been frustrated by the failure to pass an Equal Rights Amendment to the United States Constitution, and the second-class status (“intermediate scrutiny”) of women in the “suspect class” doctrine. Full recognition of the equality of women and men as a *jus cogens* norm would oblige courts to redress discrimination, even in the absence of judicial precedent, domestic legislation, or Constitutional standards. See generally Note, Customary International Law and Women’s Rights: The Equal Rights Amendment as a Fait Accompli, 1987 DET. C. L. REV. 121 (1987) (authored by J. Guertin). In cases involving aliens, *jus cogens* norms can provide meaningful protection because aliens do not enjoy the full range of Constitutional rights granted citizens. Because of the unique position of Native Americans in the United States, *jus cogens* norms may be especially powerful to protect their rights. A serious setback to Native Americans’ rights recently occurred when the United States Supreme Court, in Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. —, 99 L.Ed.2d 534 (1988), held that First Amendment religious freedom rights do not protect lands sacred to local tribes. The Court, by refusing to acknowledge the land-based nature of Indian religions, left Indians with no meaningful protection of their sacred lands. This opinion contravenes the *jus cogens* standards of self-determination, genocide, and fundamental human rights. See, e.g., International Covenant on Civil and Political Rights, supra note 40 at art. 27 (ethnic, religious and linguistic minorities have right to “enjoy their own culture, to profess and practice their own religion, or to use their own language”).
2. **Jus Cogens Allows for Universal Jurisdiction**

*Jus cogens* norms naturally call for universal jurisdiction for their enforcement: violations of *jus cogens* norms disrupt international order, and thus affect all states and persons.\(^2\) Jurisdiction is found over alleged violators in their personal capacity.

The idea of universal jurisdiction and individual responsibility for violations of international law developed largely with the laws of war. At the end of World War II, an ad hoc international court, established by the Nuremberg Charter,\(^2\) exercised jurisdiction over World War II war criminals. Reinforcing individual responsibility, the tribunal stated: “the very essence of the Charter [establishing the tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”\(^3\) Since *jus cogens* obligations transcend national boundaries, jurisdiction over violations of these international standards must be universal. A major step in developing universal jurisdiction for *jus cogens* violations is the War Crimes Convention,\(^4\) which requires states to provide for universal jurisdiction. The War Crimes Convention enumerates war crimes and expands the definition of crimes against humanity as set out in the Nuremberg Charter by adding acts committed in time of peace to those occurring in war, specifically *apartheid* and genocide.\(^5\) An aspect of universal jurisdiction is personal jurisdiction by all states over the alleged violator of such crimes.\(^6\)

Universal jurisdiction is also an important part of the Geneva Conventions. The grave breach article in each of the four Geneva Conventions is followed by a common article stating: “No High Contracting

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\(^2\) As one author put it, “[t]he human rights violator is, like the pirate, *hostis humani generis*, an enemy of all mankind, and jurisdiction to punish his violations is universal.” A. D’AMATO, supra note 7, at 107.

\(^2\) The Nuremberg Charter, supra note 137.


\(^2\) War Crimes Convention, supra note 111.

\(^2\) Id. art. 1(b).

\(^2\) Id. art. 2. As a general rule, however, alleged violations should be tried in the "countries in which they committed those crimes." G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 79, U.N. Doc. A/9030 (1973).
Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by any other High Contracting Party in respect of breaches referred to in the preceding Article."297 Another common article of the Geneva Conventions requires all parties to either try alleged violators of grave breaches in their own courts—regardless of the nationality of the violator—or to hand over alleged violators to another party.298

Universal jurisdiction is a prominent part of other international treaties codifying human rights jus cogens norms. For example, the Apartheid Convention299 provides that violators can be tried in a domestic tribunal of any state party or by an international penal tribunal.300 This Convention also obliges state parties to adopt any measures necessary to allow domestic jurisdiction.301 The Torture Convention302 provides for jurisdiction over any offender found in a state territory.303 It also requires states to allow victim suits to redress torture, including "an enforceable right to fair and adequate compensation."304 Dependents of persons who die as a result of torture are also entitled to compensation.305 The Genocide Convention also provides for universal jurisdiction.306

V. JUS COGENS IN UNITED STATES JURISPRUDENCE

The term jus cogens is rarely used in United States jurisprudence in spite of its universal acceptance and its status as a fundamental legal concept. However, the concept of jus cogens is not absent from American law. It has played a significant role in American jurisprudence from the beginning of the American nation.307

The debate about judicial application of universal standards has often been framed as part of the question: does the United States Consti-

