Normative IR Theory and the Legalization of International Politics: The dictates of humanity and of the public conscience as a vehicle for global justice

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I am looking forward to meeting you all and to our workshop.
Normative IR Theory and the Legalization of International Politics: The dictates of humanity and of the public conscience as a vehicle for global justice

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The purpose of this paper is to explore how normative political theory can be related to the debates concerning the legalization of IR. Modern IR theory largely sidelined questions of justice, partly because justice was considered an institutional virtue and anarchical international politics was said to lack the relevant institutions but also because justice was a normative idea and as such fell outside the purview of a largely positivist discipline. The empirical legalization literature has increasingly challenged the portrayal of IR as lacking relevant institutions and constructivist contributions to these debates have enriched our understanding of the normative context in which the constitution of the international legal order develops. Yet the gap between the legalization literature and that exploring questions of international justice remains significant. The convenors of this workshop in their call for papers identify, as a crucial problem, the failure of normative political theory to engage with the relevant facts of the international legal order and the failure of the empirical researchers to engage with the relevant normative debates. I want to begin by saying a few words about this very real gap in contemporary scholarship before looking at one way of bridging this divide. In the second part of this paper I develop an account of institutional moral reasoning that, I argue, enables us to explore the idea of international justice in its relation to the legalisation of international affairs and I explore the ways in which our account of justice must be disciplined by a proper respect for the law. Finally, I turn back to the law to explore the claim that
humanitarian and human rights norms have evolved to the point where radical legal and political reform is called for.

I

I want to start, not with the institutionalist literature on the legalization of international politics but with the constructivist critique of that literature. My purpose is not to rehearse the arguments that frame the discussions that we are likely to have over the course of our week in Münster. Rather I want to begin to explore the distance between the normative (understood in constructivist terms) and the normative (as commonly understood in moral terms).

The constructivist responses to the liberal institutionalist accounts of the legalization of international politics are, of course, widely critical of the very narrow view of the legal presented in their analysis. Martha Finnemore and Stephen Toope show that the institutionalists capture only what they term ‘legal bureaucratization’ and argue that normativity is to be found beyond the institutional, as narrowly defined, in the practices, traditions and beliefs of societies.¹ This urges us to look beyond treaty law to customary law, to consider law as process and to take account of interstitial law – ‘the implicit rules operating in and around explicit normative frameworks’.² Similarly Alexander Wendt shows that ‘causal depth’ requires that we embed an account of the

law ‘within broader historical contexts that construct its elements (preferences, beliefs and so on)’. At a basic level the requirement that we seek legal normativity in normative enquiry is simply a claim about causal depth (casting causality in constitutive terms). It is, as Wendt puts it, simply ‘part of what is going on in institutional design’. But there is, as most (if not all) constructivists recognise, a third use of the term normative involved in the analysis. A focus on social norms leads us to a discussion of ‘normative desirability’, to think about legitimacy and justice - the normative in the moral or ethical sense. As Finnemore and Toope point out,

Legal claims are legitimate and persuasive only if they are rooted in reasoned argument that creates analogies with past practise, demonstrates congruence with the overall systemic logic of existing law and attends to the contemporary social aspirations of the larger moral fabric of society.

The politics of international law is intimately tied up with the debates surrounding the right, the good, the just, the legitimate. Indeed Wendt’s critique of the rational design model of international law points out that all the really interesting political questions are closed to the rationalist and I want to reinforce this point about the inherently moral element of the normative debates surrounding legal normativity by quoting from Wendt’s critique of positivist position on institutional legal design.

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2 Finnemore and Toope, ‘Alternatives’, p. 188.
4 Wendt, ‘Driving with the Rearview Mirror’, p. 413.
(1) Who should be the designer? In most cases states are the designers. Is this a good thing? What about those affected by international institutions? (2) What values should states pursue in their designs? Wealth? Power? Justice? (3) For whom should states pursue these values? Nations? Civilisations? Humanity? (4) What should be their time horizon? Should States care about future generations, and if so at what discount rate? (5) Should institutional designs focus on outcomes or procedure? In sum what constitutes “the good” in a given situation to which designers should be aspiring? 

