

NORMS OF *JUS COGENS* AND OBLIGATIONS *ERGA OMNES*:
A REVIVAL OF THE NATURAL LAW TRADITION
IN INTERNATIONAL LAW?

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I. Introduction

"And what the international community perhaps lacks most of all today is not written Conventions or forums for self-expression - there is a profusion of these! - but a *moral law* and the courage to abide by it... The function of law is to give each person his due, to give him what is owed to him in justice. Law therefore has a strong moral implication. And *international law itself is founded on values*. The dignity of the person, or guaranteeing the rights of nations, for example, are moral principles before they are juridical norms. And this explains why it was philosophers and theologians who, between the fifteenth and sixteenth centuries, were the first theorists of international society and the precursors of an explicit recognition of *ius gentium*."²

The origins of international law and the paternity of its science are a controversial subject and will probably

remain so, as is often the case when trying to identify the beginnings of a social phenomenon and of its systematic study.³ However, John Paul II is certainly right in underlining the fundamental contribution to the theory of international society made by philosophers and theologians of the fifteenth and sixteenth centuries. The first name to come to mind is that of Francisco de Vitoria, a theologian and jurist of the Dominican order who taught at Salamanca in the first part of the sixteenth century.⁴

The reflection of leading Catholic theologians over the centuries had preceded Vitoria's contribution, a fact that should not be surprising if only one considers that, after all, "Catholics are internationalists by nature".⁵ Regarding international law, or at least the "law of nations" (*jus gentium*)⁶ and its relationship with natural law, the penetrating teaching of Thomas Aquinas, "light of the Church and the whole world",⁷ and before him Augustine, has influenced Catholic and non-Catholic writers of all subsequent ages.⁸

The purpose of this article is not to trace the history of the relationship between natural law and international law (including the Catholic contribution to

both). On this, the available literature is almost co-extensive with the writings on the foundation and history of international law, with the obvious difficulty of making a meaningful selection within such an ample bibliography.⁹ Rather, the purpose of this article is to summarize a few considerations on the concepts of international norms of *jus cogens* and obligations *erga omnes* from a particular perspective, namely the extent to which these two concepts (which today occupy a prominent place in the theory of international law) reflect natural law premises. A more substantial discussion of the two concepts can be found in the recent monograph that the present writer has dedicated to obligations *erga omnes*, which includes a fairly extensive treatment of *jus cogens* and of the relationship between the two concepts.¹⁰

A presentation at an annual meeting of the Society of Catholic Social Scientists, hosted in October 2001 by the Ave Maria School of Law, prompted the selection of the theme of this article. The Society of Catholic Social Scientists aims, as one of its statutory purposes, at bringing natural law "to bear on addressing the challenges and problems of modern culture".¹¹ Likewise, the informative literature of the Ave Maria School of Law encourages its

students to examine contemporary legal systems in light also of their "philosophical roots in natural law", in order to acquire a deeper understanding of the nature and function of such legal systems.¹²

The expression "natural law" is used with different meanings by different writers, and a "classical" natural law tradition is often contrasted with a "modern" one.¹³ Throughout this article, and unless otherwise indicated, the expression is not used in any technical sense. It is shorthand for suggesting, as Pope John Paul II did in the passage quoted at the beginning of this paragraph, that the law governing relations among States¹⁴ is founded on values¹⁵ and, like all law, has a strong moral implication.

II. International Norms of *Jus Cogens*

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is

permitted and which can be modified only by a subsequent norm of general international law having the same character."¹⁶

Article 53 of the Vienna Convention on the Law of Treaties,¹⁷ reproduced above, sets out one of the grounds of invalidity of international agreements, namely the conflict with a peremptory norm of general international law (*jus cogens*). The origins of the international concept of *jus cogens* are usually traced back to the earlier part of the twentieth century.¹⁸ Within the context of the codification (and progressive development) of the law of treaties, a reference to *jus cogens* was introduced into the draft of the Vienna Convention by the Special Rapporteur Sir Hersch Lauterpacht and subsequently refined by his successors, Sir Gerald Fitzmaurice and Sir Humphrey Waldock. At the Vienna Conference of 1969, an overwhelming majority of States voted in favor of what would become Article 53 in the final text.¹⁹ After the adoption of the Vienna Convention, and already before its entry into force, the rule embodied in Article 53 acquired wide acceptance. Today, the concept of *jus cogens* is generally accepted and often utilized outside its original context of the invalidity of international agreements.

