

Article

A Fiduciary Theory of Jus Cogens

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I. INTRODUCTION

In international law, the term “jus cogens” (literally, “compelling law”) refers to norms that command peremptory authority, superseding conflicting treaties and custom. The influential *Restatement on Foreign Relations of the United States (Restatement)* defines jus cogens to include, at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination;

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and “the principles of the United Nations Charter prohibiting the use of force.”¹ Jus cogens norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.²

The rise of peremptory norms over the past century has sent shock waves across international legal theory, transforming the venerable doctrine of sources and unsettling inherited conceptions of state sovereignty. As some scholars have celebrated and others have lamented, the concept of jus cogens has been widely perceived to establish a normative hierarchy within international law, endowing certain fundamental norms such as the prohibitions against slavery and genocide with a quasi-constitutional status vis-à-vis ordinary conventional and customary norms.³ By placing limits on state action, jus cogens challenges the positivist orthodoxy that views state consent as the wellspring of all international legal obligations.

In this Article, we develop a new theory of jus cogens norms that aims to explain both their peremptory status and relationship to state sovereignty. We take as our point of departure the perennial debate among three leading traditions in public international law: positivism, natural law, and public order. In Part II, we show that each of these three traditions has significant deficiencies as a general theory of jus cogens. Positivists’ efforts to link peremptory norms to state consent are unconvincing because they do not explain why a majority of states within the international community may impose legal obligations on a dissenting minority. While natural law theories circumvent this persistent objector problem, they struggle to specify analytical criteria for identifying peremptory norms. Public order theories, which view jus cogens as rules integral to interstate relations and international law’s wider normative agenda, likewise fail to illuminate which particular norms should be deemed peremptory or how jus cogens can be reconciled with state sovereignty. Thus, the dominant traditions in jus cogens theory leave two critical questions unanswered: First, what is the normative basis of peremptory norms in international law? Second, what is the relationship between peremptory norms and state sovereignty?

Far from standing in tension with sovereignty, we argue in Part III that peremptory norms express constitutive elements of sovereignty’s normative dimension. The key to understanding international jus cogens lies in a much neglected passage of *The Doctrine of Right*, where Immanuel Kant discusses the innate right of humanity which all children may assert against their parents

1. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 cmts. d-i, § 102 cmt. k (1987).

2. See Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

3. See, e.g., Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT’L L. 566, 566 (1997) (“[J]us cogens or imperative norms . . . presuppose relationships of normative hierarchy.”); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 323 (2006) (describing “universal norms” in international law as “a matter of necessity”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 416-17 (1983) (criticizing jus cogens as a “pathological phenomenon”).

as citizens of the world.⁴ Drawing on Kant's account of familial fiduciary relations, our theory of jus cogens posits that states exercise sovereign authority as fiduciaries of the people subject to state power. An immanent feature of this state-subject fiduciary relationship is that the state must comply with jus cogens.

In Part IV, we show that the fiduciary theory of jus cogens points to formal as well as substantive criteria for specifying peremptory norms. To date, the lack of determinate criteria for specifying peremptory norms has undermined jus cogens's real-world impact by deterring national and international courts from employing peremptory norms in appropriate cases. The fiduciary theory addresses this lacuna by explaining how peremptory norms embody discrete aspects of the state's fiduciary obligation to govern in accordance with principles of integrity, fairness, and solicitude, as well as to provide equal security under the rule of law. We evaluate several recognized peremptory norms in light of these criteria, demonstrating that the international prohibitions against slavery, genocide, and military aggression qualify as jus cogens. By contrast, other well-traveled norms such as the venerable prohibition against piracy do not. In addition, we identify several emerging norms that are not widely recognized as jus cogens today but nonetheless merit peremptory force under the fiduciary theory, including the right to due process, the norm against public corruption, and the principle of self-determination. As these examples illustrate, the fiduciary theory supplies a more determinate analytical framework for identifying peremptory norms than previous theories based on state consent, natural law, or public order. The fiduciary theory thus offers a principled basis for revitalizing the jus cogens concept in international legal theory and in the jurisprudence of national and international tribunals.

We conclude in Part V with a preliminary outline of the new avenues of research suggested by the fiduciary model of state sovereignty. For example, the fiduciary theory offers a fresh and compelling perspective on contested concepts in international legal theory such as cosmopolitan citizenship, *erga omnes* obligations, and derogable human rights. The fiduciary model also provides a useful analytical framework for rethinking the international community's surrogate guarantor role in protecting transnational refugees, assisting states in transition, and, most controversially, safeguarding individual dignity from state abuse through humanitarian intervention.

II. PEREMPTORY NORMS IN THEORY AND PRACTICE

To place the fiduciary theory of jus cogens in proper context, we begin by reviewing briefly the origins and evolution of the jus cogens concept in international legal theory from the seventeenth century to the present. We then outline the three leading theories of jus cogens—positivism, natural law, and public order—and demonstrate that these theories offer, at best, an incomplete justification for peremptory international law.

4. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 98-99 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

A. *Peremptory Norms in Historical Perspective*

A common misconception among international lawyers is the notion that peremptory norms represent a twentieth-century innovation without meaningful precedent in international legal theory. Although the term “*jus cogens*” did not take root in international legal discourse until the twentieth century,⁵ the principle that certain fundamental norms merit peremptory authority within international law bears a much older pedigree.

Classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff drew upon the Roman law distinction between *jus dispositivum* (voluntary law) and *jus scriptum* (obligatory law) to differentiate consensual agreements between states from the “necessary” principles of international law that bind all states as a point of conscience regardless of consent.⁶ In contrast to ordinary legal obligations derived from treaty or custom, *jus scriptum* norms would not permit derogation, Vattel reasoned, because they derived from a higher source—the natural law of reason itself:

We use the term *necessary Law of Nations* for that law which results from applying the natural law to Nations. It is *necessary*, because Nations are absolutely bound to observe it. . . . This same law is called by Grotius and his followers the *internal Law of Nations*, inasmuch as it is binding upon the conscience of Nations. . . . It is by the application of this principle that a distinction can be made between lawful and unlawful treaties or conventions and between customs which are innocent and reasonable and those which are unjust and deserving of condemnation.⁷

Vattel did not specify which obligations would constitute the “necessary Law of Nations,” preferring perhaps to leave this determination to “the laws of conscience.”⁸

Even after natural law theory fell into disrepute in the nineteenth century with the rise of legal positivism, the classical notion of peremptory law continued to influence international legal theory well into the modern era. Early twentieth-century publicists such as Lassa Oppenheim and William Hall asserted confidently that states could not abrogate certain “universally

5. For early applications of the term “*jus cogens*” to international law, see Friedrich von der Heydte, *Die Erscheinungsformen des zwischenstaatlichen Rechts; jus cogens und jus dispositivum im Völkerrecht* [*Manifestations of Law Between Nations; Jus Cogens and Jus Dispositivum in International Law*], in 16 ZEITSCHRIFT FÜR VÖLKERRECHT 461 (Max Fleischmann, Walther Schücking & Karl Strupp eds., 1932); and Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937).

6. See HUGONIS GROTII, DE JURE BELLI ET PACIS [ON THE LAW OF WAR AND PEACE] (William Whewell ed. & trans., John W. Parker, London 2009) (1625); EMER DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS OR PRINCIPLES OF NATURAL LAW] §§ 9, 27 (1758) (distinguishing “le Droit des Gens *Naturel*, ou *Nécessaire*” from “le Droit *Volontaire*”); CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTORUM [A SCIENTIFIC METHOD FOR UNDERSTANDING THE LAW OF NATIONS] ¶ 5 (James Brown Scott ed., Joseph H. Drake trans., Clarendon Press 1934) (1764).

7. EMER DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW §§ 7, 9 (Charles G. Fenwick trans., 1916) (1758).

8. *Id.* § 9 (emphasis omitted).

recognized principles” by mutual agreement.⁹ Outside the academy, judges on the Permanent Court of International Justice affirmed the existence of peremptory norms in international law by referencing treaties *contra bonos mores* (contrary to public policy) in a series of individual concurring and dissenting opinions.¹⁰ Collectively, these authorities perpetuated the classical understanding that certain imperative norms are of such importance that they supersede conflicting consensual agreements between states.

Peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross’s influential 1937 article, *Forbidden Treaties in International Law*.¹¹ Verdross argued that certain discrete rules of international custom had come to be recognized as having a compulsory character notwithstanding contrary state agreements.¹² Just as municipal courts were empowered to void contracts *contra bonos mores*, Verdross asserted that courts must set aside international agreements in conflict with international *jus cogens* (although he did not use the specific term until later). Verdross defined peremptory law as the “*ethical minimum* recognized by all the states of the international community.”¹³ To illustrate the phenomenon of international *jus cogens*, Verdross argued that states bore an imperative duty under international law to undertake certain “moral tasks,” including the “maintenance of law and order within states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, [and] protection of citizens abroad.”¹⁴ According to Verdross, examples of international treaties inconsistent with *jus cogens* would include those “binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor, or the property of men on its territory.”¹⁵ Treaties might also violate *jus cogens* if they obligated “a state to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress.”¹⁶

At first, Verdross’s vision of international *jus cogens* encountered skepticism within the legal academy. The standard bearers of international legal positivism, including such respected jurists as Professors Hans Kelsen and Georg Schwarzenberger and Judge Gaetano Morelli of the International Court of Justice (ICJ) insisted that states could not be bound to international norms without their consent and questioned whether state practice reflected

9. WILLIAM HALL, A TREATISE ON INTERNATIONAL LAW 382-83 (8th ed. 1924) (asserting that “fundamental principles of international law” may “invalidate[], or at least render voidable,” conflicting international agreements); 1 LASSA OPPENHEIM, INTERNATIONAL LAW 528 (1905).

10. For example, in the 1934 *Oscar Chinn Case*, Judge Schücking’s influential dissent stated that neither an international court nor an arbitral tribunal should apply a treaty provision in contradiction to *bonos mores*. *Oscar Chinn Case*, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting).

11. Von Verdross, *supra* note 5.

12. *Id.*

13. *Id.* at 574.

14. *Id.*

15. *Id.*

16. *Id.* at 575.

any unifying moral consensus rising to the level of international *jus cogens*.¹⁷ These voices of resistance soon found themselves in the minority, however, as the *jus cogens* concept gained enhanced recognition and credibility following the Second World War. For a generation of international lawyers, the prosecution of Axis leaders at Nuremberg and Tokyo offered compelling evidence that international law did, indeed, impose substantive limits on the invocation of state sovereignty as a shield for officials accused of crimes against humanity.¹⁸ During the same period when states were pledging allegiance to the Universal Declaration of Human Rights and working to constrain state aggression and safeguard human dignity through consent-based multilateral instruments such as the United Nations Charter and the International Covenant on Civil and Political Rights (ICCPR), international judges and scholars were declaring unequivocally that universal norms such as the prohibition against genocide would bind states irrespective of state consent.¹⁹

These two strands of the postwar human rights movement—multilateral conventions and peremptory norms—converged in a remarkable way during the 1950s and 1960s with the United Nations International Law Commission's (ILC) preparation of the Vienna Convention on the Law of Treaties (VCLT).²⁰ Early in the VCLT's drafting process, advocates for international *jus cogens* found a powerful advocate in the ILC's Special Rapporteur, Sir Hersch Lauterpacht. In March 1953, Lauterpacht submitted for the ILC's consideration a partial draft convention on treaties which stated that “[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.”²¹ Acknowledging uncertainty over the scope and content of *jus cogens*, Lauterpacht asserted that peremptory norms derived their unique legal authority from two interrelated sources—international morality and general principles of state practice. In Lauterpacht's view, “overriding principles of international law,” such as the suppression of slavery, “may be regarded as constituting principles of international public policy (*ordre international public*). These principles . . . may be expressive of

17. See, e.g., HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 344 (1952) (“No clear answer . . . can be found in the traditional theory of international law [to the question whether *jus cogens* norms exist].”); Georg Schwarzenberger, *International Jus Cogens?*, 43 *TEX. L. REV.* 455, 467 (1965) (“[I]nternational law on the level of unorganized international society fails to bear out any claim for the existence of international *jus cogens*.”); Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 *AM. J. INT’L L.* 55, 56 (1966) (discussing GAETANO MORELLI, *NOZIONI DI DIRITTO INTERNAZIONALE [NOTIONS OF INTERNATIONAL RIGHTS]* 37 (3d ed. 1951)).

18. See LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 150 (1988) (surveying legal scholarship during the period 1945-69 and reporting that “about eighty per cent [of scholars] held the opinion that there are peremptory norms existing in international law”).

19. See, e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 *I.C.J.* 15, 23 (May 28) (“[T]he principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligations.”).

20. VCLT, *supra* note 2.

21. Hersch Lauterpacht, *Law of Treaties: Report by Special Rapporteur*, [1953] 2 *Y.B. Int’l L. Comm’n* 90, 93, U.N. Doc. A/CN.4/63.

rules of international morality so cogent that an international tribunal would consider them forming a part of those principles of law generally recognized by civilized nations which the ICJ is bound to apply [under] its Statute.”²² By identifying *jus cogens* with public policy and general principles of municipal law, Lauterpacht hewed closely to Verdross’s original concern for “immoral” treaties contrary to international public policy.

Lauterpacht’s colleagues on the ILC generally accepted his assessment that certain international norms had attained the status of *jus cogens*.²³ Yet despite general agreement over the existence of international *jus cogens*, the ILC was unable to reach a consensus regarding either the theoretical basis for peremptory norms’ legal authority or the proper criteria for identifying peremptory norms. Several ILC members embraced Lauterpacht’s view that peremptory norms represented minimal rules of international morality²⁴ or were constitutive of “international public order.”²⁵ Most ILC members, however, later joined Sir Humphrey Waldock, the ILC’s fourth special rapporteur on treaty law, in seeking to reconcile *jus cogens* with the conventional positivist paradigm. According to Waldock’s formulation, the content of peremptory international law must be ascertained from traditional sources reflecting state consent, whether customary or conventional.²⁶ After an extended debate over these and other theories of *jus cogens*, the ILC concluded ruefully in 1963 that “there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*.”²⁷

In the end, the ILC chose to open the VCLT for ratification without defining with specificity either the theoretical basis of *jus cogens* or the precise criteria for identifying particular peremptory norms. Article 53 recognized the existence of international *jus cogens* by declaring that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory

22. *Id.* at 155; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 440 (separate opinion of Judge Lauterpacht) (“The concept of *jus cogens* operates as a concept superior to both customary international law and treaty.”).

23. *See* HANNIKAINEN, *supra* note 18, at 160-61 (noting that none of the twenty five members of the ILC in 1963 denied the existence of *jus cogens* or contested the inclusion of an article on *jus cogens* in the VCLT); *see, e.g., Summary Records of the 877th Meeting*, [1966] 1 Y.B. Int’l L. Comm’n 227, 230-231, U.N. Doc. A/CN.4/188 (noting that the “emergence of a rule of *jus cogens* banning aggressive war as an international crime” was evidence that international law contains “minimum requirement[s] for safeguarding the existence of the international community”).

24. *See, e.g., Summary Records of the 683rd Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 60, 63, U.N. Doc. A/CN.4/156 (arguing that *jus cogens* norms “must also be found necessary to international life and deeply rooted in the international conscience”).

25. *Id.* at 65 (characterizing “United Nations policy . . . as a value-oriented jurisprudence, directed towards the emergence of a public order in the international community under the rule of law” that embodies the values “of human dignity in a society dedicated to freedom and justice”).

26. *See, e.g., Reports of the International Law Commission to the General Assembly*, [1966] 2 Y.B. Int’l L. Comm’n 168, 248, U.N. Doc. A/6309/Rev.1 (“[A] modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty . . .”).

27. *Second Report on the Law of Treaties*, [1963] 2 Y.B. Int’l L. Comm’n 1, 52, U.N. Doc. A/CN.4/156.

norm of general international law.”²⁸ In commentary accompanying the draft convention, the ILC indicated that “the prudent course seems to be to . . . leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.”²⁹ To this end, Article 53 stated by way of definition that “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.”³⁰ In short, while Article 53 affirmed the existence of jus cogens as a corpus of nonderogable international norms, it did not expressly ground these norms in principles of natural law, state consent, public order, or any other theory of legal obligation.

During the VCLT’s ratification process, many states construed Article 53’s focus on “acceptance” and “recognition” as reflecting a consensus-based theory of jus cogens: international norms would not supersede conventional obligations unless recognized as nonderogable “by the international community of States as a whole.”³¹ This reading of Article 53 was not inevitable, however. While an international consensus might very well support a voluntarist theory of state consent,³² it could just as easily perform a purely evidentiary function in clarifying international public order or exposing fundamental ethical norms. Moreover, because Article 53 did not identify any particular international norms as nonderogable, states were free to speculate about the provision’s scope and content. Aside from mentioning “the law of the Charter on the use of force” in commentary to Article 50 as “a conspicuous example of a rule in international law having the character of *jus cogens*,”³³ the ILC deliberately declined to enumerate specific peremptory norms in an effort to avoid “misunderstanding as to the position concerning other cases not mentioned in the article” and “prolonged study of matters which fall outside the scope of the present articles.”³⁴ In the end, therefore, the VCLT adopted the general concept of jus cogens without expressly codifying any of the competing foundational theories of peremptory norms in international law.³⁵

28. VCLT, *supra* note 2, art. 53; *see also id.* art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with the norm becomes void and terminates.”).

29. *Second Report on the Law of Treaties*, *supra* note 27, at 53.

30. VCLT, *supra* note 2, art. 53.

31. *See* HANNIKAINEN, *supra* note 18, at 176; Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT’L L. 42, 53 (1991).

32. *See* Shelton, *supra* note 3, at 300 (asserting that the VCLT “bases the identification of [peremptory norms] squarely in state consent”).

33. *Reports of the International Law Commission to the General Assembly*, *supra* note 26, at 247.

34. *Id.* at 248. Most states evidently agreed that the ILC’s mandate did not require a detailed examination of jus cogens and did not press the issue. HANNIKAINEN, *supra* note 18, at 178.

35. States at the Vienna Conference disagreed, for example, as to whether peremptory norms would bind persistent objectors. *See* Danilenko, *supra* note 31, at 49-57 (chronicling these debates). Controversy over the scope and content of jus cogens persisted during the ILC’s drafting of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations. *See* Shelton, *supra* note 3, at 300-01.