Wendt acknowledges that these questions fall outside the domain of social science and fall into the realm of normative political and international theory but he also acknowledges, as every constructivist or constitutive theory must, that such a separation is seriously problematic. It is not enough to broaden the understanding of what law is and to then fight shy of engaging with that element of the normative that is shown to be an essential part of an adequate understanding of the legalization of international politics simply because it seems to be resistant to the epistemological preferences of social scientists. Without engaging with the normative in this moral sense constructivism simply replaces the rationalist error of defining international law in terms of its institutionalisation with two further problems. The first is that the normative (in the sociological sense) is defined in terms of the effects attributed to the operative norms in society. This, as Jeffrey Legro points out, is tautological and has similar failings to the rationalist model. Some very important (in the sense of being widely and highly valued) norms may not ‘work’ at all (particularly in the face of

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7 Wendt, ‘Driving with the Rearview Mirror’, p.422.
8 ibid
Great Power conservatism) and some norms that do ‘work’ may have effects that are not normatively desirable\(^{10}\). The second problem is found in defining the normatively desirable (the just, the right, the good) in terms of dominant or widely held norms even if it is possible to identify in a non-controversial manner, such dominance. Would a universalisation of the ideals of slavery (as a matter of sociological fact) be normatively desirable? Could we even develop a critical vocabulary that allowed us to make that judgment? If we adopt such a vocabulary how do we relate it to the sociological and the legal?

It is this final set of questions that keeps normative IR theorists up at nights – not, I hope, because we are other-worldly but precisely because they arise in the context of any sensible discussion of the legalisation of international politics. Some political theorists feel able to ignore (as a matter of moral theory) the sociological or the legal. These scholars develop an account of justice, whether based on an account of human vulnerabilities,\(^{11}\) capabilities,\(^{12}\) moral powers\(^{13}\) or rights\(^{14}\) that tend to prioritise reason over politics in a bid to keep the contingent away from the moral. My concern with such approaches is that it removes moral thinking from the context in which questions of justice arise and in which solutions are negotiated. This can cause problems of accessibility, intelligibility, motivation and institutionalization. Put simply, principles

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\(^{10}\) Indeed I suspect that it would be possible to extend the work of Paul Diehl, Charlotte Ku and Daniel Zamora who identify an asymmetry between the normative (in the hard, legal sense) and operative systems of international law to identify an asymmetry between the sociologically normative and international law and the morally normative and international law (Diehl et al, ‘The Dynamics of International Law: The Interaction of Normative and Operating Systems’, *International Organization* (2003) 57, 1 in Simmons and Steinberg 2006).


\(^{13}\) J. Rawls, *The Law of Peoples* (Harvard University Press, 2001)

of justice have to be intelligible to those for whom they are to count as principles. When Onora O’Neill put this point in her *Toward Justice and Virtue* she argued that genuine accessibility requires us to abstract from the particular to a formal or modal understanding of the focus and scope of practical reasoning. This is, she argues, the only way to avoid idealisation – which can be loosely cast as deriving moral boundaries by favouring contingent political borders and, in the process, denying moral access to ‘outsiders’. One of the more obvious problems (and one that O’Neill acknowledges) is that such a formal account of ethics is not motivationally sufficient\(^\text{15}\) nor does it consider the theoretical importance of the fact that such principles have to be institutionalised (one of the central points that Buchanan’s moral theory of international law seeks to address).\(^\text{16}\) The alternative account of accessibility that I work with in this paper argues that institutionally oriented moral reasoning is vital. Here, as Hurrell notes, ‘tackling the problem of moral accessibility’ means that,

> arguments need to be related to the values, patterns of argument and normative structures of both international society and global society as part of a broad process of public justification and persuasion.\(^\text{17}\)

This point of view is not restricted to the constructivists of the English School. Buchanan’s neo-Kantian cosmopolitan theory also accepts the discipline of working within the normative structures of international society. In setting up his moral theory of international law he argues that,


There is of course much more to be said about this distinction but here I only draw attention to the different approaches for the purposes of setting up the debate. It is worth noting that the more abstract approach has the upper hand in most analytic political theory.
The requirement of moral accessibility signals that... ideal theory's principles can be satisfied or at least seriously approximated through a process that begins with the institutions and culture we now have and that does not involve unacceptable moral wrongdoing in the process of transition.  

What gets these theories off the ground is not an abstraction from the normative but an active engagement with the normative. The contention is that claims concerning global justice have developed a normative momentum within the practises of the international legal order. The normative momentum of such claims to global justice is linked to the development of community values within the international legal/political order which are said to ground the development of principles of global justice. The key to my analysis lies in understanding the ways that each argument treats the emergence of the community values in relation to the moral fabric of international society and how they are related to a realistic assessment of the normatively desirable development of international law.

II

Theories that share a commitment to connecting the three senses of the normative can be said to share an interest in institutional moral reasoning. The essence of institutional moral reasoning is recognition of the vital role that a critical understanding that moral debate plays in the social context in which the legal order is constituted. The key claim is that starting from within the discourses of international

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society gains the theorist of justice access to what Hurrell terms ‘a stable and shared framework for moral, legal and political debate’ as well as ‘a stable institutional framework for the idea of a global moral community’. Allen Buchanan, writing in a very different philosophical tradition, suggests that what he terms ‘institutional moral reasoning’ is an essential corrective to abstract moral theorizing on the one hand and the conservative positivism of most international law on the other.

