



KFG Working Paper Series • No. 19 • October 2018

---

Felix Lange

**Challenging the Paris Peace Treaties, State Sovereignty, and  
Western-Dominated International Law –**

***The Multifaceted Genesis of the Jus Cogens Doctrine***

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

## KFG Working Paper Series

Edited by Heike Krieger, Georg Nolte and Andreas Zimmermann

All KFG Working Papers are available on the KFG website at [www.kfg-intlaw.de](http://www.kfg-intlaw.de).

Copyright remains with the authors.

Lange, Felix, Challenging the Paris Peace Treaties, State Sovereignty and Western-Dominated International Law - *The Multifaceted Genesis of the Jus Cogens-Doctrine*, KFG Working Paper Series, No. 19, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin, October 2018.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

Product of Humboldt-Universität zu Berlin  
Commercial use is not permitted



Berlin Potsdam Research Group  
International Law – Rise or Decline?

Unter den Linden 9  
10099 Berlin, Germany

[info@kfg-intlaw.de](mailto:info@kfg-intlaw.de)  
+49 (0)30 2093-3322  
[www.kfg-intlaw.de](http://www.kfg-intlaw.de)

**DFG** Deutsche  
Forschungsgemeinschaft

Online available at: <https://nbn-resolving.org/urn:nbn:de:kobv:517-opus4-422510>

**Challenging the Paris Peace Treaties, State Sovereignty,  
and Western-Dominated International Law –  
The Multifaceted Genesis of the Jus Cogens-Doctrine**

Felix Lange<sup>1</sup>

*This article is accepted for publication in: Leiden Journal of International Law, forthcoming.*

**Abstract:**

*The genesis of the jus cogens doctrine in international law for long has been associated with a turn to a more value-laden international law after the Second World War promoted by British rapporteurs in the International Law Commission. This paper builds on this narrative but adds two seemingly contradictory story lines. In the 1920s and 1930s German-speaking international legal scholars like Alfred Verdross developed the concept as a tool to renounce the disliked Paris Peace Treaties in the context of more and more aggressive German revision policies. Furthermore, after 1945 Soviet thinkers of the Khrushchev era used jus cogens to criticize Western economic and military integration, while newly independent states regarded the concept as a promising vehicle for distancing themselves from traditional Western international legal notions in the era of decolonization. Hence, instead of embracing a progress narrative, a dark sides-account or a contributionist reading of the history of international law, this paper highlights the multifaceted origins of the jus cogens doctrine.*

---

<sup>1</sup> PhD, LL.M. (NYU), M.A., Postdoc at KFG 'International Rule of Law – Rise or Decline?'

**Contents:**

- 1. On Multicausal Historical Writing.....5
- 2. Jus Cogens as a Tool to Circumvent the Paris Peace Treaties.....8
  - a) The German-Speaking Discourse .....8
  - b) Declaring the Versailles Treaty Null and Void .....9
  - c) The Doctrine Travels..... 11
- 3. Jus Cogens as a Pierce to Absolute State Sovereignty .....12
  - a) Relative Sovereignty during the Inter War Period.....12
  - b) Verdross and Natural Law.....13
  - c) British Special Rapporteurs and the Law of Treaties .....14
- 4. Embracement by Non-Western States .....15
  - a) Controversy at the Vienna Conference.....15
  - b) The Eastern Critique of Transatlantic and European Institutionalization .....17
  - c) The Global South and the South West Africa Cases .....18
- 5. Conclusion ..... 20
- The Author .....22

## 1. On Multicausal Historical Writing

The ‘historical turn’ in international legal scholarship led to more awareness for the manifold perspectives one can take on the history of international legal scholarship. Over the course of the 20<sup>th</sup> century until today, international legal historians have produced divergent and competing narratives of the foundational disciplinary concepts. Among these accounts, three have been particularly influential. One approach stresses the progressive formation of an increasingly dense net of normative rules on the international level, a second one highlights the contributions of non-Western regions to the field, and a third one points to the dark sides of the use of international law as a tool by hegemonic powers deeply implicated in colonial crimes.<sup>2</sup>

As this paper will show, the history of the *jus cogens*-doctrine as a normative concept in international law could be written along the lines of each of these three perspectives. First, traditionally, the codification of the *jus cogens*-doctrine in the VCLT in 1968/1969 is regarded as a symbol for progress towards a more value-based international law after the Second World War brought forward in particular by Western international lawyers. Studies on the history of the concept stress that the rapporteurs of the ILC Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock took up an idea developed by Alfred Verdross in the 1930s and included the concept in their reports on the law of treaties.<sup>3</sup> These accounts reflect a tradition of historical writing which emphasizes international law’s gradual evolution towards a more value-based and sophisticated international legal system.<sup>4</sup> Throughout the 20<sup>th</sup> century, academics identified ‘tremendous progress’ as international law’s ‘dominant trait’,<sup>5</sup> and praised the development from a ‘law of coexistence’ to a ‘law of cooperation’<sup>6</sup> and to a ‘law of mankind’.<sup>7</sup> Often these scholars highlighted that a learning process of especially Western states led to a morally advanced system of legal rules on the international political level.<sup>8</sup> The idea that British rapporteurs in the ILC successfully pushed for the doctrine of *jus cogens* fits well into this picture.

Second, as a counternarrative, the non-Western contribution to the *jus-cogens* doctrine has been emphasized. Jean Allain recently put forward that decolonization has been the ‘source’ of the legal concept. He stressed that the ‘new states’ successfully supported *jus cogens* in order to criticize the existing international law shaped by Western states.<sup>9</sup> For him the ‘legacy of the decolonization process in international law should be recognized as moving away from the European-based bilateralism of yesteryear and ushering in a recognition that there are communal interests which

<sup>2</sup> For a similar, but also somewhat different historical recollection of the narratives in international law see A. Becker Lorca, ‘Eurocentrism in the History of International Law’ in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012), 1034.

<sup>3</sup> In detail on the codification see S. Kadelbach, *Zwingendes Völkerrecht* (Duncker & Humblot 1992), 36-46; L. Hannikainen, *Preemptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status* (Lakimiesliiton Kustannus 1988), 145-180.

<sup>4</sup> E. Nys, *Les origines du droit international* (1894), 10-12, 164, 404-405; on this see M. Koskenniemi, ‘A History of International Law Histories’ in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012), 943; M. Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’ (2011) 19 *Rechtsgeschichte* 152.

<sup>5</sup> A. Nussbaum, *A Concise History of the Law of Nations*, (first published 1947, New Macmillan 1954), ix.

<sup>6</sup> W. Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964).

<sup>7</sup> See H. Steiger, ‘From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of Epochs of the History of International Law’, (2001) 3 *Journal of the History of International Law* 180.

<sup>8</sup> See J.H.W. Verzijl, *International Law in Historical Perspective*, vol 1 (A.W.Sijthoff-Leyden 1968), 435-436, 446.

