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Public Order Principles, Philosophical Method and the International Law of Nuclear Weapons

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Simons Papers in Security and Development

No. 20/2012 | May 2012

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The series is supported in part by the Simons Foundation.

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Gillroy, John Martin, *Public Order Principles, Philosophical Method and the International Law of Nuclear Weapons*, Simons Papers in Security and Development, No. 20/2012, School for International Studies, Simon Fraser University, Vancouver, May 2012.

ISSN ISSN 1922-5725

School for International Studies
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Suite 7200 - 515 West Hastings Street
Vancouver, BC Canada V6B 5K3

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Abstract:
The goal of philosophical method is the construction of a comprehensive policy argument (CPA) for a public policy or legal issue. In addition to the conventional use of empirical models and their logic of investigation in the study of policy and law, CPA requires that an underlying philosophical logic of concepts be deciphered in terms of the ideas within the issue, their definition, overlap and systematic interdependence. In this working paper, I will employ a logic of concepts from the philosophical system of David Hume to provide a unique and more complete logic of legal investigation for the illumination of the International Court of Justice's *Advisory Opinion on the Legality of Nuclear Weapons.*

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Public Order Principles, Philosophical Method and the International Law of Nuclear Weapons

In 1995, in an advisory opinion for the United Nations General Assembly, the International Court of Justice (ICJ) refused to recognize the use of nuclear weapons as illegal. This conclusion was reached despite a review of international law that emphasized essential harms to humanity and nature and the violations of rights considered from within the law of armed conflict, global humanitarian law and the international law of the environment. The failure of the ICJ to promote essential values over state sovereignty is not new. In 1951, the ICJ allowed reservations to the Genocide Treaty. In 1966 it refused to intercede on behalf of the people of southwest Africa to stop the imposition of apartheid by their trustee, the South African government. Most recently, the ICJ quashed an arrest warrant issued for crimes against humanity by the state of Belgium against the former minister of foreign affairs of the Democratic Republic of the Congo.

All of the above decisions involve the Court's assumption that the practice of international law elevates the blackletter rules of the international system, over its other component: a category of legal norms and rules that involve peremptory rights or obligations to the international community above and beyond state sovereignty. Since its modern inception, shortly after World War I, international law has been reluctant to fully integrate these peremptory norms and obligations transcendent of the state, into its positive law or ***jus dispositivum***. These norms, dealing with those factors necessary to the dignity of humanity-in-the-person, come in two types: ***jus cogens*** principles and ***erga omnes*** obligations. Together, these two categories of potential legal rules represent that part of international legal practice not subject to the dispensation of state parties. According to the ICJ opinion in the *Barcelona Traction* case, these norms include banning slavery, the slave trade, genocide, torture and piracy. However, in addition, *jus cogens* and *erga omnes* are meant to encompass a wider field of

'essential' legal concerns,[1] including a prohibition on the use of force, self-defense, self-determination, fundamental human rights and the basic principles of both humanitarian and international environmental law.[2] Consequently, in a case like the ICJ *Advisory Opinion on the Legality of Nuclear Weapons*, the Court's examination of human rights, humanitarian and environmental law should have generated peremptory norms, that, when judged against a state's use of nuclear weapons, would prove peremptory of that practice. Why didn't it?

Even with a complete examination of all of the customary and treaty law of these areas of practice, the Court could find nothing to make the use of nuclear weapons illegal. In fact, *Nuclear Weapons* supports the argument that the number of these 'right to force' precepts has not been significantly enlarged since their inception within customary international law in the nineteenth century when the *erga omnes* obligation against piracy and the *jus cogens* rules against slavery and the slave trade, were codified as peremptory.

Empirically, one can argue that the Court was simply applying the law. In addition, one could contend that the expansion of the field of peremptory norms is controversial and that reasonable argument differs on where the line is drawn. But this simply begs the question of why the international legal system, in practice, is not quick to recognize basic critical principles that have all the characteristics of peremptory status. To simply say that power and interest have conspired against an enlargement of *jus cogens* principles and *erga omnes* obligations, or that this is simply the way the positive law of nations works, is to indulge in what Diderot defined as "the sophism of the ephemeral", or what Allott calls "the disempowering idea that what happens to exist now is inevitable and permanent."[3] In order to both understand why this particular set of critical international legal precepts have been retarded in their full integration into the positive law of nations, and to detect the options for changing these conditions, I will apply philosophical method to decipher the underlying character of international legal practice so that its empirical reality can be made more transparent.

[1] Crawford, *The Creation of States in International Law* (Oxford 2007) at 81.
[2] Orakhelashvili, *Peremptory Norms in International Law* (Oxford 2006), Chapter 2.
[3] Allott, *Health of Nations* (Cambridge 2002) at 154.

First, I shall describe the practice of international law and the strata of its legal system. Second, I will suggest a different perspective provided by the philosophical method of R.G. Collingwood and the philosophical-policy of David Hume. Lastly, I will examine the *Advisory Opinion on the Use of Nuclear Weapons* from this perspective to illuminate the underlying structure of the international legal system that creates the reality where *jus cogens* principles and *erga omnes* obligations are slow to be codified. (I have created a figure that may help to conceptualize what is about to follow; see p. 26.)