In its commentary on what would then become Article 53, the International Law Commission (the body that prepared the draft of the Vienna Convention) explicitly stated that what gives peremptory character to an international norm is "the particular nature of the subject-matter with which it deals".²⁰ This comment reflects the idea of *jus cogens* shared by all the Special Rapporteurs on the law of treaties, and summarized by Fitzmaurice when he wrote that a common feature of peremptory norms is that they involve "not only legal rules but considerations of morals and of international good order".²¹ In other words, to be in conflict with *jus cogens*, a treaty must certainly be in breach of a rule of law (unlike the instances in which a treaty is allegedly in conflict with public morals, "*contra bonos mores*").²² At the same time, the very idea of *jus cogens* is that of rules of general international law which are peremptory not only because States concur that there must be no derogation from them, but also because of the very values that these rules are called to protect and promote.

The moral foundation of *jus cogens* was so obvious to some at least of the participants in the Vienna Conference

that they were not reluctant to refer expressly to natural law. For example, in one of his interventions, the Italian representative made the following remark:

"What rules had that absolute character? They were those which protected the human person and those which ensured the maintenance of peace and the existence and equality of States. That was an example of *jus naturalis* [*sic!*],²³ that was to say, the law which had its first source in mankind's awareness of the law. The positivists had believed that they had driven a wide breach into natural law. The doctrine of positivism had, however, led to the terrible experiences of the two world wars. It was not surprising, therefore, that the conscience of mankind demanded something else. The International Law Commission should be congratulated on its courage in placing article 50 [53 in the final text] in the convention."²⁴

Nor did these words constitute an isolated pronouncement at the Vienna Conference. For example, the representative of Ecuador observed:

"The subject matter of the rules of *jus cogens* reflected the legal achievements of mankind which together formed a

rational body of law, in a sense comparable to *jus naturalis* [sic!]. There was, however, a fundamental difference between the two, in that *jus naturalis* [sic!] was the point of departure, whereas the rational and universal rules of law were the point of arrival."²⁵

In this distinction between a "point of departure" and a "point of arrival", is there not an echo of the Thomistic distinction between *jus naturale* ("secundum absolutam sui considerationem") and *jus gentium* ("secundum aliquid quod ex ipso consequitur")?²⁶ It is unnecessary, though, to address here this question and others arising from the references to natural law that can be found in the preparatory works of the Vienna Convention, both at the stage of the diplomatic conference and in the previous phase conducted within the International Law Commission.²⁷ The fact is that, despite these references, in the text of Article 53 of the Vienna Convention the traces of natural law are feeble indeed, if at all present.

Article 53 is composed of two sentences. The first one provides for the special consequence attaching to derogation from a norm of *jus cogens*, namely the nullity of the treaty in question. The second one provides for the

tests that a norm has to satisfy to be a peremptory rule. The norm must be (a) "accepted and recognized by the international community of States as a whole" as a norm from which (b) "no derogation is permitted", and which (c) "can be modified only by a subsequent norm of general international law having the same character".

A trace of natural law behind this definition in Article 53 could perhaps be identified in the requirement that a peremptory rule not only be "accepted" (as a subjective act of the will of States) but also "recognized" (as an objective acknowledgment of its intrinsic moral value) as such. In reality, the preparatory works of the Vienna Convention reveal that the reference to "acceptance" and "recognition" was intended to mirror the terminology used, respectively for international custom and the general principles of law, in Article 38, paragraph 1, of the Statute of the International Court of Justice, an article traditionally interpreted as a statement of the sources of international law. If so, the issue (which cannot be explored here) becomes that of ascertaining the extent to which the "general principles of law recognized by civilized nations" may theoretically be, and effectively are, a source of peremptory rules and, if so, whether such

principles, while belonging to positive law, are declaratory of natural law.²⁸

The inadequacy of the formalistic definition of *jus cogens* in Article 53, namely a definition that insists on external tests of identification rather than the analysis of the values protected by the norm (preferably accompanied by the offering of a few examples, as had been suggested by the representative of the Holy See and others),²⁹ clearly emerges when attempting to explain the expression "international community of States as a whole". What does "as a whole" mean? Is it necessary that a peremptory norm be accepted and recognized as such by every single State? If not, when does a number of States short of unanimity constitute the international community "as a whole"? If what is necessary is acceptance and recognition by the "basic components" of the international community, how does one select these "basic components" without incurring in a totally arbitrary choice? And if unanimity is not required, and yet a dissenting State is still bound by a peremptory rule (lest the very idea and purpose of *jus cogens* be defeated), how can one account for this universal opposability of norms of *jus cogens* to all sovereign independent members of the international community,

irrespective of consent, without resorting to an underlying natural law theory?