The idea that institutional moral reasoning (to adopt Buchanan’s phrase rather than to endorse his complete idea) grants access to the moral, legal and political debates imposes certain constraints on the theoretical enterprise. The constraint might best be understood as the requirement that the theorist respect the institutional autonomy of the international legal order (ILO). The idea that we need to think in terms of the institutional autonomy of the ILO is found most clearly in the work of Christian Reus-Smit who uses this term and suggests that we need to focus on the distinctive ways that legal norms are used and the institutional process that enable or constitute the ‘socially sanctioned’ interpretation of such rules. However it is also found in Allen Buchanan’s argument that a moral theory of international law needs to be progressively conservative, which can be broadly understood in terms of setting realistic moral targets under the constraint of moral accessibility, in Andrew Hurrell’s account of moral accessibility as well as in Terry Nardin’s claim that the ‘moral

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20 A. Buchanan, *Justice* chapter 2 section II.
considerations used in the criticism of international law must be restricted to those inferred from the customs and usages of international society’.  

If the approach to questions of international justice unites these thinkers so does a shared focus on the question of whether the emergence of community values changes the nature of international justice to the extent that we can make claims about the normative desirability of reform of the international legal order. The debate here is fascinating. All claim that the legalisation of international politics exhibits normative and ethical changes. At one end of the spectrum we see Nardin’s recent claim that the idea of the rule of law has come to function as a non-instrumental moral constraint on state power.  

At the other end of this continuum we find Buchanan’s cosmopolitan claim that a moral theory of international law requires radical reform of the international legal order including the abolition of the state-consent model of international law. Between these two poles we find claims by solidarists, particularists and constitutive theorists that emphasise the cautious transition from order to justice. The community values in question are most often cast in terms of human rights. Parallels can be drawn between the work of legal scholars such as Meron who sees, in the incremental development of a hierarchy of norms in international law,’ the humanization of international law’ or with Falk who heralds a ‘second Grotian moment’ as a move from consent to global populism ‘encouraged by

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26 Buchanan, Justice, chapter 7.
27 An example here might be Nicholas Wheeler’s claim that developments in the law governing the use of force shows the emergence of a series of accepted mitigating arguments or legitimate exceptions to the application of the letter of the law rather than the development of new law. Wheeler, Saving Strangers: Humanitarian Intervention in International Society (Oxford University Press, 2001) see also Walzer’s reiterative theory of human rights, Frost’s account of the constitutive importance of human rights to contemporary account so global justice etc. REFS
progressive jurisprudence’ with Buchanan’s claim that human rights norms must be systematically applied to the legal order or Walzer’s claim that the reiteration of human rights requires a rethink of the structures of international society.

The claim, common to these positions, is that the evolution of humanitarian and human rights principles (understood in the broadest normative terms) exerts (or should exert) significant pressure toward reform of the international legal order. The work that this normative evolution carries is very significant. Take, as a brief example the role it plays in the cosmopolitanism of Buchanan and Pogge, the solidarism of Hurrell, and the particularism of Walzer. Both Buchanan and Pogge, in a bid to make their cosmopolitanism more accessible argue that they can get their argument running by simply extrapolating from the human rights commitments we have already made. Pogge argues that taking the commitments made in articles 25 and 28 of the Universal Declaration of Human Rights (UDHR) we require only a modest moral theory to generate broad ranging duties of distributive justice (Pogge 2002). Buchanan develops his account of the moral and political implications of international law in more detail examining both the contradictions inherent in the relationship between significant tract of traditional international law (effective sovereignty and recognition, the prohibition on the use of force for humanitarian purposes etc) and international human rights law (IHRL) and the growing tensions between superior norms and the state consent model. Indeed, despite articulating a clear neo-Kantian account of the natural duty of justice Buchanan makes the following claim.

I wish to emphasize that much of what I say in the remainder of this volume does not depend upon the argument there is a Natural Duty of Justice. My main concern is to develop a moral theory of international law that takes justice- understood as a respect for basic human rights – seriously. All that is required is the assumption that there are basic human rights.\(^\text{32}\)

There is a very similar pattern in Hurrell’s account the development of the global order that gives rise to global solidarism (Hurrell 2004:79-91). Like Buchanan, Hurrell identifies the evolution of international law from narrowly bilateral treaties to multilateral and universal instruments, instant customary law and superior norms as heralding the normative (in the moral sense) development towards global justice and a more coercive solidarism (Hurrell 2004:63).