Public Order Norms In International Law

Basically, transnational public law exists in three recognized sources: principle, treaty and general or customary international law.[4] But, in addition to the 'blackletter' law that they generate, the legal system contains an international public policy process which provides it with both an inventory of competitive norms and arguments for legal change, as well as a valid evolutionary process by which to progressively codify or update positive practice. This policy, or 'public order process', is a recognized component of the international legal system. Beginning with the assumption that "[p]ublic policy is a concept derived from law not from politics"[5], international tribunals, including the ICJ, have recognized that international law is more than those rules and norms existing in blackletter law but includes "…generally recognized principles of morality which are not necessarily part of positive law."[6]

Traditionally, the public policy process integrates the three sources of law to form two strata of legal rules: *jus dispositivum* and *jus cogens.* The former, translated from the Latin as "law subject to the dispensation of the parties" is defined through the voluntary law of treaty and custom. *Jus dispositivum* means "the law adopted by consent". This category of international law consists of rules derived from the reciprocal relations of states, it is a body of permissive and

[4] According to Article 38 of the *Statute of the International Court of Justice*, the sources of international law are: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations."

[5] Orakhelashvili, *Peremptory Norms in International Law* at 12.

[6] *Kuwait Air Corp., 116 ILR 571*. See also Kegel, *Internationales Privatrcht (1987), 326.*

voluntary international law created, more or less, at a state's discretion.[7] It is founded on the self-interest of the participating states. Therefore, *jus dispositivum* binds only those states consenting to be governed by it. Within this category of the law, states may derogate from the rules, sources of law that are of more recent origin are generally accepted as more authoritative, and specific rules (i.e., *lex specialis*), take precedence over general rules (i.e., *legi generali*).

Jus cogens is the superior strata of the positive law which contains not only peremptory principle but *erga omnes* obligations. It translates as "compelling law" and these rules "are not just binding but operate in an absolute and unconditional way."[8] These are peremptory principles, non-derogable, and not subject to considerations of state consent. These norms are characterized by the absolute value of their inherent content, and exist to protect individual and community interests that are transcendent of the state. With *erga omnes* obligation, or compelling duties of states on behalf of international society, "[t]he absolute nature of *jus cogens* makes irrelevant the pleas of reciprocity and circumstances precluding wrongfulness, such as necessity."[9] Currently, international blackletter law has codified prohibitions against genocide, slavery, and aggressive warfare as *jus cogens* and freedom of the seas with the obligation to inhibit piracy as *erga omnes* obligations. These precepts, as codified in the *Vienna Convention on the Law of Treaties*[10] (which is declaratory of custom), and in critical ICJ cases like *Barcelona Traction*, possess a higher status than *jus dispositivum* in the jurisprudence of international law. Once a value becomes a rule or obligation under *jus cogens* or *erga omnes*, it cannot legally accommodate a state opting-out or derogating through private agreements, domestic statutes, or bilateral/ multilateral treaties.

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[7] First fully defined in the writings of Grotius and Vattel.

[8] Orakhelashvili, *Peremptory Norms in International Law* at 67.

[9] Orakhelashvili, *Peremptory Norms in International Law* at 69.

[10] Article 53: Treaties conflicting with a peremptory norm of general international law ("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. And Article 64: Emergence of a new peremptory norm of general international law ("jus cogens")--- If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

The Lens of Philosophical Method

The goal of philosophical method is the construction of a comprehensive policy argument (CPA) for a public policy or legal issue. In addition to the conventional use of empirical models and their logic of investigation in the study of policy and law, CPA requires that an underlying philosophical logic of concepts be deciphered in terms of the ideas within the issue, their definition, overlap and systematic interdependence. Philosophical method is a means with which to interpret and understand competing systematic and complete conceptual logics both existing at the core of an issue and pertinent to policy change.

Philosophical method,[11] derived by R.G. Collingwood as a supplement to social scientific method, offers a distinct perspective on legal practice. First, it suggests that the investigator should focus on universals rather than particulars. This recommends that one examine the law in terms, not of any one specific component but, architectonically, as a whole, interrelated system of concepts. Second, it assumes that the concepts of this holistic logic will not be classifiable into exclusive categories for study but will overlap dialectically. For example, one is not able to study theory without a simultaneous consciousness of practice, or the normative dimensions of a question without understanding their overlap with the empirical parameters of the issue. Third, philosophical method assumes that this systemic logic of overlapping, dialectic, concepts (in our case international law), exists on an evolutionary scale of forms where the tension between ideas and institutions sorts the various inherent dialectics into a metaphysics of absolute and relative presuppositions which change as different balance points occur within their dialectic structure.

On a scale of forms, it is not the discovery of new concepts or theories that is the task of the analyst, but the refinement of knowledge. From the standpoint of philosophical method, all empirical phenomena are created from sets of dialectically-related presuppositions, where one is absolute and the others relative. Any particular reality or 'moment' of that phenomena is the result of the specific balance of overlapping dialectics in a particular context. Here, the job of each generation of philosophers is to refine the existing logic of concepts in response to the demands of the evolution of those concepts in one's contemporary circumstances, in effect deciphering the continuity or discontinuity of ideas. For the relationship between policy and law,

[11] As described in R.G. Collingwood, *An Essay on Philosophical Method* (Oxford 1933).

philosophical method would predict that every empirical logic of investigation is a superstructure for an inherent philosophical logic of overlapping and dialectic concepts. Deciphering the substructure of these empirical moments and their continuity is the task of legal study.