<sup>9</sup> J. Allain, ‘Decolonisation as the Source of the Concepts of *Jus Cogens* and *Obligations Erga Omnes*’ (2016) 1 *Ethiopian Yearbook of International Law* 35.

transcend the interests of any given state'.<sup>10</sup> This historical reading of the jus cogens concept is inspired by writings of the decolonization era, when scholars underlined the African, Indian or Muslim impact on the evolution of international legal rules.<sup>11</sup> Also today, in his recent celebrated book *Mestizo international law* Arnulf Becker Lorca demonstrates that in the 19<sup>th</sup> century the 'periphery' appropriated the European international law according to its own political ideals and created an international law consisting of various influences.<sup>12</sup> According to Allain's account non-Western states did not only contribute to the creation of the jus cogens-doctrine but even were the driving force behind the idea.

Third, as this paper will demonstrate, the history of jus cogens can also be told as exposing the dark sides of international law. Verdross' writings were closely related to the German/Austrian fight against the Paris Peace Treaties during the inter-war years. Jus cogens was regarded as a helpful tool by which one could circumvent the obligations of the disliked 'peace dictates'. This narrative can relate to writings which stress the potential instrumental use of international law for contestable ends. Already Wilhelm Grewe's controversial *Epochs of International Law* claimed that since the 15<sup>th</sup> century eras of Spanish, French, British, Anglo-American and Anglo-Soviet domination brought forth international legal rules, which were structured in line with the interests of the leading hegemon.<sup>13</sup> Furthermore, more recent studies connect basic features of international law like the sovereignty doctrine<sup>14</sup>, international institutionalization<sup>15</sup> and the history of the United Nations<sup>16</sup> to the colonial project pushed by Western states.<sup>17</sup> Understanding jus cogens as a vehicle to demolish the Paris Peace Treaties in the context of National Socialist revision policies provides a similar 'dark sides'-story.

Which of these alternative histories offers the most plausible account of the emergence of the doctrine? Was it a stronger value-orientation, the involvement of non-Western states or the critique of the Paris Peace Treaties which explains the evolution the concept? While one could subscribe to either the one or the other historical reading, this paper draws from all of these perspectives when engaging with the history of the jus cogens-doctrine. Instead of juxtaposing the divergent accounts against each other and claiming exclusive truth for one narrative, it takes the view that this history of jus cogens is complex and can be traced to different origins. Instead of constructing a straightforward monocausal story, it takes all three historical perspectives seriously.

---

<sup>10</sup> Ibid, 36.

<sup>11</sup> See T.O. Elias, *Africa and the Development of International Law* (Leiden, A. W. Sijthoff 1972), 3-15; see also A.K. Mensah-Brown (ed), *African International Legal History* (United Nations Institute for Training and Research 1975); R.P. Anand, 'The Influence of History on the Literature of International Law', in R. St.J. Mac Donald and Douglas M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), 341, 342; Muhammad Hamidulla, *Muslim Conduct of State* (Lahore 1945), XIII; also pointing to the need of paying attention to the Islamic tradition of international law, Majid Khadduri (ed), *The Islamic Law of Nations of Shaybani's Siyar* (Baltimore, John Hopkins 1966), xi-xiii.

<sup>12</sup> A. Becker Lorca, 'Universal International law: Nineteenth-Century Histories of Imposition and Appropriation' 51 (2010) *Harvard International Law Journal* 475; A. Becker Lorca, *Mestizo International Law. A Global Intellectual History 1842-1933* (CUP 2014).

<sup>13</sup> See W. G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos, 1984); W. G. Grewe, *The Epochs of International Law* (Berlin/ New York: Walter de Gruyter, 2000).

<sup>14</sup> See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004).

<sup>15</sup> See J. Klabbers, 'The emergence of functionalism in international institutional law: colonial inspirations', (2014) 25 *European Journal of International Law* 645-675.

<sup>16</sup> See M. Mazower, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2010).

<sup>17</sup> See already J. Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart, Steiner 1984); for another important work G. Gong, *The Standard of 'Civilization' in International Society* (OUP 1984).

This somewhat runs against a common trend in international legal scholarship which stresses the plurality of narrative(s)<sup>18</sup> and international legal historie(s)<sup>19</sup> and regards them as distinct and incompatible. Often authors assume that traditional perspectives and more critical perspectives which stem from the ‘turn to history’ cannot relate to each other. Indeed, if the recent critical approaches are written to deconstruct the earlier historical writing, how could one reconcile the positions? Furthermore, if no one can tell ‘how history really was’<sup>20</sup>, if historical works are closely related to fiction<sup>21</sup> and linked to the political preferences of the respective authors, why should one bother with ‘mediating’ different historical perspectives?

Nonetheless, this article takes a ‘mediating’ approach. Even though it is convincing that the reading and interpretation of history depends on our personal and present experiences and a certain narratological strategy is necessary to convey the historical argument to the reader, in the view of the author the openness for pluralist approaches to the history of international law does not justify the production of one-sided stories. International lawyers should be careful not to tell straightforward narratives of particular doctrines and neglect the manifold political contexts in which doctrines are applied to different usages. Accordingly, the paper tells the history of the normative concept as a multicausal phenomenon. The *jus cogens*-doctrine stemmed from dark origins in the context of the inter war period (2), reflected a development towards a more value-based international law starting in the 1920s which reached a first peak in the 1960s (3) and benefitted from the endorsement by non-Western actors during the Khrushchev era and in the context of decolonization (4).

This paper thus underlines that *jus cogens* was used at different moments in time by different actors for different purposes. Because the political environment and the international legal system changed, new actors applied the concept from different vantage point to attack the governing status quo. In this sense, the different accounts follow a chronology from the German/Austrian fight during the inter-war period against the Paris peace system to the struggle of third-world states and the Soviet Union against the traditional Western-centered international law after the Second World War. However, a strict chronological story does not do justice to the overlaps and tensions which existed between different actors who pushed for the idea of *jus cogens*. During the 1920s, *jus cogens* was not only regarded as a tool against the Paris Peace Treaties, but also as an expression of an international legal system based on values and natural law. After 1945 it was not only propagated as a tool to criticize the Western international law but also as an emblem of the Western promoted value-laden international law. By including these different perspectives in the historical account, the paper embraces the complexity and multifacetedness of the *jus cogens*-doctrine’s origins.

---

<sup>18</sup> See A. von Arnould (ed), *Völkerrechtsgeschichte(n)*, Historische Narrative und Konzepte im Wandel (Duncker & Humblot 2017), 9-17.

<sup>19</sup> See A. Kemmerer, *Völkerrechtsgeschichten*, 3 September 2014, <https://voelkerrechtsblog.org/volkerrechtsgeschichten/>

<sup>20</sup> See L. Ranke, *Geschichte der germanischen und romanischen Völker von 1494-1514*, Vorrede zur ersten Ausgabe – Oktober 1824, (3. ed, Duncker und Humblot 1884), VII.

<sup>21</sup> See H. White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (John Hopkins 1973).

