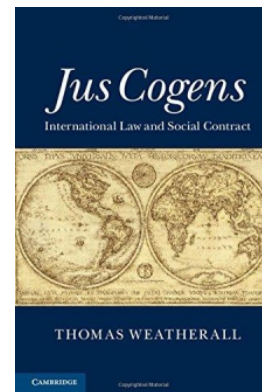


Book Review

Title : *Jus Cogens* - International Law and Social Contract
Author : Thomas Weatherall
Publisher : Cambridge University Press, 2015
Book Reviewer : Irawati Handayani*



This book is based on the doctoral thesis completed by the author as an International Scholar of the Cambridge Overseas Trust at the University of Cambridge. The main idea of the book lies on the fact that *jus cogens* still becomes one of the most complex doctrines in contemporary international law. The legal foundation of *jus cogens* is still questionable, whether it lies on natural law, positive law, or even to higher or divine origin. However, there is general agreement that *jus cogens* represents the fundamental value in international society or the so-called higher norm in international law.

This book offers an alternative perspective to answer the legal theory of *jus cogens*, since in practice *jus cogens* reveals numerous unresolved substantive and systemic issues. Author attempts to explore the theory of contract social, as he has opinion that peremptory norm is a product of a socialization of the post-war era and it does not conform to the dynamic of state voluntarism that characterize conventional international law. Therefore, author believes that in the context of *jus cogens*, the idea of social contract offers interplay of an individual-oriented normative structure, a state-based legal order, and values common to the international community as a whole.

The first part of this book discusses the core concept of peremptory norm of general international law (*jus cogens*). Chapter 1 introduces peremptory norms, obligation *erga omnes*, and international responsibility. The knowledge of these concepts is necessary to understand the operation of peremptory norm. In practical, obligation *erga omnes* concerns on the enforcement of *jus cogens* norm. In other words, obligation *erga omnes* derives from *jus cogens* as an obligation, concerning the enforcement of peremptory norms, owed by international community as a whole. Furthermore, the violation of *jus cogens* norms can also lead

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* Lecturer and Researcher at International Law Department, Faculty of Law Universitas Padjadjaran, Jl. Dipati Ukur No. 35 Bandung, S.H (Universitas Padjadjaran), LL.M. (Raoul Wallenberg Institute-Lund University Sweden), Dr. (Universitas Padjadjaran)

to state responsibility. Chapter 2 particularly discusses the theory of social contract and the possibility of its application to *jus cogens*. It is believed that enforcing *jus cogens* has been conceived as a requirement of an 'implied' social contract in international law, by which the enforcement of peremptory norms is delegated to the international community.

The second part of the book discusses the authority of *jus cogens*. This part explained the philosophical principle and legal practice to build arguments of the authority of peremptory norms of international law. Chapter 3 confronts the idea of authority by critically assesses the juridical construction the international community of state as a whole, the entity that accepts and recognizes the peremptory norm as clearly mentioned in Article 53 of the Vienna Convention on the Law of Treaties 1969. Practice and history reveal that the interests of the international community, implicated by the relations of states, are represented by the protection of human dignity. In addition, the interests of the international community of states as a whole that give rise to *jus cogens* are intended in safeguarding the most basic values and interest of mankind. Judge A. A. Cançado Trindade also confirmed on the importance of humanity that derives from human conscience in the formation of international law, which is shared by the international community as a whole and humankind.

Chapter 4 discusses the distinct role of human dignity as a general principle of law across four domains: domestic constitutional law, European Union Law, public international law, and *jus cogens*. This chapter discussed several cases that showed the connection between human dignity and *jus cogens*, for example, in the Corfu Channel (1949) case, International Court of Justice (ICJ) affirmed that Albania has the responsibility to inform ships traversing Albania's territorial waters and the existence of mine, specifically to British ship. The court has opinion that such obligation derives not from the laws of war codified in the Hague Convention 1907, but rather, from 'certain general and well-recognized principles' namely elementary consideration of humanity. The same tone is also showed in several others cases, in Armed Activities on the Territory of Congo case (2002), Military and Paramilitary Activities in and against Nicaragua case (1986), and Legality of the Threat or Use of Nuclear Weapons case (1996), etc. Chapter 5 applies the normative aspect of human dignity to account for considerations of morality in the doctrine of peremptory norms, ultimately leading to an explanation of the effect of morality in *jus cogens*. Chapter 6 is the conclusion of this part, which relates the authority of *jus cogens* as a product of the interests of the international community to the starting point of the theory of social contract.

The third part explains the material and formal sources of *jus cogens*, particularly discussing the sources of peremptory norms in international law.

Chapter 7 examines historical considerations relevant to understanding the normativity implicit in *jus cogens* as a category of non-derogable norm. Chapter 8 discusses the formal source of peremptory norm as indicated by Article 53 VCLT 1969 and how it is formally incorporated into positive international law. Chapter 9 further assesses the interplay of the material and formal sources of peremptory norm.

Part four, regarding peremptory norms and individual, develops a substantive conceptualization of the form of peremptory norms as they concern rights and duties incumbent upon the individual. This part begins with Chapter 10, which discusses the development of individual legal personality in international law and the subsequent crystallization of individual rights and duties in international sphere. Chapter 11 explores the material content of *jus cogens* to identify the peremptory norms accepted and recognized by the international community of states as a whole. Chapter 12 examines aspects of individual responsibility, both criminal and civil, for violations of peremptory norms as the principal locus of responsibility arising from *jus cogens* under international law. Chapter 13 as the final chapter of this part considers implications of the individual as the primary subject of peremptory norms and the way in which the content of *jus cogens* reflects the emergence of the social contract through historical exigencies.

Part five is about peremptory norms and the State. This part particularly discusses the legal effects of peremptory norms with respect to the state, an examination framed by obligations *erga omnes* arising from peremptory norms and responsibility for the breach. Chapter 14 discusses the performance of obligation *erga omnes* as the concept has evolved in contemporary practice. This includes consideration of the consequences for breaches of this obligation and the way in which these effects reflect structures that have emerged pursuant to the enforcement of peremptory norms. Chapter 15 then assesses the nature of state responsibility arising under *jus cogens* and its divergence from individuals, characterized by the principle of 'dual responsibility'. It is also considered as the effect of the *erga omnes* status of obligation for purposes of standing before the ICJ, as well as the jurisdictional immunity of the state before domestic courts in cases concerning state responsibility for *jus cogens* violations. Chapter 16 discusses a case study of the crisis in Libya, which illustrates how the legal regime of obligation *erga omnes* arising from peremptory norms harmonizes with the governing institutions of the international community. Finally, Chapter 17 considers how the enforcement of *jus cogens* through obligation *erga omnes* reflects the operational elements of the social contract.

Part six is the final part of the book. It is about the International Law and Social Contract, which consolidates the findings of the previous chapters and in line with

the purpose of the book to reconcile an individual-oriented normative structure of public order with a state-based international legal order. Chapter 18 discussed the legal observations that are the primary focus of the book by reviewing understanding of the sources, authority, content, and enforcement of *jus cogens* developed herein. Chapter 19 considers the broader theoretical implication of the book. This entails a summary of academic frameworks related to *jus cogens*, a review of the way features of *jus cogens* are consistent with the social contract and an evaluation of public order exhibiting characteristics of a social contract in international law.

Overall, this book has successfully given another perspective on the foundation of *jus cogens* in international law. The author managed to explain the social contract theory and relate it with *jus cogens* as well as 'thinking out of the box' by using others theories besides natural law and positivism that are mainly used to explain the legal foundation of *jus cogens*.