But given the empirical complexity of sources and strata that is international legal practice, how can one begin to decipher and elevate the underlying logic of concepts that is international law? The key is to use any number of pre-existing philosophical systems that have already worked through the complicated maze of overlapping concepts to create competing systematic arguments for social life and the law. Although philosophers like Immanuel Kant, G.W.F. Hegel or David Hume may not have produced specific theories for each and every facet of human social interaction, they did something better and unusual from a twenty-first century perspective: they created comprehensive and systematic philosophical arguments about humanity, its nature, and the application of practical reason in the empirical world. They compiled intricate and well reasoned arguments that offer ready-made logical systems of concepts, that potentially can be used, when paired with a specific investigational or empirical logic, to create alternative paradigms for the study of international law and policy.

But even with these conceptual logics worked out, they are so intricate and cover so many topics related to the human condition, that a way has to be found to focus on the specific theoretical requirements of, for example, international law and its public order process. This is where the two-step process that is *philosophical-policy and legal design* is useful. First, to turn a comprehensive philosophical argument into a policy paradigm for application to the law, we need to sort the logical system of the philosopher into those categories that inform the generic substructure of law and policy arguments. These, I argue,[12] require that the investigator apply the methodological categories of philosophical method to the philosopher's line of reasoning so as to decipher the *fundamental assumptions* and *core principle(s)* of the legal-policy argument. I contend that there are three fundamental assumptions: the definition of the person; the character of the collective action problem; and the role of the state in terms of law and the definition of justice. The core principle is that single precept that represents the interaction of the fundamental

[12] John Martin Gillroy, *Justice and Nature: Kantian Philosophy, Environmental Policy and The Law* (Georgetown 2000).

assumptions as defined by that philosophical argument. For example, with Kant the core principle is autonomy; for Hegel it is freedom; for Hume, it is the passion for society and for the market paradigm it is Kaldor-Hicks efficiency.

In the second step in the process one applies the philosophical-policy to the context of the practice under scrutiny. In effect, this makes the philosophical system a philosophical-policy paradigm applied within a legal design space. I call this legal design because the prior logic of the philosophical system is applied both to understand the policy process as it exists and then to decipher the flaws within its logic and the means of change given the ramifications of the status-quo. This illuminates the empirical reality in terms of its underlying philosophical presuppositions (i.e., absolute and relative) so that the analysis of policy and law becomes a matter of utilizing the underlying imperatives of the philosophical-policy to create a legal design space. Here, the idiosyncrasies of the law are no longer just assumed or ignored but explained by an understanding of the ideas that have created, and are simultaneously created by, the facts of legal practice and institutions.

Philosophical method is not meant to be a replacement for the empirical investigation of a policy or legal issue, or the use of scientific method in social studies. Rather, it is a prerequisite and complimentary method that seeks a more complete understanding of the philosophical presuppositions of positivist ideas like power, interest, or strategic rationality. Philosophical method is meant to be used with the facts of the policy or legal issue in an effort to match an illuminating logic of concepts with a pertinent logic of investigation. Within the CPA, the use of philosophical method and the deciphering of the metaphysics of a policy or legal issue is assumed to be critical to the full understanding of the overlapping concepts, dialectics, and scale of forms that determines, and is determined by, the empirical context of the policy or legal topic.

Hume's Philosophical-Policy and the Public Order Process: The Logic of Concepts

Why Hume? Because every superficial empirical *logic of investigation* requires an essential *logic of concepts* in order that the full delineation of those philosophical concepts

essential to an understanding of the policy or legal issue, its systematic nature, and what is at stake in the analysis, is provided as an interdependent component of the study of policy and law.

In the specific case of international law, Hume provides a logic of philosophical concepts that fulfills the requirements for a fuller understanding of the origin and evolution of law from social convention; a more adequate delineation of the overlapping concepts of the law in terms of the ideas and institutions that deal with norms and justice (e.g., principle, process, practice, rule, power, interest); an understanding of the essential dialectics at the core of a conceptualization of the law with both unconscious and conscious human participation (i.e., passion↹reason, process↹principle); the establishment of an evolutionary scale of forms based on these dialectics that conceptualizes law as applied practical reason creating both a two-stage legal system where principle, within its dialectic with process, has the opportunity to redress an inherent process-bias, and a fuller and more systematic explanation of the presuppositions of the concept of sovereignty, than positivist models, alone, can provide.

David Hume's philosophical argument for human nature offers a whole system of overlapping concepts on a scale of forms that can be used to illuminate the inherent logic of concepts at the origins of modern international law. [13] Hume's philosophical logic of concepts is useful because of its understanding of the genesis of human social cooperation and the evolution of sanctions, including law, that rise to secure it.[14] Hume argues that all legal practice originates as social convention and this provides a reasonable origin story for international law. As a philosophical-policy paradigm, applied through legal design, it can provide us with a systematic metaphysical map capable of illuminating the origin and evolution of international law and the inherent tension between the policy and law of the international legal system that are manifest in practice.

[13] John Martin Gillroy, "Philosophical-Policy and International Dispute Settlement: Process↹Principle And The Ascendance of the WTO's Concept Of Justice", 3 *Journal of International Dispute Settlement* 53: 59-73 (2012) and "Justice-As-Sovereignty: David Hume and The Origins Of International Law" *British Year Book of International Law.* 79: 429-479 (2007).

[14] This was after the application of philosophical method to a cross-section of philosophical systems including those of Hobbes, Locke, Rousseau, Kant, Hegel and Aquinas.