## 2. Jus Cogens as a Tool to Circumvent the Paris Peace Treaties

### a) The German-Speaking Discourse

In retrospect the jus cogens-doctrine is sometimes traced back to the natural law writings of Francisco de Vitoria and Hugo Grotius.<sup>22</sup> Moreover, one has to note that some writers of the 19<sup>th</sup> century claimed that an international public order existed which has a superior status to treaty law.<sup>23</sup> Nonetheless, it seems that the terminology of jus cogens in international law (or *zwingendes Völkerrecht*) became particularly prominent in the discourse of German-speaking international lawyers during the inter war period.<sup>24</sup>

Switzerland was one location where some early conceptualizations of the idea evolved. A book on the morality of international treaties was published in 1924<sup>25</sup> and nine years later a first monograph on *Zwingendes Völkerrecht* was published at the University of Zürich.<sup>26</sup> While these two studies did not receive a lot of attention in the discipline, a parallel strand - generated in Austria around the same time - had a stronger influence on the general discussion. From the late 1920s to the mid-1930s, the famous Austrian international lawyer Alfred Verdross (1890-1980) slowly developed and disseminated his ideas about jus cogens. Verdross had become a professor at the University of Vienna in 1925 and soon dominated Austria's international legal discipline alongside his colleague Hans Kelsen. Already in his Hague lecture of 1929, Verdross put forward the idea that international law contained 'rules of "jus cogens" which oblige states to strictly observe a certain conduct'.<sup>27</sup> At the same time, Friedrich-August von der Heydte,<sup>28</sup> an assistant at Verdross' Viennese chair, published an article about 'ius cogens and ius dispositivum in international law'. Von der Heydte argued that several categories of jus cogens norms existed: rules which are indispensable for the existences of international law as a legal order and rules in which all members of the community have an interest.<sup>29</sup> In the mid-1930s, Verdross himself then engaged more intensively with the concept in two articles on 'reviewable and void' as well as 'holy and immoral' international treaties.<sup>30</sup>

<sup>22</sup> See A. Gómez Robledo, 'Le ius cogens international: sa g n se, sa nature, ses fonctions', *Recueil des Cours* 172 (1981-III), 9 (23-32).

<sup>23</sup> See instead of many J. Bluntschli, *Das moderne V lkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, 1872,   410 et seq.

<sup>24</sup> See E. Suy, 'The Concept of Jus Cogens in Public International Law', in: *Carnegie Endowment for International Peace (European Centre) (ed.), Papers and Proceedings II, The Concept of Ius Cogens*, 1967, 17, at 26-33; P. B. Stephan, *The Political Economy of Jus Cogens*, (2011) 44 *Vanderbilt Journal of Transnational* 1073, at 1081.

<sup>25</sup> M. Fr hlich, *Die Sittlichkeit in v lkerrechtlichen Vertr gen* (Hasch 1924).

<sup>26</sup> J. Jurt, *Zwingendes V lkerrecht. Ein Beitrag zur Lehre vom objektiven V lkerrecht* (Friedrich Gegenbauer 1933).

<sup>27</sup> See A. Verdross, 'R gles g n rales du droit de la paix', (1929 V) 30 *RdC* 271, at 304.

<sup>28</sup> After 1945 von der Heydte was involved in right-wing conservative catholic circles as a German professor see M. Stolleis, *Geschichte des  ffentlichen Rechts in Deutschland, Viertes Band, Staats- und Verwaltungsrechtswissenschaft in West und Ost 1945-1990* (Beck 2012), 71.

<sup>29</sup> See F. von der Heydte, 'Die Erscheinungsformen des zwischenstaatlichen Rechts. Ius Cogens und ius dispositivum im V lkerrecht', (1932) 16 *Zeitschrift f r V lkerrecht*, 461.

<sup>30</sup> See A. Verdross, 'Heilige und unsittliche Staatsvertr ge', (1935/1936) 2 *V lkerbund und V lkerrecht* 164; *ibid.*, 'Anfechtbare und nichtige Staatsvertr ge', (1935) 15 *Zeitschrift f r  ffentliches Recht*, 289; on the influence of Verdross on the concept of ius cogens see B. Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', (1995) 6 *EJIL* 33, at 50-53.



## b) Declaring the Versailles Treaty Null and Void

The writings of Verdross were closely related to one of the main goals of German/ Austrian international legal scholarship of the 1920s and 1930s: the revision of the Paris Peace Treaties. The German/ Austrian discipline was preoccupied with the Peace Treaties of Versailles and Saint Germain, which sanctioned territorial losses of Germany and Austria and laid the basis for reparation claims against the countries. Based on broad scholarly consensus the academics devoted considerable energy to attacking provisions of the perceived ‘dictates’.<sup>31</sup> For Heinrich Triepel, the famous father of the doctrine of dualism, the clause prohibiting the reunification of Germany and Austria constituted an ‘unnatural separation’ that a ‘great nation’ could not tolerate permanently.<sup>32</sup> According to the Hegelian-minded Erich Kaufmann, it was ‘madness’ to base a peace treaty on ‘punitive justice’.<sup>33</sup> But not only national conservative thinkers, also many pacifists rejected Versailles. The Geneva professor Hans Wehberg described the revision of the Treaty as ‘a precondition for the reconstruction of Europe’.<sup>34</sup> For Walther Schücking, the German judge at the Permanent Court of International Justice (PCIJ), the Treaty resembled an ‘egregious injustice’ triggering a ‘right to revision’.<sup>35</sup>

Also, Verdross was highly sceptical of the Paris Peace Treaties. As a bourgeois Austrian-nationalist, he believed in the unification of Austria and Germany which the treaties explicitly forbade. As he himself later emphasized, since 1918 he had propagated *großdeutsche* ideas.<sup>36</sup> Furthermore, he took a skeptical approach towards the international system installed by the League of Nations because it was related to the Paris Peace Treaties. For instance, he argued that the mandate system of the League disguised that through the Versailles Treaty the German colonies had been taken without compensation.<sup>37</sup>

The idea of *jus cogens* was also developed as a tool to fight the peace treaties.<sup>38</sup> Already in his Hague lecture of 1929, Verdross indicated that a convention would be *contra bonos mores* and invalid if it did not allow a state to protect its subjects properly.<sup>39</sup> Shortly thereafter, in an article on the merger of Germany and Austria, he criticized the provisions of the Versailles and Saint Germain Treaties, which codified that Austrian independence ‘shall be inalienable, except with the consent of the Council of the League of Nations’. He underlined that immoral treaties are not valid

---

<sup>31</sup> On the reaction of German international legal scholarship to the Treaty of Versailles, see M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Dritter Band, Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914-1945* (Beck 1999) 86-88.

<sup>32</sup> See Triepel, ‘Eröffnungsansprache’, (1924) 1 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDS)* 5, at 6.

<sup>33</sup> See Kaufmann, ‘Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung’, (1927) 3 *VVDS* 2, at 14.

<sup>34</sup> Wehberg, ‘Die Revision des Versailler Vertrages’, (1925) 25 *Die-Friedenswarte* 150.

<sup>35</sup> W. Schücking, *Die nationale Aufgabe unserer Politik* (1926), at 8, 12.

<sup>36</sup> On Verdross political convictions see J. Busch, ‘Alfred Verdross – Ein Mann des Widerspruchs? Teil 1, Verdross im Gefüge der Wiener Völkerrechtswissenschaft vor und nach 1938’, in: T. Olechowski and I. Reiter (eds.), *Vertriebenes Recht – Vertreibendes Recht. Die Wiener Rechtswissenschaftliche Fakultät zwischen 1938 und 1945* (2010), 139; A. Carty, ‘Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law’, (1995) 6 *EJIL* 78.

<sup>37</sup> A. Verdross, *Völkerrecht* (1937), 62.

<sup>38</sup> Already the 1924 book of Fröhlich had taken the Versailles Treaty as a key example of an immoral treaty, Fröhlich, *supra* note 24, 84.