It is not just the traditional universalisms of cosmopolitanism and solidarism that employ this form of argument. Michael Walzer argues that the development of human rights have effected the moral conscience of mankind in ways that have lead to important changes in international law, political practise and moral discourse. The set of ideas that are tied up with the phrase ‘the moral conscience of mankind are, I think, very important and it is a phrase that crops up in a wide variety of places in political thought, and legal scholarship and practise. In Walzer’s work this phrase underwrites the just use of military force - understood as preventive, pre-emptive and humanitarian warfare or the just exceptions to the non-interventionist ‘legalist

\(^{31}\) T. Pogge, *World Poverty and Human Rights*, Blackwell, 2002

\(^{32}\) Buchanan, *Justice*, p.97.
paradigm’. In his later work it also underpins the very thin but politically urgent rights to life and liberty that begin his account of human rights. Ultimately, in that startling essay ‘Governing the Globe’ we find Walzer musing on the next evolution of global society on the basis of these reiterated shared ideas. The very idea that there are acts that shock the conscience of mankind provides a sociological universalism which allows Walzer to make global normative and political claims. It is not, however, a phrase born of Walzer’s literary style. We find the phrase embedded in public international law from the 1899 Hague conventions and it has been an increasingly important feature of modern international law right up to the present day. We find it in the 1998 Rome Statute of the International Criminal Court and in the jurisprudence of the ICTY and ICJ. The claim that underpins the work of the normative theorists cited above draws directly on claims made in treaty and customary law, on the practise of courts and tribunals and in the development of legal doctrine about the development of the moral conscience of mankind. The claim, put simply, is that in the developing normative momentum of the conscience of mankind we find the evolution of a community of practise that revolves around the gradual ‘humanization’ of international law. It is to an exploration of this claim that I now turn.

III

The most celebrated instance of the idea of a moral conscience of humanity is found in the preamble to the UDHR which is built atop the recognition that ‘disregard and
contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind’. However the idea of a public conscience that is a universal moral compass has a much longer history. Michel Veuthey shows that public conscience in the context of humanitarian action finds expression throughout the ancient world. In modern thought expressions of this idea, including that found in the UDHR are regarded as expressions of the Martens clause which is found in the preamble to the 1899 Hague convention with respect to laws and customs of war on land. The clause, inserted by the Russian delegate to the conference (Freidrich Martens or Fyodor Fyodorovich Martens), reads,

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience;

The Martens clause became a permanent feature of humanitarian law. We find the phrase repeated in 1907 Hague convention and in the body of the 4 Geneva conventions of 1949 where it limits the right of contracting parties to denounce the convention (articles 63, 62, 142 and 158 respectively). It appears again in the preamble to the 1977 additional protocols and again in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons 1980. The idea is also

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used in military manuals – including those of the USA, UK and Germany.\textsuperscript{37} Equally importantly it has been referred to in key military tribunals from Nuremberg and Tokyo after World War 2 to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunals for Yugoslavia and Rwanda as well as in key opinions of the ICJ. While the history of this concept is tied into the history of humanitarian law it is fascinating to see how it developed a far broader usage. As the international community came to recognize that the idea that vulnerable individuals need protection extends beyond the classic instance of inter-state conflict the clause became more fully embedded in international moral and legal norms. Over time International Humanitarian law (IHL) and international human rights law (IHRL) became more integrated and the Martens clause became applicable both in peace and war and in internal as well as international conflicts. Further developments include the genesis of a category of crimes against humanity which spans and directly builds upon IHL and IHRL,\textsuperscript{38} as does the development of International Criminal Law where, according to the Rome statute of the ICC, ‘Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,’ parties have sought to establish individual criminal liability to such acts.\textsuperscript{39} Some commentators go further and argue that developments in these fields have led to the development of new hierarchies in public international law. Here we find claims concerning the development of obligations \textit{erga omnes}, ‘owed to the whole international community, with the practical consequence that the right to react to any violation of the norm is not confined to the

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state or states directly injured',\textsuperscript{40} the development of a hierarchy of fundamental human rights\textsuperscript{41} and the genesis of peremptory norms \textit{Jus Cogens} where certain rights begin to eclipse the traditional rights of sovereignty.\textsuperscript{42}

A more detailed version of the legal and political history of the martens clause is essential if we are to evaluate the normative claims of the scholars cited above. Even though there is a solid consensus on the elements of the history of Martens clause\textsuperscript{43} every step is subject to multiple interpretations and, once in the thick of the detail we begin to see the tentative, even fragile, development of a community of practice that speaks to questions of global justice. The questions that underpin the work of the subset of theorists of global justice that we are concerned with here focuses on the extent to which we can identify a progression towards a moral consensus that suggests an eclipse of norms of sovereignty with norms of humanity. What are the key constitutive moral, legal and political norms that drive development (or conservatism) within the global order? How can we best characterise the normative momentum of the Martens clause? To what extent have community values of global justice come to trump the norm of state consent? If we are to understand the normative force of this development we need a more detailed account of the growth of the concept, the areas where there is firm consensus and the characteristics of those areas that are still contested.