Shortly after the Vienna Convention was adopted, the International Court of Justice (the principal judicial organ of the United Nations) ³⁰ followed a different approach when identifying, in the dictum partially reproduced at the start of the next paragraph, a category of international legal obligations known as "obligations *erga omnes*".³¹ The International Court gave four concrete examples of such obligations (these examples corresponding to the most frequently cited obligations deriving from norms of *jus cogens*) and wrote that that they are "by their very nature" the concern of all States. In other words, instead of a "test-oriented" approach such as that reflected in Article 53 of the Vienna Convention for *jus cogens*, the International Court adopted a "value-oriented" approach supported by practical examples.

III. International Obligations *Erga Omnes*

"... an essential distinction should be drawn between the obligations of a State towards the international community

as a whole, and those arising vis-à-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*... Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."³²

Two distinctive features of obligations *erga omnes* are immediately detectable upon even a cursory reading of the International Court's dictum: solidarity and universality. Solidarity, in this context, means that every State is deemed to have a legal interest in the protection of these obligations; universality means that obligations *erga omnes* are binding on all States without exception. This latter element entails a fundamental theoretical difficulty: how can universality (not in the sense that an obligation happens to be factually accepted by all States, but in the sense that it is binding on all States irrespective of consent) be reconciled with the structure of international

society, composed of independent entities giving rise, as a rule, to legal relations on a consensual basis? In other words, what is the basis for the universal opposability of obligations *erga omnes*?

The International Court had confronted a similar issue, albeit in different terms, several years before its dictum on obligations *erga omnes*. In the *South West Africa* cases, the applicant States (Ethiopia and Liberia) maintained that a norm of "non-discrimination" or "non-separation" had emerged in international law and was opposable to all States without exception (including South Africa as the mandatory for South West Africa). In a passage from the pleadings, the applicants' position was articulated as follows:

"the norm of non-discrimination and non-separation involves the promotion of common interests and collective interests of States, and of the organized international community taken as a whole. These are, moreover, common interests which rest upon a widely shared and deeply felt and often eloquently expressed humanitarian conviction. In this respect, apartheid corresponds to genocide, and the nature of the law-creating process in response to both has been

remarkably similar: one in which the collective will of the international community has been shocked into virtual unanimity, and in which the moral basis of law is most visible... If the offender is allowed to avoid the legal condemnation of his action by stating a protest, then international law is rendered impotent in the face of a grave challenge to the values underlying the international social order."³³

Hence one of the grounds on which the applicant States relied in their argument was the "moral basis" embodied in the international norm of "non-discrimination" or "non-separation", aimed at promoting the "common interests of States, and of the organized international community taken as a whole". They also referred to certain elements of similarity between the protection from racial discrimination and the prohibition of genocide.

In an advisory opinion of almost twenty years earlier, the International Court wrote that, by adopting a resolution on the crime of genocide, the General Assembly of the United Nations had intended to condemn genocide as a crime against moral law and the spirit and aims of the United Nations, and that later a Genocide Convention had

been adopted for a purely humanitarian and civilizing purpose in the common interest of States. From this, the International Court concluded that the principles underlying the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligation".³⁴

In the *South West Africa* cases (Second Phase), the International Court did not pronounce on these elements of analogy between the prohibition of genocide and the protection from racial discrimination, or on the question of the opposability *erga omnes* of the norm of "non-discrimination". Actually, it did not pronounce at all on the merits of the dispute because it found, on the casting vote of its president, that the applicant States lacked standing. Some of the judges, however, examined the merits of the issues raised by the parties in the course of the proceedings. In his dissenting opinion, Judge Tanaka (a "pious Catholic" and a "man of strong convictions")³⁵ discussed in great detail the prohibition of racial discrimination.³⁶

The starting point in his reasoning was that human rights derive from the very concept of a person. States do

not create human rights, but only confirm their existence. Thus, human rights exist independently of the will of States. From this it follows that "States which do not recognize this principle [i.e. the protection of human rights] or even deny its existence are nevertheless subject to its rule." On this ground, Judge Tanaka concluded that the prohibition of racial discrimination, which is "in itself" contrary to the principle of equality among human beings, is opposable to all States.³⁷ In other words, the binding effect *erga omnes* of the prohibition of racial discrimination derives from the underlying moral and social values that the prohibition is meant to protect, as reflected in the recognition by States of this prohibition.

In broader terms, the universal opposability of the international obligations which, like the prohibition of racial discrimination, are *erga omnes* rests essentially on a moral foundation. In its dictum, the International Court wrote that certain obligations are the concern of all States (are *erga omnes*) "[b]y their very nature", thus requiring that the "nature" of a particular obligation, namely its essential qualities and properties, be examined to ascertain whether the obligation in question is *erga omnes*.³⁸

Instead of moving from the "pessimistic" observation of the differences within the international community,³⁹ and insisting on a formal test of recognition and acceptance by the community "as a whole", as required for norms of *jus cogens* pursuant to Article 53 of the Vienna Convention, the International Court sought what unites the international community, and took as a starting point the realistic acknowledgment that every obligation has a "nature" that can be known and studied. (This different approach can be explained, at least in part, in light of the different process of decision-making followed by a court as opposed to a diplomatic conference, as well as the specific problems attaching to treaty nullity, which is the context within which *jus cogens* was addressed at the Vienna Conference.)

