The Legacy of Punishment in International Law

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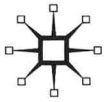

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Contents

CHAPTER 1

Introduction

> The continued development of universality, objective norms such as norms *jus cogens*, obligations *erga omnes* and international crimes . . . all point to a move from strict positivism, absolute equality of consent and unanimity.[1]

In Nicholas Onuf's account of the constitution of international society, key explanatory weight is carried by two sets of constitutive rules that he labels "primary" and "secondary."[2] He takes this formulation from the system H. L. A. Hart detailed in *The Concept of Law*.[3] In the simplest terms, the former are the specific rules—prescriptive and prohibitive—governing the conduct of agents. The latter are rules governing rules—the rules for the creation and change of rules.[4] This typology neatly captures things, but there is a subspecies of primary rules that bears special attention for the unique role it plays in the constitution of international society—indeed of all societies. Among primary rules, rules of categorical, peremptory character, *jus cogens,* play a special role in the constitution of any society. More so than rules of a quotidian, dispositive character, *jus cogens* rules identify what it means to be part of a society. Adherence to these rules—if not *in foro interno* adherence to the values underlying them—is a *sine qua non* condition of membership in the society defined by those rules.

Even in a legal environment characterized by Positivism and Voluntarism (like international society), there are still some rules that are considered absolute.[5] Although categorical

obligation is usually associated with Natural Law thinking or Kantian ethics, modern international law has found, or perhaps more accurately *created,* a place for peremptory obligation (to use international law's preferred term).[6]

International law's conceptualization of peremptory norms differs in important ways from that of both Natural Law and Kantian ethics. Unlike "Laws of Nature," *jus cogens* are human created, and they are subject to change. These rules are *made* by people, and they are *endowed* with their peremptory status by people. Unlike Kant's conception of categorical obligation, there is no *a priori* basis for the subject matter content of these rules or their peremptory character.[7] Instead, as stated previously, we *make* these rules categorical; we *make* certain prohibitions unconditional, and sometimes *make* certain positive obligations unconditional. The basis of categorical obligation in international law is rooted in neither Natural Law metaphysics, nor deontological reason; categorical obligation is a construction of human minds and human wills. Rules of all descriptions are always simultaneously social constructions and resources for the ongoing cycle of social construction.

Before analyzing the relationship between these rule types and their role in the constitution of international society, we must briefly attend to the nature and character of *jus cogens* in international law. As set out in Articles 53 and 64 of the 1969 *Vienna Convention on the Law of Treaties,* norms of this character admit of no exceptions. Any treaty—and by extrapolation, any act—in contravention of such a norm is always automatically wrong and by consequence void. Such obligations cannot be contracted out of *inter se.* Their violation neither is nor can ever be allowable; neither can violation ever be excusable.[8]

Jus cogens are the rules that are uppermost in the hierarchy of a society's norms; historically, this function was fulfilled by the rules of Natural Law. A *legitimate* violation of Natural Law was not only unthinkable, it was by definition impossible in the same way that a violation of the physical laws of nature was understood to be materially impossible. Indeed, the categorical character of *jus cogens* imparts an uncomfortable Natural Law flavor, which seems to be at the base of much of the explanatory difficulty surrounding the concept. This will be

addressed in Chapter 3. Although *jus cogens* were formulated in Positivist terms in the Vienna Convention, and have their root in Roman law, their apparent Natural Law character requires a different approach to understanding the basis of their normativity. We construct normative hierarchies in ways that reflect our *values*. Some values and the norms deriving from them are always special. Some are considered particularly important because they are necessary for the very functioning of the rest of the normative system, and hence foundational (the norms *pacta sunt servanda* and *rebus sic stantibus* in international law).[9] Others because they reflect our widely and deeply held moral sentiments about what it means to be who we are (the categorical bans on slavery and genocide), and are thus uppermost among the hierarchy of norms.

I do not, however, want to equate *jus cogens* with morality *simpliciter;* peremptory norms may reflect or embody morality or sentiments (one would be hard-pressed to find any high-level principles of law that do not), but they are in the first instance part of Positive Law. The peremptory, categorical character and bindingness of these laws have a moral basis. It is for moral reasons that we have *made* them exceptionless; it is for moral reasons that we have *endowed* them with peremptory standing. *Jus cogens* rules are "more binding" than other rules of *jus disposituvum* character because, in our moral vocabulary, we cannot conceive of legitimate grounds for their violation whatever the circumstances. Consequently, neither can we countenance any circumstances precluding the wrongfulness of their violation.[10]

The rules having *jus cogens* character in any society play a more fundamental role in defining that society than other primary rules by making certain foundational stipulations such as "These are the things we unconditionally prohibit" and "These are the things we unconditionally require." In reality, these obligations are not purely unconditional because all norms, including peremptory norms, change. As indicated previously, this is a signal point of differentiation from Natural Law. Although Article 53 of the Vienna Convention acknowledges that a *jus cogens* rule can be supplanted, it limits this possibility to replacement by another norm of the same character.