To sort Hume's philosophical argument into a philosophical-policy paradigm required locating his fundamental assumptions and core precept. Specifically, for Hume, the fundamental assumptions dealing with the affect of context or circumstance on the individual, and the requirements of collective action to establish a stable, certain, and ordered existence that encourages the public good, is regulated by a single human "passion" or core precept: *the individual's need for society*.[15] In Hume's argument, the person is universally and necessarily motivated to establish and maintain cooperation with other humans in a stable social environment.[16] This is the absolute presupposition of Hume's argument.[17]

Because the need for society is defined as a product of the passions, argued to be the dominant force opposed to reason in the dialectic of human nature, Hume describes the individual in terms of the association of ideas in the human mind that produces a particular category of sentiment: fellow-feeling or sympathy.[18] Sympathy provides a fundamental basis for a morality of passions; the development or encouragement of sympathy with others grants moral value to human action. However, the development of this sympathetic predisposition is countered in the human mind by the existence of a powerful opposite force from which the individual must be able to remove himself to create and maintain social organization: self-interest. This tension defines the person within a dialectic struggle for her practical reason that finds its synthesis in Hume's concept of "limited generosity."[19] This limited generosity, combined with empirical scarcity and general equality define Hume's circumstances of justice.

For Hume, no single, independent or *a priori* criterion for justice as an expression of practical reason exists. Justice is a process-norm, a level of sanctions beyond individual approbation of moral behavior by which the collective utility of social processes are identified and protected from disturbance. Justice is based on the mutual respect human beings share for

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[15] Hume, David. *A Treatise of Human Nature*. Edited by L. A. Selby-Bigge and P.H. Nidditch. 5th. ed. (Oxford 1978) at 485-486, 526, 543.

[16] Buckle, Stephen. *Natural Law and the Theory of Property: Grotius to Hume* (Oxford 1991) and Gillroy, John Martin. *Justice-As-Sovereignty: The Source of Practical Reason As Utility In International Law* [Manuscript].

[17] Gillroy, John Martin. *Justice-As-Sovereignty* [Manuscript]; John W. Danford. *David Hume and the Problem of Reason: Recovering the Human Sciences* (Yale 1990).

[18] Hume, *Treatise* 470, 472, 478, 484.

[19] Hume, *Treatise* 487-488.

the stability of one-another's property.[20] Justice is the result of social pressure as the complexity of interaction forces a more formal and universal norm to establish, or reestablish, an enlightened sense of public well-being linked to social order. Justice is both allocative and distributive, a means and an end, a source, locus, and scope for society, and simultaneously both a normative and empirical concept.

Applied to international law, the complexities of Hume's definition of collective action find synthesis in the concept of justice-as-order or justice-as-sovereignty, as a process-norm that secures the reciprocal cooperation of states and the stability or 'effective control' of property in legal practice. The overlapping dynamics of social evolution, to compensate for the circumstances of justice and the dynamic complexity of human social interaction, must settle upon a process-norm; that is, a norm that is neutral between specific manifestations or principles of property, but created by the fact that a process that stabilizes property achieves a consensus that justice is meant to represent and defend. Here, the process of cooperation is both the *means* to justice and the *ends* of justice itself. For Hume's philosophical-policy, justice is order, or the stable coordination of human interaction, where one's sympathy to fundamental social interests requires an additional level of sanction to persist. Justice is also that pattern of allocation and distribution that solves the collective action problem and assures a stable social order. In effect, as the dialectic between sympathy⇆self-interest evolves and overlaps with the dynamics of the empirical world, justice-as-sovereignty is a means for incorporating new social facts over time, while protecting the essential coordination of (e.g., international) society.

In order to describe the full transference of individual habit into social expectation of moral behavior, Hume utilizes the idea of evolving *social convention*. Conventions are not customs,[21] but those unconsciously learned rules which set the parameters of action in terms of

[20] Hume, *Treatise 491*.

[21] Specifically, social convention has three critical distinctions from the standard positivist assumptions about custom adopted by H. L. A. Hart in his *Concept of Law* (Oxford 1961). First, Humean social convention is built on an innate dialectic between practice and the generation of rules that makes social convention inherently *efficacious* in that it exists specifically to solve a collective action problem and is motivated by the passion for society and social order, upon which its public utility depends. Second, conventional practice, within Hume's philosophical-policy, endows all informal and formal legal rules with a dialectic between external patterns of human behavior and the 'internal' moral aspects of those rules. Unlike Hart's concept of law, which assumes custom has no inherent sense of justice or morality, Hume argues that social convention, even in its pre-legal form, evolves the sanctions of

the requirements of justice, thereby stabilizing social order. The further growth and universal spread of convention is dependent on consensus over an equilibrium and process-norm that provide a moral focus for just order adding moral obligation to action through the 'artificial' maxims of justice. Here the dialectic connection between the empirical and the normative becomes critical to the establishment and persistence of society.

Duty, promise, and transference by consent become possible only with the establishment of the social convention of justice as a process-norm.[22] On route, morality, through a sympathy for the general interest, lends approbation and obligation to anything that supports society and denies it to that which tends to social disintegration. Morality is a necessary foundation and reinforcement of one's *sense of justice* and provides an added sanction for social stability, beyond that provided by the protection of one's 'honor'.[23] With justice, individual sympathy becomes reinforced by a concrete sense of the public interest that articulates the utility of society and further realigns self-interest to collective ends.[24]

Hume's contention that society can and does establish itself with the process-norm of justice alone, and without formal institutional governance, is based on the premise that society remains homogeneous, small and simple.[25] Justice as social convention is necessary in the formation of society to stabilize property and ascribe moral virtue to the support of the public interest. But, like the preceding moral approbation that sanctioned social order, justice alone is not always sufficient to assure a stable and evolving society. This creates a role for the law.