297. Geneva Conventions, supra note 4, (armed forces in the field), art. 51; (armed forces at sea), art. 52; (prisoners of war), art. 131; (civilians), art. 148.
298. Id. (armed forces in the field), art. 49; (armed forces at sea), art. 50; (prisoners of war), art. 129; (civilians), art. 146.
299. Apartheid Convention, supra note 177.
300. Id. art. V.
301. Id. art. IV.
302. Torture Convention, supra note 152.
303. Id. art. 5.2.
304. Id. art. 14.
305. Id.; see Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
306. Genocide Convention, supra note 4, art. VI.
stitution and the rights it protects evolve? Most anti-evolutionists insist on literal Constitutional interpretation, claiming the evolutionary function properly belongs to the legislature, not the judiciary. Justice Black pleads this argument in his dissent in *Griswold v. Connecticut.* Most courts, however, have incorporated analysis of fundamental standards as they are understood contemporaneously, using *jus cogens* analysis, though not the term "*jus cogens.*"

A. Use of *Jus Cogens* Principles in the Incorporation of the Bill of Rights into the Fourteenth Amendment

A fruitful area in which to observe the *jus cogens* analysis in United States courts is in cases involving the incorporation of rights contained in the Bill of Rights into the Fourteenth Amendment's due process clause. Judges taking on the evolutionary mantle emphasize the fundamental quality of rights and principles and the fairness of the outcome rather

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("The due process argument . . . is based . . . on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law . . . is offensive to a 'sense of fairness and justice.' If these formulas based on 'natural justice' . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. . . . I do not believe that we are granted power . . . to measure constitutionality by our belief that legislation is . . . offensive to our own notions of 'civilized standards of conduct.' Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.").

311. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954) (segregation in public school no longer acceptable); Loving v. Virginia, 388 U.S. 1 (1967) (marriage between people of different races constitutionally protected); *In re Gault,* 387 U.S. 1 (1967) (children have constitutionally protected rights); Miranda v. Arizona, 384 U.S. 436 (1966) (detainee must know right against self-incrimination in custodial surroundings); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (Amish children may have alternate education to public schools). In private law, "immoral" contracts are not enforceable. Whether or not they are immoral has always been according to the eye of the judicial observer.
than specific, written constitutional provisions. For instance, in *In Re Kemmler*, the United States Supreme Court declared "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" must be included in due process as applied to the states. The *Kemmler* test was further developed in subsequent cases. In *Twining v. New Jersey*, for example, the Court considered whether the right against self-incrimination was such a fundamental principle and found it was not. The Court invoked "immutable principles of justice" and questioned whether the right "inheres in the very idea of free government." The Court also tested the right's universality, scanning, for instance, the laws of "civilized countries," and the writings of scholars and jurists.

As standards evolve, earlier decisions are reversed. *Twining* was overturned by *Malloy v. Hogan*. In *Betts v. Brady*, the Court found the denial of the right to appointed counsel for indigents in criminal cases did not "shock . . . the universal sense of justice." In *Gideon v. Wainwright*, the Court reached the opposite conclusion. In *Palko v. Connecticut*, the Court concluded that the prohibition against double

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312. 136 U.S. 436 (1890).  
313. *Id.* at 448. Prohibition against cruel and unusual punishment was found not to rise to this standard.  
314. 211 U.S. 78 (1908).  
315. *Id.* at 102, 113-14. In *Twining*, a New Jersey judge, during a misdemeanor trial, commented extensively on Twining's exercise of his right not to incriminate himself. The judge strongly suggested the defendant was guilty because of his unwillingness to testify, and a state law permitted such an inference to be drawn. Twining contended this law violated the Fourteenth Amendment of the United States Constitution by abridging the privileges and immunities of citizens of the United States, and deprived him of due process of law. The Court concluded that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship, although it might be a right inherent in state citizenship. The test was also used in *Herbert v. Louisiana*, 272 U.S. 312, 315-16 (1926) (one act may be separate offenses under federal and state law and would not constitute double jeopardy), which was subsequently quoted in *Powell v. Alabama*, 287 U.S. 45, 67 (1932) and *Palko v. Connecticut* 302 U.S. 319, 325 (1937).  
316. 211 U.S. at 102, 106. The Court cited *Holden v. Hardy*, 169 U.S. 366, 389 (1898) ("[T]here are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.").  
317. 211 U.S. at 102-08, 113.  
318. *Id.*  
320. 316 U.S. 455 (1942).  
321. *Id.*, at 462, 471-73.  
322. 372 U.S. 335, 343-44 (1963) (provision of counsel in all criminal cases is "a fundamental right essential to a fair trial" and applicable to the states).  
jeopardy is "not of the very essence of a scheme of ordered liberty." 324 The Palko Court focused on the concept of the "traditions and conscience of our people" in analyzing rights.325 Following this rule, the Court later overturned the result reached in Palko.326