The basic terms of the debate over peremptory norms have changed little since the VCLT entered into force in 1980. As then, the concept of international jus cogens today enjoys widespread acceptance among international publicists and has been discussed with approval by numerous international, regional, and municipal courts.³⁶ However, scholarly debates over the nature, scope, and content of peremptory norms—questions deferred during the ILC’s deliberations—remain equally contentious today.

B. *Positivist Theories*

Most contemporary commentators continue to view jus cogens through the positivist prism of state consent. The requirement of state consent is justified on grounds that states are independently sovereign and autonomous, and therefore states cannot be bound by norms to which they have not consented.³⁷ According to the consent-based approach, international norms achieve peremptory status through the same sovereign lawmaking processes that generate ordinary international law. Specifically, states may consent to peremptory norms by codifying the norms in treaties, accepting them as customary international law, or employing them domestically as general principles of law.³⁸ In theory, these traditional lawmaking modalities provide standardized processes for states to signal their consent to emerging norms, thereby enabling international actors to distinguish genuine peremptory norms from counterfeits. Upon closer inspection, however, none of these three lawmaking modalities forges an adequate link between jus cogens and state consent.

The leading positivist theory of jus cogens conceives of peremptory norms as customary law that has attained peremptory status through state practice and *opinio juris*.³⁹ The *Restatement* endorses this position, stating that jus cogens “is now widely accepted . . . as a principle of customary international law (albeit of higher status).”⁴⁰ For positivists, a custom-based conception of jus cogens bolsters international law’s legitimacy by ensuring that states maintain firm control over the generation and evolution of

36. See, e.g., *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992) (recognizing torture as a jus cogens violation); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.R. 3, 40-41, 2002 SCC 1 (Can.) (stating that the prohibition on torture “cannot be easily derogated from”); *Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda)* (Judgment of Feb. 3, 2006), available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (last visited Mar. 31, 2009) (recognizing genocide as a violation of jus cogens); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (recognizing the prohibition on the use of force in international law as jus cogens).

37. Danilenko, *supra* note 31, at 47; Schwarzenberger, *supra* note 17, at 457-60.

38. See CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 76 (1976) (arguing that without evidence of state consent, “considerations such as the general nature of a rule, its moral, ethical, or constitutional status are insufficient to legitimize such a rule as a jus cogens norm”); MALCOLM N. SHAW, *INTERNATIONAL LAW* 118 (5th ed. 2008) (asserting “that only rules based on custom or treaties may form the foundation of jus cogens norms”).

39. See, e.g., Michael Byers, *Conceptualizing the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211, 212 (1997) (arguing “that jus cogens rules are derived from the ‘process of customary international law’”).

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 n.6 (1987).

peremptory norms. When pressed, however, positivists struggle to reconcile this custom-based theory of jus cogens with actual state practice. States rarely (if ever) express an affirmative intent to transform ordinary customary norms into peremptory law, and it is unclear what forms of state practice (if any) would support an inference of implied intent. Indeed, critics of jus cogens are quick to point out that many human rights norms such as the prohibition against torture, which are widely accepted as jus cogens, are also widely violated in practice.⁴¹ Even if state practice clearly supported recognizing peremptory norms as customary international law, the consent-based approach is hard-pressed to explain why customary norms would bind persistent objectors or nullify subsequent conflicting treaties. It is difficult, therefore, to dispute the assessment that “calling peremptory norms customary distorts the concept beyond recognition.”⁴²

If jus cogens does not fit neatly within the rubric of customary international law, the notion that peremptory norms derive their nonderogable status from treaty instruments is less plausible still. The VCLT does not purport to codify any particular norms as jus cogens, nor does it purport to bind nonparties to its provisions regardless of consent. Other conventions such as the ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) do incorporate fundamental human rights norms and aspire to universal membership. In the final analysis, however, state consent to these conventions cannot reasonably be construed to generate peremptory international law applicable to states that have not ratified them. The fact that many states have ratified the Genocide Convention does not obviate the need for nonsignatories to grant their consent in order for them to be bound by the Convention’s specific provisions. Indeed, the notion that the Genocide Convention generates jus cogens through state consent is belied by the Convention itself, which states that parties “*confirm* that genocide . . . is a crime under international law”⁴³ and contains a denunciation clause permitting state withdrawal.⁴⁴ This is not to say, of course, that the prohibition against genocide is not jus cogens or that there is no relation

41. See ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 113 (2006) (asserting that noncompliance with the peremptory norms against military aggression, torture, genocide, and slavery is too widespread to support the custom theory); Shelton, *supra* note 3, at 294 (“The asserted primacy of all human rights law has not been reflected in state practice.”).

42. ORAKHELASHVILI, *supra* note 41, at 114 (summarizing N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function, and Future*, 4 DENVER J. INT’L L. & POL’Y 187, 193 (1974)); see also *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149 (7th Cir. 2001) (“‘Customary international law . . . rests on the consent of states.’ . . . In contrast, a state is bound by jus cogens norms even if it does not consent to their application.”) (quoting *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)); Byers, *supra* note 39, at 222-23 (recognizing that custom “is problematic as a source for jus cogens rules because . . . States, if they choose, are . . . able to create legal exceptions to such rules”).

43. Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*] (emphasis added).

44. *Id.* art. XIV; see also Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946, 953 (1967) (noting that the Geneva Conventions and other multilateral human rights conventions also contain denunciation clauses).

between peremptory norms and treaties.⁴⁵ What is clear, however, is that the mere fact that a multilateral convention codifies international norms is insufficient to identify the norms as peremptory.

Another popular theory of jus cogens asserts that peremptory norms enter international law as “general principles of law recognized by civilized nations.”⁴⁶ These general principles may include procedural maxims such as *pacta sunt servanda*, positivists argue, as well as basic individual rights enshrined in municipal constitutions, statutes, and judicial decisions. For Verdross and Lauterpacht, general principles of law were compelling evidence of a transcendental morality tantamount to international public policy.⁴⁷ In contrast, positivists infer that states implicitly consent to peremptory norms by honoring them as fundamental principles of municipal law.⁴⁸ As with custom and treaties, however, explicit or implicit state acceptance of general principles provides an unstable foundation for a positivist theory of jus cogens. Few general principles are truly universal across the international community, and the consent of some (or many) states does not explain why states that do not apply particular peremptory norms in their municipal legal systems should be deemed to consent to these norms as a matter of international law. Thus, some theory other than state consent must be employed to bridge the gap between general principles of law and jus cogens.

Recognizing the asymmetries between traditional sources of international law and jus cogens, some scholars have suggested that the requirement of state consent might be satisfied if a representative supermajority of states accepted an emerging norm as peremptory. The ILC’s Commentary to Article 53 appears sympathetic to this approach. Peremptory norms need not achieve universal acceptance to create a binding international consensus, the ILC opines; instead, international norms may claim a consensus of “the international community of States as a whole” if a “very large majority” of representative states accept the norms as nonderogable.⁴⁹ Circumventing actual state practice, advocates of this consensus theory typically presume that states signal their consent to peremptory norms through a variety of expressive acts, whether they be unilateral declarations by heads of state, diplomatic correspondence, or the simple failure to register a timely objection to emerging norms. Consensus theory thus envisions a new,

45. To the contrary, the ICJ has held that the principles outlined in the Genocide Convention (as opposed to its specific provisions) are “universal” and “binding on States, even without any conventional obligation.” Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28). For an argument that human rights principles are universally binding domestically without legislative endorsement because they are universal, whereas implementing rules and regulations are not, see Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219 (1985).

46. Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

47. See Lauterpacht, *supra* note 21, at 155; von Verdross, *supra* note 5, at 573.

48. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 16 (6th ed. 2003) (noting this tension).

49. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 n.6 (citing U.N. Conference on the Law of Treaties, *Report of the Proceedings of the Committee of the Whole*, at 471-72, U.N. Doc. A/CONF.39/11 (May 21, 1968) (comments of the chairman)).

autonomous mode of general international law formation—a quasi-customary source that is not beholden to state practice or individualized state consent.⁵⁰

The primary advantage of consensus theory over other positivist theories of *jus cogens* is that it liberates peremptory norms from customary international law's persistent objector rule. Yet to the extent that consensus theory continues to posit state consent as the foundation of *jus cogens*, it remains vulnerable to the same theoretical quandary that vexes positivist approaches to *jus cogens* generally, namely: why may a supermajority of states impose nonderogable duties on a dissenting minority? Those who embrace consensus theory tend to assume that states consent to the general process by which peremptory norms arise, even if they do not necessarily consent to particular norms generated in that process. At present, however, there is little evidence that states accept international consensus (or near consensus) as an authoritative process for generating peremptory norms. Even if states did consent to a consensus-based source of international lawmaking, the positivist paradigm would be ill-equipped to explain why states that disapprove of emerging peremptory norms in the future could not withdraw their consent at will.⁵¹ Thus, international consensus, like traditional sources of international law, is not particularly well suited to furnish the theoretical underpinnings of *jus cogens*.

As many positivists have recognized, the very concept of *jus cogens*—peremptory norms that bind states irrespective of state consent—is sharply at odds with the positivist account of international lawmaking.⁵² If peremptory norms are to be taken seriously as a source of international obligation, their imperative force must derive from some principle other than state consent.

C. *Natural Law Theories*

One response to the inadequacy of positivist theories of *jus cogens* has been to embrace peremptory norms as remnants of the natural law tradition. Inspired by Lauterpacht's antipositivism, a number of commentators have argued that peremptory norms owe their privileged status to their imperative moral authority. For example, ILC member Mustafa Kamil Yaseen asserted during the VCLT's drafting process that "the only possible criterion" for distinguishing peremptory norms from ordinary conventional or customary

50. See W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 15 n.29 (2000) ("In human rights discourse, *jus cogens* has . . . evol[ed] into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity."); cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99-100 (June 27) (looking to *opinio juris* without considering actual state practice). *But see* Danilenko, *supra* note 31, at 48 (noting that at the Vienna Conference the representatives of France and other states expressly rejected the view that the VCLT contemplated a new source of law).

51. See JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL REAPPRAISAL* 97 (1974).

52. See *id.* at 64 ("[T]he introduction of a consensual ingredient into the concept of *jus cogens* leads inevitably, in the ultimate instance, to the very negation of that concept."); cf. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 715 (9th Cir. 1992) (stating that *jus cogens* norms "transcend . . . consent").

norms “was the substance of the rule,” including whether the norms were “deeply rooted in the international conscience.”⁵³ More recently, prominent human rights theorists such as Louis Henkin and Louis Sohn have suggested that *jus cogens* norms such as the prohibitions against slavery and military aggression derive their peremptory character from their inherent rational and moral authority rather than state consent; as such, treaties, custom, and general principles might recognize and incorporate peremptory norms, but they could not abrogate them.⁵⁴ Similar affirmations of *jus cogens* as natural law may be distilled from the jurisprudence of the ICJ⁵⁵ and the Inter-American Commission on Human Rights.⁵⁶ Although few international lawyers today share Vattel’s confidence in a universal natural law of reason, many nonetheless agree that “[t]he character of certain norms makes it difficult to portray them as other than peremptory.”⁵⁷

The conceptual challenges associated with natural law theory are well documented. Positivists argue that natural law theories of *jus cogens* artificially conflate law and morality, confusing parochial and relativistic ethical norms with objective principles of legal right and obligation.⁵⁸ Although some peremptory norms such as the prohibitions against genocide and slavery are relatively uncontroversial across the international community of states, it is by no means clear how natural law theory would resolve disputes over the scope or content of less well-defined norms, such as the prohibition against torture, once *jus cogens* is uncoupled from state consent. More troubling still, natural law theory, like legal positivism, struggles to explain how peremptory norms can place substantive limits on state action without eviscerating the concept of state sovereignty.⁵⁹ For these and other reasons, most international courts and publicists of the last half-century have eschewed reliance on natural law in favor of other theories of *jus cogens*.

53. *Summary Records of the 683rd Meeting*, *supra* note 24, at 63.

54. LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 15 (1981); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982) (citing the “natural law concept of rights, rights to which all human beings have been entitled since time immemorial and to which they will continue to be entitled as long as humanity survives”); *see also* Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT’L L. 359, 361 (1987) (“[The] distinctive character essence of *jus cogens* is such . . . as to blend the concept into traditional notions of natural law.”).

55. *Nicaragua*, 1986 I.C.J. at 112 (describing certain norms of international humanitarian law as “elementary considerations of humanity” that “constitute intransgressible principles”).

56. *See, e.g.*, *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶ 49 (2003) (describing *jus cogens* as a “superior order of legal norms, which the laws of man or nations may not contravene[,] . . . rules which have been accepted . . . as being necessary to protect the public morality recognized by them”) (internal citation and quotation marks omitted); *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, at 95-96 (Sept. 17, 2003) (characterizing the principle of nondiscrimination as a *jus cogens* norm deriving “directly from the oneness of the human family and . . . linked to the essential dignity of the individual”) (internal citation and quotation marks omitted).

57. ORAKHELASHVILI, *supra* note 41, at 108.

58. *See, e.g.*, A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1, 30 (1995) (arguing that natural law “risks falling into the error of assuming that, if it would be a good thing for subjects of a legal system to refrain from particular behavior, it must make sense to render the behavior illegal”).

59. *See* Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47, 63-75 (1995-96) (discussing this tension).

D. *Public Order Theories*

A third tradition in international legal theory defines *jus cogens* as public order norms essential to the integrity of international law as a legal system. According to this theory, international law recognizes certain imperative norms as hierarchically superior to ordinary conventional and customary law in order to promote the interests of the international community as a whole and preserve international law's core values against fragmentation. In Verdross's words,

the law of civilized states . . . demands the establishment of a juridical order guaranteeing the rational and moral coexistence of the members. . . . A truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis.⁶⁰

According to public order theories of *jus cogens*, all peremptory norms serve one of two functions: they either safeguard the peaceful coexistence of states as a community or honor the international system's core normative commitments.⁶¹

Insofar as public order theory envisions *jus cogens* violations as offenses against the international community as a whole, this approach places peremptory norms in close proximity to *erga omnes* rules—offenses that give rise to generalized state standing. The ICJ famously endorsed the *erga omnes* concept in *Barcelona Traction* when it affirmed states' responsibility to refrain from “acts of aggression, and of genocide,” and to observe “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination” and characterized these norms as “obligations of a State to the international community as a whole.”⁶² While superficially appealing, the ICJ's attempt to frame peremptory norms as duties owed by states to the international community as a whole poses significant conceptual difficulties of its own: In what sense does the international community suffer an injury when a state subjects its own nationals to slavery or racial discrimination? As the ICJ acknowledged in a different context, where fundamental human rights are at stake “one cannot speak of individual advantages or disadvantages to States.”⁶³ By the same

60. Von Verdross, *supra* note 5, at 574, 576.

61. See, e.g., *Summary Records of the 877th Meeting*, *supra* note 23, at 230 (“The rules of *jus cogens* represented a minimum requirement for safeguarding the existence of the international community.”); ORAKHELASHVILI, *supra* note 41, at 46 (“The purpose of *jus cogens* is to safeguard the predominant and overriding interests and values of the international community as a whole”); Stefan A. Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 513 (1966) (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 7, 1965, 18 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 441 (448) (F.R.G.) (characterizing peremptory norms as “legal rules . . . indispensable to the existence of the law of nations as an international legal order”).

62. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 33 (Feb. 5).

63. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28). Even assuming that each state has a concrete interest in preventing violence in a neighboring state from spilling over into its own territory, this interest would cover only a narrow subset of *jus cogens* violations and therefore would not furnish a satisfactory general theory of *jus cogens*.

logic, it is unclear why the international community as a whole could claim a more particularized interest in intrastate human rights observance than either its constituent member states or the people who reside within them.⁶⁴

Public order theory's best response to this dilemma has been to recast peremptory norms as principles integral to the normative objectives of international law and constitutive of the international community itself. Myers McDougal, Harold Lasswell, Michael Reisman, and others have argued persuasively that jus cogens norms such as the prohibitions against acts of aggression and racial discrimination reflect international law's transformation into a purposeful global community of conscience dedicated to promoting human rights and the peaceful coexistence of states.⁶⁵ As evidence of this normative agenda, public order theorists point to instruments such as the Charter of the United Nations, which defines the United Nations's objectives to include the promotion of "international peace and security," "friendly relations among nations," "human rights," and "fundamental freedoms."⁶⁶ When one considers the international community's overwhelming acceptance of the United Nations's mission, the notion that peremptory norms constitute international public policy is not farfetched.

At the same time, public order's insight that peremptory norms shape and define international law's normative agenda does not, in and of itself, yield a promising positive or prescriptive theory of jus cogens. Public order theory does not illuminate the normative basis of peremptory norms, nor does it clarify which particular international norms should be deemed peremptory. When confronting these critical questions concerning the nature and content of peremptory norms, advocates of public order theory either retreat to circular reasoning about peremptory norms' indispensability to international society or recycle arguments from legal positivism or natural law theory. Equally disconcerting, public order theory—like positivism and natural law theory—does not address the enduring paradox at the core of human rights discourse: international law's seemingly contradictory commitments to state sovereignty and individual dignity. To answer these critical questions, international legal theory must look beyond the alleged requirements of public order.

* * * *

In sum, jus cogens remains a popular concept in search of a viable theory. The prevailing accounts of peremptory norms' legal status are premised upon, and shaped by, normative political theories of consent, natural

64. As discussed in Part V, the real problem with these public order theories is that they misidentify the beneficiary of jus cogens norms as the international community of states rather than individuals. See *infra* text accompanying notes 188-191.

65. MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 3-6 (1980); W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 576 (2007).

66. U.N. Charter art. 1, paras. 1-3; see also HANNIKAINEN, *supra* note 18, at 5 (explaining that, in discerning jus cogens, "at present it can be said that the United Nations . . . acts on behalf of 'the international community of States as a whole'" (citing U.N. Charter art. 53)).

law, and international order—none of which has proven adequate to the task. While the ICJ recently endorsed the jus cogens concept for the first time in its 2006 Judgment on Preliminary Objections in *Armed Activities on the Territory of the Congo* (Congo v. Rwanda), it declined to clarify jus cogens's legal status or to specify any criteria for identifying peremptory norms.⁶⁷ Current scholarly commentary on jus cogens continues to reenact the ILC debates of the 1950s and 1960s without resolving the two fundamental questions with which we started: First, what is the normative basis of jus cogens? Second, what is the relationship between jus cogens and state sovereignty? Taken together, these threshold questions demarcate a zone of theoretical indeterminacy that international legal scholars have variously dubbed the “conceptual aporia”⁶⁸ or “mystery”⁶⁹ of jus cogens.