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justice based on morality before the advent of political society or codified law. A third difference between Hart and Hume is that one can uniquely identify a core dialectic of process↹principle from Hume's philosophical-policy, that is generic to Hume's concept of law and foundational to all rules generated by practice. By engaging the validity of the law and its moral authority in a dialectic between, respectively, procedural and substantive rules, Hume's philosophical-policy avoids the minefield of the dichotomy between valid law and moral law. In effect, the relationship between Hart's primary and secondary rules is, for Hume, reversed so that procedural rules become prerequisite to substantive rules and is a creature of his essential dialectic between process↹principle; rule validity is inherently part of morality. See, John Martin Gillroy J*ustice-As-Sovereignty* [Manuscript] at Chapter 3.

[22] Hume, *Treatise* 516.

[23] Hume, *Treatise* 501.

[24] There is confusion as to the exact role utility plays in Hume's philosophy. In the *Treatise* he begins with self-interest but finds utility only in the collective good (472). In the *Enquiries* he begins with the case for the utility of social convention and ends with its relationship to self-love (174). While it is popular to consider Hume a father of English Utilitarianism, some see the utility argument as less than central. See Miller, David. *Philosophy and Ideology in Hume's Political Thought* (Oxford 1981).

[25] Hume, *Treatise* 499.

Before public policy and legal institutions, the conventions of justice and its resulting social order are at risk of collapse as society becomes more complex. Considering that the passion for society is still of paramount importance to humanity, a further and formal refinement must be made to the empirical circumstances of justice to provide a long-term solution to the integrity of collective action. The conscious creation of government institutions through Humean contract-by-convention is the solution. What Hume calls "political society"[26] finds its genesis in the formal reconfirmation of personal utility in the collective interest.

As justice empowers limited generosity by compensating for the tendencies of self-interest to undermine society, the role of the state is to add institutional structure and sanction to established social conventions. Consequently, social convention, originating in moral approbation with the conventions of justice to insure performance, gains the formal social sanction of government and codified law to support it. Now, larger social groups are more permanently able to coordinate themselves in the face of the dynamic evolution of human nature. Government is not based on a distinct or stronger obligation than justice requires, but governance combined with justice has a cumulative and more powerful effect on individual cooperation. Each overlaps and builds on the other, with the social stability of larger and more complex communities as their common end.[27]

Utilizing Hume's philosophical-policy as a paradigm for international law, his basic dialectic between passion↹reason generates a concept of law with these two foundational source of dialectic interaction. Based on this dialectic and given Hume's emphasis on passion over reason with his connection between passion and social convention, we can identify a central legal dialectic for the international system in the tension between process↹principle as foundations for rules. Here the former provides a basis for law in social convention created from the passions and their requirements in terms of the process of human cooperation, while the latter is characterized by critical principle based in reason and the inherent requirements of humanity-in-the person. Both are factors in the definition of justice, with a strong balance toward process.

[26] Hume, *Treatise* 538.
[27] Hume, *Treatise* 543.

This core dialectic also has ramifications for the definition of the idea of a 'principle' within the legal system. With the establishment of contract-by-convention and political institutions, Hume's 'political society' is finally able to fully engage the traditional definition of principle as a standard based on reason and critical of social convention. However, before government, justice still required that certain principles be established as a basis for rules that support social convention and its process norm. These principles derive their meaning from social convention and are therefore contextual principles to the ends of process and social stability.

Applying Hume's philosophical-policy to law therefore requires careful attention to which definition of principle is being used. Are they independent of social convention and necessary or essential to humanity-in-the-person and therefore *critical principles* or are they completely contextual to social convention and therefore *contextual principles*. For example, the idea of dignity can be argued as either a contextual or critical principle. As a contextual principle it acquires its meaning from the social circumstances around which the stable society is formed. It is defined, externally to the individual, by social convention and requires that the dignity of the person be judged collectively. As a critical principle, dignity is defined by the requirements of reason and individual autonomy independent of social convention. It is defined internally, by the ability of the person to maintain their integrity.[28] While many principles can be defined either way, the way they are defined is important to the manner in which the philosophical argument relates to both the definition of justice and the practice of the law. Does the principle come from the passions and defend process and social convention, giving its idea of justice the character of *jus dispositivum*, or does it have essential or preemptive character from reason, granting its subject *jus cogens* status?

Overall, the balance of process and principle within the core dialectic defines justice as simultaneously both an empirical condition of stable coordination and a normative imperative to maintain that equilibrium. Hume's argument for justice creates a synthesis where process and its contextual principles, or the need to stabilize property as a means to cooperation, outweighs any preemptive definition of justice in terms of specific critical principles or ends. But just as he

[28] Jane Austin's heroines, in any of her novels, are driven by this dialectic.

promotes the passions over reason without eliminating the latter as a part of human nature, he promotes process and contextual principle over preemptive law and critical principle without denying the existence of the latter in shaping the process-norm of justice and the positive law. For Hume, the stability of the process of collective action is the paramount requirement of the human passion for society.[29] To the degree that the introduction of a preemptive principle critical of this process would be disruptive to its stability, it is discounted and discouraged within the logic of concepts that generates social convention. In this way, Hume's definition of justice is necessarily biased toward process.