From the words and examples used by the International Court, it is clear that the rationale for the universal opposability of obligations *erga omnes* is not to be found in an extrinsic principle, such as the presumed or effective predominance of the will of the majority of States or the more powerful ones over a dissenting minority, but in the universal validity of the moral values

that these obligations are meant to protect. Each of the four obligations *erga omnes* listed by the International Court reflects an exceptionless moral norm (or moral absolute)⁴⁰ prohibiting an act which, in moral terms, is intrinsically evil (*malum in se*).⁴¹ Quoting a passage of the pastoral constitution on the Church in the modern world *Gaudium et Spes* (of December 7, 1965), the encyclical letter *Veritatis Splendor* (of August 6, 1993) gives in paragraph 80 the following examples of intrinsic evils:

"[w]hatever is hostile to life itself, such as any kind of homicide, genocide, abortion, euthanasia and voluntary suicide; whatever violates the integrity of the human person, such as mutilation, physical and mental torture and attempts to coerce the spirit; whatever is offensive to human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution and trafficking in women and children; degrading conditions of work which treat labourers as mere instruments of profit, and not as free responsible persons".

The three goods identified in this list, namely life, physical and mental integrity, and human dignity, are essentially those protected by the four examples of

obligations *erga omnes* given by the International Court in 1970. With respect to the specific evils cited by the International Court, *Gaudium et Spes* had condemned genocide and slavery in paragraph 27, racial discrimination in paragraph 29, and war in paragraph 82.⁴²

No State can elude the binding force of these specific prohibitions, not only because States accept and recognize that it must be so, but also and more fundamentally because nobody can claim special exemptions from moral absolutes. This line of reasoning is entirely convincing, unless one is willing to take a "short-sighted" view of rigid separation between law and morals,⁴³ which the International Court seems to have rejected in its dictum on obligations *erga omnes*.

IV. Conclusions

"International law cannot be the law of the stronger, nor that of a simple majority of States, nor even that of an international organization. It must be the law which is in conformity with the principles of the natural law and of

the moral law, which are always binding upon parties in conflict and in the various questions in dispute.”⁴⁴

Is not there a risk that the lofty notions of *jus cogens* and obligations *erga omnes* might be abused, especially in an age of moral lassitude, and become an instrument for imposing questionable values (if not counter-values) on all States? Conversely, might not these notions be unduly neglected on the ground that it is difficult, if not impossible, that the recognition of the “nature” of an international obligation occur within the pluralistic society, in which States have different values and political aims?

Regarding the risk of abuse, the Vienna Conference has established strict tests of norms of *jus cogens*. While not providing, as was mentioned earlier, a convincing criterion for identifying peremptory rules, these tests may provide a safeguard against unfounded claims on the nullity of a treaty allegedly derogating from *jus cogens*. As to obligations *erga omnes*, a study of the practice of States, international judicial decisions and the literature on the four examples given by the International Court, and the subsequent comparison of these examples with one another,

reveals that the obligations *erga omnes* identified by the International Court (a) are narrowly defined prohibitions deriving from rules of general international law belonging to *jus cogens*; (b) are codified by international treaties to which a high number of States have become parties; (c) are instrumental to the main political objectives of the present time (the preservation of peace and the promotion of fundamental human rights);⁴⁵ and (d) reflect basic moral values, first and foremost life and human dignity. Hence the International Court has set clear boundaries to a category of international obligations that are not to be multiplied freely but to be identified rigorously.

On the other hand, regarding the risk of neglect based on the difficulty of acknowledging objective moral values within the pluralistic society of States, similar difficulties were encountered by the representatives of different human traditions who were called to contribute to the elaboration of a basic human rights instrument of the present time, the Universal Declaration of Human Rights.⁴⁶ Despite their differences, these representatives succeeded in agreeing on the final text of the Universal Declaration. As one of them, the French philosopher and influential Catholic intellectual Jacques Maritain, has remarked, this

agreement on common principles of action was possible because it was not subject to a concurrent agreement on their underlying premises.⁴⁷ (In making this remark, Maritain was not denying, of course, the importance of seeking and finding the truth about the underlying premises.)