International law's perennial anxiety over jus cogens has real-world costs. Over time, legal scholars have generated conflicting catalogues of peremptory norms, fueling skepticism about the jus cogens concept itself.⁷⁰ As Dinah Shelton has demonstrated in a recent study, concerns about jus cogens's uncertain basis and uneasy coexistence with state sovereignty have diminished the concept's influence in transnational dispute resolution.⁷¹ In some municipal cases, courts have declined to recognize international norms as peremptory while expressing doubt about the proper criteria for identifying jus cogens.⁷² In other cases, national courts have accepted international norms as peremptory, but have hesitated to enforce these norms for fear that they might thereby compromise state sovereignty.⁷³ International tribunals have also hesitated to apply peremptory norms in appropriate cases. In *Congo v. Rwanda*, for example, Judge ad hoc John Dugard observed that the ICJ had refrained from invoking the jus cogens concept in several previous cases

67. *Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application* (Dem. Rep. Congo v. Rwanda) (Judgment of Feb. 3, 2006), at 31-32, available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (last visited Mar. 31, 2009).

68. Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 11 (2000).

69. DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 39 (2002); see also IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 224 (2d ed. 1984) (“The mystery of jus cogens remains a mystery.”).

70. See, e.g., HANNIKAINEN, *supra* note 18 (identifying various broad categories of jus cogens, including “the prohibition of aggressive armed force between States,” “basic human rights,” “order and viability of sea, air, and space areas outside national jurisdiction,” and “the law of war”); Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625-26 (1977) (listing twenty categories, including piracy, political terrorism, and disruption of international communications). See generally A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1493 (2003) (noting that state delegations at the Vienna Conference “offered widely differing lists of rules meeting the requirements of *jus cogens*; of the twenty-six delegations . . . no more than thirteen agreed with respect to any one rule”).

71. Shelton, *supra* note 3, at 305-17. Of course, one may take the view that the inadequacy of prior accounts of jus cogens reveals that the concept is indefensible and should be abandoned. The ubiquity and salience of jus cogens in international law, however, gives publicists reason to develop a more satisfactory account of peremptory law before giving up on the idea. The fiduciary theory defended in the text below is one such account.

72. See, e.g., *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149 (7th Cir. 2001) (expressing concern that jus cogens should be invoked “[o]nly as a last resort”).

73. See, e.g., *Bouzari v. Iran*, [2004] 71 O.R.3d 675 (Can.) (holding that the prohibition against torture does not entail a right to a civil remedy enforceable in a foreign court).

where peremptory norms manifestly clashed with other principles of general international law.⁷⁴ Similarly, the European Court of Human Rights has addressed jus cogens only once, in *Al-Adsani v. United Kingdom*, when it famously rejected the argument that jus cogens violations would deprive a state of sovereign immunity.⁷⁵ Neither the U.N. Tribunal on the Law of the Sea nor the international claims tribunals for Iran or Iraq have ever mentioned jus cogens.⁷⁶ In short, while the jus cogens concept has achieved widespread acceptance across the international community, its unsettled theoretical foundation has impeded its implementation and development. For jus cogens to achieve full legal standing, it will need to be reframed in a way that both illuminates its normative basis and explains its relationship to state sovereignty.

III. THE NEW POPULAR SOVEREIGNTY: FIDUCIARY STATES IN INTERNATIONAL LAW

In this Part we develop a theory of jus cogens norms that aims to explain both their peremptory status and relationship to state sovereignty. We argue that jus cogens norms are constitutive of a state's authority to exercise sovereign powers domestically and to claim sovereign status as an international legal actor. Our theory draws on the work of Immanuel Kant, but from an overlooked passage in the *Doctrine of Right*. In this passage, Kant concludes that parents owe their children fiduciary obligations on account of the innate right of humanity children possess as citizens of the world. While the theory we propose is Kantian, however, it is not Kant's per se, as Kant's theory of international law ultimately relies on his social contract theory of the state. Rather, the theory we defend is that the state and its institutions are fiduciaries of the people subject to state power, and therefore a state's claim to sovereignty, properly understood, relies on its fulfillment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power. One of the requirements of this obligation—perhaps the main requirement—is compliance with jus cogens. Put another way, a fiduciary principle governs the relationship between the state and its people, and this principle requires the state to comply with peremptory norms.

Our theory aims to avoid the positivist's reliance on state consent by showing that peremptory norms arise from a state-subject fiduciary relationship rather than from state consent.⁷⁷ On the fiduciary theory,

74. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)* (Judgment of Feb. 3, 2006), at 2 (dissenting opinion of Judge Dugard), available at <http://www.icj-cij.org/docket/files/126/10449.pdf> (last visited Mar. 31, 2009) (citing Arrest Warrant of Apr. 11, 2000 (Dem. Rep. of Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14)); *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (June 30); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21); Shelton, *supra* note 3, at 308-09.

75. Shelton, *supra* note 3, at 309 (discussing *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 61).

76. *Id.*

77. As will become clear below, the fiduciary theory implies that states have cosmopolitan obligations to foreign nationals affected by the state's power, including those outside the state's

arguments about whether consensus or a supramajority are required for a jus cogens norm to emerge are misplaced, since they all begin from the false premise of state consent. Similarly, the fiduciary view overcomes the difficulty public order theories face as they seek to justify jus cogens norms protective of human rights. Because these theories take interstate relationships as their primary focus, they struggle to illuminate the legal significance of peremptory human rights which govern the state-subject relationship. The fiduciary theory, on the other hand, starts with the state-subject relationship, and therefore is well situated to explain the inclusion of fundamental human rights within jus cogens.

The fiduciary view also moves beyond natural law accounts of jus cogens which depend on vague notions of “the international conscience”⁷⁸ or a “superior order of legal norms.”⁷⁹ While the fiduciary theory, as we shall see, relies explicitly on a moral idea of dignity, its reliance is not on dignity in the abstract, but on the legal significance of dignity within the juridically secure confines of a full-blooded legal relationship—the state-subject fiduciary relationship. Jus cogens norms flow from this relationship, and thereby embody distinctive norms that structure the very relationship that is constitutive of state sovereignty.⁸⁰ Thus, the fiduciary model promises to reconcile jus cogens with sovereignty, and through a principled legal framework that helps to illuminate the nature of both.

We develop the fiduciary model in several stages, beginning with an account of the circumstances that give rise to fiduciary relations, an historical overview of international law’s prior use of the fiduciary concept, and the argument that the state is a fiduciary of its people. With these pieces in place, we turn to Kant’s explication of the moral basis of fiduciary relationships: the innate right of humanity of the person subject to fiduciary power. We illustrate the fiduciary model’s ability to generate jus cogens norms using the prohibitions against slavery and discrimination as examples.⁸¹ We then explain how jus cogens norms, under the fiduciary theory, are constitutive of sovereignty from the vantage point of both domestic and international law.

territory. For convenience, we will generally refer to the “state-subject fiduciary relationship” as the locus of jus cogens, but it is important to note that “state-subject” denotes a wider class of relations than “state-citizen.” The state-subject fiduciary relationship denotes a fiduciary and therefore legal relationship between the state and any person affected by state action, regardless of civil or political status.

78. *Summary Records of the 683rd Meeting*, *supra* note 24, at 63 (comments of ILC member Mustafa Kamil Yaseen).

79. *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶ 49 (2003).

80. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990). Reisman argues that we are now in a period of a “new constitutive, human rights-based conception of popular sovereignty,” but he does not explain why or in what sense human rights are constitutive of sovereignty. *Id.* at 870. The fiduciary theory aims at such an explanation. While the fiduciary account is a natural law theory in the sense that it trades on Kant’s idea of an innate right of humanity, we shall see that it does not insist from the outset, as natural law theories usually do, on the preeminence of substantive natural rights or deeply cherished norms (e.g., freedom from slavery). Rather, peremptory norms flow from the conjunction of a Kantian understanding of dignity and the fiduciary position of the state vis-à-vis the agent subject to state power.

81. We apply the model to other candidate peremptory norms. See *infra* Part IV.

Exercises of state power that violate jus cogens are prohibited under international law precisely because they are inimical to the fiduciary principle that governs state-subject relations. Finally, we argue that the fiduciary theory of the state is preferable to Kant's own social contract theory, and provides a better foundation for peremptory norms that constitute and constrain state sovereignty.

A. *Fiduciary Relationships and the State as Fiduciary*

Familiar fiduciary relationships include the following: trustee-beneficiary, agent-principal, director/officer-corporation, lawyer-client, doctor-patient, partner-partnership, joint venturer-joint venture, parent-child, and guardian-ward. Fiduciary relations arise from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is peculiarly vulnerable to the fiduciary's power in the sense that she is unable, either as a matter of fact or law, to exercise the entrusted power.⁸²

Discretionary power of an administrative nature is other-regarding, purposive, and institutional. It is other-regarding in the straightforward sense that it is not self-regarding. A business owner's administrative power over her solely-owned business is not other-regarding, whereas a partner's administrative power over a partnership is. The fiduciary's power is purposive in that it is held or conferred for limited purposes, such as furthering exclusively the equitable interests of a trust's beneficiary. And finally, the power is institutional in that it must be situated within a legally permissible institution, such as the family or the corporation, but not, for example, within a kidnapping ring. Although the kidnapper is subject to some fiduciary-like obligations that mimic parental duties, such as a duty to provide food, the kidnapper is not a lawful fiduciary because kidnapping is irremediably unlawful. The law seeks to dissolve rather than regulate relationships of incorrigible domination.

Beneficiaries are peculiarly vulnerable in that, once in a fiduciary relationship, they generally are unable to protect themselves or their entrusted interests against an abuse of fiduciary power. In many fiduciary relationships of private law (e.g., lawyer-client, doctor-patient, agent-principal), the fiduciary is a person to whom the beneficiary has turned for professional services or advice. The fiduciary is empowered to act on the beneficiary's behalf, and the things she is empowered to do for the beneficiary (e.g., defend a suit, tend an injury, sign a contract) are things the beneficiary is legally entitled to do for herself. In other fiduciary relationships, however, the beneficiary's vulnerability is of a different kind because the beneficiary

82. One of us has defended this conception of fiduciary relationships, as well as a fiduciary conception of the state. See Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005). One of us has also argued that administrative law rests on fiduciary foundations. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

cannot in principle exercise the kind of power the fiduciary is entrusted to exercise.

Children and wards of guardians, for example, lack legal capacity to act as autonomous adults. Artificial persons, such as corporations, cannot act except through their agents or representatives. But most interesting for present purposes are beneficiaries subject to a fiduciary power to which other beneficiaries are also subject, such as pension fund claimants with competing demands on the same fund.⁸³ In these cases, the contending beneficiaries are not entitled to exercise the fiduciary's power because no person can be judge and party to the same cause. As we shall see, *mutatis mutandis*, the same principle applies to private parties vis-à-vis the state and its sovereign powers.

Although the hallmark fiduciary duty of a trustee to a discrete beneficiary is a duty of loyalty, the content of this duty necessarily changes if multiple classes of beneficiaries are subject to the same power. In these circumstances, the fiduciary duty necessarily becomes one of fairness or evenhandedness as between beneficiaries, and reasonableness in the sense that the fiduciary must have due regard for the distinct beneficiaries' separate interests.⁸⁴ In all cases the fundamental fiduciary duty is to exercise the entrusted power exclusively for the other-regarding purposes for which it is held or conferred.

The idea that the state is in a fiduciary relationship with its people traces its origins to the republican idea of popular sovereignty that rose to prominence in the seventeenth century during the English Civil War, and is reflected in constitutional documents such as the 1776 Pennsylvania Declaration of Rights: "[A]ll power being . . . derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."⁸⁵ Long before the United States's struggle for independence, Locke had famously asserted that legislative power is "only a fiduciary power to act for certain ends" and that "there remains still *in the people a supreme power to remove or alter the legislative*, when they find the *legislative* act contrary to the trust reposed in them."⁸⁶ In other words, popular sovereignty denotes that the state's sovereign powers belong to the people, and so those powers are held in trust by their rulers on condition that they be used for the people's benefit. Popular sovereignty thus implies that the state and its institutions are fiduciaries of the people, for their justification rests exclusively on the authority they enjoy to govern and serve the people. As we shall see, the fiduciary theory explains the state's legal authority to announce and enforce law for the benefit of the

83. See, e.g., *Equitable Life Assurance Soc'y v. Hyman*, [2002] 1 A.C. 408 (H.L.) (U.K.).

84. See *id.*; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 (Can.); P.D. FINN, FIDUCIARY OBLIGATIONS 59-74 (1977).

85. PA. CONST. of 1776, art. IV. For detailed exposition of the use of trust and fiduciary concepts in the historical development of public law, including international law, see Paul Finn, *The Forgotten "Trust": The People and the State*, in EQUITY ISSUES AND TRENDS 131 (Malcolm Cope ed., 1995); and Jedediah Purdy & Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power*, 70 LAW & CONTEMP. PROBS. 165 (2007).

86. JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT (1690), reprinted in SOCIAL CONTRACT 1, 87 (Sir Ernest Barker ed., 1948).

people, while simultaneously explaining limits intrinsic to state authority, such as peremptory norms.

With the Peace of Westphalia and the emergence of autonomous states in the seventeenth century, the prevailing view of international order was that, as between European powers, there was no law, but rather a Hobbesian state of nature.⁸⁷ Nonetheless, for more than 400 years these powers pressed the fiduciary theory of the state into ideological service as they sought to extend European sovereignty over non-Europeans and their lands. Spanish theologian Francisco de Vitoria, who generally defended the interests of indigenous peoples against Spanish conquest, claimed that indigenous peoples were essentially children incapable of self-government. Therefore, they were susceptible to a purportedly civilizing European trusteeship, albeit one that could exist only provisionally and for the benefit of the colonized peoples.⁸⁸ With a like sympathy for Indians subject to British rule, Edmund Burke deployed the fiduciary theory from within the colonial paradigm to argue that the East India Company had breached the trust-like authority Parliament had given it over India, and that the governing powers ceded to the Company therefore reverted back to Parliament (not to India).⁸⁹

In the interwar period, the Mandate System established by the League of Nations formally entrenched the colonial trusteeship ideas of Vitoria and Burke. Article 22 of the Covenant of the League of Nations stipulated in part that the mandate states (former territories of Germany and the Ottoman Empire) were “not yet able to stand by themselves,” and that their well-being fell to the League as a “sacred trust of civilization.”⁹⁰ The mandatories owed duties of good governance to both the international community (the League of Nations) and their subject wards, which in theory were to be groomed for self-rule. Although the League of Nations eventually dissolved, the system continued in diminished form after World War II under the United Nations Trusteeship System and has on occasion supplied a means of redress to trust territories.⁹¹

On balance, the historical record appears to suggest that fiduciary doctrine enabled colonialism by lending it a veneer of legality. Arguably,

87. See, e.g., THOMAS HOBBS, *LEVIATHAN* 183-88 (Crawford B. Macpherson ed., Penguin English Library 1968) (1651) (“[I]n all times Kings, and Persons of Sovereigne authority, because of their Independency, are in continual jealousies, and in the state and posture of Gladiators . . . which is a posture of War.”).

88. See FRANCISCO DE VITORIA, *POLITICAL WRITINGS* (Anthony Pagden & Jeremy Lawrance eds., Cambridge Univ. Press 1991). The historical discussion in this paragraph is indebted to Purdy & Fielding, *supra* note 85, at 180-210.

89. See David Bromwich, *Introduction to EDMUND BURKE, ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 1-39* (David Bromwich ed., 2000) [hereinafter *ON EMPIRE*]; EDMUND BURKE, *SPEECH ON FOX’S EAST INDIA BILL (1783)*, reprinted in *ON EMPIRE, supra*, at 286.

90. League of Nations Covenant art. 22, para. 1.

91. In 1989, Nauru, a Micronesian island and trust territory under Australia’s administration, claimed before the ICJ that Australia had engaged in self-dealing by managing the island’s phosphate deposits for the benefit of Australia rather than Nauru. Australia eventually settled with Nauru, paying an amount that included Nauru’s claim to the loss it suffered as a consequence of Australia’s self-dealing. See Ramon E. Reyes Jr., *Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru’s Claims for Rehabilitation of Its Phosphate Lands*, 16 N.Y.L. SCH. J. INT’L & COMP. L. 1 (1996).

however, the wrongfulness of colonialism lies not in the trust-like structure of colonial rule *per se*, but in colonialism itself, i.e., in the prior denial of the colonized peoples' ability to govern themselves. In a postcolonial world in which the fiduciary theory is wedded inextricably to popular sovereignty, the theory underscores rather than subverts the idea that public power ultimately belongs to the people. Disabused of its colonial past and already open to a fiduciary vision of public authority, international law may now be ready to make good on the democratic and republican promise of popular sovereignty that the fiduciary conception of the state makes possible.

The argument for the idea that the state is a fiduciary of the people subject to its powers draws on the general constitutive features of fiduciary relationships referred to at the beginning of this Section—namely, discretionary power of an administrative nature and vulnerability. The state's legislative, judicial, and executive branches all assume discretionary power of an administrative nature over the people affected by its power. For example, the state assumes discretionary authority to announce and enforce law over everyone within its jurisdiction. The legislative, executive, and judicial powers entailed by sovereignty, in their own familiar ways, exhibit the institutional, purpose-laden, and other-regarding characteristics that constitute administration. Moreover, legal subjects, as private parties, are not entitled to exercise public powers. For this reason, legal subjects are peculiarly vulnerable to public authority, notwithstanding their ability within democracies to participate in democratic processes and assume public offices. It follows that the state's sovereign powers—discretionary powers of an administrative nature that private parties are not entitled to exercise—give rise to a fiduciary obligation.

We argue that the minimal substantive content of the state's fiduciary obligation is compliance with *jus cogens*, an obligation that remains in place whether or not the state has ratified a convention that signals a commitment to such norms.⁹² To apprehend the normative basis of this obligation, however, we need to have in view a general theory of fiduciary relations, one that sets out the moral basis of the beneficiary's right to the fiduciary's duty.

B. *Kant's Model of Fiduciary Relations*

Kant sets out the requisite moral basis for fiduciary obligation in an argument concerning the duties that parents owe their children, duties that arise as a consequence of a particular unilateral undertaking on the part of the parents:

[C]hildren, as persons, have by their procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly on the basis of principle (*lege*), that is, without any special act being required to establish this right.