Applying Hume's Philosophical-Policy to the issue of public order principles in international law produces a series of insights. First, that legal practice, as a generic concept, has two overlapping foundations for its positive law. First, those international social conventions and contextual principles that came from pre-legal social convention and, second, conscious, reason-based critical principles that transcend the reciprocal relations of states. The former can be described as the basis of *jus dispositivum* and the latter understood as the realm of peremptory norms made up of *jus cogens* principles and *erga omnes* obligations. These two foundations for international legal validity and obligation are not eristically independent or distinct and dichotomous foundations for the study of law. One is not separate, or irrelevant to the study of the other, within Hume's concept of law; they overlap within his logic of concepts as represented by the core dialectic of process⇆principle.

The second insight is that international legal practice ought to be biased toward the process side of the dialectic. The process-norm of justice-as-sovereignty[30] draws its status from its ability to maintain the stable coordination of the international society of states. As made

[29] Hume, *Treatise* 472, 480, 497.

[30] That is, justice as public utility and a stable international system focused on the process-based norm of sovereignty. Process-based because sovereignty is a means to establish coordination and therefore justice that is not contained in a critical end independent of social convention but in a contextual process-norm existing for the sake of convention and the stability of an international society of states. See John Martin Gillroy "Justice-as-Sovereignty: David Hume and the Origins of International Law." *The British Year Book of International Law* 78 (2007): 429-79.

evident in the 1927 *Lotus* case,[31] sovereignty, as that norm which defines the modern legal system, creates a prohibitive system of legal practice.

> ... international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will. Restrictions upon the independence of States cannot therefore be presumed.[32]

A third insight is that the dynamic quality of the law is increasingly fostering a more balanced core dialectic where critical principle (e.g., rights, freedom, integrity) gains strength and threatens the dominance of process and justice-as-sovereignty within the international legal system. With the advent of contract-by-convention, and the institutions of international governance, reason can compete with the passions as a counterweight to social conventions that while good at stable social order are not adequate to the protection of humanity-in-the-person. This requires Hume's concept of law to accommodate at least two stages or levels of complexity in its scale of forms: a Stage-I and Stage-II legal system. The former operationalizes a process⇆principle dialectic weighted toward process; the latter a legal system that can adapt to the rise of critical principle.

A CPA For Legality of Nuclear Weapons: A Logic of Investigation Informed by Hume's Logic of Concepts

The complicated decision of the majority in *Nuclear Weapons* takes place within a more developed international legal system than existed when the Permanent Court of International Justice (PCIJ) decided the *Lotus* case and it illustrates that a transition to a Stage-II international legal system is underway. However, the majority still relied on social convention with contextual principles and process-norms verifying the staying power of a process-centered international law based on justice-as-sovereignty. By refusing to make the use of nuclear weapons illegal, the

[31] This case is about a collision at sea that causes death and the arrest and trial of a French ship's officer for manslaughter. The issue of criminal jurisdiction was eventually settled by Article 95 of the United Nations Convention on the Law of the Sea, which allowed the ship's flag to determine jurisdiction. However, this case remains critical to international law in terms of its making the law a system of prohibitions where a state, because of its sovereignty, must only refrain from action if a specific rule prohibits it.

[32] *Lotus Case* at 18.

Court apparently discounts the critical principles (i.e., of humanitarian, armed conflict and environmental law) within the contemporary public order debate.

In the first procedural decision of the Court, the judges decided to switch the question from whether international law existed that would *permit* the use of nuclear weapons to a search for a specific *prohibition* against the use of such weapons. This reconceptualization of the argument, a direct application of the *Lotus* case, recognizes that sovereignty is a process-norm, while it relies on the underlying assumption that the legal burden of proof lies with those who would prohibit a state's actions.

> The use of the word "permitted" in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by use of the word "permitted", States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the "Lotus" case…" [quoting ICJ Reports 1986 p.135 ¶269-Nic] 'in international law there are no rules, other than such rules as may be accepted by the States concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited' ... [33]

With the establishment of *Lotus* sovereignty as the point of departure for the examination of the question, the Court could have simply let this process-norm maintain the legality of nuclear weapons without further argument. However, in the years since *Lotus*, the status of critical principle in legal argument had advanced. In addition to the progress of human rights law which had been established by both treaty and the UN Charter, humanitarian law had been more thoroughly codified in both war and peace. International environmental law, seeking to protect the integrity of nature, had also been incorporated in treaty, principle, and custom. Most critically, the ideas of *erga omnes* obligations, containing the seeds of universal jurisdiction, and

[33] *Nuclear Weapons* para.21.

jus cogens critical principles, as the most important class of preemptive norms or substantive moral principles of law, were both codified, the former in case law and the latter in treaty.[34]

Consequently, the Court was not able to dismiss critical principle altogether as the *Lotus* Court did. Instead, they proceeded to search the treaty and customary law of armed conflict, human rights and environmental as well as humanitarian law for a prohibition of the use of nuclear weapons. This search uncovered many 'obligations' that the sovereign state would be legally expected to take into account. For example, from the law of environmental protection:

> The existence of general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment"...[35]
>
> The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account …"[36]

However, these obligations were judged not to be *erga omnes,* nor as coming from *jus cogens* or critical principles, so they were insufficient to provide a preemptive prohibition against the use of nuclear weapons.

The logic of the Court, and its ultimate decision, are not based on any of the many *jus cogens* elements of human rights or humanitarian law, but on the concept of self-defense. Applying the lens of Hume's philosophical-policy, we can say that the Court had a choice of defining the idea of self-defense as a critical principle (i.e., *jus cogens*) or as a contextual principle informed by the process-norm of justice-as-sovereignty (i.e., *jus dispositivum*). They chose the latter.