Likewise, in the *Barcelona Traction* case, judges representing the "main forms of civilization" and the "principal legal systems of the world"⁴⁸ were able to agree on the concept of obligations *erga omnes* (and providing four concrete examples), thus showing that the pluralistic society of States can accommodate the recognition of international obligations which protect basic moral values and are binding on every State without exception. On this point, the present writer would go even farther and submit that this recognition, today more than ever, is a precondition of any meaningful dialogue among the different components of the international community,⁴⁹ and more generally of any fruitful dialogue among cultures.⁵⁰

In his masterly treatise on law, when responding to the question whether natural law is the same in all men, Aquinas observes that, with respect to the conclusions from

general principles, in some cases there may be a failure both as to rectitude, by reason of certain obstacles, and as to knowledge, because in some the reason is perverted by passion, or evil habit, or an evil disposition of nature.⁵¹ Likewise, the problem of the possible abuse or neglect of norms of *jus cogens* and obligations *erga omnes* is not, ultimately, one of law but of human virtue, and more specifically of courageous conformity to the moral law, as recalled by Pope John Paul II in the two passages reported in the introduction and the conclusions of this article.

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² *Address of His Holiness Pope John Paul II in response to the new year greetings of the diplomatic corps accredited to the Holy See*, January 13, 1997, electronically available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1997/documents/hf_jp-ii_spe_13011997_diplomatic-corps_en.html.

³ It is unnecessary to provide here extensive bibliographical references on the origins of international society. A thought-provoking

article is Ago, "Pluralism and the Origins of the International Community", 3 *Italian Yearbook of International Law* (1977), pp. 3-30. Among the more recent monographs on international society and international legal norms, in medieval times and even before, see Battaglini, *Il diritto internazionale come sistema di diritto comune*, 1999; Bederman, *International Law in Antiquity*, 2001.

⁴ Within the vast bibliography on the life and work of Vitoria, see Hernandez Martin, *Francisco de Vitoria. Vida y pensamiento internacionalista*, 1995; Barcia Trelles, "Francisco de Vitoria et l'École moderne du Droit international", 17 *Hague Recueil* (1927, II), pp. 113-337; Brown Scott, *The Spanish Origin of International Law. Francisco de Vitoria and His Law of Nations*, 1934. See also (on Vitoria and, more generally, the Spanish school), Grewe, *The Epochs of International Law*, 2000, pp. 186-95; Truyol y Serra, *Histoire du droit international public*, 1995, pp. 48-55; Miaja de la Muela, "El derecho 'totius orbis' en el pensamiento de Francisco de Vitoria", 18 *Revista Espanola de Derecho Internacional* (1965), pp. 341-64; Donohue, "Vitoria's Universalism and the World Rule of Law", 6 *Catholic Lawyer* (1960), pp. 200-19; *Actualité de la pensée juridique de Francisco de Vitoria*, 1988; van Hecke (ed.), *L'Espagne et la formation du droit des gens moderne*, 1988; Araceli Mangas Martin (ed.), *La escuela de Salamanca y el derecho internacional en América. Del pasado al futuro*, 1993.

⁵ Martin, "What the Church Tries to Do at International Conferences", 25 *Origins* 1995 (No. 6), p. 97.

⁶ The expressions *jus gentium*, *jus inter gentes*, "law of nations", and "international law", would each require an attentive analysis from a historical perspective, a task that cannot even be attempted within the limits of the few pages of this article.

⁷ Letter of Pope Paul VI, dated November 20, 1974, on the occasion of the seventh centenary of the death of Saint Thomas Aquinas. The expression used by Pope Paul VI is close to the one Pope Leo XIII had applied to Aquinas in the letter encyclical *Aeterni Patris*, dated August 4, 1879: "chief and master of all towers".

⁸ See Nussbaum, *A Concise History of the Law of Nations*, 1947, pp. 40-5. See also Grewe, *The Epochs of International Law*, pp. 83-7. On the international law teaching of Aquinas, see Bernareggi, "La filosofia del diritto internazionale in S. Tommaso", *San Tommaso d'Aquino (Pubblicazione dell'Università del Sacro Cuore commemorativa del VI centenario della canonizzazione)* (1923, II), pp. 192-227. On Augustine, see Kisters, "Le 'droit des gens' chez Saint Augustin", 60 *Revue de droit international et de législation comparée* (1933, 3rd series), pp. 31-6, 282-317 and 634-76.