\textsuperscript{41} T. Meron ‘On a Hierarchy of International Human Rights’, \textit{American Journal of International Law} 80,1 (1986).
The original intention of Freidrich Martens was not to develop a normative principle at the heart of humanitarian law. As Cassese shows it was a diplomatic ploy designed to meet the concerns of the Great powers in respect of provisions relating to the legal status of citizens of occupied countries taking up arms (as partisans) against the occupying powers. Why, we must ask, did this neat diplomatic sidestep end up becoming a feature of all IHL that followed? This is true to the extent that in hindsight it is quite usual to note, as Cassese does, that,

Since 1907, the clause… has been hailed as a significant turning point in the history of international humanitarian law. It has been argued, in this respect, that it represents the first time in which the notion that there exist international legal rules embodying humanitarian considerations and that these rules are no less binding than those motivated by other (e.g. military or political) concerns was set forth.

Meron agrees, suggesting not only that the Martens clause has exerted ‘a powerful pull towards normativity’ but that the mutually reinforcing relationship between IHL and IHRL has done much to move PIL from an inter-state perspective to an individual rights perspective. The examination of case law and state practice by these two former presidents of the world court and appeals chamber judges for ICTY shows the clause, despite its humble origins, has indeed been used in a number of fascinating, and increasingly bold, ways.

45 Cassese, ‘The Martens Clause’, p.188.
46 Meron, Humanization, p.29.
47 Meron, Humanization, p.9.
Careful analysis suggests that there are a number of contending interpretations available to us. Cassese argues that the most radical ways in which scholars claim that the Martens clause has been invoked are,

1) the claim that ‘the clause has created two new sources of law; i.e. the laws of humanity and public conscience and
2) the claim that ‘the clause expresses notions that have motivated and inspired the development of international humanitarian law’.\(^{48}\)

To this we must add a third (drawing principally on the work of Meron and Shelton),

3) – the claim that the clause has inspired the ILO to develop a broad consensus on a core set of community values that have a higher status than most public international law but fall short of developing a solid global public policy or *ordre public* that would move the ILO beyond the voluntarist model of international law.

The claim that the clause creates new sources of law is by far the most radical. The most important sources of international law are treaty and custom (Article 38.1 Statute of the ICJ). What underpins the authority of those sources is that they are firmly grounded in state consent. The suggestion that the laws of humanity and dictates of public conscience form new sources of law implies that a universal moral code stands above state consent. What we need to determine is the extent to which

this is true. If we can discern an element of truth to this claim then we also need to be able to adequately characterize the nature and limitation of that universal moral element. The second claim is easier to defend and offers very interesting insights into how social and moral norms combine in the formation of a community of practice. However, as Meron shows, what started as a striking development in humanitarian law has had a huge impact on international law more generally. It is clearly the case that the clause has been an animating feature of the practise of courts and tribunals. Meron goes so far as to suggest that in the jurisprudence of authoritative bodies from the International Military Tribunals at Nuremburg (IMT) and Tokyo (IMTFE) to the ICTY and the ICC we can see that ‘the radiation, or the reforming effect, that human rights and humanitarian law has had, and is having, on other fields of public international law’ is ‘epitomized by the martens clause’.49

Both Cassese and Meron acknowledge (albeit to differing degrees) that the clause had an impact on the work of tribunals after WWII. As important as this was both show that the crucial moment in the development of the clause came as human rights principles came to be used to flesh out the meaning of the clause. As Meron shows, Cassese himself, when presiding judge for the Kupreskic case at the ICTY argued that the clause was too indeterminate to be seen as an independent source of international law but that the clause directs us to principles of humanity and public conscience when the law is imprecise50 Indeed his own article on the Martens clause offers an extended defence of that interpretation and it is interesting that he approvingly cites the K.W. case 1950 before Military Court of Brussels (Conseil de Guerre de Bruxelles) where the court referred to the clause and fleshed out the legal content of

the clause by reference to the UDHR. Here the court is linking up relevant sources of law rather than relying on the indeterminate source ‘created’ by the Martens clause and Cassese believes this to be a model of how the clause should be used. In this formulation the terms ‘dictates of humanity’ and ‘public conscience’ are given determinate meaning by treaty and custom as the traditional sources of law codified in the statute of the ICJ (art 38.1).