This caveat notwithstanding, the function of rules of *jus cogens* character is to indicate that if an agent violates them or rejects their unconditionality, that party excludes itself thereby from membership in this society.

The body of rules to which a society ascribes peremptory standing is constituted by what Richard Rorty has called its "final vocabulary." "All human beings carry about a set of words which they employ to justify their actions, their beliefs, and their lives . . . [I] call these words a person's 'final vocabulary.' "[11] Rorty employs the Aristotelian-sounding language of finality because such a vocabulary is final in the sense that if it is challenged, its user has no way to argue on its behalf but to employ terms taken from the vocabulary itself; it cannot be defended noncircularly. It is, Rorty says, as far as the user can go with language. Beyond these words "is only helpless passivity or a resort to force." In performing this function, the final vocabulary is the means by which the society articulates (however contingently in the eyes of an observer or properly ironic society member) its bedrock beliefs and sentiments such as "These are the beliefs we hold unconditionally, the beliefs that make us who we are." It provides the means by which the society determines the things it unconditionally prohibits or requires, condemns or lauds. Like parties disclaiming rules of *jus cogens,* parties who do not hold these beliefs are not part of the relevant "us" or "we." If "they" do not share in what "we" consider (however contingently) defines "us," they cannot be "us."

A society's secondary rules specify the means by which any norm can become enshrined in the Positive (primary) Law of that society; they detail as well how the status of existing laws can be changed from dispositive to peremptory. The legitimacy of any primary rule candidate—especially one claiming peremptory status—is determined by a set of antecedent secondary rules, but despite secondary rules being in this regard logically prior to (peremptory) primary rules, other *jus cogens* rules also play a role in the ongoing process of constitution. These rules are a factor in setting the very criteria by which agents use secondary rules to evaluate primary rule candidates, and indeed in setting out the secondary rules themselves—hence the analogy to Kelsen's *Grundnorm.*

The overall relationship of final vocabulary, *jus cogens,* and international society is recursive and circular; no one element can be changed without having an effect on the others. In the apparently simple case, when our final vocabulary changes, it results in a change in the body of (simple) primary and *jus cogens* primary rules; this results in a change in the character of the international society. This change in final vocabulary may, depending on the subject matter, also exert an influence on the secondary rules themselves; we may, for example, come to view our rules of recognition as too narrow and exclusionary, and call for their revision.

Changes of final vocabulary do not arise *ex nihilo;* they often arise from the dynamics of the very society they constitute. Although institutionalization may serve to strengthen the hold of our final vocabulary, other factors (including especially the unintended consequences of institutionalization) may come into play, and these may make some of "us" question "our" final vocabulary, attempt its replacement, and begin the cycle anew.

Calls to restructure the current international society are, in fact, manifestations of either changes in "our" final vocabulary or perhaps the emergence of a new, incommensurable final vocabulary exerting new demands and expressing new valuations. Besides critique from within, another way this change may take place is by the addition (constitution) of new agents. The rules establishing the means by which agency is gained are themselves a subset of the secondary rules constituting the international society. For example, with the advent of decolonization (itself the effect of previous changes in international society), new voices making new and unfamiliar demands were heard. As some of these demands were gradually accepted and became internalized by the society that these "new" states had joined, the final vocabulary of international society changed, international society's *jus cogens* changed, and finally, international society itself changed. International society was in this regard reconstituted by the inclusion of new agents. More often, of course, these demands were repressed and there was no change, but the intervention into the cycle of co-constitution by agents who had not participated in previous iterations of the cycle and who brought with them new

and potentially revolutionary values and demands remains a potential source for change.

Plan of the Book

To show how this process may work, the rest of this book addresses the story of the rise, fall, and rise again of the practice of international punishment. Generically, punishment connotes the use of force against a party that has committed a wrong by another party whether or not the second party was specifically injured by the first. Domestically, the state punishes criminals even though it is often private individuals who are the materially injured parties. Often this concept implies a relation of authority, punisher over punished. By contrast, retaliation is the standard instrument of self-help in Realist understandings of international relations (IR), where in the absence of a supranational authority, one state responds in kind to an injury inflicted by another state.

Although Realists characterize IR as having essentially always been a self-help system, punishment was also the norm in the sixteenth and seventeenth centuries. Starting with Grotius and his antecedents in Chapter 2, we will see the development, demise, and potential rebirth of an international system in which actors (not only states) could use force against any other party should there be a violation of any of the fundamental rules of the system. As detailed most famously by Richard Tuck, it was a commonplace between the sixteenth and nineteenth centuries that nations and later states had the right to use force to punish other states for violating certain of international society's rules, without regard to whether the punishing state or its nationals had been affected by the violations—in other words, without regard to legal standing. Every nation / state had this right; in principle, any nation / state anywhere could punish any other nation / state for any violation of Natural Law.