Their use of self-defense is contextual in the sense that it is dependent for its meaning on the idea of state sovereignty. The majority settled on a sense of self-defense conditioned by a *Lotus* idea of independence, measured by the *jus dispositivum* norms of *proportionality* and

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[34] Chazournes, Laurence Boisson de, and Philippe Sands, eds. *International Law, the International Court of Justice and Nuclear Weapons* (Oxford 1999).

[35] *Nuclear Weapons* para.29.

[36] *Nuclear Weapons* para.33.

necessity.[37] This demonstrates that, not only did the Court allow justice-as-sovereignty to retain its character as a core process-norm protecting collective action, it moved the argument away from peremptory norms altogether, keeping it within the realm of *jus dispositivum* where process is advantaged. If they had argued self-defense as a peremptory norm,[38] it would have to be separated from the social conventions of sovereignty and judged independently. That would have opened a debate over the *jus cogens* status of the other humanitarian, environmental and rights-based preemptive ideas within the case working against the legality of nuclear weapons. Logically, this could have forced a different outcome, which was avoided.

The process nature of its definition of self-defense is confirmed in the Court's insistence that the measures of a state's sovereign defense would be proportionality and necessity. The standards of necessity and proportionality are measures not of critical but contextual principle, not *jus cogens* but *jus dispositivum*. If these limiting conditions were being judged as *jus cogens* or *erga omnes* then, as critical principle, they would need to be considered, by definition, a matter of inherent necessity. A preemptive norm contains its own moral causality and is never measured continuously but discreetly; it either exists (e.g., within the law, or within morality) or it does not. For example, a right against genocide does not bend to necessity of circumstance or proportionality, but, once acknowledged, continues to exist regardless of degree. This is why a state's argument that exigent circumstances make violation of a *jus cogens* principle legal does not change the international law on the subject, nor the state's responsibility.

Proportionality is also not a test of preemptive norms. One cannot be proportionately tortured, nor is the genocide of one states' citizens a fit legal basis for the proportional genocide of another's nationals. If self-defense was a critical principle in the mind of the Court, then the tests of necessity and proportionality would not be required. The fact that they do apply these conditioning tests is evidence that they understand self-defense in terms of what Hume's concept of law defines as a contextual principle, subject to consent and the voluntary rules of social convention within a law of *jus dispositivum*.

[37] *Nuclear Weapons* para.42.

[38] The Court avoided having to make any judgment on the *jus cogens* nature of any of the law under scrutiny by claiming that the parties to the case had not emphasized peremptory norms in their arguments.

With the contextual principle of self-defense in hand, the majority then produces a finding that there are circumstances in which the use of nuclear weapons are legally justified.[39]

First, the Court concludes that there is no direct prohibition on the use of nuclear weapons, which basically removes the decision from the realm of *jus cogens*. Second, based on the law of *jus dispositivum,* it maintains that state sovereignty and its defense cannot rule out a scenario where proportionality and necessity will require one state to use nuclear weapons to save itself from annihilation.[40] One explanation for what is commonly considered a complex argument is that the Court was desperately trying to avoid a situation where no law was available to answer its central question (i.e., *non liquet*).[41] But there was a great variety of law in this case from which to choose. The critical dimension of the majority decision, from the standpoint of Hume's philosophical-policy and legal design, is in its acknowledgement, on the one hand, that critical principles were involved and, on the other, that since none of them had achieved *jus cogens* or *erga omnes* status, it was more important to provide for those extreme circumstances within *jus dispositivum* where a sovereign state has to act in self-defense given dire risk.

The Court's opinion can be interpreted, first, as recognizing the conventional roots of the contextual principle of self-defense as a creature of justice-as-sovereignty. In the same way that the conventional definition of international legal practice was critical in the reorientation of the case toward 'prohibition', it also provided the basis for the dialectic between process (i.e., self-defense measured by necessity and proportionality) and critical principle (e.g., humanitarian law*)* that characterizes the central arguments about nuclear weapons and the law of force, humanitarian law, and environmental protection that make up the opinion.

Further evidence for the Court's unconscious recognition, but predisposition against, the evolving dialectic between process↹principle, can be found in the Judge Weeramantry's dissent. He acknowledges the predominance of social convention from *Lotus* but with the contention that

[39] Chazournes, Laurence Boisson de, and Philippe Sands, eds. *International Law, the International Court of Justice and Nuclear Weapons*.

[40] *Nuclear Weapons* para.96. "...the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake."

[41] Chazournes, Laurence Boisson de, and Philippe Sands, eds. *International Law, the International Court of Justice and Nuclear Weapons*.

the progress of critical principle over process needs to be more actively acknowledged by the Court.