B. Use of Jus Cogens Principles to Find Unenumerated Constitutional Rights

Judicial enforcement of unwritten fundamental principles also demonstrates the operation of jus cogens: the Supreme Court has found rights in the Constitution that are not enumerated in the document itself. For example, in Griswold v. Connecticut327 and Roe v. Wade,328 the Court found the right of privacy to be present in the Constitution even though the Constitution never utilizes the term. In Griswold, the Court found the right of marital privacy to be "older than the Bill of Rights,"329 and indicated that the right is found "within the zone of privacy created by several fundamental constitutional guarantees."330 Writing for the Court, Justice Douglas invoked a "penumbra"331 surrounding certain written constitutional provisions sufficient to engender additional rights. Justice Goldberg relied on a virtually uninterpreted Ninth Amendment332 as well as substantive due process333 to find a constitutional right of privacy. In Roe v. Wade,334 the Court relied on fundamental due process to find that a woman's right to choose abortion is protected by the right of privacy.335

324. Id. at 325.
325. Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
327. 381 U.S. 479 (1965).
329. 381 U.S. at 486 (Goldberg, J., concurring).
330. Id. at 485.
331. Id. at 484-85.
332. Id. at 487-93, 499. (Goldberg, J., concurring). The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.
333. 381 U.S. at 486-88, 496-99 (Goldberg, J. concurreni). Chief Justice Warren and Justice Brennan joined this concurrence. The idea of fundamental rights as part of substantive due process came into disfavor after Lochner v. New York, 198 U.S. 45 (1905), where the Court struck down protective legislation for the hours bakers could work on the ground that the right to contract to buy or sell labor is a Fourteenth Amendment due process right. Justice Black's dissent in Griswold, as in other cases discussed in this Article, was in part based on Lochner and its "natural law due process philosophy." 381 U.S. at 515 (Black, J., dissenting). Black does not acknowledge the Court's error in Lochner.
335. Id. at 153, 155.
C. The Use of *Jus Cogens* Principles to Proscribe Government Misconduct

*Jus cogens* principles are used to determine whether government acts are acceptable. In *Malinski v. New York*, the United States Supreme Court demanded "civilized standards," where a suspect was stripped, held incommunicado, and humiliated by police to obtain a confession. Similarly, the Court condemned government conduct when a prisoner died from an asthma attack while incarcerated because of grossly inadequate medical facilities, a lack of competent medical care, the administration of contraindicated drugs, and the use of a respirator known to be inoperable.

A common measure used by courts to evaluate governmental conduct is whether it shocks the conscience. This standard was articulated in *Rochin v. California*, where police officers forcibly induced vomiting to obtain swallowed evidence from a suspect. The Court acknowledged its "inescapabl[e]" responsibility to proscribe conduct that violates principles of justice rooted in "compelling" legal traditions. The Court concluded the conduct of the officers "shocks the conscience."

The United States Supreme Court has also required that laws or governmental conduct must not violate "rights... basic to our free society." The government cannot act contrary to "deeply rooted feelings of the community," or "fundamental notions of fairness and jus-

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337. *Id.* at 414.
339. 342 U.S. 165, 172-73 (1952) (deliberate and excessive infliction of pain in prison security measures "shocks the conscience" and "affords brutality the cloak of law").
340. *Id.* at 169.
341. *Id.* at 171. (citing Snyder *v.* Massachusetts, 291 U.S. 97, 105 (1934)).
342. 342 U.S. at 172. Other cases where police or State conduct has been held to shock the conscience are: Black *v.* Stephens, 662 F.2d 181, 189 (3d Cir. 1981) (excessive force in the performance of police duties such as brandishing a revolver in another's face and filing unwarranted charges against the victim in retaliation for victim's complaint); Curtis *v.* Everett, 489 F.2d 516, 518-19 (3d Cir. 1973), *cert denied* 416 U.S. 995 (prevention by prison personnel of prisoner from defending self when attacked by other prisoners in their presence); U.S. ex rel Guy *v.* McCauley, 385 F. Supp. 193 (E.D. Wisc. 1974) (two visual vaginal searches of woman seven months pregnant by female police officers with no medical training not in a medical environment). In U.S. *v.* Townsend, 151 F. Supp. 378, 382, 387 (D.D.C. 1957), police forced a suspect to submit to the swabbing of his genitals by police in order to get a blood sample and then beat him up and denied him a lawyer; the court considered the police conduct to be "highly offensive" and to "shock the conscience."
tice,” or in a way that “den[ies] . . . fundamental fairness [which is] shocking to the universal sense of justice.” Not all behavior that violates international norms has been found to shock the conscience. For instance, in some prison cases courts have ignored the United Nations Standard Minimum Rules for the Treatment of Prisoners in upholding treatment in clear violation of international minimum standards. In other prison cases, courts have invoked the United Nations Standard Minimum Rules to find that treatment of prisoners violated their rights.