This practice arose in a period when sovereignty as both principle and practice remained inchoate. Likewise, international punishment was conceptualized in Natural Law terms; the rules binding nations / states had sources independent

of human (or nation / state) will, and need never have been accepted by any nation / state. Nations, like individual persons, were simply bound by certain universal rules. As the meaning of sovereignty evolved toward our current understanding, especially in its emphasis on Voluntarism, and its being a property of *states,* the practice of international punishment became conceptually unsustainable, and was largely set aside.[12] In the older scenario, neither authority nor injury nor standing were predicates to punishment; the mere violation of the rule was sufficient to give *any* other party the standing to punish the offender. There are many noteworthy elements to this largely Grotian vision, to be worked out in the next chapter, but what is central at the moment is that the rules in question were the Laws of Nature, exogenous to the will of those bound by them, and the subjects of these laws were not states *per se,* but nations.

The differentiation between state and nation (and the parallel differentiation between both of those terms and sovereign) is part of what caused international punishment to fall out of favor. Nations as congeries of natural persons were regarded as bound by Natural Law; states as artificial persons distinct from the natural persons they "personated" were progressively harder to portray as bound by Natural Law.[13] As long as sovereigns were discrete individuals, they could be considered bound by Natural Law, but when the transition to the idea of the state itself being sovereign was effected, Natural Law as a system of rules imposed by a nonhuman source grew increasingly difficult to defend. The sovereign, artificial person of the state was bound only by voluntarily agreed-to Positive Laws, and was bound by them only so long as it continued to assent. Most importantly, as sovereign, these artificial persons (states) were considered the juridical equals of one another, and not subject to the judgment of one another. In the absence of judgment, of course, there could no longer be punishment. What remained, as we will see in Chapter 2, was reprisal.

The practice of international punishment, as Chapter 2 will show, went through a series of transformations before eventually being rejected. These transformations, and the ultimate rejection of the legitimacy of punishment in international society—representing fundamental shifts in the secondary and

jus cogens rules—correlate very closely with the rise of Positivism in law, the displacement of Natural Law, and the concomitant move toward a more rigid conception of sovereignty and the sovereign equality of states. Each of these conceptual and political changes made punishment progressively more difficult to justify, because each undermined one of the pillars justifying the practice. However, subsequent changes in the last 60 years have opened the door to new manifestations of discrete aspects of international punishment, but in ways rooted in a different normative framework. The remainder of this book details how individual component practices have reemerged to produce a new, still inchoate, form of international punishment as our understanding of sovereignty has again been reconfigured. Each of the remaining chapters of this book will address how portions of the old practice have come back in new form—the new form is not predicated upon the use of military force, however; it keeps punishment wholly within the realm of legal practices.[14]

As we have seen telegraphically already, there were three main components to classical international punishment: absolutely and universally binding nonconsensual rules, universal standing to punish those who violate the rules without regard to injury or interest, and an understanding of sovereignty without implications of inviolability or the sort of immunity from judgment that comes from juridical equality. Chapters 3 through 6 will each address developments in international law and international politics that seem to indicate a return to the punitive ethos characteristic of the late Renaissance and early modern period.

Somewhat paradoxically, considering the key explanatory role that *jus cogens* plays here, the subject matter of Chapter 3 is *jus cogens* itself. There is obviously a certain amount of circularity—if not question begging—in using the concept of *jus cogens* to explain the workings of *jus cogens*. But it is important to recognize that in the period of Positivist Voluntarism's greatest dominance, the concept of norms peremptory to all others disappeared from international law, even if in practical terms the sovereignty-Positivism normative complex was treated as outweighing other norms. The very introduction

of *jus cogens* into the discourse of international law represented a fundamental change in the body of *jus cogens* rules of international society.

There is nothing *per se* punitive about *jus cogens;* indeed, the majority of rules of all characters are not directly concerned with punishment. The fact remains, however, that one of the pillars of international punishment has returned, albeit in attenuated form. The larger purpose of Chapter 3 will be to explain how we can conceptualize categorical obligation in a still predominantly Voluntarist setting. On its face, these two notions are all but antithetical; can an obligation be both indefeasible and voluntary? How can a rule of Positive Law be as absolute and exceptionless as a rule of the Law of Nature?

The first pillar of international punishment was absolute rules of universal scope. The second—logically dependent upon the first—was the universal standing to enforce those rules. This pillar also tumbled under challenge from Positivist Voluntarism. Modern international law has conceptualized obligations as bilateral in character even when the instruments declaring them were multilateral in scope. International law does not generally understand obligations to be owed to the community of states at large. Standing to seek redress for the violation of a rule was (and remains) overwhelmingly limited only to parties directly and materially injured by the violation. There was nothing necessary about this: bilateral agreements were simply more common historically, and bilateral obligation was the cognitive framework within which early multilateral agreements were formulated, and this conceptualization has been utilized ever since.

As we will see in Chapter 4, the last few decades have seen the enunciation—if not clear-cut application—of a new manifestation (admittedly with hesitation) of the second pillar. Since the 1970s, international law has recognized the existence of obligations *erga omnes,* obligations that are owed to the international community generally. Some have postulated that violation of these obligations, since they are owed to the international community generally, gives rise to general standing to enforce them, namely, to the *actio popularis.* Based on a practice from Roman law, the *actio popularis* is an action brought