92. *E.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 153 (Dec. 10, 1998) (observing that the prohibition against torture is peremptory based on “the importance of the values it protects” rather than state consent).

For the offspring is a *person*, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation. So from a *practical* point of view it is a quite correct and even necessary Idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can. They cannot destroy their child as if he were something they had *made* (since a being endowed with freedom cannot be a product of this kind) or as if he were their property, nor can they even just abandon him to chance, since they have brought not merely a worldly being but a citizen of the world into a condition which cannot now be indifferent to them even just according to concepts of Right.⁹³

To understand Kant's argument, we need to review briefly some of the central features of his theory of right, which includes a very specific conception of the idea of innate right. For Kant, legal rights embody our moral capacity for putting others under legal obligations.⁹⁴ Kant refers to property and contractual entitlements as acquired rights, because some act is required on the part of the right-holder for her to acquire them. An innate right, on the other hand, "is that which belongs to everyone by nature, independently of any act that would establish a right."⁹⁵ All rights at private law, for Kant, are either innate or acquired. Moreover, persons have one, and only one, innate right, which each possesses equally by virtue of his shared humanity—that is, the right to as much freedom as can coexist with the freedom of everyone else. Freedom, Kant explains, is simply "independence from being constrained by another's choice."⁹⁶ More positively, freedom is the agent's capacity for rational self-determination. It follows that in a world where interaction with others is unavoidable, law must enshrine rights within a regime of equal freedom in which no party can unilaterally impose the terms of interaction on another.

With these precepts in mind, consider Kant's claim that children have an innate and legal right to their parents' care. It is easy to see that the child's

93. KANT, *supra* note 4, at 98-99 (footnote omitted). It is settled law in Canada that parents owe their children fiduciary duties. See *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (Can.). For an argument that U.S. family law should follow suit, see Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). Other accounts of fiduciary relations are instrumental in that they emphasize the social utility of fiduciary relationships rather than the right of the beneficiary to the fiduciary's obligation. See, e.g., LEONARD ROTMAN, *PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA* 152 (1996) ("[T]he law of fiduciaries is focused on a desire to preserve and protect the integrity of socially valuable or necessary relationships."). Yet other accounts explain fiduciary obligations as proxies for implied contractual terms. See, e.g., Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 823 (1995). The Kantian theory is noninstrumental because its focus is exclusively the beneficiary's right to the fiduciary's obligation, and it is noncontractual because it governs relationships in which consent is in practice or in principle unattainable. All accounts, however, take seriously the protection of the beneficiary from an abuse of power.

94. KANT, *supra* note 4, at 63. For clarity, Kant's discussion of rights summarized in the text refers exclusively to coercively enforceable legal rights and their correlative legal obligations. Kant is not referring to unenforceable ethical duties from his doctrine of virtue, such as the duty of beneficence. Those duties are unenforceable because no one has a right to call on the state to coerce their performance. Ethical duties, for Kant, arise solely from the categorical imperative (the ethical requirement to act only in accordance with universalizable principles) rather than from the rights of others. See *id.* at 42-43, 246-47. For a discussion of the intimate relationship in Kant between legality and coercion, see Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 2 (2004).

95. KANT, *supra* note 4, at 63.

96. *Id.*

right cannot be an acquired right, since the child does nothing to acquire it. She is simply born. The part that needs further clarification is how the child's innate right to equal freedom can place the parents under a legal obligation. Although strangers have the same innate right to equal freedom as the child, parents owe them none of the special legal duties that they owe their children.

To establish the necessary connection between parent and child, Kant points to the act of procreation, an act that brings a helpless and vulnerable child into the world without the child's consent. For Kant, the parent's obligation takes hold in the first instance because no party can unilaterally impose terms of interaction on another. When parents unilaterally create a person who cannot survive without their support, the child's innate moral capacity to place the parents under obligation is triggered to ensure the child's security. Parents' freedom to procreate can thus coexist with the child's right to security from the perils of a condition to which she never consented. The child is treated as a *person* worthy of respect in her own right, and not as a thing the parents can destroy or abandon. Kant defines a person as "a subject whose actions can be *imputed* to him."⁹⁷ A thing, on the other hand, is "[a]ny object of free choice which itself lacks freedom," and thus a thing "is that to which nothing can be imputed."⁹⁸ Put another way, the parents have brought into being a person who is a "citizen of the world," and one implication of citizenship in Kant's world of equal freedom is recognition and affirmation of the child-citizen's innate moral capacity to put her parents under obligation.

As persons, children cannot be treated as mere means or objects of their parents' freedom to procreate. Rather, they are beings who by virtue of their moral personhood have dignity, and dignity proscribes regarding them as if they were things. By the same token, legal personality and the idea of dignity intrinsic to it supplies the moral basis of the beneficiary's right to the fiduciary obligation. A relationship in which the fiduciary has unilateral administrative power over the beneficiary's interests can be understood as a relationship mediated by law only if the fiduciary (like the parent) is precluded from exploiting his position to set unilaterally the terms of his relationship with the beneficiary. The fiduciary principle renders the beneficiary's entrusted interests immune to the fiduciary's appropriation because those interests, in the context of fiduciary relations, are treated as inviolate embodiments of the beneficiary's dignity as a person. In other words, the fiduciary principle authorizes the fiduciary to exercise power on the beneficiary's behalf, but subject to strict limitations arising from the beneficiary's vulnerability to the fiduciary's power and her intrinsic worth as a person. In the case of the state-subject fiduciary relationship, these limitations include *jus cogens* norms, and as we argue now, their fiduciary basis explains both their juridical nature and preemptory status.

97. *Id.* at 50.

98. *Id.*

C. *Fiduciary States and the Prohibitions Against Slavery and Discrimination*

Kant's model of fiduciary relations provides a powerful framework for reconceptualizing both the state-subject relationship and the concept of jus cogens. Applying the fiduciary principle, states are no more at liberty to deny jus cogens than parents are at liberty to deny the fiduciary obligations that accompany parenthood. While of course a state's adult subjects are not children, and ought not to be treated like children, there is an important sense in which the state-subject relationship resembles parent-child relations: in both cases there is involuntary subjection to proclaimed authority. It is this common feature which explains why so many writers on state authority look to parental authority for inspiration.⁹⁹ As G.E.M. Anscombe puts it, with both parental and governmental authority, "[y]ou find yourself the subject of these whether you like it or not."¹⁰⁰ Thus, if the state, like the parent, is subject to fiduciary obligations, and if those obligations include the norms of jus cogens, then they bind the state peremptorily and independently of anything the state may do or say to deny them.¹⁰¹ It follows that Article 53 of the VCLT's consensus-driven criterion for identifying peremptory norms is misguided, for it relies on the consent of "the international community of States as a whole."¹⁰²

A further corollary of the fiduciary model is that the whole of Article 53 of the VCLT is superfluous. States are bound by jus cogens whether they have ratified the VCLT or not and irrespective of whether Article 53 has the status of customary international law. Therefore, even states that have not ratified the VCLT are barred from concluding treaties that violate peremptory norms. Article 53 makes no difference to states' obligation to refrain from entering treaties that violate jus cogens.

To see by way of illustration how jus cogens norms might flow from the fiduciary model of the state, consider the peremptory prohibition against slavery.¹⁰³ Let us assume that there is a state-subject fiduciary relationship, and that the fiduciary principle authorizes the state to secure legal order on behalf of every agent subject to state power. At a minimum, establishing legal order on behalf of every agent entails that each must have the possibility of acquiring rights that can enshrine and protect his respective interests; otherwise, such interests would be entirely vulnerable to the power and

99. See, e.g., HOBBS, *supra* note 87, at 253-55; JOSEPH RAZ, *THE MORALITY OF FREEDOM* 54, 57, 86-87 (1986); G.E.M. Anscombe, *On the Source of the Authority of the State*, in *AUTHORITY* 142, 148 (Joseph Raz ed., 1990).

100. Anscombe, *supra* note 99, at 148.

101. Tesón deploys the parent-child analogy much as we are doing here, saying that "[j]ust as the parent's representation of the child is a function of the parent's respect for the rights of the child, so the government's representation of its citizens is a function of its observation of human rights." FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 85 (1988). Tesón does not adopt the fiduciary model, but he comes close when he acknowledges that his "fundamental philosophical assumption" is the idea that "the reason for creating and maintaining states and governments is precisely to ensure the protection of the rights of the individuals." *Id.* at 112.

102. VCLT, *supra* note 2, art. 53.

103. One of us has developed an inchoate version of this argument. See Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 *LAW & PHIL.* 533 (2008).

caprice of others. In other words, each agent must be treated as a person because each agent is an equally valid subject of the fiduciary authorization of public authority. As a principle of legality, the fiduciary principle must treat like cases alike.¹⁰⁴ Thus, the fiduciary principle has no capacity to discriminate arbitrarily between agents who, in virtue of the state-subject fiduciary relationship, enjoy equal status vis-à-vis the state as co-beneficiaries of the fiduciary principle's authorization of public authority.

Because slaves are denied the capacity to possess legal rights, a state that enforces slavery cannot claim to have secured legal order for the purpose of guaranteeing rights on behalf of each agent. It follows that if a state supports slavery, it does so in contravention of its most basic fiduciary obligation to ensure that each agent subject to its powers is regarded equally as a person capable of possessing legal rights. Since the fiduciary principle necessarily treats like cases alike and therefore regards every individual as an equal co-beneficiary of legal order, the fiduciary state must provide for every individual's secure and equal freedom. As a consequence, the fiduciary state is duty-bound to protect every individual against all forms of arbitrary discrimination (such as apartheid), and not just slavery. Moreover, the duty is a binding legal duty, and thus juridical in nature, because fiduciary duties are legal duties. In Part IV we suggest how other jus cogens norms can be derived from or informed by the fiduciary model. But it is already apparent that the foundation of such norms is neither a full nor partial consensus among international actors, nor the consent of state parties as registered through treaty ratification or governance practices, nor the congeniality of such norms to the associative demands of comity and international public order. Instead, as we shall now see, the ultimate basis of jus cogens rests within the very concept that tends to be pitted against it: sovereignty.

D. *The Fiduciary Constitution of Sovereignty*

Sovereignty is traditionally understood in international law as the legal authority of a state to rule and represent a given population within a given territory.¹⁰⁵ As noted above, the fiduciary model respects the demands of popular sovereignty by acknowledging the people's dominion over the state's sovereign powers, and the resulting fiduciary position of the state vis-à-vis the people. A plausible political implication of combining the fiduciary model with popular sovereignty is democracy, since democracy permits the people to elect and dismiss those who wield state power. The novelty of the theory we

104. H.L.A. Hart, the most influential contemporary defender of legal positivism, was prepared to admit this much: "[i]f we attach to a legal system the minimum meaning that it must consist of general rules . . . this meaning connotes the principle of treating like cases alike." H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 81 (1983).

105. See, e.g., *RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES* § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."); Patrick Macklem, *What Is International Human Rights Law? Three Applications of a Distributive Account*, 52 *MCGILL L.J.* 575, 586 (2007).

propose, however, is that the state-subject fiduciary relationship, properly understood, is a legal as well as a political relationship, and thus it has legal consequences, such as the emergence of peremptory norms constitutive of a new popular sovereignty. This conception of popular sovereignty is new in the sense that it yields specific legal obligations to which all states are subject strictly by virtue of the sovereign powers they possess. Consider now the relationship between this new popular sovereignty and international law's recognition of claims to sovereignty.

Patrick Macklem argues compellingly that sovereignty does not simply exist, as a matter of brute fact, but rather international law distributes it to some legal actors (sovereign states) and not to others. For international as opposed to national law, sovereignty “comes from above, from international law itself,” because international law alone can “shape an international political reality into an international legal order by determining the legality of multiple claims of sovereign power.”¹⁰⁶ Macklem observes that, although international law does not recognize every plausible claim to sovereignty (e.g., the claims of indigenous peoples), it does protect the territorial integrity of “a state whose government represents the whole of its population within its territory consistent with principles of equality, nondiscrimination, and self-determination.”¹⁰⁷ International law may also confer statehood on a “people” that has suffered protracted colonial rule, and likewise sovereignty may arise as a matter of international law if a sufficient number of states recognize the sovereign status of the claimant state. In short, Macklem contends that while international human rights law properly seeks to regulate the *exercise* of sovereign power, this body of law should also regulate the *distribution* of sovereign power with an eye to mitigating the historical injustices for which international law is partially to blame, such as the denial of sovereignty to indigenous peoples.¹⁰⁸

The fiduciary theory provides a unifying theoretical framework for sovereignty congenial to both the distributive and power-controlling projects of international human rights law. Just as the fiduciary principle governs the domestic exercise of sovereign power, it may also be thought to underlie the authority of international law to regulate the distribution of sovereignty, for in both cases the dignity of the people subject to sovereign power is at stake. We have seen already in the case of slavery that implicit within the fiduciary authorization of state power is a requirement that the state treat each person as an equal co-beneficiary of legal order. This requirement explains the leading criterion that Macklem identifies as regulating the distribution of sovereignty—namely, the principle that a government must represent “the whole of its population within its territory consistent with principles of equality, nondiscrimination, and self-determination.”¹⁰⁹ Thus, the fiduciary principle provides a unified standard of authorization that permits critical

106. Macklem, *supra* note 105, at 587-88.

107. *Id.* at 586.

108. *Id.* at 594.

109. *Id.* at 586.

scrutiny and regulation of both the international distribution and domestic exercise of sovereign powers.

E. *Why Not Kant's Social Contract?*

Within the state-subject fiduciary relationship, *jus cogens* norms are constitutive of a new conception of popular sovereignty precisely because they embody legal limits on state power arising from the fiduciary principle. This fiduciary theory, we argue now, lays a better foundation for *jus cogens* (and human rights law generally) than Kant's social contract theory.

Kant believed that the state derived its legitimacy from a contract that we each must be understood to make with each other to form a Rousseauian "general will." Through our agreement and the general will, Kant claimed, we jointly authorize the state to announce and enforce law. Kant did not think that people actually contracted with one another to set up the state through referenda or any other such means.¹¹⁰ Rather, he claimed that we are under an obligation to agree to leave the state of nature to render our rights determinate and secure. Even on the rosy assumption of some mutual recognition of provisional rights in the state of nature, "when rights are *in dispute (ius controversum)*, there would be no judge competent to render a verdict having rightful force."¹¹¹ Individuals must therefore agree to enter civil society because, as Arthur Ripstein puts it, "they cannot object to being forced to accept those procedures [that would make right possible], because any objection would be nothing more than an assertion of the right to use force . . . unilaterally."¹¹²

But we do not need to subscribe to a social contract to recognize the force of the principle that no one is entitled to impose terms unilaterally on others, and therefore that no one is entitled to be judge and party to the same cause. This principle of impartiality stands on its own, as Hobbes made clear in *Leviathan* almost 150 years before Kant.¹¹³ Once the principle of impartiality is established, we can explain the need for the state, and given its fiduciary relationship to the people, we can explain its obligation to comply with *jus cogens*. Nothing is added by supposing that the people must consent

110. Although Fernando Tesón defends a Kantian view of international law, he appears to make the Lockean claim that state legitimacy rests on an *actual* "horizontal" contract between the people, as well as on an *actual* "vertical" contract between the people and the state's officials. FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 57-58 (1998). One problem with this account is that both contracts are really fictions, so strictly speaking it is false. A. John Simmons has offered the most well-developed defense of the Lockean view (political voluntarism) that Tesón espouses. Simmons aptly calls it "philosophical anarchism" because in no states do the conditions of universal and actual consent obtain. Thus, as he argues, a commitment to political voluntarism leads to the conclusion that all states in the world today, including liberal democracies, are illegitimate. See A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 103-12, 155-56 (2001).

111. KANT, *supra* note 4, at 124.

112. Ripstein, *supra* note 94, at 33.

113. See HOBBS, *supra* note 87, at 111 ("[A]s when there is a controversy in an account, the parties must by their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted by Nature.").

to the state, since whether they must consent or not makes no difference to the state's authority and obligation to establish legal order on their behalf. It is enough that the state possesses irresistible administrative power over its subjects, that they depend on the state's proper exercise of its powers for the provision of legal order, and that they—as private parties—are not entitled to exercise public authority. With these assumptions in place, the fiduciary principle demands legal order of political sovereignty, a significant aspect of which is *jus cogens*.

A final reason to prefer the fiduciary theory to the social contract account of the state relates to cosmopolitan citizenship, Kant's idea that an individual is a "citizen of the world" and therefore enjoys some rights vis-à-vis all states. Kant's own view of cosmopolitan citizenship was somewhat thin: states owe strangers hospitality, a right of temporary passage.¹¹⁴ Kant did not think that the original contract to form the state grounded cosmopolitan citizenship, and it is hard to imagine how it could, since members of states would lack privity of contract with nonmembers. The fiduciary theory of the state, however, lets us explain how *jus cogens* norms constitute a universal bill of cosmopolitan human rights.¹¹⁵ On the fiduciary view, states owe every individual subject to state power a fiduciary obligation to respect their human rights because every agent so situated is peculiarly vulnerable to state power. The exercise of state power over vulnerable noncitizens engages the fiduciary principle because state power is always quintessentially fiduciary in nature; it is always purposeful, other-regarding, and institutional in character—and it retains this fiduciary character regardless of whether it is exercised over a citizen or a foreign national. As consequence, exercises of state power over noncitizens trigger a fiduciary obligation that requires the state to respect noncitizens' human rights. Thus, in the conduct of foreign affairs, states must respect the rights of nonsubjects enshrined under *jus cogens*.

Of course, sovereign states are not the only entities that may assume the fiduciary obligations associated with public governance. In many areas of the world, nonstate actors have exercised powers of unilateral public administration comparable to the sovereign powers of conventional states. Examples include such varied institutions as the U.N. Interim Administration for East Timor, the Palestinian Authority, Hezbollah, and the State of New York. That the international community does not recognize these entities as full-fledged sovereign states does not render the fiduciary principle inapplicable to them, for it is an entity's assumption of state powers, not *de jure* statehood *per se*, that triggers the fiduciary principle. Any entity that assumes unilateral administrative power over individuals bears a fiduciary

114. Kant derived the duty of hospitality from humankind's common possession of the earth's limited surface. Because the earth is a globe, individuals "cannot infinitely disperse and hence must finally tolerate the presence of each other." IMMANUEL KANT, *TOWARD PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (1795), *reprinted in* *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE AND HISTORY* 67, 82-85 (Pauline Kleingold ed., David L. Colclasure trans., 2006).