This linking up of IHL with the early elements of IHRL is vital and laid the groundwork for something very important to the later stages of this process. It is widely acknowledged now that the development of the central instruments of IHRL were both inspired by the humanitarianism of the martens clause (hence the preamble to the UDHR) and that various IHRL treaties not only duplicate their content, but are also designed to contribute additional specificity. Meron is clear that the jurisprudence of the *ad hoc* tribunals contributes to a significant change in humanitarian law that paved the way for the development of the ICC. Hague and Geneva law became linked to non-international conflicts (see especially *Tadic* interlocutory appeal 1995), individuals became criminally liable for rules that were previously thought to be the responsibility of states, through these developments there was an incremental criminalization of serious human rights abuses and, equally importantly we are witnessing the developing differentiation of norms. He writes,

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50 Meron, ‘The Martens Clause’, p. 86.
52 Freeman, ‘International Law’, *passim*.
Under the influence of the concepts of human rights, of obligations *erga omnes*…and of peremptory norms, international law has embarked on a limited transition from bilateral legal relations to a system based on community interests and objective normative relationships.\(^{54}\)

It is the development of this hierarchy of norms that suggests to some the subversion of the state-consent model of international law and its replacement with a hierarchy of universally binding, human rights based norms.

While the categories of norms *erga omnes* and *jus cogens* have been recognized in courts, treaties and the declaratory statements of key actors and scholars the idea that we have an uncontroversial hierarchy of norms is still hotly disputed. There is general consensus that reference to such norms has been largely (although not solely) doctrinal and rhetorical.\(^ {55}\) Nevertheless the way these categories respond to ‘community interests’ and issues of global public policy, core values such as ‘basic human rights’ and pressing challenges such as environmental change where international society can ill-afford to wait for consensual instruments to develop gives the political theorist interested in the development of justice rather than law in itself significant pause for thought. Nevertheless it is essential, if we are to respect the theoretical requirements of institutional autonomy or institutional moral reasoning laid out above that we tread very carefully on this crucial ground.

\(^{54}\) Meron, *Humanization*, p.187, p.256.

\(^{55}\) Meron, *Humanization*, p.262, Shelton’ Normative Hierarchy’ *passim*
Obligations *erga omnes* were first identified by the ICJ in *dicta* in the *Barcelona Traction* case in 1970. Such obligations are owed to the international community as a whole. This means that states not harmed by the wrongful act can pursue their legitimate interest in the protection of the rights involved. The court held that,

Such obligations derive...from the outlawing of acts of aggression, and of genocide, and also from the principles and rules governing basic rights of the human person including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered in to the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.⁵⁶

Such obligations generally aim at regulating action within the borders of a state (where no other state is harmed) and so the importance of the norms themselves validate the legal interest of unaffected states.⁵⁷ Similarly the category of *jus cogens*, recognized in article 53 of the Vienna convention on the law of treaties, develops that idea that there are certain peremptory norms from which there be no derogation. While the notion arose initially as a constraint on freedom of contract the more usual contemporary contention is that there are matters of global public policy or vital community values (often expressed in the style of the martens clause or basic human rights) that are so fundamental to the system that the law could not survive without them. There are two main ways in which this latter sense of *jus cogens* has been interpreted. Alexander Orakhelashvili draws the distinction between systemic and

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⁵⁶ In Meron, *Humanization*, p.259.
substantive norms where systemic norms are inherent in the character of the ILO. Thus such principles would be those such as *pacta sunt servanda*, recognition and consent.\(^{58}\) However, the more radical interpretation places the emphasis on the centrality of certain substantive norms such as the prohibition on the use of force, self-determination and fundamental human rights.\(^{59}\) The crucial issue here, of course, is the extent to which international law has moved beyond a voluntarist model of legal obligation in deference to what Charney terms universal law.\(^{60}\)

Much turns on the question of the source of peremptory norms. As Shelton shows ‘the source of peremptory norms has been variously attributed to state consent, natural law, necessity, international public order, and the development of constitutional principles. The different theories lead to considerably different content for *jus cogens* norms and consequences for their breach.’\(^{61}\) Both categories of superior norms have been the subject of huge controversy both in the formal fora of treaty drafting conventions and tribunals and in academic debate. States and courts have been careful to avoid relying on such claims and there are serious concerns about using the category for its primary purpose which appears to be to override the will of persistent objectors in the face of urgent community concerns, especially as that category ‘expands in an effort to further the common interests of humanity’.\(^{62}\) In fact this seems to be the nub of the issue. The theoretical wherewithal to develop a step change in the ILO appears to be in place but the principal actors remain opposed in word and

\(^{57}\) Shelton, ‘Normative Hierarchy’, p.318.  
deed to developing this potential without universal assent. This is seen in the objections to these universal categories by states, by the refusal of courts to explore the issues, in the continuing violation of norms such as those prohibiting torture and non-refoulement by states (such as the USA and UK) who have previously been at the forefront of the promulgation of key human rights claims and in the contradictory discourses of the interdependence and indivisibility of human rights as reaffirmed by the Vienna declaration and programme of action 1993 and that of fundamental or basic human rights in the doctrine of peremptory norms.