⁹ As a first approach, one can refer to the following works: Eppstein, *The Catholic Tradition of the Law of Nations*, 1935; Messineo, *Il diritto internazionale nella dottrina cattolica*, 1944; Le Fur, "La théorie du droit naturel depuis le XVIIIe siècle et la doctrine moderne", 18 *Hague Recueil* (1927, III), pp. 263-441; Walsh, "Les principes fondamentaux de la vie internationale", 53 *ibid.* (1935, III), pp. 101-73; Lord Wright, "Natural Law and International Law", Sayre

(ed.), *Interpretations of Modern Legal Philosophies. Essays in Honor of Roscoe Pound*, 1947, pp. 794-807; Moreau-Reibel, "Le droit de la société interhumaine et le *jus gentium*", 77 *Hague Recueil* (1950, II), pp. 485-96; Guggenheim, "Jus gentium, jus naturae, jus civile et la communauté internationale issue de la divisio regnorum intervenue au cours des 12e et 13e siècles", 7 *Comunicazioni e studi* (1955), pp. 1-31; Id., "Les Origines de la Notion autonome du Droit des Gens", *Symbolae Verzijl*, 1958, pp. 177-89; O'Connell, "Natural Law and the International Community", 5 *Catholic Lawyer* (1959), pp. 207-17; Del Vecchio, "Osservazioni sui rapporti tra giusnaturalismo e diritto internazionale", 38 *Rivista internazionale di filosofia del diritto* (1961), pp. 341-4; Scheuner, "Ius gentium and the Present Development of International Law", *Volkenrechtelijke Opstellen. Aangeboden aan Professor Dr. Gesina H. J. Van Der Molen*, 1962, pp. 123-36; Miaja de la Muela, "La recepción del derecho natural en el orden jurídico internacional", *Filosofía y Derecho. Estudios J. Corts Grau*, 1977, I, pp. 603-36; Verdross and Koeck, "Natural Law: The Tradition Of Universal Reason and Authority", Macdonald and Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, 1983, pp. 17-50; Schall, "Natural Law and the Law of Nations: Some Theoretical Considerations", 15 *Fordham International Law Journal* (1991-1992), pp. 997-1030; Dominicé, "Le grand retour du droit naturel en droit des gens", *Mélanges en l'honneur de Jacques-Michel Grossen*, 1992, pp. 399-409; Peirano-Basso, "Naturaleza y fundamento del derecho internacional público", *International Law in an Evolving World. Liber Amicorum in Tribute to Professor Eduardo Jiménez de Aréchaga*, 1994, I, pp. 181-208; Puente Egidio, "Natural Law",

Bernhardt (ed.), *Encyclopedia of Public International Law*, III, 1997, pp. 515-20.

¹⁰ Ragazzi, *The Concept of International Obligations Erga Omnes*, 1997 (hardback) and 2000 (paperback).

¹¹ Constitution of the Society of Catholic Social Scientists, Article Two (Purpose).

¹² See the informative material available through the web site of the Ave Maria School of Law, at <www.avemarialaw.edu>. In June 2000, the Law School co-sponsored, with the Sacred Heart Major Seminary, a conference on *St. Thomas Aquinas and the Natural Law Tradition*.

¹³ See Finnis, "Natural Law: The Classical Tradition", Coleman and Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 2002, pp. 1-8; Bix, "Natural Law: the Modern Tradition", *ibid.*, pp. 61-3.

¹⁴ For reasons of convenience, throughout this writing the term "State" is used as synonymous with "subject of international law", unless the context otherwise requires.

¹⁵ The term "value", which denotes something that has intrinsic worth, becomes rather meaningless in various contexts precisely because it comprises too much. However, even with its limitations, the term refers, as Cardinal Lustiger has observed, "to a very important dimension of human reality: ethics". (Lustiger, "La personne devant le

cardinal Archevêque de Paris", *Recueil Dalloz Sirey* (1995, No. 2), p. 7.)

¹⁶ Article 53 of the Vienna Convention on the Law of Treaties.

¹⁷ The Vienna Convention was adopted on May 23, 1969, and entered into force on January 27, 1980. At the time of writing (May 2002), ninety-four States have become parties to it.

¹⁸ Already in 1914, Anzilotti had distinguished between peremptory and dispositive norms of international law without, however, using the expression "*jus cogens*" ("*Intorno agli effetti delle modificazioni del corso di un fiume sul confine fra due Stati*", 8 *Rivista di diritto internazionale* (1914), p. 78). The expression was then used by several writers, such as Verdross, von der Heydte and Salvioli, in the inter-war period.

¹⁹ Article 50 (which was then renumbered as Article 53 in the final text) was adopted by eighty-seven votes to eight, with twelve abstentions (*U.N.C.L.T. Off. Recs., Second Session, Vienna, 9 April - 22 May 1969, Summary records of the plenary meetings and of the Committee of the Whole*, pp. 106-7).

²⁰ "Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at its Eighteenth Session", *U.N.C.L.T. Off. Recs., First and second sessions, Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969, Documents of the Conference*, p. 67, para. 2.