D. Use of Jus Cogens Principles in Cases Directly Invoking International Law

Jus cogens principles appear in United States jurisprudence in cases invoking international law as well as in cases resolved by domestic law. Often judges reach for jus cogens principles because American statutory, constitutional, or customary law does not appear to address the issue before them or, if applied in its strictest sense, would yield an unjust result.

In M.A. v. U.S. Immigration and Naturalization Service, the court, remanding a deportation order, held that M.A., a native and citizen of El Salvador, had presented a prima facie case for political asylum based on his assertion that he would face induction into military service in an army which commits war crimes. The court, concluding that the Salvadoran army violates article three of the Geneva Conventions by inhumane treatment of civilians, murder, torture and summary executions, invoked section 171 of the United Nations High Commissioner for Refugees Handbook, and held that M.A. had shown he would suffer dispro-

345. Id. at 607 (Burton, J., dissenting).
348. See, e.g., Sostre v. McGinnis 442 F.2d 178 (2d Cir. 1971), cert denied 405 U.S. 978 (1972) (indefinite solitary confinement not cruel or unusual punishment); Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969) (prisoner held with no running water or wash bowl and fed bread and water with only one regular meal every third day held constitutional).
350. 858 F.2d 210 (4th Cir. 1988), petition for reh’g en banc granted (1989).
351. Id. at 219.
352. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 40 (1979). Section 171 provides: “Where, however, the type of military action is condemned by the international
portionately severe punishment on account of his refusal to serve in the army. 353

In United States v. Toscanino, 354 the court provided relief for an alien who alleged he was tortured by United States government agents in Uruguay, and then kidnapped by them and brought to the United States for the purpose of obtaining federal court jurisdiction over him. The Circuit Court of Appeals, in remanding, reasoned that an earlier case disallowing aliens a remedy for government kidnapping outside the United States 355 had been undermined, and invoked the Rochin standard ("this is conduct that shocks the conscience") 356 and Justice Brandeis' dissent in Olmstead v. United States: 357 "If the Government becomes a law-breaker, it breeds contempt for the law . . . it invites anarchy." 358 The court also found that the claim of international kidnapping, if true, would violate the plaintiff's rights under the United Nations Charter, the Charter of the Organization of American States and customary international law, for which the remedy is the return of the kidnapped victim. 359

Courts have applied international law in cases involving misconduct of agents or officials of the United States government in the United States as well. In Fernandez v. Wilkinson, 360 although the court found that indeterminate detention of a person in a maximum security prison pending unforeseeable deportation constitutes an arbitrary detention, 361 the court could find no remedy under the United States Constitution or any statute, because of the defendant's status as an excludable alien refugee. 362 Failing to find any relevant domestic law, the court looked to customary international law to determine the applicable standard regarding the right to freedom from arbitrary detention. 363 Having concluded that ex-

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353. 858 F.2d at 217-18.
354. 500 F.2d 267 (2d Cir. 1974), reh'g denied 508 F.2d 1380 (2 Cir. 1974).
355. Ker v. Illinois, 119 U.S. 436 (1886). The plaintiff in Ker was forcibly abducted in Peru by a Pinkerton agent and brought to Illinois to stand trial for embezzlement.
356. 500 F.2d at 273, (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).
358. Id. at 485.
359. 500 F.2d 267, 277-78 ("The resolution merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped.").
361. 505 F. Supp. at 794.
362. Id. at 795-98.
363. To determine the customary law, the court considered numerous international
isting customary international law prohibits arbitrary detention, that the plaintiff had a claim based on that law, and that his detention had violated international law, the court ordered his release.\footnote{364}

\section*{VI. CONCLUSION}

The forty years since the promulgation of the Universal Declaration of Human Rights\footnote{365} have generated hope that developing standards of law would result in a higher realization of justice in domestic actions and in an enhanced outlook for justice, peace and cooperation among nations. A major result of that hope has been the increasing vitality of the principle of \emph{jus cogens} and its developing predominance in international law. The use of \emph{jus cogens} in human rights actions should overcome court-invoked barriers to redress and should be a compelling factor in the progressive enforcement of human rights.

\begin{itemize}
\item Sources, including United Nations instruments and declarations, multilateral treaties, articles by legal scholars of international law, and statements of members of the United States government. The court even cited the inscription on the Statue of Liberty. \textit{Id.} at 795-99.
\item \textit{Id.} at 800. The court stated: “Perpetuating a state of affairs which results in the violation of an alien’s fundamental human rights is clearly an abuse of discretion on the part of the responsible agency officials. This court is bound to declare such an abuse and to order its cessation.” \textit{Id.} at 799.
\item Universal Declaration of Human Rights, \textit{supra} note 3.
\end{itemize}