115. We elaborate some of the details and implications of this new conception of cosmopolitan citizenship in Part V, *infra*.

obligation to honor the basic demands of dignity, including the peremptory norms of international jus cogens.¹¹⁶

In explaining the relationship between peremptory norms and state sovereignty, human rights advocates such as Reisman and Tesón begin with the assumption that such rights are universal, and infer without much argument that all states must respect them.¹¹⁷ The fiduciary theory provides a substantive argument that runs in just the opposite direction: all states by their very nature are in a fiduciary relationship with everyone subject to their power, and therefore all states must respect the human rights of their subjects. The universality of human rights is the conclusion rather than the premise of the fiduciary argument. The fiduciary theory thus explains the universal character of human rights through the universal obligation of states to respect them, aspects of human rights law that Tesón and Reisman present as articles of faith.

* * * *

We have argued that the fiduciary model addresses the perceived tension between jus cogens and sovereignty by demonstrating that jus cogens norms are not exceptions to state sovereignty (as is often supposed) but constitutive of it. Others have suggested that human rights are constitutive of popular sovereignty (Reisman), or that claims to sovereignty in some way depend on respect for human rights (Tesón), but the fiduciary theory offers the best account of *why* and *how* this is so.

The fiduciary theory also avoids the problems that beset jus cogens under other accounts. Just as there is no need to pretend that sovereignty arises from the consent of the people, there is no need to pretend that jus cogens norms arise from state consent or interstate associational duties. Instead, peremptory norms in international law arise from the state-subject fiduciary relationship. It is time now to consider the general criteria for the specification of jus cogens norms that emerge from the fiduciary model and the extent to which currently accepted jus cogens norms satisfy these criteria.

IV. FIDUCIARY STATES AND PEREMPTORY NORMS

As we have seen, the international community has yet to settle on criteria capable of specifying peremptory norms. The fiduciary theory points to formal and substantive criteria that together establish an analytical framework of necessary and sufficient conditions capable of identifying such norms. We discuss these criteria immediately below. We then assess the main jus cogens norms presently recognized in light of the criteria that arise from the fiduciary model. We also specify some additional norms that ought to be recognized and discuss some contenders that should not.

116. For ease of exposition, the remainder of this Article discusses peremptory norms as fiduciary constraints on state-subject relations, though the discussion generally applies with equal force to nonstate actors that exercise quasi-sovereign powers.

117. See, e.g., TESÓN, *supra* note 110, at 40; Reisman, *supra* note 80.

A. Criteria for Identifying Peremptory Norms

Some of the fiduciary model's criteria for specifying peremptory norms are formal in that they condition the form such norms must adopt, while others are substantive in that they constitute the substantive aspect of peremptory norms which flow from the fiduciary position of the state.

We begin by sketching seven formal criteria borrowed directly from Lon Fuller's internal morality of law, a set of desiderata that legal norms should aspire to satisfy irrespective of their substantive aims.¹¹⁸ First, peremptory norms must embody general and universalizable principles as opposed to ad hoc and particularized commands. The fiduciary theory is a general theory of state legal authority, and thus its substantive principles can have only a general and potentially universal character.

Second, peremptory norms must be public so that states, as fiduciary agents of their people, can know them and adjust their policies and actions accordingly. States cannot be expected to conform their behavior to secret norms.

Third, compliance with jus cogens norms must be feasible in the sense that they cannot demand the impossible. States with entrenched poverty, for example, cannot be expected to alleviate such conditions in the very near term. States that permit or enforce slavery, on the other hand, can be required to eliminate it immediately (or as soon as humanly possible), since a slave state cannot under any interpretation be construed as a faithful fiduciary of its slave population.

Fourth, the subject matter of the norm should be clear and unequivocal, since the point is to provide a public criterion of justice capable of guiding state action. The prohibition on slavery, for example, is clear and unequivocal, whereas a prohibition on exploitation, without more, is not. The fact that international standards such as the prohibitions against slavery, arbitrary killing, and torture require explication as applied to particular state acts does not render such norms insufficiently clear to guide state action.¹¹⁹

Fifth, peremptory norms should be internally consistent as well as consistent with the wider set of jus cogens norms. An inconsistent peremptory norm, or a norm that contradicts another, provides no guidance to the fiduciary state entrusted with securing legal order on behalf of its people. Article 53 of the VCLT (notwithstanding its superfluity under the fiduciary model) implicitly confirms this metaprinciple by stipulating that a peremptory norm can be modified only by a subsequent norm of the same character. This limitation on modification ensures that a set of internally coherent peremptory norms will always retain internal coherence.

Sixth, jus cogens norms should be prospective rather than retroactive in nature, since states cannot go back in time to bring their actions into

118. See LON L. FULLER, *THE MORALITY OF LAW* 33 (rev. ed. 1969). One of us has argued that Fuller's internal morality sits congenially with a fiduciary view of the state, and that this conception of public authority has substantive implications for human rights. See Fox-Decent, *supra* note 103, at 536.

119. See FULLER, *supra* note 118, at 64 ("Sometimes the best way to achieve clarity is to take advantage of . . . common sense standards of judgment A specious clarity can be more damaging than an honest open-ended vagueness.").

conformity with the norm. This does not exclude the emergence of a peremptory norm that requires reparations for past wrongs, since the norm would still apply to the state prospectively by requiring it to provide a remedy at some point in the future.

Finally, the set of peremptory norms should remain relatively stable over time so that states can plan their actions and implement policies within a relatively stable framework of international law. With respect to emerging norms, this means that attention should be paid to the effect their recognition would have on benevolent state policies that were innocently developed without taking the emerging norm into account. In practice, the stability criterion is unlikely to play a major role because, as we shall see, peremptory norms are immanent to the state's fiduciary obligation to secure legal order, and international law already recognizes a good number of them. But a concern for stability would rule out the theoretical possibility of replacing the currently accepted norms of *jus cogens* with an entirely different set.

In summary, the formal criteria ensure that peremptory norms assume the form of general principles which provide public, feasible, clear, consistent, prospective, and stable guidance to fiduciary states entrusted to govern and represent their people. These criteria flow from the fiduciary conception of the state because they enable the state to act as a faithful fiduciary. Norms that flagrantly violate any of these principles would either frustrate the state's fiduciary mission or simply fail to enable it to establish legal order, and therefore they would lack any justification from the point of view of the fiduciary model.

That the formal criteria are necessary does not mean that they constitute sufficient conditions for *jus cogens*. Strictly speaking, a norm such as "maximize the personal wealth of state officials" satisfies the formal criteria but would hardly warrant peremptory force. Nor are the formal criteria necessary in the strong sense that it is logically impossible for a *jus cogens* norm to exist if it infringes to any degree whatsoever one of the formal criteria. Peremptory norms will typically assume the general form of principles, and in some cases (e.g., torture) their precise meaning may be controversial. Moreover, they may satisfy the formal criteria without achieving a degree of clarity and determinacy that would prescribe the precise legal consequences of their violation. Considerations of this sort led Fuller to conclude that his internal morality of law was a morality of aspiration rather than strict legal duty, since the achievement of clarity or feasibility, for example, will typically be a matter of degree.¹²⁰

The formal criteria establish necessary conditions in the weaker sense that a norm's flagrant infringement of any single criterion will undermine the norm's fiduciary justification by subverting the state's ability to comply with it. In other words, the formal criteria are necessary in the sense that they lay down formal desiderata with which peremptory norms must generally comply in order to meet the demands of the fiduciary model.

120. *Id.* at 42-43.

Further necessary conditions arise from substantive criteria that flow from the structure and content of the fiduciary model. Domestically, the fiduciary principle authorizes the state to secure legal order for the benefit of every agent subject to state power and, internationally, the state is authorized to represent the people by acting as their agent.¹²¹ In both contexts, the fiduciary principle's authorization of state power requires the state and its institutions to act for the good of the people rather than for the good of its officials or rulers. The fiduciary model's first substantive criterion for *jus cogens* is therefore a principle of *integrity*: peremptory norms must have as their object the good of the people rather than the good of the state's officials. This criterion eliminates formally adequate norms that would permit public officials to self-deal, such as "maximize the wealth of state officials."

The second and third substantive criteria arise from the *general* content of the state's overarching fiduciary obligation to the people. Recall from Part III that the fiduciary state owes general duties of *fairness* and *reasonableness* to the people subject to its power. The duty of fairness governs the attitude of the state toward distinct individuals with competing claims on its institutions and resources. The fiduciary state must treat like cases alike, regarding each agent as a formally equal co-beneficiary of the legal order it is entrusted to secure. The second substantive criterion that bears on peremptory norms, then, is a principle of *formal moral equality*: peremptory norms must treat persons as moral equals. This principle is *formal* in the sense that it alone does not require any particular action of the state, but rather demands fairness as between individuals whenever the state does act. On a strict interpretation, state officials would satisfy this principle if they looked on and did nothing while an ocean liner sank with scores of their citizens aboard. They would violate the principle if they attempted rescue but their rescue efforts gave preference to certain racial or ethnic groups.

The state's duty of reasonableness, however, would require its officials to make best efforts to rescue. The duty of reasonableness is akin to parental obligation in the sense that the state's attitude toward its subjects must be one of solicitude rather than indifference. The fiduciary state must have due and sensitive regard for the lawful and legitimate interests of its subjects. Thus, the third substantive criterion of *jus cogens* to emerge from the fiduciary model is a principle of *solicitude*: peremptory norms must be solicitous of the legal subject's legitimate interests. Whereas the principle of integrity prohibits self-dealing on the part of officials, and the principle of formal moral equality requires even-handedness, the principle of solicitude demands that the state take seriously the legitimate interests of its subjects.

These three substantive criteria arise directly from the substantive content of the fiduciary model and narrow the field of candidate *jus cogens* norms along familiar republican and democratic lines. Yet, like the formal criteria, they establish necessary rather than sufficient conditions of *jus cogens* because most or all human rights conform to them. Civil and political human

121. For a discussion of the fiduciary implications of the state's agency at international law with respect to odious debt, see Jeff A. King, *The Doctrine of Odious Debt in International Law: A Restatement* (Jan. 21, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1027682>.

rights from which derogation is possible, as well as economic, social, and cultural rights, fit commodiously within the analytical framework set out thus far. Freedom of expression and the right to work, for example, are specifiable in accordance with the formal criteria, have the good of the subject as their object, and are consistent with the principles of formal moral equality and solicitude. Hence, it may appear that the fiduciary model proves too much, and is too crude to distinguish jus cogens norms from other human rights, because it seems to imply respect for all human rights (or at least a very great number) and not merely peremptory norms. The problem is that the formal and substantive criteria enumerated thus far, even when taken collectively, do not provide a basis for distinguishing peremptory from nonperemptory norms.

Now, all law presents itself as peremptory in the sense that compliance with it is mandatory. When publicists discuss jus cogens, however, what they really mean by peremptory is that such norms are mandatory and nonderogable irrespective of state consent.¹²² While arguably the fiduciary model provides a principled basis for thinking that respect for all (or nearly all) human rights is mandatory, circumstances may justify restricting the scope or effect of certain rights and freedoms. For example, in many liberal democracies a prohibition on hate speech limits freedom of expression.¹²³ Similarly, freedom of association does not include the freedom to associate for the purpose of a criminal conspiracy. Likewise, the right to privacy gives individuals security against search and seizure, but yields if there are reasonable and probable grounds to believe that the individual has committed a crime. Respect for freedom of expression, freedom of association, and the right to privacy is mandatory, but either the scope of these norms is determined in light of wider societal interests or the norms are subject to restrictions based on competing public concerns.

In international law, the nonabsolute and derogable nature of these norms is reflected in instruments such as the ICCPR and the European Convention on Human Rights. Each of these instruments allow state parties, under narrowly prescribed circumstances, to declare states of emergency during which the state may lawfully derogate from freedom of expression, freedom of association, and the right to privacy.¹²⁴ Those same provisions that entitle states to declare states of emergency, however, prohibit states from derogating from norms of a jus cogens character, such as the prohibitions on arbitrary killing, slavery, and torture.¹²⁵ The fiduciary model, we argue now,

122. See, e.g., VCLT, *supra* note 2, art. 53.

123. See, e.g., Canada Criminal Code, R.S.C., ch. C-46, §§ 318-20 (1985) (prohibiting speech that advocates genocide or hatred against an identifiable group).

124. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171, 174 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 233-34 [hereinafter European Convention].

125. See ICCPR, *supra* note 124, arts. 4-5. The *travaux préparatoires* of the ICCPR and the European Convention reveal that the drafters carved out nonderogable rights with three considerations in mind: (1) the need to limit derogation strictly to national emergencies, such as lawful war; (2) the need to preserve states' ability to defend themselves in national emergencies; and (3) the desire to safeguard human dignity against grave abuses. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, 8th Sess., 330th mtg., at 4-14, U.N. Doc. E/CN.4/SR.330 (July 1, 1952); ECOSOC,

supplies criteria capable of distinguishing peremptory and nonderogable norms from other human rights.

Whereas the three substantive criteria discussed above arise from the general character of the fiduciary principle's authorization of state power and the general content of the state's fiduciary obligation to the people (the duties of fairness and reasonableness), the substantive criteria relevant to the peremptory and nonderogable character of jus cogens flow from the *specific* content of that obligation: to wit, from the fiduciary obligation of the state to secure legal order. As discussed in Part III, the Kantian conception of legal order on which the fiduciary model relies consists in a regime of secure and equal freedom. Within this regime, persons must be treated as ends always, and not as mere means to achieve the ends of others or broader goals of social policy. Demanding that others live under the rule of law is consistent with dignity, but treating an individual as the mere instrument of another's ends is not.¹²⁶

Dignity reflects the intrinsic value of agency, and sets limits on state action that respond proportionally to the threat such action poses to agency. Some state actions, such as genocide, arbitrary killing, and wars of aggression, may literally annihilate the agent. Others, such as slavery and apartheid, subject the agent to systemic domination. Policies of annihilation and systemic domination necessarily treat their victims as mere means, and aim deliberately at the extinguishment or ongoing domination of the victim's agency. They constitute a gross infringement of secure and equal freedom because they deny freedom's security from the outset.

The proportional response of the Kantian fiduciary model is an absolute prohibition of such policies. The grave nature of the threat they pose to an

Comm'n on Human Rights, 6th Sess., 195th mtg., ¶¶ 34-81, U.N. Doc. E/CN.4/SR.195 (May 29, 1950) (discussing the appropriateness of using the concept of "war" in the covenant); ECOSOC, Comm'n on Human Rights, 6th Sess., 196th mtg., ¶¶ 5-26, U.N. Doc. E/CN.4/SR.196 (May 26, 1950) (discussing the articles that should be nonderogable in times of war); ECOSOC, Comm'n on Human Rights, 5th Sess., 126th mtg., at 3-9, U.N. Doc. E/CN.4/SR.126 (June 17, 1949) (discussion between the U.K. representative, Miss Bowie, and the USSR representative, Mr. Pavlov, and comments of the French representative, Mr. Cassin); ECOSOC, Comm'n on Human Rights, 5th Sess., 127th mtg., at 4-8, 12-13, U.N. Doc. E/CN.4/SR.127 (June 14, 1949) (discussion centered around the concepts of "public emergency," "national security" and "war"); ECOSOC, Comm'n on Human Rights, 5th Sess., 88th mtg., at 13-14, U.N. Doc. E/CN.4/SR.88 (May 19, 1949) (comments of Lebanon's representative, Mr. C. Malik); ECOSOC, Comm'n on Human Rights, *International Covenant on Human Rights, United Kingdom: Proposals on Certain Articles*, U.N. Doc. E/CN.4/188 (May 16, 1949); ECOSOC, Comm'n on Human Rights, *France: Proposed Draft of Article 4 of the International Covenant on Human Rights*, U.N. Doc. E/CN.4/187 (May 16, 1949); ECOSOC, Comm'n on Human Rights, *Draft International Covenant on Human Rights: Recapitulation of Amendments to Articles 2 and 4*, at 2-4, U.N. Doc. E/CN.4/319 (May 16, 1949); ECOSOC, Comm'n on Human Rights, *International Covenant on Human Rights: Article 4: United States, Amended Proposal*, U.N. Doc. E/CN.4/170/Add.1 (May 13, 1949). Under international law, the major difference between the nonderogable rights of the ICCPR and the European Convention, on the one hand, and jus cogens, on the other, is that the latter bind states to nonderogable norms irrespective of state consent. This is the principal characteristic of jus cogens that the fiduciary model seeks to illuminate.

126. The conception of freedom on which we are relying echoes Philip Pettit's idea of freedom as nondomination, which is freedom from the arbitrary choices and power of others. Freedom as nondomination allows subjection to the rule of law, but proscribes subjection to even the most kind and generous of slave masters. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

individual's freedom is such that under no interpretation could they be viewed to serve her ends. Nor could their universalization ever be consistent with a regime of secure and equal freedom, since they annihilate or deny freedom rather than provide for its security. Nor may such policies be justified on grounds that they contribute to the collective good, for while in some sense they may do so, they necessarily regard their victims as mere means.¹²⁷ The fiduciary principle cannot authorize state action that irreparably or systemically victimizes some for the sake of others. In sum, policies that entail gross infringements of secure and equal freedom are deeply inconsistent with the state's fiduciary obligation to secure legal order.

Therefore, the fourth substantive criterion of *jus cogens* is a principle of *fundamental equal security*: norms that are indispensable to the fundamental and equal security of individuals qualify as peremptory norms. Because the fiduciary state is under an obligation to guarantee fundamental and equal security, it is likewise under an obligation to respect the norms that are indispensable to it. And, because respect for such norms is indispensable to the state's performance of its fiduciary obligation to secure legal order, the state cannot derogate from them. Thus, the principle of fundamental equal security that flows from the fiduciary model lets us distinguish nonderogable from derogable norms, and thereby supplies a sufficient condition to the many necessary conditions that have preceded it. The principle supplies a sufficient but not a necessary condition because, as we shall see now, implicit within the state's obligation to secure legal order is another independently sufficient condition for the identification of peremptory norms: the rule of law.