²¹ "Third Report on the Law of Treaties" (Doc.A/CN.4/115), p. 41, para. 76.

²² In his "Third Report", Fitzmaurice clearly distinguished between "legality of the object (conflict with international law)" (Article 17) and "ethics of the object" (Article 20). On treaties *contra bonos mores*, see Monaco, "Cours général sur des Principes de droit international public", 125 Hague *Recueil* (1968, III), pp. 153-4 (including the bibliographical references in note 8).

²³ Despite the occasional use of Latin expressions, no firm command of the language of Julian, Papinian, and the other classic Roman jurists (as well as the medieval glossators), was displayed at the Vienna Conference. For example, in the quoted passage, the correct expression should have been "*jus naturale*" or "*jus naturae*", not "*jus naturalis*", for the obvious reason that the gender of the noun "*jus*" is neuter. Regrettably, the situation is not rosy within other contexts either. At the European Synod of 1999, the current Pontiff jokingly noted the small number of addresses in Latin (one exception being the address by Archbishop Janis Pujtas of Riga, Latvia) with the words: "The poor Latin language, Riga seems to be its last refuge". (See the October 10, 1999, issue of the international news agency Zenit, at <http://www.zenit.org/english>.) In November 1978, shortly after his elevation to the Pontificate, John Paul II, while lamenting that the current times do not seem to be favorable to Latin, borrowed Cicero's words that it is not so much a matter of pride to know Latin, but a matter of shame not to know it! (Quoting *Brutus*, 140, in the speech to the

participants in the "Certamen Vaticanum", electronically available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1978/documents/hf_jp-ii_spe_19781127_certamen-vaticanum_lt.html.)

²⁴ U.N.C.L.T. *Off. Recs., First Session, Vienna, 26 March - 24 May 1968, Summary records of the plenary meetings and of the Committee of the Whole*, p. 311, para. 42 (intervention by Mr. Maresca).

²⁵ U.N.C.L.T. *Off. Recs., First Session*, p. 320, para. 43 (intervention by Mr. Garcia-Ortiz).

²⁶ *Summa Theologiae*, IIa IIae, q. 57, a. 3.

²⁷ Among the interventions by members of the International Law Commission, reflecting on the intrinsic nature of peremptory rules and their significance for a critical evaluation of legal positivism, see, for example, those by de Luna, reproduced in the *Yearbook of the International Law Commission* (1963, I), pp. 71-2 (paras. 58-66), 75 (paras. 19-21), and *ibid.* (1966, I), p. 39 (paras. 31-5).

²⁸ For bibliographical references on the sources of international law and, in particular, on the general principles of law, see Ragazzi, *The Concept of International Obligations Erga Omnes*, p. 53, footnote 41, and p. 103, footnote 44, respectively.

²⁹ The representative of the Holy See suggested that a principle of interpretation such as the primacy of human rights would give the

concept of *jus cogens* a more concrete value. See *U.N.C.L.T. Off. Recs., First Session*, pp. 258-9, para. 75.

³⁰ See Article 92 of the United Nations Charter.

³¹ The Latin expression "*erga omnes*" means "towards all". The term "*omnes*" can have either a collective or a distributive connotation. (See Glare (ed.), *Oxford Latin Dictionary*, 1982, pp. 1248-9 ("*omnis*").) As applied to the concept of obligations *erga omnes*, this double connotation raises the issue whether the international community as such can be bound by obligations *erga omnes* and be the bearer of the corresponding rights of protection.

³² International Court of Justice, Judgment, *Barcelona Traction* (Second Phase), 1970, paras. 33-4.

³³ ICJ Pleadings, *South West Africa*, IX, p. 351.

³⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 23.

³⁵ Oda, "Kotaro Tanaka (1890-1974)", 56 *Annuaire de l'Institut de Droit International* (1975), pp. 593-5. On Tanaka's philosophical approach, see Hanzawa, "Kotaro Tanaka as a Natural Law Theorist", 7 *Vera Lex* 1987 (No. 1), p. 5. For additional biographical and bibliographical references on Tanaka, see Ragazzi, "International Obligations *Erga Omnes*: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions", Goodwin-Gill

and Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie*, 1999, pp. 459-60, footnote 17.

³⁶ In reproducing, in his *Basic Documents on Human Rights* (3rd edn., 1992), an extract from Judge Tanaka's opinion, Brownlie remarks that Judge Tanaka provided "what is probably the best exposition of the concept of equality in existing literature" (at p. 567).

³⁷ ICJ Reports, pp. 298 and 313-16.

³⁸ For Aristotle, "the nature of a thing is its end. For what each thing is when fully developed, we call its nature". (*The Complete Works (The Revised Oxford Translation)* (Barnes ed., 1984), 1252b (*Politics*).)