<sup>39</sup> Verdross, *supra* note 26, 430-431.

according to international law.<sup>40</sup> Five years later, in the context of aggressive National Socialist revision policies, Verdross became even more outspoken. In March 1935, Adolf Hitler had deliberately set aside the Versailles Treaty's limit of a 100.000 soldier strong German army (Article 160) by introducing military draft service. Britain, France and Italy reacted by initiating a resolution in the League of Nations. On 17 April 1935, the Council of the League criticized German rearmament and stressed that the 'scrupulous observance of all the obligations of treaties is a fundamental rule of international life and a primary condition for the maintenance of peace'.<sup>41</sup> Verdross attacked this statement in an extensive article. *Pacta sunt servanda* would only apply in case the treaties in question were valid.<sup>42</sup> The remainder of the article was devoted to criticism of the 'Versailles Dictate' using three arguments. First, Verdross put forward that the whole Treaty of Versailles was null and void because of illegal coercion. Many German international lawyers took the position that the treaty was illegally forced upon Germany after the end of the First World War which - threatened with further military action - had had no choice but to sign.<sup>43</sup> Second, Verdross also criticized the treaty as breaching a preliminary peace treaty. German international lawyers put forward that Woodrow Wilson's *Fourteen Points* had been the offer of a preliminary peace treaty, which Germany had accepted. This preliminary peace treaty then had been violated by the much stricter conditions imposed by the Treaty of Versailles.<sup>44</sup> To these well-known arguments, Verdross now added a third: the notion of immoral treaties. After stressing that 'zwingende Völkerrechtsnormen' would establish limits to the possible content of international treaties, he explained that the peace treaties would be a prime example of void international treaties. He underlined that the maintenance of internal and external security would belong to the 'morally imperative functions of the state'. The peace treaties had to be regarded as immoral and void because they would strip Germany of the opportunity to defend itself against an aggression from outside.<sup>45</sup>

The political context of Verdross' writing becomes also obvious in a vivid exchange with the notorious German lawyer Carl Schmitt. Schmitt, who during the early 1930s legitimized various aggressive National Socialist policies,<sup>46</sup> had published a study on National Socialism and international law. In this work, he criticized the 'illusory boom of international legal scholarship' during the League era. For him, the Viennese 'pure theory of law' provided the fallacious theoretical foundation for this optimism. Schmitt explicitly attacked Verdross for legitimizing the Versailles Treaty by putting a strong emphasis on the principle of *pacta sunt servanda* in his writings.<sup>47</sup> Indeed, in his famous *Verfassung der Völkerrechtsgemeinschaft* Verdross had declared the *pacta sunt servanda* principle to be one foundational principle of the international community.<sup>48</sup> However, Schmitt's critique triggered a forceful reaction. In a footnote in his article on void treaties, Verdross built a line of defense. It would be 'unintelligible' how Schmitt could arrive at his conclusions, even though all of Verdross' writings would envision limitations for the

---

<sup>40</sup> See A. Verdross, 'Der Zusammenschluss im Lichte des Völkerrechts', in F. Kleinwächter and H. von Paller (eds), *Die Anschlussfrage in ihrer kulturellen, politischen und wirtschaftlichen Bedeutung* (1930), 548.

<sup>41</sup> See *Dokumente zu den europäischen Paktverhandlungen und zur Wiederherstellung der deutschen Wehrfreiheit*, (1935) 5 ZaöRV 354.

<sup>42</sup> Verdross, *Anfechtbare*, *supra* note 29, 289, Fn 1.

<sup>43</sup> See the many references in *ibid.*, 291 Fn 3.

<sup>44</sup> See *ibid.* 291 Fn 3.

<sup>45</sup> *Ibid.*, 289, Fn 1; 291-294.

<sup>46</sup> See C. Schmitt, 'Der Führer schützt das Recht', (1934) *Deutsche Juristenzeitung*, 945.

<sup>47</sup> See C. Schmitt, *Nationalsozialismus und Völkerrecht* (1934), 10-11.

<sup>48</sup> See A. Verdross, *Verfassung der Völkerrechtsgemeinschaft* (1926), 32-33.

pacta sunt servanda principle. He emphasized that he had always highlighted the possibility of declaring the ‘peace dictates’ void and that law was grounded in morality.<sup>49</sup>

### c) The Doctrine Travels

The idea of jus cogens slowly moved from the German speaking world to the international plane. At first, the concept had hardly any influence on academic writing and legal practice.<sup>50</sup> In 1936, the British international lawyer James Brierly stated in his Hague Course that ‘the law imposes little restriction on the conditions which States may introduce in their treaties’. The migration of the idea of such limits from the domestic to the international level would be unlikely in the near future.<sup>51</sup> Also, the early mention of the concept by an international court - the separate opinion of the German PCIJ judge Walther Schücking in the *Oscar Chinn* case between Britain and Belgium of 1934 - largely went unnoticed. Interestingly, Schücking used the idea of jus cogens to argue that another treaty was void, which had been concluded after the First World War. At the heart of the Oscar Chinn case were the principles of free trade and freedom of navigation as laid down in the 1919 Convention of St. Germain which superseded the notorious Congo Act of 1885. While Germany had been a treaty party to the Congo Act, it had not taken part in the deliberations at St. Germain. Schücking argued that the St. Germain Convention was invalid because it violated the jus cogens established by the Congo Act.<sup>52</sup> Again, a German speaking lawyer used the jus cogens-concept to criticize a Post-First World War treaty.

With his famous AJIL article on *Forbidden Treaties* of 1937, Verdross then presented his idea of jus cogens to the wider world.<sup>53</sup> In reaction to a report on the law of treaties, which had been developed by the Harvard Research Group under the auspices of the American international lawyer James Wilford Garner,<sup>54</sup> Verdross criticized that the report did not address the question of conflict between treaties and general international law. Referring to the early Swiss monograph on ‘Zwingendes Völkerrecht’, he stressed that therefore ‘the existence of ius cogens’ was at stake. According to Verdross’s view, jus cogens prohibited to conclude immoral treaties and treaties contra bones mores. For assessing whether a treaty was immoral, one had to ask whether a treaty allowed a state to fulfill its main moral tasks: the maintenance of law and order among states, defense against external attacks, care for the spiritual and physical well-being of citizens and the protection of nationals abroad. More concretely, Verdross put forward that ‘binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an inadequate manner the life, the liberty, the honor and the property of men on its territory’ is forbidden in international law. Furthermore, he added that an ‘international treaty binding a state to reduce its army in such a way as to render it defenseless against external attacks’ was immoral. Concluding, Verdross proposed to integrate a norm into the Harvard treaty report which held: ‘A treaty norm is void if it is either in violation of a compulsory norm of general international law or contra bones mores.’<sup>55</sup>

<sup>49</sup> Verdross, *Anfechtbare*, *supra* note 29, 292 Fn 4.

<sup>50</sup> On this see Hannikainen, *supra* note 2, 124-132.

<sup>51</sup> J.L. Brierly, ‘Règles générales du droit de la paix’, (1936) 58 RdC 3, at 219.

<sup>52</sup> Separate Opinion Judge Schücking, *The Oscar Chinn Case* (Britain v. Belgium), 12 December 1934, PCIJ Rep Series A/B No. 63, at 149.