The constitution of legal order, as opposed to rule by naked force, has a number of immanent features that are united thematically under the concept of the rule of law. Fuller's internal morality of law is widely taken by positivists and antipositivists alike as the starting point of inquiry into the rule of law.¹²⁸ As indicated, the formal criteria of *jus cogens* set out above are desiderata from the internal morality that Fuller thought legislation should aspire to achieve. To these he added the principle of legality, familiar to administrative lawyers, that official action must be congruent with declared law, thus

127. In 2006 the German Constitutional Court rendered a historic judgment that celebrates this principle. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118. Section 14 of the Air Safety Act purported to give the Minister of Defense authority to order the military to shoot down a hijacked airliner with innocent passengers aboard—but only if doing so were necessary to prevent the plane from being used against human targets. Notwithstanding this limitation, the Court struck down section 14, holding that the passengers' constitutional rights to life and human dignity precluded the state from granting the Minister legal power to kill innocent persons, even if such action would save a greater number of lives. For discussion of the case and its relevance to a fiduciary understanding of justification defenses within criminal law, see Malcolm Thorburn, *The Constitution of Criminal Law: Justifications, Policing and the State's Fiduciary Duties*, 2 CRIM. L. & PHIL. (forthcoming 2009), available at <http://law.queensu.ca/facultyAndStaff/facultyProfiles/malcolmThorburn-1/constitutionOfCriminalLaw.pdf>.

128. See, e.g., T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (1979); N.E. SIMMONDS, LAW AS A MORAL IDEA (2007); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467; Fox-Decent, *supra* note 103; Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW & PHIL. 1 (2004).

ensuring that the rule of law prevails over the legally unauthorized rule of the rulers.

Another theorist who provides an insightful catalogue of legal principles intended to be constitutive of legality or the rule of law is Thomas Hobbes. Although Hobbes is frequently referred to as the father of legal positivism and a defender of absolute sovereignty, he thought that the proper construction of legal order required fidelity to a series of determinate legal principles.¹²⁹ These include the related ideas that no person may be judge and party to the same cause, and that all disputes must be submitted to an impartial arbitrator. Hobbes developed these principles into constraints on the constitution of judicial authority, claiming that judges are not free to decide matters arbitrarily and must exercise their adjudicative authority impartially. For example, judges cannot have an interest in the outcome of a dispute, and they must treat like cases in a like manner.¹³⁰

It is well beyond the scope of this paper to articulate a comprehensive account of the rule of law, but if Hobbes and Fuller are correct to suggest that a body of fairly determinate legal principles is constitutive of legal order, then the fiduciary state must respect those principles (collectively, the rule of law), since its specific fiduciary obligation to its subjects is to secure legal order. Whereas the Kantian idea of secure and equal freedom establishes limits on state action that reflect the substantive demands of dignity within the fiduciary model (that is, peremptory human rights), the principles of legality identified by Hobbes and Fuller set out procedural constraints arising from the rule of law.¹³¹ The fifth substantive criterion of jus cogens, then, is a procedural principle regarding *the rule of law*: a norm will count as jus cogens if respect for it is indispensable to the state's ability to secure legality for the benefit of all. As the ICCPR and the European Convention make clear, even in states of emergency in which the state's very existence as such is threatened, it cannot opt out of legality altogether. A state cannot jettison core components of the rule of law and maintain its fiduciary credentials, and thus those core components are sufficient conditions of peremptory norms. Some core components of the rule of law might include Fuller's principle that all state action must have a legal basis, judicial independence, impartial adjudication, and the principle that no one may be punished except in accordance with a previously declared penal law.

Table 1 below provides a summary of the formal and substantive criteria we have discussed that comprise necessary and sufficient conditions for identifying jus cogens norms. These criteria are intended to provide merely a preliminary and illustrative framework that reflects the jus cogens requirements of the fiduciary model. Each of the substantive criteria in particular deserves far more elaboration than we have space to offer here, and

129. HOBBS, *supra* note 87, at 189-217.

130. For a discussion, see David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 LAW & PHIL. 461 (2001).

131. We have no quarrel with readers who think that the rule of law, properly understood, includes the Kantian idea of secure and equal freedom and a commitment to human rights. Arguably it does, as one of us has argued elsewhere. See Fox-Decent, *supra* note 103. We separate the ideas here to highlight the distinctive, substantive aspects of the fiduciary theory.

there may be further distinct criteria that merit inclusion within the framework. But even as an inchoate starting point, the analytical framework that arises from the fiduciary theory provides a far clearer and more principled framework for inquiry into jus cogens than any of the positivist, natural law, or public order theories available today. Most significantly, the framework delivers on the promise of the fiduciary model to show how jus cogens norms can be both nonderogable and mandatory independently of state consent.

Table 1. Criteria for Specifying Peremptory Norms

| Specific Jus Cogens Criteria | Character | Constitutive Property |
|------------------------------|-------------|-----------------------|
| Generality | Formal | Necessary |
| Publicity | Formal | Necessary |
| Feasibility | Formal | Necessary |
| Clarity | Formal | Necessary |
| Consistency | Formal | Necessary |
| Prospectivity | Formal | Necessary |
| Stability | Formal | Necessary |
| Integrity | Substantive | Necessary |
| Formal moral equality | Substantive | Necessary |
| Solicitude | Substantive | Necessary |
| Fundamental equal security | Substantive | Sufficient |
| Rule of law | Substantive | Sufficient |

B. *Recognized Peremptory Norms*

With the fiduciary theory's analytical framework in place, let us consider particular norms that claim jus cogens status. Over time, a number of commentators have attempted to catalogue peremptory norms, composing lists of varying length and content.¹³² While none of these efforts has generated anything approaching a definitive statement on the scope of international jus cogens, the *Restatement* cited in the Introduction to this Article has become an influential reference point when discussing well-established peremptory norms. Recall that seven categories of norms appear in the *Restatement* as illustrations of international jus cogens: the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and "the principles of the United Nations Charter prohibiting the use of force."¹³³ Tellingly, each of these well-established international norms merits peremptory treatment under the fiduciary theory of jus cogens.

As we have seen, the international norms against slavery and racial discrimination reflect the fiduciary theory's vision of persons as equal co-

132. See, e.g., HANNIKAINEN, *supra* note 18, at 315-23; Whiteman, *supra* note 70, at 625-26.

133. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 (1987).

beneficiaries of state action. When states fail to accord their subjects equal freedom under law, or otherwise engage in arbitrary discrimination, they contravene the basic fiduciary principle that furnishes the theoretical framework for state sovereignty itself. The international prohibitions against slavery and apartheid thus have peremptory force within international law precisely because a state's claim to sovereignty depends critically on its compliance with these demands of the fiduciary principle. States cannot support slavery or arbitrary discrimination without forfeiting their claim to exercise sovereignty on behalf of the people under their authority.¹³⁴

The fiduciary principle's application, however, extends well beyond slavery and arbitrary discrimination. Other state practices that deny the innate moral dignity of individuals likewise violate states' nonderogable fiduciary obligations under international law. Just as states may not adopt laws that deny their beneficiaries equal rights and freedoms, they must forebear from exploiting their subjects as mere instruments of state policy or obstacles to the realization of state interests. At a minimum, the fiduciary model's criterion of equal security—the principle that a state may not exploit individuals as mere means to its own ends—limits state legislative and administrative power by outlawing grave offenses such as genocide,¹³⁵ crimes against humanity,¹³⁶ summary executions,¹³⁷ torture,¹³⁸ forced disappearances,¹³⁹ and prolonged

134. See *Juridical Condition and Rights of the Undocumented Migrants*, Inter-Am. Ct. H.R. (advisory opinion) OC-18/03, at 100 (Sept. 17, 2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf (“[T]he fundamental principle of equality and non-discrimination . . . belongs to the realm of *jus cogens* and is of a peremptory character . . .”); *Aloeboetoe Case*, Inter-Am. Ct. H.R. (ser. C) No. 15, at 50, 57 (Sept. 10, 1993) (recognizing slavery as a *jus cogens* violation).

135. See *Reservations to the Convention on Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (accepting the prohibition against genocide as *jus cogens*); *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 639 (Jan. 17, 2005) (“It is widely recognised that . . . the norm prohibiting genocide constitutes *jus cogens*.”). Under the fiduciary model, the *jus cogens* prohibition against genocide would have a broader scope than under the Genocide Convention because it would proscribe genocidal acts not only against “a national, ethnical, racial or religious group” but also against groups based on political affiliation, gender, or other characteristics. Genocide Convention, *supra* note 43, art. II.

136. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2003) (characterizing crimes against humanity as *jus cogens* violations); *Almonacid-Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, at 47 (Sept. 26, 2006) (finding that extrajudicial execution as part of a “generalized or systematic attack against certain sectors of the civil population” is a crime against humanity and violates *jus cogens*); *Prosecutor v. Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, Judgment, ¶ 21 (Oct. 7, 1997) (“Because of their heinousness and magnitude, [crimes against humanity] constitute an egregious attack on human dignity, on the very notion of humaneness.”).

137. See *Corte Suprema de Justicia [CSJN]*, 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad,” Fallos (2005-328-2056) (Arg.) (striking down Argentina's amnesty laws as unconstitutional because they prevented Argentina from complying with the *jus cogens* norm against forced disappearances); *Gómez Paquiyauri Brothers v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 110, at 76 (July 8, 2004) (holding that extrajudicial executions violate *jus cogens*).

138. See *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34 Eur. H.R. Rep. 11, 290 (2001) (recognizing that under the European Convention “the right . . . not to be subjected to torture or to inhuman or degrading treatment or punishment . . . is an absolute right, permitting of no exception in any circumstances”); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 144 (Dec. 10, 1998) (“[T]he prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency . . . [because it] is a peremptory norm or *jus cogens*.”).

arbitrary detention.¹⁴⁰ Such flagrant abuses of state power deny a state's beneficiaries secure and equal freedom and therefore trigger international law's strictest peremptory prohibitions.

As discussed previously, however, the state-subject fiduciary relation is not limited to a state's interactions with its own nationals. Individuals are vulnerable to transnational state aggression just as they are vulnerable to intraterritorial aggression, and the same nonderogable legal and moral imperatives that govern the state-subject relationship apply with equal vigor to state abuses against foreign nationals. We shall have more to say in Part V about international law's growing recognition of dignity as a constraint on transnational state action. For present purposes it will suffice to observe that under the fiduciary model states can claim no greater license to engage in crimes against humanity against individuals outside their borders than against their own people.¹⁴¹ All such abuses are inimical to the principle of secure and equal freedom under law, and so the fiduciary model helps to explain the cosmopolitan scope of jus cogens norms, in addition to explaining their content.

The fiduciary theory thus confirms the conventional wisdom that certain grievous abuses of state power are universally prohibited as a matter of jus cogens. These mandatory and nonderogable norms do not owe their peremptory status to state consent; rather, they demarcate the outer limits of the fiduciary state's legal authority.

C. *Emerging Peremptory Norms*

Looking beyond the *Restatement's* well-recognized categories of jus cogens, the fiduciary theory's formal and substantive criteria provide a practical framework for identifying other peremptory norms. We now review briefly three norms that rarely attract attention in discussions of jus cogens, and yet qualify as peremptory under the fiduciary theory: the right to due process, the norm against public corruption, and the principle of self-determination.

Due Process. The fiduciary conception of state sovereignty demands that states afford all individuals the fundamental procedural protections of due process. International instruments such as the Universal Declaration of Human Rights and the ICCPR have long recognized that states must employ certain minimal procedures to safeguard human life and liberty from arbitrary deprivation, including the right to notice of criminal charges, an opportunity

139. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (classifying the prohibition against forced disappearances as a peremptory norm); *Goiburú v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, at 67 (Sept. 22, 2006) (characterizing the prohibitions against forced disappearances and torture as jus cogens).

140. See *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (listing "prolonged arbitrary detention" among other jus cogens violations).

141. For this reason, military aggression and grave war crimes—which are tantamount to crimes against humanity—violate jus cogens. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27) (describing the prohibition against military aggression as a "conspicuous example of a rule of international law having the character of jus cogens").

to be heard and to present evidence, and adjudication by an independent and impartial tribunal.¹⁴² As international criminal law has matured over the past two decades, these fundamental due process norms have been codified as mandatory procedural rules for international criminal tribunals,¹⁴³ and a few scholars have asserted that due process should be recognized as a peremptory norm.¹⁴⁴

The fiduciary theory strongly supports classifying due process as a peremptory norm. A state transgresses its general fiduciary duties of fairness and solicitude when it deprives individuals of life or liberty without employing decisionmaking procedures that are sufficiently robust to minimize the risk of a biased, arbitrary or otherwise unfair hearing. Indeed, however one defines the state's specific duty to promote public security under the rule of law, this duty must, at a minimum, require adherence to basic principles of procedural fairness. What due process demands in a particular proceeding will turn upon contextual factors,¹⁴⁵ though some basic features of a fair hearing are clearly indispensable in all cases, such as the need for an impartial adjudicator. These basic attributes of a fair hearing protect individuals against arbitrary or self-serving government action and are integral to the state's fiduciary obligation to secure the rule of law. As such, they cannot admit derogation even during national emergencies, lest the state abdicate its fundamental fiduciary role.¹⁴⁶

Public Corruption. The international norm against state corruption has received even less attention as a candidate for peremptory status.¹⁴⁷ This oversight cannot be explained away on the grounds that public corruption is a

142. See, e.g., Universal Declaration of Human Rights arts. 10, 11, G.A. Res. 217A, at 71, 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (proclaiming the right to a fair and public hearing in an independent and impartial tribunal, including the right to "all the guarantees necessary for [the accused's] defence").

143. See Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 641-70 (2007) (chronicling these developments).

144. See ORAKHELASHVILI, *supra* note 41, at 60 (describing "due process" as a peremptory norm); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 44 n.253 (2005) (same). *But see* Michael Byers, Book Review, 101 AM. J. INT'L L. 913, 916 (2007) (asserting that "due process guarantees and the right to a fair trial" are "derogable").

145. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (defining due process under the U.S. Constitution to require a multifactor balancing test); *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, 2007 SCC 9 (Can.) (while national security concerns can warrant less robust and open procedures, the right to a fair hearing remains intact).

146. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (holding that a U.S. citizen allegedly apprehended on the battlefield in Afghanistan was entitled to due process because "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens"); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006) (arguing that the rule of law demands respect for procedural safeguards even if the executive has broad discretionary authority to detain individuals on national security grounds).

147. A few scholars have argued that wide-scale public corruption should be considered an international crime against humanity, suggesting by implication that the norm should be treated as peremptory. See, e.g., Sonja B. Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1297 (2007) ("Given the massive suffering caused . . . grand corruption seems to amount to a paradigmatic example of what should be considered an international crime.").

lesser evil than other grave abuses of state power. To cite but one example, human rights observers in Angola chronicled “the disappearance of over four billion dollars from the public coffers [between 1997 and 2002,] an amount ‘roughly equal to the total amount spent on the humanitarian, social, health, and education needs of a population in severe distress.’”¹⁴⁸ Such brazen kleptocracy undermines the very governmental institutions that are charged with preserving legal order and jeopardizes the physical security and liberty of nationals who depend on government assistance for relief from violence, starvation, and disease.

Viewed from the fiduciary theory’s perspective, the international norm against public corruption merits peremptory authority within international law. The prohibition against self-dealing meets the fiduciary theory’s substantive criteria by advancing the best interests of the people rather than state officials (*integrity*), refusing to privilege certain private interests over others arbitrarily (*formal moral equality*), and manifesting due regard for the interests of its beneficiaries (*solicitude*). The anticorruption norm also satisfies the specific substantive criteria because it requires the state to treat its national patrimony (e.g., tax revenue, resources, public services) as a public good to which every national has an equal claim under the rule of law and relevant municipal legislation. Like the prohibitions against summary execution and torture, the prohibition against corruption is necessary to ensure that the state regards its nationals as ends in themselves and never merely as the means for the ends of others. More broadly still, there can be no derogation from the norm against corruption because corruption is the antithesis of the other-regarding mandate the fiduciary state enjoys to secure legal order. For these reasons, the fiduciary theory elevates the international norm against public corruption to the status of nonderogable *jus cogens*.¹⁴⁹

Recognizing the norm against public corruption as a peremptory norm illuminates an important feature of *jus cogens* itself. Public corruption offends the state-subject fiduciary relation irrespective of whether the corrupt acts are large or small in scope: a low-level public official who steals a pittance or accepts a petty bribe violates the peremptory norm against corruption, just as a head of state violates *jus cogens* by draining the state treasury for private gain. The prohibition against corruption thus illustrates the important principle that the scope of *jus cogens* is not limited exclusively to acts such as military aggression or genocide that inflict harm on a massive scale. Violations of peremptory norms such as the prohibitions against corruption and torture are necessarily wrongful and legally impermissible on any scale.

148. *Id.* at 1283 (quoting HUMAN RIGHTS WATCH, SOME TRANSPARENCY, NO ACCOUNTABILITY: THE USE OF OIL REVENUE IN ANGOLA AND ITS IMPACT ON HUMAN RIGHTS (2004), available at <http://www.hrw.org/en/reports/2004/01/12/some-transparency-no-accountability>); see also Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT’L LAW. 149, 161-63 (2000) (reviewing comparable examples of public corruption in Nigeria and the former Republic of Zaire).

149. Note that recognition of public corruption as a peremptory norm arguably renders Article 50 of the VCLT superfluous, since “the corruption of [a State’s] representative” under Article 50 would render a treaty provision invalid under Article 53. VCLT, *supra* note 2, art. 50.

Self-determination. Unlike due process and public corruption, the right to self-determination of peoples has attracted a great deal of attention and controversy as a potential peremptory norm.¹⁵⁰ Generally speaking, international law recognizes the right of peoples to full political participation and cultural identity within an independent and autonomous state that honors their fundamental rights and freedoms—even if, for various reasons, peoples might not succeed in acquiring independence from their state of residence.¹⁵¹ This general principle operates today along two dimensions: “external” self-determination and “internal” self-determination.¹⁵² External self-determination provides that national groups have a right to freedom from colonial domination—to “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁵³ Where subnational groups are unable to break away from existing states to form new states of their own, they may still claim a right to internal self-determination, which requires, at a minimum, that they enjoy full and equal participation in the processes of representative self-governance. Although these general principles of self-determination have yet to achieve universal acceptance among international publicists as full-fledged peremptory norms,¹⁵⁴ there seems to be a growing movement to seat self-determination within the ranks of *jus cogens*.¹⁵⁵

The right to external self-determination flows naturally from the fiduciary foundations of state authority. As we have seen, a state cannot use force for the purpose of subjecting another state to its control without implicitly failing to treat foreign nationals as equal moral agents. By the same token, a group’s claim to independence from external domination is a derivative of individuals’ entitlement to secure and equal liberty as citizens of the world. Colonial domination frustrates the liberty of individuals to self-organize into a political community governed by laws responsive to their interests. Like the prohibition against military aggression, the anticolonial right to external self-determination seeks to guarantee individuals’ secure and equal freedom by providing for their self-rule.