³⁹ This "pessimistic" perspective that inspired the drafting of Article 53 of the Vienna Convention was clearly indicated by Ago, the chairman of the Vienna Conference, in "The Concept of 'International Community as a Whole': A Guarantee to the Notion of State Crimes", Weiler, Cassese and Spinedi (eds.), *International Crimes of State. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, 1989, pp. 252-3.

⁴⁰ On moral absolutes, see Finnis, *Moral Absolutes. Tradition, Revision, and Truth*, 1991. See also Rescher, *Moral Absolutes. An Essay on the Nature and Rationale of Morality*, 1989; Tettamanzi, *Verità e libertà. Temi e prospettive di morale cristiana*, 1993, pp. 367-416; May, *An Introduction to Moral Theology*, 1994, pp. 107-53.

⁴¹ The distinction between *malum in se* and *malum prohibitum* dates back to Aristotle (*The Complete Works*, 1134b (*Nicomachean Ethics*)). On the history of this distinction, see Pinckaers, *Ce qu'on ne peut jamais faire. La question des actes intrinsèquement mauvais. Histoire et discussion*, 2nd edn., 1995, especially pp. 20-66. The distinction is accepted, for example, in Blackstone, *Commentaries on the Laws of England* (A Facsimile of the First Edition of 1765-1769), I, 1979, pp. 57-8 (Introduction, Section II), but rejected, for example, in Kelsen, *General Theory of Law and State*, English trans. Wedberg, 1949, pp. 51-3 (Part One, chap. III.A).

⁴² For an English translation of *Gaudium et Spes*, see Abbott and Gallagher (eds.), *The Documents of Vatican II*, 1967, pp. 199-308.

⁴³ "positivism juridique à courte vue" (Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, 5th edn., 1994, p. 206, para. 132).

⁴⁴ *Address of His Holiness Pope John Paul II in reply to the new year greetings of the diplomatic corps accredited to the Holy See*, January 11, 1999, electronically available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1999/documents/hf_jp-ii_spe_11011999_diplomatic-corps_en.html.

⁴⁵ Pursuant to the two opening paragraphs of the Charter, the "Peoples of the United Nations" are determined "to save succeeding generations from the scourge of war", and "to reaffirm faith in fundamental human rights".

⁴⁶ The Declaration was adopted by the United Nations General Assembly on December 10, 1948. See Eide *et alii* (eds.), *The Universal Declaration of Human Rights: A Commentary*, 1992. See also Morsink, *The Universal Declaration of Human Rights. Origins, Drafting and Intent*, 1999; Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights*, 2001.

⁴⁷ "Autour de la nouvelle déclaration universelle des droits de l'homme (Introduction aux textes réunis par l'Unesco, juillet-août 1948)", reproduced in Maritain, *Les droits de l'homme*, Mougel (ed.), 1989, pp. 125-37.

⁴⁸ See Article 9 of the Statute of the International Court.

⁴⁹ In his speech at the Louvre in May 1961, King Baudouin of Belgium said that there cannot be dialogue, in any human society, without the common recognition of certain supreme truths: "Nul dialogue n'est valable entre les hommes si ceux-ci ne communient pas à quelque vérité souveraine et reconnue par tous." (The Louvre speech is partially reproduced in "Baudouin Ier", *Le Soir*, Supplement of August 2, 1993, p. 16.) These words are all the more significant, as they were pronounced by a Head of State whose faithfulness to one such supreme truth, namely respect for human life from the very moment of conception, was severely put to the test. (See Suenens, *Le Roi Baudouin. Une vie qui nous parle*, 1995, pp. 126-8.)

⁵⁰ This point emerged clearly at a plenary session of the Congregation for the Doctrine of the Faith in January 2002. See the English translation of the Pope's Address electronically available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020118_dottrina-fede_en.html. Archbishop Tarcisio Bertone, secretary of the Congregation, observed: "In the Church and human society, the natural law was the platform of dialogue between believers and nonbelievers... Now, in a certain sense, this platform has sunk and there is no other instrument for comparison and dialogue than the despotic will of each individual or the so-called search for consensus of the majority, which leads to the adoption, including in legislation, of behavior that is very debatable." (See the January 14, 2002, issue of the international news agency Zenit, at <http://www.zenit.org/english>.)

⁵¹ "ut in paucioribus potest deficere et quantum ad rectitudinem, propter aliqua impedimenta... et etiam quantum ad notitiam; et hoc propter hoc quod aliqui habent depravatam rationem ex passione, seu ex mala consuetudine, seu ex mala habitudine naturae..." (*Summa Theologiae*, Ia IIae, q. 94, a. 4.)