<sup>53</sup> A. Verdross, ‘Forbidden Treaties in International Law’, (1937) 31 AJIL 571.

<sup>54</sup> See Law of Treaties, Reporter James W. Garner, (1935) 29 AJIL Documents, 655.

<sup>55</sup> Verdross, *supra* note 52, 571-577.

The critique of the Paris Peace Treaties was less directly advanced in the AJIL article than in Verdross' German writings, however a skilled observer could sense the undertone. Verdross cited a work on the revision of the Paris Peace Treaties, when explaining the concept of *jus cogens*.<sup>56</sup> Also, his reference to the maintenance of a functioning military as a moral task of the state had to be understood against the background of German rearmament. Hence, even the American Journal article contained an *ex post facto* legitimization of Hitler's aggressive revision policies of the Paris Peace Treaties.

This explains why the British international lawyer Hersch Lauterpacht at first reacted very skeptical to the concept of immoral treaties. In his Hague lecture of 1937 he underlined with explicit reference to the writings of Verdross: 'The alleged nullity of immoral treaties is a constant invitation to those who violate the law, to unilaterally and heroically disengage themselves from the obligation which impedes them.'<sup>57</sup> Knowing the German discourse, Lauterpacht feared the political implications of the *jus cogens*-doctrine. As a tool for criticizing the Paris Peace Treaties during the Weimar and National Socialist years, the *jus cogens*-doctrine threatened the stability of international relations.

### **3. Jus Cogens as a Pierce to Absolute State Sovereignty**

#### **a) Relative Sovereignty during the Inter War Period**

Besides this tainted legacy of the legal doctrine, the concept also stems from an intellectual tradition which many international lawyers regard as a positive development: the emergence of a more value-oriented international law which is based on higher moral principles and limits the sovereignty of states. Still today some lawyers understand the doctrine as a foundational concept for the emerging international community<sup>58</sup> or highlight the potential for enhancing the fairness of international law.<sup>59</sup> This strand of thought became particularly influential after the Second World War emanating from the discourse of the inter-war period.

Already in the 1920s, some Western jurists had attacked the doctrine of state sovereignty and the dominating theory of voluntarism according to which all legal rules had to be based on the consensus of states. In the context of the establishment of the League of Nations, authors from across Europe and the United States propagated that international institutions and international law had to be taken seriously and decried the concept of absolute state sovereignty. Well known academics like Nicolas Politis, Edwin Borchard, James Brierly, George Scelle and Paul Fauchille propagated to turn away from the traditional consensus based understanding of international law.<sup>60</sup> In the German speaking world, Hans Kelsen, Walther Schücking and Hans Wehberg subscribed to the project of international institutionalization and developed theories fighting against the sovereign state dogma. By pointing to the advantages of the League and international

---

<sup>56</sup> See the reference to J. Kunz, *Die Revision der Pariser Friedensverträge* (1932).

<sup>57</sup> H. Lauterpacht, 'Règles générales du droit de la paix', (1937) 62 *Recueil de Cours*, 96, at 306.

<sup>58</sup> R. Kolb, *Théorie du ius cogens international: essai de relecture du concept* (Presses Universitaires de France 2001).

<sup>59</sup> A Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006).

<sup>60</sup> For a long list of names see J. W. Garner, 'Le développement et les tendances récentes du droit international', (1931 I) 35 *RdC* 609, at 699-702.

cooperation, they criticized traditional voluntarist conceptions of the pre-war period.<sup>61</sup> For some observers, international law appeared to be in an era of transition and transformation.<sup>62</sup>

Not only progressive modernizers embraced these ideas but also more conservative thinkers. In his inaugural essay on the founding of the Berliner Kaiser-Wilhelm Institute for Comparative Public Law and International Law, Viktor Bruns expressly dissociated himself from a PCIJ opinion, in which the judges had emphasized that the principle of the independence of states was a basic principle of international law.<sup>63</sup> Bruns argued instead for the existence of an international legal community. 'The basic principle of any legal system is not the independence of the individual actor, but its limitation for the community's sake.'<sup>64</sup> The idea of a legal community limiting the sovereignty of states came to be a common theme in the discipline.

### **b) Verdross and Natural Law**

Also Verdross' writings stood in this community tradition. Natural law ideas inspired him to believe in legal rules which were superior to formally binding treaties. In his *Verfassung der Völkerrechtsgemeinschaft* of 1926, Verdross emphasized that the goal of the transfer of the concept of constitution to the international level was to highlight that 'international law is not a mere collection of individual fragments which have no inner connection', but forms 'a harmonious order of norms', which is 'properly called the international legal community'.<sup>65</sup> Even though Verdross did not (yet) expressively develop a concept of hierarchically higher substantive international legal rules, his belief in international law as a sophisticated legal system was apparent.

Verdross' community conceptualization of the international legal sphere originated from his philosophical and religious belief in natural law. Already in the early 1920s he had referred to 'international justice' as a subsidiary source of international law and the foundation of the international constitution.<sup>66</sup> Also he stressed that the 'Christian doctrine of all men as children of God' represents the 'ethical-metaphysical foundation' for the realization of a universal legal order.<sup>67</sup> In 1937, he emphasized that 'the classical natural law doctrine' with its 'moral foundations' provides the point of departure for the study of international law.<sup>68</sup> Verdross explicitly endorsed the tradition of (Catholic) Christian universalism.

Verdross' ideas about immoral treaties and *jus cogens* were part of this belief in an international legal community based on natural law. In his writings on void treaties, Verdross stressed that his *jus cogens* approach was connected to the idea of universally recognized general principles of international law (Art. 38 I c of the Statute of the PCIJ)<sup>69</sup> which he regarded as stemming from

<sup>61</sup> On the writings of Hans Kelsen, Walther Schücking and Hans Wehberg, see for instance J. von Bernstorff, *The Public International Law Theory of Hans Kelsen. Believing in Universal Law* (2010).

<sup>62</sup> See Garner, *supra* note 59, 694.

<sup>63</sup> Request for advisory opinion concerning the Status of Eastern Carelia, 23 June 1923, PCIJ Rep Series B No 5, at 27.

<sup>64</sup> See V. Bruns, 'Völkerrecht als Rechtsordnung I', 1 (1929) ZaöRV 8, at 9, 12.

<sup>65</sup> Verdross, *supra* note 47, Preface.

<sup>66</sup> See A. Verdross, *Die Einheit des rechtlichen Weltbildes auf der Grundlage der Völkerrechtsverfassung* (1923), 120-126.

<sup>67</sup> A. Verdross, 'Die sittlichen Grundlagen des modernen Völkerrechts' (1930/1931), in H. Klecatsky, R. Marcic and H. Schambeck (eds), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl und Alfred Verdross* (1968), 2121, at 2121-2122.

<sup>68</sup> See Verdross, *supra* note 36, V; 36.

<sup>69</sup> Verdross, *Anfechtbare*, *supra* note 29, 295.

natural law. Furthermore, he highlighted that the rules on jus cogens had to correspond to the 'universal ethics of the international community' and decried a 'dogmatic positivism which wishes to separate positive law from its ethical mother soil'.<sup>70</sup> Verdross' thinking about the jus cogens-doctrine was part of the intellectual turn from strict positivist absolute sovereignty to a more relative sovereignty and a deeper value-orientation of international law.