Internal self-determination has proven to be more politically and theoretically divisive than external self-determination, as it has been invoked

150. See Karl Doehring, *Self-Determination*, in *CHARTER OF THE UNITED NATIONS: A COMMENTARY* 62 (Bruno Simma et al. eds., 2002) (describing the debate).

151. See U.N. Charter art. 1, para. 2; ICCPR, *supra* note 124, art. 1(1); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (1970).

152. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 67-140 (1995).

153. ICCPR, *supra* note 124, art. 1(1).

154. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 81 (1979) (asserting that the peremptory status of self-determination is “difficult to accept”); HANNIKAINEN, *supra* note 18, at 357 (expressing skepticism about internal self-determination).

155. See U.N. Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 23, ¶ 5 cmt., in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (Oct. 30, 2001) (characterizing self-determination as *jus cogens*); *cf.* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 213 (June 30) (characterizing the self-determination principle’s *erga omnes* character as “irreproachable”).

in support of diverse subnational and transnational independence movements, as well as indigenous peoples' claims to political autonomy and control over resources.¹⁵⁶ We need not canvass all of the possible conceptions or applications of internal self-determination, however, to recognize that certain norms commonly associated with the principle qualify as *jus cogens* under the fiduciary theory. At a minimum, a state cannot reasonably claim to honor its fiduciary obligations if it arbitrarily denies a discrete group of its nationals the opportunity to participate equally in national politics or withholds other critical rights or privileges of nationality. In addition, some municipal courts have held that states are in a fiduciary relationship with indigenous peoples, and that states must consult with indigenous peoples and seek to accommodate their concerns if proposed state action will infringe their rights.¹⁵⁷ International law also supports indigenous self-determination and a duty to consult.¹⁵⁸ Violation of these kinds of autonomy-enabling rights would breach obligations that many states now recognize as fiduciary in character. Insofar as the principle of internal self-determination addresses these or other constitutive concerns of the state-subject fiduciary relation, it deserves to be accorded peremptory force within international law.

Much more work must be done, of course, to clarify the fiduciary theory's application to internal self-determination. The limited scope of this Article does not permit us to address whether other norms commonly associated with internal self-determination (for example, legal pluralism, linguistic and educational rights) would qualify as *jus cogens* under the fiduciary theory. Nor do we have space to set out the conditions under which certain remedies for state violations of internal self-determination would be preferable to others (for example, secession, federative autonomy, restoring civil and political rights, enhanced claims to resources to ensure cultural survival, duties to consult and accommodate). For present purposes, we observe simply that the fiduciary theory lends credence to the view that various norms that fall under the heading of internal self-determination qualify for peremptory status.

156. See MORTON H. HALPERIN & DAVID J. SCHEFFER WITH PATRICIA L. SMALL, SELF-DETERMINATION IN THE NEW WORLD ORDER 49-51 (1992) (discussing these and other contexts where internal self-determination has been invoked); Allan Rosas, *Internal Self-determination*, in MODERN LAW OF SELF-DETERMINATION 225, 228 (Christian Tomuschat ed., 1993) (noting disagreement over the concept of internal self-determination).

157. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards."); *British Columbia v. Haida Nation (Minister of Forests)*, [2004] 3 S.C.R. 511 (Can.) (finding that the Crown's duty to consult includes a duty to seek an accommodation of their interests); *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1077 (Can.) (declaring that the Crown is in a fiduciary relationship with aboriginal peoples and owes them a duty of consultation); *New Zealand Maori Council v. Attorney-General*, [1987] 1 N.Z.L.R. 641 (H.C.) (asserting that the Crown and the Maori are in a fiduciary relationship).

158. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 6, June 27, 1989, 28 I.L.M. 1382 (supporting duty to consult); Declaration on the Rights of Indigenous Peoples arts. 3-5, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (supporting self-determination); *id.* art. 18 (supporting general participatory rights); *id.* arts. 15, 17, 19, 30, 32, 36, 38 (supporting duties to consult).

One possible objection that does merit a reply, however, is that groups or peoples are collectivities rather than individuals, and the fiduciary theory seems to address solely the dignity of the individual considered as a free and self-determining agent. In what sense does a people (considered collectively) have dignity analogous to the dignity of the individual? The short answer is that peoples have dignity analogous to individuals because both are *persons*. Recall that Kant defines a person as “a subject whose actions can be *imputed* to him.”¹⁵⁹ If peoples, like states, may have the actions of their institutions and representatives imputed to them, then they too may be viewed as international law views states today, as artificial persons that require agents to act for them.¹⁶⁰ Peoples, in other words, are persons in the relevant, Kantian sense. Peoples, like individuals, have agency and dignity precisely because they are capable of autonomous self-determination. The primary difference is that someone must act on a people’s behalf. But so long as those actions can be attributed to a people as such, a given people is a person and therefore worthy of respect in its own right.

The dignity of persons from Kant’s account of legality (and our account of jus cogens) includes and explains the human dignity of individuals because individuals are natural persons and therefore have moral personhood. But Kant’s conception of dignity is wider than human dignity because it bears on artificial (nonhuman) persons as well as natural persons. Whereas for liberalism the basic unit of moral value is the natural person or individual,¹⁶¹ in Kant’s theory of the right, the basic unit of value is the person, including artificial persons such as states and peoples. Thus, in addition to reasons derived from the interest of individuals to self-govern, the fiduciary theory calls on states to treat the right to self-determination as a peremptory norm, because a people’s capacity for self-determination is constitutive of their moral personhood and the embodiment of their dignity.

D. *Nonperemptory Norms*

By specifying criteria for identifying peremptory norms, the fiduciary theory also offers a principled framework for distinguishing norms that do not qualify as jus cogens. To merit recognition as jus cogens, it is not enough for a norm to achieve widespread state acceptance or preserve orderly relations between states. Rather, the norm must satisfy the fiduciary theory’s formal and substantive criteria, which limit jus cogens to formally satisfactory norms that are constitutive of the state-subject fiduciary relation. Guided by these concerns, the fiduciary theory’s analytical framework eliminates from consideration a variety of international norms, which courts and commentators occasionally mischaracterize as jus cogens.

159. KANT, *supra* note 4, at 50.

160. Hobbes defined a person much as Kant later did, and characterized the state as an artificial person that can have its sovereign’s actions imputed to it. See HOBBS, *supra* note 87, at 217-28.

161. For discussion of the liberalism/communitarianism debate based on this premise, see WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989).

Some scholars have suggested, for example, that well-accepted maxims of international treaty law such as *pacta sunt servanda*,¹⁶² or general principles of international jurisdiction such as the territorial principle,¹⁶³ should be recognized as jus cogens. The rationale for including these norms is that they have achieved widespread acceptance across the international community and are constitutive of international law as a legal system.¹⁶⁴ The fiduciary theory counsels a different result. A state might very well discharge its fiduciary obligations faithfully by renouncing an onerous international agreement following a fundamental change of circumstances—as, for example, where goods earmarked for export under bilateral trade agreements are needed to avert local starvation following a natural disaster.¹⁶⁵ Similarly, the fiduciary theory of state sovereignty does not require the international community to respect a state's territorial jurisdiction over acts of genocide if national prosecution would result in a sham trial and impunity for the offenders. The mere fact that certain norms are well entrenched within international law is insufficient to distinguish them as jus cogens.

Guided by this insight, the fiduciary theory also challenges conventional wisdom by excluding the venerable norm against piracy from the ranks of jus cogens.¹⁶⁶ Article 15 of the Convention on the High Seas, which is widely recognized as customary international law, defines piracy in relevant part as “illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft.”¹⁶⁷ Although such private acts may be illegal under international law, they are not violations of jus cogens because they do not in and of themselves address the limits of sovereign authority in the state-subject fiduciary relation. To merit recognition as a peremptory norm, the international norm against piracy would have to be repackaged as a constraint on state authority satisfying the fiduciary theory's formal and substantive criteria. This might be accomplished, for example, by shifting the piracy prohibition's focus from pure private conduct to state-sponsored or state-condoned piracy—practices

162. See BROWNLIE, *supra* note 48, at 591-92 (defining *pacta sunt servanda* as the principle that treaties are binding between parties and must be performed in good faith).

163. See *id.* at 299 (“The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition . . .”).

164. See, e.g., Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 773 (2003) (“If *jus cogens* is defined as a body of norms representing the core, nonderogable values of the community of states, then included in this body, arguably, is the principle of state jurisdiction . . .”); Schwelb, *supra* note 44, at 965 (discussing *pacta sunt servanda* as a potential peremptory norm).

165. See VCLT, *supra* note 2, art. 62 (permitting treaty termination or withdrawal under limited circumstances where there has been a “fundamental change of circumstances”); *cf.* ORAKHELASHVILI, *supra* note 41, at 44 (arguing that an agreement providing for derogation from *pacta sunt servanda* would be absurd).

166. See BROWNLIE, *supra* note 48, at 489 (citing a rule prohibiting piracy as jus cogens); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172-III RECUEIL DES COURS 219, 262 (1981) (same).

167. Convention on the High Seas art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (emphasis added); see also United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397, 436 (adopting the High Seas Convention's language verbatim); BROWNLIE, *supra* note 48, at 229 (identifying the High Sea Convention's definition as customary international law).

tantamount to aggression.¹⁶⁸ Absent a clear nexus to the state-subject fiduciary relationship, however, the prohibition against piracy is best classified as a common crime.

To be sure, most well-recognized peremptory norms such as the prohibitions against slavery, genocide, and military aggression would retain their nonderogable status under the fiduciary theory of jus cogens. Nonetheless, the preceding examples demonstrate that the fiduciary theory would unsettle the prevailing status quo in important respects. As we have seen, the fiduciary theory constricts the potential scope of jus cogens by excluding important norms such as *pacta sunt servanda* and the prohibition against piracy. Conversely, the fiduciary theory expands jus cogens to encompass emerging norms that are constitutive of the state-subject fiduciary relation such as the right to due process, the prohibition against state corruption, and the principle of self-determination. The fiduciary theory thus addresses concerns about the perceived indeterminacy of jus cogens by furnishing a significantly more determinate framework for identifying peremptory norms than its competitors.

E. *Possible Objections to the Fiduciary Theory*

We anticipate that positivists will take issue with the fiduciary theory on the ground that it decouples peremptory norms from state consent without specifying an institution capable of generating, modifying, or interpreting peremptory norms. If we are correct, however, that peremptory norms are constitutive of the state-subject fiduciary relation itself—owing their nonderogable status to the moral demands of dignity rather than to the will of any state or nonstate actor—the positivist critique is fundamentally misguided. We do not mean to suggest that states and international institutions have no role to play in the progressive development of jus cogens. States bear primary responsibility for operationalizing peremptory norms in the first instance. When state practices attract criticism, the fiduciary theory may assist international organizations such as the United Nations Security Council, the United Nations Human Rights Council, and the ICJ to determine whether peremptory norms have been violated. The fiduciary theory thus invites the international community to employ its analytical framework as the foundation for a new international consensus, but without mistaking the intended consensus for the normative basis of jus cogens.

Some might object that our theory undermines treaties and customary international law by rendering these sources superfluous to international human rights law. It does not. While we reject the positivist thesis that state consent constitutes the basis for peremptory norms' nonderogable character, the fiduciary theory continues to rely on these traditional modalities of

168. See *Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. Int'l L. Comm'n 253, 282, U.N. Doc. A/3159 (suggesting in commentary to Article 100 that "[a]ny State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law"); LORD MCNAIR, *THE LAW OF TREATIES* 215 (1961) ("Can there be any doubt that a treaty whereby two States agreed to permit piracy in a certain area, or against the merchant ships of a certain State, with impunity, would be null and void?").

international lawmaking to specify norms that satisfy the fiduciary theory's formal and substantive criteria. For example, the negotiation of multilateral instruments such as the ICCPR and the Genocide Convention has played a crucial role in generating specific human rights guarantees that in part implement the more general jus cogens norms which flow from the fiduciary theory's analytical framework. Moreover, since the fiduciary theory does not prescribe any particular enforcement mechanism for violations of peremptory norms, treaty regimes will continue to serve as important tools for coordinating the international community's response to grave abuses of the state-subject fiduciary relation. Thus, far from heralding the demise of treaties or custom, the fiduciary theory looks to them for the less abstract principles and rules that are necessary for the theory's practical application.

Other readers might find our theory objectionable on the ground that it undervalues norms that target nonstate actors such as terrorists, corporate polluters, or perpetrators of domestic violence.¹⁶⁹ To be clear, the fiduciary theory does not aspire to establish a normative hierarchy within international law, distinguishing norms that are intrinsically "fundamental" or categorically "superior" from those of lesser importance. Private acts of terrorism, environmental despoliation, or domestic violence may be just as damaging as state acts, and norms proscribing abuses by nonstate actors may be just as fundamental to the interests of society as the peremptory norms against state-based human rights abuses.¹⁷⁰ What distinguishes norms as peremptory vis-à-vis states' other international obligations is not their relative importance in some abstract sense but rather their constitutive role as fiduciary constraints on a state's sovereign power. For this reason, our theory would not necessarily preclude the international community from specifying peremptory norms in the future to outlaw state-sponsored terrorism, state complicity in environmental despoliation, or state inattention to domestic violence.

Lastly, there are those who argue that the very concept of jus cogens reflects a Western bias and fails to account for cultural diversity across the international community.¹⁷¹ The fiduciary theory blunts the force of this objection by limiting jus cogens's scope to norms that embody common public values of integrity, fairness, and solicitude. Furthermore, the fiduciary concept cannot be easily dismissed as an expression of Western values alien to the traditional values of non-Western societies. Legal scholars have traced the fiduciary concept as far back as the Code of Hammurabi in Ancient

169. See, e.g., Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65-66 (1993) (criticizing the concept of jus cogens, which according to some accounts safeguards "the most fundamental and highly-valued interests of international society," because it tends to exclude wrongs such as domestic violence that disproportionately affect women (quoting Cordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 587 (1988))).

170. See Christenson, *supra* note 169. Indeed, the importance of these prohibitions against private acts offensive to human rights is likely to become all the more significant for international society as the twenty-first century unfolds. See PHILIP BOBBITT, *TERROR AND CONSENT* (2008).

171. See BEDERMAN, *supra* note 69, at 123 (noting that human dignity is a contested concept and that rights discourse is often perceived as a surrogate for the transmission of Western values); SHAW, *supra* note 38, at 118 ("The situation to be avoided is that of foisting peremptory norms upon a political or ideological minority, for that in the long run would devalue the concept.").

Mesopotamia (present-day Iraq), and have shown that concepts of fiduciary obligation informed not only Roman law and Germanic (Salic) law, but also Islamic law and the Jewish law of agency.¹⁷² Indeed, the modern Anglo-American law of trust owes a considerable debt to the *waqf* from Islamic law—an endowment created by a donor for use by designated beneficiaries and under the administration of a trustee—which was introduced to England by Franciscan friars returning from the Crusades in the thirteenth century.¹⁷³ Even in non-Western societies that emphasize collective identities (for example, family, clan, nation, religion) over individual freedom and dignity, scholars have observed that implied fiduciary obligations structure public and private legal institutions.¹⁷⁴ Indeed, one contemporary Chinese philosopher has described “the ideal Confucian society as a ‘fiduciary community’ in which the corporate effort of the entire membership turned the group into ‘a society of mutual trust instead of a mere aggregate of individuals.’”¹⁷⁵ Thus, while the debate over cultural relativism in international human rights discourse cannot be addressed fully in this Article, there are good reasons to believe that the fiduciary theory is less vulnerable to such concerns than other theories of *jus cogens*.

We recognize, of course, that the fiduciary theory might challenge deeply engrained cultural values in some areas of the world. For example, states that discriminate arbitrarily among their subjects based on status or caste (e.g., apartheid) violate their peremptory obligations under the fiduciary theory, irrespective of whether such distinctions reflect traditional social norms. We take comfort, however, in observing that few states persist in defending policies of pervasive, invidious discrimination today, and fewer still seek to justify military aggression, torture, or corruption under the banner of cultural relativism. Moreover, the principle of popular sovereignty upon which the fiduciary theory rests cannot easily be rejected as Western-centric ideology, for it has become a deeply embedded principle of general international law embraced throughout the international community.¹⁷⁶ The

172. See TAMAR FRANKEL, *FIDUCIARY LAW* 7-14 (2007); Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139 (1996); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191 (2001).

173. Avini, *supra* note 172, at 1140-43.

174. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1607-08 (2000); see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 240 (1999) (“The valuing of freedom is not confined to one culture only, and the Western traditions are not the only ones that prepare us for a freedom-based approach to social understanding.”).

175. Ruskola, *supra* note 174, at 1627 (quoting TU WEI-MING, *CENTRALITY AND COMMONALITY: AN ESSAY ON CHUNG-YUNG* 67, 81 (1976)).

176. See, e.g., African Charter on Human and Peoples’ Rights art. 13(1), June 27, 1981, 1520 U.N.T.S. 217 (“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”); ICCPR, *supra* note 124, art. 25 (“Every citizen shall have the right and the opportunity . . . [t]o take part in the conduct of public affairs, directly or through freely chosen representatives”); Universal Declaration of Human Rights, *supra* note 142, art. 21 (“The will of the people shall be the basis of the authority of government”); Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT’L L. 403, 412-13 (1996) (examining historical materials and concluding that “[t]he fundamental republican principle of popular sovereignty (‘imperium populi’) has been at the core of the developing law of nations from the beginning”); Reisman, *supra* note 80. *But see* Jed Rubenfeld,

fiduciary theory thus calls upon states to honor their basic duties and pursue their aspirations as stewards for those subject to their power.

V. FUTURE AVENUES OF INQUIRY

We have argued above that the fiduciary model explains many of the currently recognized norms of jus cogens, disqualifies others, and supplies a robust analytical framework for identifying emerging peremptory norms. We have also argued that the fiduciary theory reconciles jus cogens with state sovereignty by showing how such norms are constitutive of a novel conception of popular sovereignty under international law. We conclude with a few brief comments on new avenues of inquiry suggested by the fiduciary understanding of jus cogens.