We do see the categories primarily in dissenting opinions and dicta (most famously perhaps in the ICJ’s Nuclear Weapons Advisory Opinion 1996) in assertions by international bodies such as the Commission on human rights and the UN committee on Economic, Social and Cultural Rights, and the proliferation of ‘soft-law’ or non-binding agreements. More recently, the jurisprudence of international, regional and domestic tribunals has begun, rather tentatively, to support the existence of peremptory norms albeit with limited consequences. In Armed Activities: Congo vs Rwanda before the ICJ in 2006 the court recognized that Rwandan reservations to the Racial discrimination Convention and the Genocide convention were illegitimate as the rights and obligation contained in those conventions were erga omnes but this alone did not over-ride the Rwandan reservation to ICJ jurisdiction. The court went on to point out that same holds for jus cogens (Judgment of 3rd February 2006:32). Here the categories are used to distinguish norms of particular importance but do not appear to

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override general principles of law – here in respect of reservation to jurisdiction and in *Arrest Warrant* 2002 in respect of sovereign immunity.\(^{68}\)

The conclusion we must surely draw here is that while the clause is a central part of the debate it does not have the presence to be a force for radical change. There is clear evidence that the institutional basis for a transition to a system where basic human rights act as international public policy is not yet in place. Nevertheless as Shelton concludes,

> The most significant positive aspect of this trend toward normative hierarchy is its reaffirmation of the link between law and ethics, in which law is one means to achieve the fundamental values of an international society. It remains to be determined, however, who will identify the fundamental values and by what process.\(^{69}\)

**IV**

None of this is intended to suggest that legal reform in the name of justice is not happening or not possible. We appear to be witnessing a juridification of global politics that has moved public international law in to new areas and given it new powers. Despite this many commentators remain understandably frustrated at the limits of effective action in response to humanitarian disaster and human rights abuses. The contradictory pull of much charter based law and our developing human

\(^{68}\) Ibid.

\(^{69}\) Ibid.
rights culture suggests that we need radical reform. If we return to the continuum of theoretical positions outlined in earlier sections the most radical argument is found in Buchanan’s cosmopolitan account of legal reform demanded by a human rights based conception of justice. Underpinning all the detailed and finely crafted argument about reforming the law relating to intervention, state legitimacy, recognition and secession is the claim that human rights can and must be used in the place of state-consent as the basis for legal reform. Buchanan’s position is useful here partly because it offers a very detailed argument on the themes addressed by this paper and partly because he develops a very clear commitment to institutional moral reasoning. His insistence that we do not have to engage with the moral argument in order to develop a human rights based conception of justice rests primarily on the claim that progressive conservatism is an essential element of reasoning about legal reform. However, it also rests on the thought that a cosmopolitan account of human rights and human rights as developed by the ILO are relevantly similar and therefore that a systematic application of the principles inherent in the ILO will yield cosmopolitan conclusions. However, if we look at the development of human rights law, at the ways in which it radiates into other key areas of international law and at the community of practise that has grown up around it the evidence suggests that a great deal of care has been taken to ensure that such considerations of humanity are compatible with pluralist rather than cosmopolitan institutional structures. The scholarly consensus seems to be that we must manage the development of this element of international law to avoid ‘foisting’ these substantive and systemic changes on reluctant parties. As Shelton notes,

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69 Shelton, ‘Normative Hierarchy’, p.323.
Although it may be appropriate today to recognize fundamental norms deriving from international public order, the extensive assertion of peremptory norms made by some writers and international tribunals, without presenting any evidence to support the claimed superior status of the norms under consideration, poses risks for the international legal order.\textsuperscript{73}