How can this be reconciled with Verdross' attack on the Paris Peace Treaties? Interestingly, for Verdross, natural law and international justice not only provided the intellectual moral foundation of international law, but at the same time enabled him to criticize the 'unjust' peace treaties. In his view the Versailles Treaty rendered it impossible for Germany to defend its people against outside attacks even though Germany like every other state was morally obliged to do so. Therefore, the treaty violated jus cogens and was *contra bonos mores*. The use of this moral reasoning for attacking Versailles demonstrates one potential problem of the jus cogens-doctrine: different actors regard different values to be morally imperative and fundamental for the existence of an international community.

### **c) British Special Rapporteurs and the Law of Treaties**

After the Second World War, the idea of jus cogens caught on. The United Nations as the new universal international organization stood for a more value-laden international law. The UN Charter declared the observance of human rights and fundamental freedoms to belong to the goals of the institution and its members (Art. 55 and Art. 56). Furthermore, the (non-binding) Universal Declaration on Human Rights became an emblem of the general perception that international law had to be grounded in moral values. As some scholars observed, natural law ideas resurfaced in many different corners of the discipline.<sup>71</sup> In this context, the idea of higher fundamental norms limiting the free will of states inspired the thinking of many international lawyers.

As Stefan Kadelbach has shown, one important promoter of the jus cogens-doctrine was the International Law Commission of the United Nations. In November 1947, the General Assembly established the Commission in line with Article 13 (1a) of the UN Charter and provided it with the mandate to promote the progressive development and codification of international law.<sup>72</sup> While the first drafts of other expert bodies on the law of treaties had largely been silent on the question of jus cogens,<sup>73</sup> Hersch Lauterpacht, the Special Rapporteur on the law of treaties, included the topic in his 1953 draft. Article 15 of the first report of the ILC on international treaty law held: 'A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.' According to the proposal, the illegality of an international treaty did not result from a violation of customary law, but only from a violation of 'such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre public international*)'. These fundamental principles were described as being so 'expressive of rules of international morality' that a tribunal would consider them as belonging to the general principles of law (Article 38 I c ICJ Statute).<sup>74</sup> Apparently Lauterpacht had changed his mind, after Germany had lost the war, the Paris

<sup>70</sup> Verdross, *supra* note 52, 574-576.

<sup>71</sup> See U. Scheuner, 'Naturrechtliche Strömungen im heutigen Völkerrecht', (1950) 13 ZaöRV, 556.

<sup>72</sup> GA/RES/174 /II, 21 November 1947.

<sup>73</sup> On the see Kadelbach, *supra* note 2, 36-37.

<sup>74</sup> United Nations Yearbook of the International Law Commission (YILC) 1953, vol. II, 154-155.

Peace Treaties were no longer an issue and Verdross' argument about immoral treaties had lost its object. Still however, it is telling that Art. 15 referred to 'illegality' rather than 'immorality' of a treaty and thus somewhat distanced itself from Verdross' *contra bonos mores* idea.<sup>75</sup>

Lauterpacht's successors at the ILC pursued his path. Sir Gerald Fitzmaurice in his report of 1958 explicitly introduced the language of *jus cogens*: 'It is essential to the validity of a treaty that it [...] should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*.'<sup>76</sup> In his commentary, Fitzmaurice referred to treaties contrary to rules created for the protection of individuals and treaties in which two States conspired to commit an act of aggression as examples for the application of the rule. Fitzmaurice stressed that as a common characteristic the rules of *jus cogens* 'involve not only legal rules but considerations of morals and of international good order'.<sup>77</sup>

The 1963 draft of the new British Special Rapporteur Humphrey Waldock then laid the ground for the discussion in the Vienna Conference on the Law of Treaties. Article 13 of Waldock's draft held: 'A treaty is void if it is contrary to international law and if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*.' In his commentary Waldock argued that '[w]hatever imperfections international law may still have, the view that in the last analysis there is no rule from which States cannot at their own free will contract out has become increasingly difficult to sustain. The law of the Charter concerning the prohibition of the use of force in reality presupposes the existence in international law of rules having the character of *jus cogens*.'<sup>78</sup>

The reactions to the proposal demonstrate that the concept had support in many quarters of the (Western-dominated) international legal discipline. In the leading international law magazines in France, the USA and Germany, Michel Virally, Egon Schwelb and Ulrich Scheuner praised that the draft recognized substantive limits for the action of states.<sup>79</sup> As the extensive study of Eric Suy on the scholarship on *jus cogens* demonstrates various French, Italian, Belgian, Dutch, Spanish and American authors embraced the normative concept. In the overall academic discussion about four-fifths of the involved international lawyers argued for the existence of so-called indispensable norms (peremptory norms) in international law.<sup>80</sup> Against the background of the founding of the United Nations and the crimes of the Second World War, the idea of *jus cogens* received a lot of support.

#### **4. Embracement by Non-Western States**

##### **a) Controversy at the Vienna Conference**

The origins of the *jus cogens*-doctrine cannot only be found in the anti-Peace Treaties strand of German interwar thinking and the value-oriented fight against state sovereignty. Recently, Jean

<sup>75</sup> On this Kadelbach, *supra* note 2, 37.

<sup>76</sup> YILC 1958, II, 26.

<sup>77</sup> YILC 1958, II, 40-41.

<sup>78</sup> See YILC, II, 52.

<sup>79</sup> See M. Virally, 'Réflexions sur le "jus cogens"', (1966) 12 *Annuaire français de droit international* 5; U. Scheuner, 'Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences', (1967) 27 *ZaöRV* 520; E. Schwelb, 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission' (1967), 61 *AJIL* 946.

<sup>80</sup> See Suy, *supra* note 23, 17.

Allain has argued that the decolonization process generated the idea of communal interests in international law. For him, decolonization has been the 'source' of *jus cogens*.<sup>81</sup> While Allain's explanation sidelines other historical actors which contributed to the emergence of *jus cogens*, the endorsement of peremptory norms by non-Western states in the East and in the South played an important role for the universal recognition of the idea at the UN-level.

At the Vienna Conference of Ministers, which was held in 1968 and 1969, the articles proposed by the ILC were kept with a few changes. Art. 53 (formerly Art. 50) of the Vienna Convention was dedicated to 'treaties conflicting with a peremptory norm of general international law ("jus cogens")'. The well-known article holds that '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.' The idea that international law limits the free contractual will of states thereby gained recognition in an instrument with potentially universal outreach.

The discussions at the Vienna Conference between the state representatives on the concept of *jus cogens* had been controversial. Even though most state representatives acknowledged the need to limit the unbound treaty making power of states, some also highlighted the dangers of the doctrine. A telling geographical split between opponents and supporters emerged.