A. *Cosmopolitan Citizenship*

Under the fiduciary model, cosmopolitan citizenship emerges as the fiduciary principle's response to extraterritorial abuses of state power and intraterritorial abuses against nonsubjects. Individuals under occupation or subject to detention in a foreign jurisdiction may be more vulnerable to the power of a foreign state than they ordinarily would be vulnerable to the power of their own state. Because the fiduciary principle authorizes state power on behalf of every person subject to it, states can claim no greater entitlement to enslave or torture foreign nationals than they can claim vis-à-vis their own citizens. Just as children are born "citizens of the world" with an innate right to their parents' care, all individuals by virtue of their moral personhood and dignity are innately entitled to the protection of basic human rights against the powers that be, including not only their own state of residence but also the broader community of states, severally and collectively. If a state seeks to exercise its public powers over foreign nationals, the fiduciary principle dictates that the state must respect peremptory norms within the scope of these interactions even if the state does not undertake to establish a more formal or enduring state-subject relationship. This is the conception of cosmopolitan citizenship that the fiduciary view of public authority makes possible.

One consequence of recognizing peremptory norms as constitutive of cosmopolitan citizenship is that detained foreign nationals enjoy due process rights even if they are apprehended and detained extraterritorially. We have argued above that due process is a peremptory norm under the fiduciary model. This insight suggests that academic inquiry and judicial opinions should move past the threshold question of whether foreign detainees at Guantanamo Bay and elsewhere are entitled to due process at all (they are).¹⁷⁷

Unilateralism and Constitutionalism, 79 N.Y.U. L. REV. 1971, 1986 (2004) ("[T]he fundamental point of international law, and particularly of international human rights law, was to *check national sovereignty*, emphatically including national *popular sovereignty*.").

177. *But see* Robert Knowles & Marc D. Falcoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 665 (2007) (noting that the Bush Administration "has argued that it may detain non-citizens extraterritorially without according them any due process because non-citizens detained extraterritorially possess no rights"); Tung Yin, *Procedural*

Instead, scholars should focus their energies on clarifying the content of due process in cases involving foreign nationals, especially where national security concerns appear to weigh in favor of reduced protections. For example, are individuals detained abroad entitled to legal counsel? If so, should defense counsel have access to sensitive information (on a confidential basis) for the purpose of testing the government's evidence? What is the evidentiary burden the government must meet to keep foreign nationals detained? In light of the United States Supreme Court's decision in *Boumediene v. Bush* that detainees at Guantanamo Bay may challenge their confinement by petitioning for habeas corpus review in U.S. courts, these questions are especially pressing, for publicists and judges alike.¹⁷⁸

Another field of future inquiry suggested by the fiduciary view of cosmopolitan citizenship concerns the underlying substantive justification of the Geneva Conventions, and humanitarian law generally. The positivist view of the Geneva Conventions is that they are binding on state parties because those parties consented to them. The fiduciary model, on the other hand, suggests that the protections contained within the Geneva Conventions are good candidates for *jus cogens* status because respect for them is necessary to satisfy the principle of equal security from the fiduciary theory's analytical framework: even in times of war, mistreatment of prisoners or noncombatants is unlawful because it infringes upon their fundamental equal security. This conclusion is supported by Article 4 of the ICCPR and Article 15 of the European Convention, which permit derogations from some treaty rights in times of emergency, but only if those derogations are consistent with the state party's "other obligations under international law."¹⁷⁹ As the *travaux préparatoires* make clear, these obligations are intended to refer to those enshrined in the Geneva Conventions and humanitarian law generally.¹⁸⁰ The fiduciary theory's formal and substantive criteria offer a vehicle for distinguishing which of these obligations qualify for peremptory treatment.

The fiduciary conception of cosmopolitan citizenship also resonates with Kant's idea of hospitality, and offers a fresh perspective on the 1951 Convention Relating to the Status of Refugees (Refugee Convention).¹⁸¹ The Refugee Convention obligates state parties to provide asylum to individuals fleeing persecution. On the fiduciary theory, the Refugee Convention formalizes and makes concrete a fiduciary duty of hospitality which states owe to individuals who arrive at their borders effectively stateless. The

Due Process To Determine "Enemy Combatant" Status in the War on Terrorism, 73 TENN. L. REV. 351, 365 (2007) ("Whether a nonresident alien outside the [United States] has due process rights remains an unsettled question, due in part to the existence of conflicting lines of cases.").

178. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2266-71 (2008) (applying due process analysis to determine the need for habeas corpus); see also *id.* at 2279 (Roberts, C.J., dissenting) (criticizing the majority for granting habeas corpus "without bothering to say what due process rights the detainees possess").

179. ICCPR, *supra* note 124, art. 4(1); see also European Convention, *supra* note 124, art. 15(1).

180. See, e.g., ECOSOC, Comm'n on Human Rights, 6th Sess., 195th mtg., *supra* note 125, at 45; ECOSOC, Comm'n on Human Rights, 6th Sess., 196th mtg., *supra* note 125, at 20.

181. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

fiduciary theory thus clarifies how states' international obligations of hospitality and *nonrefoulement* constitute peremptory norms emanating from asylum seekers' moral capacity to place states under legal and moral obligations to provide for their basic security.

A further issue that arises from the fiduciary conception of cosmopolitan citizenship is whether, or to what extent, states are bound to treat nationals and nonnationals alike under the principle of formal moral equality. The conventional view underlying immigration law is that citizenship bestows certain rights, denizens are not citizens, and therefore the state is not required to treat denizens as if they were citizens in all respects.¹⁸² The fiduciary theory does not necessarily abolish the traditional distinction between citizens and denizens, though it casts the distinction in a new light. Insofar as foreign nationals are entitled to claim legal entitlements or rights to political participation within their country of origin, the fiduciary theory does not necessarily obligate another state to duplicate or supplement those entitlements in the name of formal moral equality. For example, resident aliens may not enjoy the full panoply of political rights held by citizens, such as the right to vote and run for public office, unless and until they acquire citizenship. The fiduciary theory does require respect for human rights, however, and there is no reason in principle to suppose that either the peremptory or "ordinary" human rights of foreign nationals are any less obligatory under the fiduciary principle than citizens' human rights. For instance, the fiduciary theory would not permit states to use strict nationalization rules to enforce a *de facto* caste system. While we cannot begin in this Article to work out the details of the proper relationship between human rights and citizenship rights, the fiduciary model hints that the latter must seek to accommodate the former because human rights are constitutive of state sovereignty, including the state's sovereign authority to confer citizenship. Thus, under the fiduciary theory the differential treatment of foreign nationals cannot consist in differential restrictions of human rights, with the possible exception of certain political rights such as the right to vote.

B. *The Fiduciary Character of International Order*

If the state is a fiduciary of the individuals subject to its power, what then is the relationship between the international legal order as a whole and the individual? Arguably, this relationship too has a fiduciary character in that the international community may act as a surrogate guarantor of *jus cogens* if the state flagrantly violates peremptory norms. On the view defended here, the fiduciary principle authorizes the international community to act as a surrogate guarantor because the fiduciary principle seeks always to vindicate the individual's innate right to be treated as a person with equal dignity. If the state breaches its fiduciary obligation to so treat the individual, then, to the

182. See, e.g., *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."); *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, 2007 SCC 9 (Can.); *Canada v. Chiarelli*, [1992] 1 S.C.R. 711 (Can.).

extent practicable, the international community must fill the void. Indeed, the peremptory norms of international law make international legal order possible and, ultimately, these norms trace their justification back to the dignity of the person.

The fiduciary character of international order is perceptible in a variety of contexts. For example, the fiduciary principle arguably authorizes the international community through the United Nations to establish transitional administrations to assist transitional states in establishing democratic and legal institutions that reflect their people's sovereignty.¹⁸³ The fiduciary nature of the international legal order might also obligate the international community to provide disaster and famine relief, as well as impose a duty to address life-threatening poverty in the south, along the lines suggested by cosmopolitan scholars such as Thomas Pogge.¹⁸⁴ Hence, the fiduciary view reinforces the distributive account of international human rights law discussed earlier in that both seek to mitigate the deleterious effects of current distributions and abuses of sovereign power. Of course, much more would have to be said to defend the idea (if it is defensible) that the international community's redistributive obligations are mandated by jus cogens, and any such argument would have to contend with difficult questions about the extent to which the state is entitled to favor the claims of its residents over nonsubjects.

Finally, and most contentiously, the fiduciary structure of international order might supply a basis for humanitarian intervention in extreme cases where states systematically violate peremptory norms. Insofar as the international community stands as a surrogate guarantor of human rights protected under jus cogens, the fiduciary structure of international order may permit intervention by the coordinated action of the international community as a whole.¹⁸⁵ It is far less clear, however, whether the fiduciary principle would supply the same warrant to individual states that wish to engage in unilateral humanitarian intervention, notwithstanding individuals' claims of cosmopolitan citizenship against foreign states. Arguably, third-party states should pursue a collective response to egregious violations of human rights because the international community alone and as a whole (not third-party

183. See, e.g., S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (establishing the United Nations Transitional Authority for East Timor to "be endowed with overall responsibility for the administration of East Timor and . . . empowered to exercise all legislative and executive authority, including the administration of justice"); S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999) (creating the United Nations Interim Administration Mission in Kosovo to "provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo").

184. THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 177-81 (2002).

185. See INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT*, at xi (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> ("Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.").

states) stands in the position of surrogate guarantor of human rights for all individuals within the international community.¹⁸⁶

C. *The State as Agent*

While much of our discussion has focused on the fiduciary state's specific obligation to secure legal order in the domestic sphere, at international law the state has another specific fiduciary obligation. The state must represent its people and act on their behalf as their agent. This obligation opens up additional lines of inquiry that a number of commentators have already begun to explore.¹⁸⁷ For example, state officials cannot acquire public debts to enrich themselves, and plausibly creditor states that lend money to corrupt governments with actual or constructive knowledge of their corruption are not entitled to collect these odious debts. Yet another implication of the state's fiduciary position as agent is that it cannot delegate or contract out essential fiduciary obligations of statehood (e.g., the state's duties to guarantee equal security and the rule of law) without providing adequate safeguards to those affected by the delegated powers. Fruitful future inquiry could elaborate on the content of these safeguards in various contexts such as extradition and state delegation to military contractors.

D. *Peremptory Norms and Obligations Erga Omnes*

A further implication of the fiduciary theory is to call into question the popular concept of obligations *erga omnes* in international law.¹⁸⁸ Contrary to the ICJ's classic statement in *Barcelona Traction*, a state's peremptory duty to refrain from acts of genocide, slavery, and racial discrimination are not "[b]y their very nature" "obligations of a State towards the international community as a whole."¹⁸⁹ Rather, a state "is bound to extend . . . the protection of the law and assumes obligations concerning the treatment to be afforded" individuals—whether nationals or nonnationals—because these norms are constitutive of the fiduciary authorization of state sovereignty.¹⁹⁰ Under the fiduciary conception of cosmopolitan citizenship, states bear fiduciary obligations toward all persons subject to state power, and accordingly

186. See Thorburn, *supra* note 127 (noting that, because public powers are fiduciary in nature, they must be exercised consistent with an *ex ante* permission or authorization that is public rather than private in nature).

187. See, e.g., Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1238-39 (2007); King, *supra* note 121.

188. See Byers, *supra* note 39, at 211 (defining *erga omnes* rules as "rules, which, if violated, give rise to a general right of standing").

189. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 19). States may, of course, voluntarily assume obligations to other states regarding their human rights observance by consenting to multilateral conventions or international custom. But these consensual obligations are distinguishable from both the nonderogable duties that arise from the state-subject fiduciary relation (*jus cogens*) and state obligations "toward the international community as a whole" (*erga omnes*). *Id.*

190. *Id.*

vulnerable persons but not states are the relevant rights-bearers for bringing claims based on *jus cogens* violations.

This is not to suggest, of course, that the international community ought to be indifferent to genocide, slavery, or apartheid. As we have seen, the international community—acting through organizations such as the U.N. Security Council—may serve as a secondary guarantor of human rights. An international tribunal might consider this guarantor role sufficient justification to allow states to bring next-friend claims on behalf of individuals who have suffered *jus cogens* violations in other states. Nevertheless, while the result achieved by so-called *erga omnes* obligations might be defensible, the concept of obligations *erga omnes* as applied to peremptory norms is not. Absent a procedural right conferred by treaty, states cannot claim any material interest of their own in another state's human rights observance. Thus, whatever salience the concept of obligations *erga omnes* may have in other contexts, “the basic rights of the human person” discussed in *Barcelona Traction* do not qualify as such.¹⁹¹

E. *Nonabsolute Human Rights*

As we have discussed, most human rights, such as freedom of expression or association, can admit of derogation or limitation.¹⁹² But it bears emphasizing that the fiduciary model requires states to respect these “ordinary” human rights, too. Ordinary human rights satisfy the fiduciary theory's formal and substantive criteria: they vindicate the principle of integrity by presupposing that state officials cannot self-deal, they affirm the formal moral equality of individuals, and they directly express solicitude for the dignity and well-being of the individual. Therefore, under the fiduciary theory, “ordinary” human rights are presumptively mandatory. What is less clear and worthy of further research is whether the fiduciary conception of sovereignty points to conditions under which derogation from these norms is permissible.

We have seen that the ICCPR and the European Convention permit derogation in times of emergency. Human rights treaties also permit restrictions of certain rights when the interests those rights protect are clearly outweighed by more pressing considerations, such as the rights of others. For example, Article 18(3) of the ICCPR allows states to impose some restrictions on freedom of religion, but only if the restrictions are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”¹⁹³ So, for example, freedom of religion cannot be called upon to defend acts of violence against nonbelievers.

191. *Id.* at 32.

192. *See supra* Part IV.

193. ICCPR, *supra* note 124, art. 18(3). Articles 12 (freedom of movement), 19 (freedom of expression), 21 (peaceful assembly), and 22 (freedom of association) of the ICCPR contain similar limitation clauses. Likewise, section 1 of the Canadian Charter of Rights and Freedoms provides for a similar proportionality test on the basis of the principles of “a free and democratic society.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 1 (U.K.).

When the state limits nonabsolute rights in defense of other fundamental rights and freedoms, the fiduciary model suggests that it bears a burden to justify its actions publicly, and thereby accept legal and political responsibility for its actions. In other words, restrictions on nonabsolute, derogable rights must pass a test of proportionality, and they must always take the form of a publicly defensible justification that meets certain legal standards.

The test of proportionality immediately raises questions of who gets the last word on the interpretation of human rights, the judiciary or the legislature. The more immediate concern from the standpoint of the fiduciary model, however, is the requirement of public reason-giving itself.¹⁹⁴ On the fiduciary theory, this requirement reflects the foundational idea that sovereignty ultimately resides in the people: the state must ground its actions in reasonable justifications to ensure that individuals are subject to the rule of law, not arbitrary exercises of public power. While specifying the exact form and nature of this justification lies beyond the scope of this paper, such justifications would have to take seriously the substantive principles from the fiduciary framework, namely: integrity, formal moral equality, solicitude, equal security, and the procedural demands of the rule of law.

F. *Legal Consequences of Breaches of Peremptory Norms*

The eminent publicist Christian Tomuschat suggests that legal inquiry into jus cogens is a two-stage endeavor: (1) identify the peremptory norm, and (2) determine the legal consequences that flow from the norm's breach.¹⁹⁵ This Article has focused on establishing a theory capable of guiding inquiry under the first stage of Tomuschat's framework. The specific legal consequences that would flow from a breach of jus cogens and the optimal enforcement vehicles for securing state compliance with jus cogens may be highly context dependent and subject to further considerations beyond the scope of this study. An interesting issue in this regard is whether a state that regularly violated peremptory norms would have the legal capacity under international law to enter binding treaties or otherwise act as an agent of its people at the international level. With respect to civil remedies for specific breaches of jus cogens, space permits us to signal only that the remedies available should seek to make the wronged person whole, thereby rectifying (to the extent practicable) the past wrong. Happily, the fiduciary character of state legal authority offers a fruitful starting point for future consideration of these critical issues.

194. This requirement has been a major focus of public lawyers from diverse jurisdictions. *See, e.g.*, DYZENHAUS, *supra* note 146 (asserting that legal order consists largely in a public culture of justification); Paul Craig, *Unreasonableness and Proportionality in UK Law*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 85 (Evelyn Ellis ed., 1999) (observing that the principle of proportionality was a part of U.K. administrative law prior to its accession to the European Convention in 1998).

195. Christian Tomuschat, *Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes—Concluding Observations*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER* 425, 428-29 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

VI. CONCLUSION

This Article has developed a fiduciary theory of jus cogens with the aim to furnish a more persuasive explanation for peremptory norms and their relationship to state sovereignty under international law. We have argued that peremptory norms such as the prohibitions against slavery and torture are not exceptions to state sovereignty, but rather constitutive constraints flowing from the state-subject fiduciary relationship itself. States must honor peremptory norms as basic safeguards of dignity because they stand in a fiduciary relationship with all persons subject to their power and therefore bear specific duties to guarantee equal security under the rule of law. This fiduciary model of state sovereignty advances international human rights discourse beyond vague notions of “public policy,” “international consensus,” and “normative hierarchy” toward a more theoretically defensible and analytically determinate account of peremptory norms.

We recognize, of course, that this Article constitutes only a first step in understanding the fiduciary model’s implications for international human rights law. Many important questions require further consideration. For example, it remains to be seen how the fiduciary theory’s analytical framework would apply to various norms not discussed in this Article that have been identified elsewhere as candidates for peremptory treatment.¹⁹⁶ Additional consideration should be devoted, as well, to unpacking the fiduciary model’s consequences for future litigation to enforce alleged jus cogens violations, including such threshold concerns as standing, sovereign immunity, causes of action, compulsory jurisdiction, forums, and remedies. Equally important, the legal dynamic between the state-subject fiduciary relation and the international community’s surrogate guarantor role warrants more detailed attention than we have been able to devote in this Article. Addressing these questions will be essential to determine the specific legal consequences that flow from a breach of jus cogens. This Article has attempted to provide a sound theoretical basis from which this more fine-grained inquiry may proceed.

196. See, e.g., Charlesworth & Chinkin, *supra* note 169, at 75 (asserting that jus cogens should “give prominence to a range of other human rights” including “the right to sexual equality” and the right “to food”); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT’L L. 219 (2005) (arguing that sexual violence should be recognized as a jus cogens violation).