> ... the absence of specific illegality was anchored to the "Lotus" decision.
>
> It would have been furthest from the mind of the Court deciding that case that its dictum …would be used in an attempt to negate all that the humanitarian laws of war had built up—for the interpretation now sought to be given to the "Lotus" case is nothing less than that it overrides even such well-entrenched principles as the Martens clause, [42] which expressly provides that its humanitarian principles would apply "in cases not included in the Regulations adopted by them."
>
> … [as the Permanent Court, years earlier had observed] … the sovereignty of states would be proportionately diminished and restricted as international law developed. …
>
> In the half century that has elapsed since the "Lotus" case, it is quite evident that international law—and the law relating to humanitarian conduct in war—have developed considerably, imposing additional restrictions on state sovereignty over and above those that existed at the time of the "Lotus" case…This Court cannot in 1996 construe "Lotus" so narrowly as to take the law backward in time even beyond the Martens clause.[43]

Conclusion: Hume's CPA, Convention and Public Order Principles

Hume's philosophical-policy suggests that the uphill battle of reasoned principle against instinctual process and social convention provides an explanation for the split between the majority and dissent on this issue. It is not that human reason exists only to obfuscate or justify choices arrived at by the operation of sentiment through social convention, but that this is the predisposition of anyone with the experience of stability under social convention. Hume's insight here is that unconscious human interaction creates social stability out of the expression of the passions where reason begins as is its 'slave'.

With the advent of governance and the introduction of critical principle as a counterweight to social convention, reason acquires a new role in international law. Applying philosophical method and Hume's philosophical-policy the law will acknowledge the dialectic of

[42] The Martens Clause is the humanitarian foundation for the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land: " … 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".

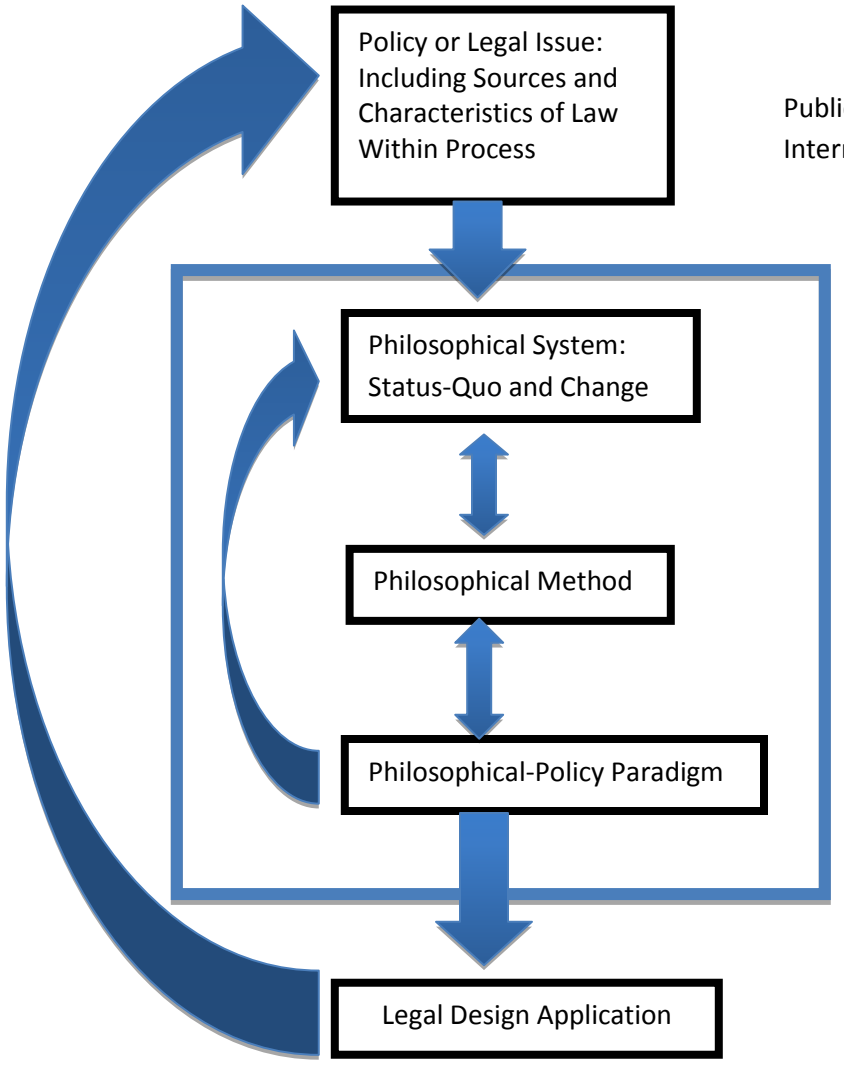
[43] *Nuclear Weapons* Dissent-Weeramantry, Sec.9.

process↹principle. Social conventions will be subjected to the test of whether they empower or harm those critical principles that represent preemptive concerns for humanity-in-the-person. The use of the public order/policy process in international law, as exemplified in *Legality of Nuclear Weapons*, demonstrates that the instinctual power of social convention and its tendency to reduce reflective reason and the role of its critical principles erodes over time, but very slowly.

Although the ICJ, between 1966 and 1995, had evolved to the point where reflective reason was a consideration in the judgment of *Lotus* sovereignty, it had not advanced so far as to acknowledge the basic protections of humanitarian or environmental law through codification as peremptory *jus cogens* principles or *erga omnes* obligations. The majority decision in this case continues to support the fundamental role of justice-as-sovereignty within international legal practice and the continued dominance of a *Lotus* definition of *jus dispositivum*.

[See Figure, next page]

PHILOSOPHICAL-POLICY AND LEGAL DESIGN



Public Order Principles in International law

The Use of Philosophical Method to Decipher Hume's Philosophical-Policy from his Philosophical System

Application of Hume's Philosophical-Policy to the ICJ *Advisory Opinion on the Legality of Nuclear Weapons*

Feedback: A Reconsideration of Public Order Principle (The Status of *Jus Cogens* and *Erga Omnes*) in International Law