Several states from the Western world became skeptical of the *jus cogens* norms because of their indeterminate character and the risk of misuse. In academia, Georg Schwarzenberger forcefully argued that the *jus cogens*-doctrine could be used as a vehicle for circumventing contractual obligations. The proposal of the ILC 'leaves everybody free to argue for or against the *jus cogens* character of any particular rule of international law'. Reminding the actors of the experiences with the *clausula rebus sic stantibus*, he criticized *jus cogens* 'as a means of undermining the sanctity of the pledged word.'<sup>82</sup> Taking up this criticism, a French delegate at the Conference criticized that *jus cogens* would drive 'seeds of insecurity' into international relations and expressed the fear that the article might 'deprive States of one of their essential prerogatives, since to compel them to accept norms established without their consent and against their will infringed their sovereign equality'.<sup>83</sup> Also, the United States, Great Britain and Belgium (joined by Turkey) declared that because the identification of *jus cogens* would hardly be possible, the rules of *jus cogens* would not be ripe for becoming part of the codification on the law of treaties.<sup>84</sup> Similarly, the representative of the United Kingdom highlighted 'what might be *jus cogens* for one state would not necessarily be *jus cogens* for another.'<sup>85</sup> Luxemburg even outright rejected the principle.<sup>86</sup> In order to limit the notion, Western states in particular (but also states like Lebanon and Turkey) pressed to make the recognition of *jus cogens* dependent on the decision of the International Court of Justice (Articles 65, 66 a VCLT).<sup>87</sup>

---

<sup>81</sup> See Allain, *supra* note 8, 35-36.

<sup>82</sup> See G Schwarzenberger, 'Ius Cogens in International Law?', (1965) 43 Texas Law Review 455, at 477-478.

<sup>83</sup> For the citation see United Nations Conference on the Law of Treaties, Second Session, 19<sup>th</sup> plenary meeting, A/CONF.39/SR.19, 93-95.

<sup>84</sup> Yearbook of the United Nations 1967, 765.

<sup>85</sup> United Nations Conference on the Law of Treaties, First Session, 53rd meeting of the Committee of the Whole, 6 May 1968, A/CONF.39/C.1/SR.53, 305.

<sup>86</sup> YILC 1966, II, 20.

<sup>87</sup> See on this Kadelbach, *supra* note 2, 41-46; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Art. 53 paras 2-4.



When the state parties voted on Article 53 VCLT with 87 in favour, 8 against and 12 abstentions, it were largely states from the West resisting the draft. Except for Turkey, the other seven states Australia, Belgium, France, Lichtenstein, Luxembourg, Monaco and Switzerland all came from the West. Furthermore, France became the only state which ultimately voted against the adoption of the whole VCLT because it strongly opposed the codification of the jus cogens concept.<sup>88</sup> In contrast, most states in the East and the South embraced the idea of jus cogens.

### **b) The Eastern Critique of Transatlantic and European Institutionalization**

In the Soviet bloc, the jus cogens-doctrine was regarded as a helpful instrument for criticizing the new regional international treaty law created by Western states after World War II. In a meeting of the Soviet Society of International Law in 1958, Soviet international lawyers argued for the recognition of various fundamental principles in international law.<sup>89</sup> With a view to 'illegal imperialist treaties', one author stressed that all international law norms which are contrary to fundamental principles cannot be considered as valid.<sup>90</sup> Another author claimed that peaceful co-existence would be the key fundamental principle of international law. Treaties like the NATO, SEATO and the European Treaties could not be regarded as lawful because they would subvert the Charter of the United Nations and international peace.<sup>91</sup> Furthermore, in the early 1960s, the most famous Soviet international lawyer Grigory Tunkin subscribed to the idea of higher principles in international law which in his reading included Nikita Khrushchev's foreign policy ideal of peaceful co-existence. The principle of non-aggression for him was the prime example of this idea.<sup>92</sup> As a member of the ILC, Tunkin was directly involved in the discussions about Waldock's draft. Even though he preferred to speak of fundamental principles rather than jus cogens, he declared his general agreement with the jus cogens-concept. Tunkin argued that as an example for the notion, unequal treaties which establish gross inequalities between the obligations of parties should be mentioned.<sup>93</sup>

Similar views were advanced by East German international lawyers. Rudolf Arzinger embraced the idea that the principle of *pacta sunt servanda* does not apply if agreements are contrary to fundamental principles of international law. As examples he referred to the prohibition of the use of force, non-intervention and the right of self-determination. For him, the NATO Treaty and the Treaty of Paris establishing the European Coal and Steel Community were typical examples of treaties which violated these principles.<sup>94</sup> Hence, for Eastern lawyers, the jus cogens-doctrine allowed to question disliked treaties which stood for the economic and military integration of the West.

---

<sup>88</sup> See on this Kadelbach, *supra* note 2, 45.

<sup>89</sup> See T. Schweisfurth, *Der internationale Vertrag in der modernen sowjetischen Völkerrechtstheorie* (Wissenschaft und Politik 1968), 211.

<sup>90</sup> See German translation of the Conferences of the Society of International Law, *Die Jahrestagungen der Sowjetischen Gesellschaft für Völkerrecht*, vol. I (1964) 66-67.

<sup>91</sup> *Ibid.*, 108-111.

<sup>92</sup> See G. Tunkin, *Das Völkerrecht der Gegenwart. Theorie und Praxis* (1963) 95; see also Tunkin, 'Ius Cogens in International Law', (1971) 3 *University of Toledo Law Review* 107.

<sup>93</sup> See YILC 1963, I, 69; on this also T. Schweisfurth, 'Die Völkerrechtswissenschaft in der Sowjetunion', (1974) 34 *ZaöRV* 1, at 42-45.

<sup>94</sup> See R. Arzinger, 'Vertragstreue und völkerrechtswidrige Verträge', in *Festschrift Erwin Jacobi* (Deutscher Zentralverlag 1957), 238.

### c) The Global South and the South West Africa Cases

Besides the East, also non-aligned states embraced the doctrine of jus cogens. In the discussions of the ILC about the Waldock-draft, the Indian and Afghan ILC-members Radhabinod Pal and Abdul Hakim Tabibi stressed that the UN-Charter, especially its prohibition of aggression and its reference to human rights were examples of such norms.<sup>95</sup> Furthermore, Pal and the Uruguayan Jiménez de Aréchaga explained the intellectual background of the doctrine. Because the horrors of the Second World War had led to the adoption of the principles of the Nuremberg Military Tribunal and of the Charter of the United Nations, international law would now be morally grounded.<sup>96</sup> Moreover, many Southern governments positioned themselves favorable to the inclusion of the jus-cogens draft articles in the law of treaties. For instance Algeria, Brazil, Ecuador, Ghana, Guatemala, Indonesia, Iran, Iraq, Morocco, Pakistan, Panama, the Philippines, Syria, Thailand, Uruguay, Venezuela and the United Arab Emirates belonged to the supporters of the doctrine.<sup>97</sup>

The motivations of lawyers from the Global South to embrace the notions were manifold. As the statements of the ILC members demonstrate, the belief in a value-laden international law as a reaction to the crimes and violence of the Second World War played a role for some lawyers. Moreover, on a more instrumental level, non-aligned states also favored the principle because it promised to allow them to disengage disliked customary international law norms or treaty obligations. In the 1960s, many decolonized states developed a revolutionary attitude towards some of the existing rules of international law as a product of a system created by imperialist states and demanded to take their interests into account.<sup>98</sup> As the Swiss jurist Paul Guggenheim remarked shortly after the Vienna conference, for him the introduction of jus cogens into the Vienna Convention was a political concession to newly independent states. Like some of his colleagues he implied that new states might be bound only by jus cogens norms and were free to choose whether they adopted other norms.<sup>99</sup> With a somewhat different emphasis, the Egyptian George Abi-Saab argued that 'to the extent that jus cogens imposes limitations on the freedom of action of the powerful, wealthy and old established States who muster the greater bargaining power on the international scene, it extends a valuable protection to the newer and weaker States.'<sup>100</sup>

That the idea of jus cogens could potentially be used for the benefit of colonized or newly independent states was demonstrated in the South West Africa cases of 1966. During the League of Nations time, South Africa had received the mandate for the former German colony South West Africa which was supervised under the League of Nations mandate system. After South Africa annexed South West Africa in 1949, the ICJ, in an advisory opinion initiated by the General Assembly, declared that the Union of South Africa could not unilaterally modify the international status of the South West African territory.<sup>101</sup> However, South Africa did not comply with the opinion. In 1960, the former League members Ethiopia and Liberia then brought a contentious case against

<sup>95</sup> YILC 1963, I, 63, 65

<sup>96</sup> YILC 1963-, I, 65, 74.