The incremental changes have given us the tools to act to prevent or react to gross violations of human rights, to hold individuals criminally liable, whatever their political position and this is both to be welcomed and supported as a yet unfinished project. However the normative risks that Shelton alludes to become clear in Meron’s warning that tell us that ‘the inflation of \textit{jus cogens} norms would imperil its very existence’.\textsuperscript{74} This is not so much because the legitimacy of community values is not apparent to the moral conscience of the international community but because the institutional processes by which the ideals are developed, specified and insitutionalised are not settled. Where these developments threaten this pluralism we find the greatest controversy, the most objections and the general refusal to engage with the processes that might institutionalise the superiority of human rights as an independent source of law or as a matter of global public policy. It is not the case that recalcitrant states are struggling against the tide of a new account of international justice and law. In the development of \textit{erga omnes} principles and crimes against humanity and, more tentatively, in the development of a substantive account of \textit{jus cogens} states have recognised a human rights based account of justice that underpins

\textsuperscript{73} Shelton, ‘Normative hierarchy’, p.292..
legal development. However, the international community has not developed, and there is little evidence to suggest that they will ever want to develop, in a systematic way, a human rights based global public policy. Indeed there is no clear sense within the ILO that the logic of the first stage of this legal development theoretically presumes the moral necessity of the second. The moral force of the cosmopolitan position does make this link but we should be concerned that this moves us beyond the range of institutional moral reasoning and from the moral, legal and political accessibility this grants. In simple terms in forcing the issue beyond the tolerance of international society may encourage a greater conservatism.

Accepting the limits of institutional moral reasoning does not, however, force us into an acceptance of the status quo. It is clear that community values are developing, however tentatively, a normative momentum of their own and it is on this basis that Hurrell gives us five reasons for expanded normative ambition and Falk demands a progressive jurisprudence. However both solidarists recognise that the idea of human rights or humanitarian based account of global justice rests on the idea of institutional moral reasoning – not just as a methodology for discovering the constitutive causes of change but as a nurturing or scaffolding device. Both recognise that international society has not transcended the pluralist model despite the range and seriousness of the problems and challenges we face and the universal moral standards we have developed to cope with them. In the structures of international society pluralism and solidarism, cosmopolitanism and statism all share a political and conceptual space (albeit uncomfortably).

74 Meron, Humanization, p.396.
So from whichever point one starts, the search for shared principles of justice will need to enquire into the social, moral and political conditions that make for a meaningful global moral community and the degree to which they correspond to what actually exists or is likely to exist. Global justice is not something that can be deduced from rational principles, nor can it be reflected in a single world view religious or secular; It is, rather, a negotiated product of dialogue and deliberation and therefore always subject to revision and re-evaluation.  

For Hurrell (and others who want to address the problem of moral accessibility through institutional moral reasoning) it is vital that political theorists in search of global justice continue to respect the institutional autonomy of international law and recognise that for all the important changes we can see the system is still pluralist, multilateralist and consent based. This does not mean that states still enjoy the old sovereign immunities of the Westphalian order. While political rhetoric, doctrine and elements of soft-law fall short of direct legal normativity all play a vital role in the development of a community of practise which Adler describes as a shared domain of knowledge, a sense of joint enterprise and mutual engagement and ‘a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols and discourse’. Examples of the power of such a community of practise can be found in the willingness of the legal order to find new custom emerging where there is far more in the way of opinio juris than state practice and also in the

75 Hurrell, Global Order, pp.43-45.
international community’s willingness to tolerate breaches of the law where humanitarian concerns necessitate it and in the increasing acknowledgment of community norms in political discourse. Theorists of global justice who require the sort of moral, legal and political accessibility that this inter-disciplinary argument offers need to recognise that there is a balance to be struck between moral theory, law and politics.

So where does this leave normative political theory? When Amartya Sen laid out his idea of justice he emphasised, in the opening passages, the importance of partial rather than transcendental approaches to justice. Here we are enjoined to work to resolve obvious injustice rather than aim at an ideal institutional expression of justice. A casuistical, incremental and partial approach seems to me to have the potential to remain within the bounds of institutional moral reasoning and to offer a directive account of normative desirability. There is a lot of work to be done on the nature of normative IR theory that is capable of adding to the legalization debates. A lot of this work will be looking at the role of reason in relation to the norms of contemporary international society (or the relative priority of philosophy to democracy as Walzer and Rorty style it). Moral theory has to be capable of offering a critical perspective rather than simply aping the development of the normative fabric of international society. Nevertheless a critically relevant theory has to nurture its relationship with the legal and political even as it seeks to settle very hard cases by getting involved in an analysis of the basic (and shifting) justifications for the institutions in which such

76 Adler, Communitarian IR, p.15.
hard cases arise.\textsuperscript{79} This is the subject of another paper. However, if we let institutional moral reasoning set the parameters (because it relates the moral to the legal and political) we have taken the first vital step.

\textsuperscript{79} On this see Frost’s use of Dworkin’s analysis in Frost, \textit{Ethics and International Relations: A Constitutive Theory}’ Cambridge University Press, 1996, p.98