<sup>97</sup> See on this Kadelbach, *supra* note 2, 40 Fn 45.

<sup>98</sup> On this see S. Prakash Sinha, 'Perspectives of the Newly Independent States on the Binding Quality of International Law', (1965) 14 ICLQ 121.

<sup>99</sup> P. Guggenheim, in Carnegie Endowment for International Peace (ed.), *The Process of Change in International Law* (1965), 22; on this see Allain, *supra* note 8, 50-52.

<sup>100</sup> G. Abi Saab, 'Introduction', in Carnegie Endowment for International Peace (ed.), *The Concept of Jus Cogens in Public International Law: Papers and Proceedings* (1967), 7, at 14.

<sup>101</sup> *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, ICJ Rep 1950, p. 128, at 144.

South Africa challenging the policies of apartheid installed in South West Africa. At a Conference of Independent African States, South African opposition leaders from the African National Congress had urged the two countries to take the case to the court.<sup>102</sup> During the ICJ-proceedings, the agents based their arguments on the principle of non-discrimination and put forward that 'South Africa may not claim exemption from a legal norm which has been created by the overwhelming consensus of the international community, a consensus verging on unanimity.'<sup>103</sup> After the ICJ had decided with a thin 9 to 8 majority in 1962, that it had jurisdiction to hear the case, four years passed until the decision on the merits. In 1966, by the President's casting vote, the Court held that the two countries did not have legal standing to bring the claim. Neither Liberia nor Ethiopia would have an individual legal interest in the controversy on behalf of South West Africa because no *actio popularis* existed in international law.<sup>104</sup> For the dissenting judges the decision was utterly wrong. They argued that the mandate provided all members of League of Nations with the task to oversee the compliance with the mandate's obligations and hence all former League members would have a legal interest in the case.<sup>105</sup>

Even though the more expansive reading of the standing issue was not directly connected to the *jus cogens*-idea in Waldock's draft, the underlying premise of the dissenters was quite clear: since the apartheid system in South West Africa violated the recognized principle of non-discrimination as a fundamental norm of international law, legal standing requirements should not be interpreted too narrowly. Accordingly, the Japanese Judge Tanaka explicitly referred to *jus cogens* as the basis of his dissenting opinion on the merits of the case. He forcefully emphasized that South Africa had to respect the principle of equality of the South West African people as a human right. To strengthen the claim, he stressed: 'If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.'<sup>106</sup>

In the coming years, non-Western states continued to refer to the principle of *jus cogens* in order to strengthen their legal and political position. As Gennady Danilenko has demonstrated the new non-Western majority in the General Assembly regarded *jus cogens* as a legislative tool by which one could transform the traditional notions of international law. At the Third United Nations Conference on the Law of the Sea, many developing countries supported the view that the common heritage of mankind developed in relation to the seabed was a principle of *jus cogens*. The Chilean representative even proposed to explicitly codify the principle as a preemptory norm in the UNCLOS treaty, a proposal which failed because of the dissent of some Western states like the United States. Moreover, at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts developing countries claimed that the principle of the permanent sovereignty over natural resources which had been highlighted in a number of General Assembly

---

<sup>102</sup> On the background see Allain, *supra* note 8, 39-41.

<sup>103</sup> See ICJ Pleadings, South West Africa Cases (Vol. IX) (Statements by E.A. Gross), 304, cited after G. M. Danilenko, 'International Jus Cogens: Issues of Law-Making', (1991) 2 EJIL 42, 50.

<sup>104</sup> *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, ICJ Rep 1966, p. 6.

<sup>105</sup> See for instance *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, ICJ Rep 1966, p. 6, at 216 (Wellington Koo, Dissenting Opinion).

<sup>106</sup> *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, ICJ Rep 1966, p. 6, at 298 (Judge Tanaka, Dissenting Opinion).

resolutions reflected *jus cogens*.<sup>107</sup> Even though the non-Western states were not successful with their attempts to use *jus cogens* as a tool to change the direction of the Western dominated legal discourse, they put high hopes into the new doctrine and supported its application. Hence, the emergence of *jus cogens* has also to be credited to the Global South.

## 5. Conclusion

Since the establishment of the *jus cogens* provisions in the VCLT, the doctrine of *jus cogens* has been part of the international legal discourse. Even though the ICJ has been rather reluctant to refer to the notion and has preferred the concept of *erga omnes*,<sup>108</sup> in the *Armed Activities in the Territory of the Congo case between the Democratic Republic of the Congo and Rwanda*, the Court finally explicitly mentioned the doctrine.<sup>109</sup> Also other international bodies like the ICTY have taken up the *jus cogens*-idea.<sup>110</sup> Since 2016, the ILC is preparing a report on 'Peremptory norms of general international law (*Jus cogens*)', which demonstrates that the notion is at the heart of international law.<sup>111</sup>

This paper points to the multifaceted history of the concept. It reminds us that the doctrine originates from different and seemingly contrary lines of thinking. While for German-speaking international legal scholars of the 1920s and 1930s the concept was a tool to revise the Paris Peace Treaties, it was also connected to the fight against absolute state sovereignty and the belief in natural law during the inter-war period. Furthermore, whereas for Soviet thinkers of the Khrushchev era, *jus cogens* provided a tool to criticize Western economic and military integration and newly independent states regarded the concept as a promising vehicle for distancing themselves from the traditional international legal notions, the embracement of *jus cogens* as a representation of a more value-laden international law was also a reaction to the crimes of the Second World War. Hence, the relative success of the the concept of *jus cogens* probably also stems from its conceptual openness which allows to apply the notion for different and even contradictory political objectives.

However, despite these underlying tensions, one common theme comes to the fore. The concept appears to be directed against the status quo. After having lost the First World War, Germany intended to reshape the existing international legal system by attacking the Versailles Treaty. During the Cold War, the Soviets as well as states from the Global South tried to transform the Western dominated international legal order. At the same time, Western international lawyers put high hopes in the concept as a tool to challenge the free political will of states by providing for a more value-laden international law. In a sense, the losers of the First World War, the Non-Western socialist and decolonized countries and the legal idealist in the ILC all subscribed to a struggle against power.

<sup>107</sup> See Danilenko, *supra* note 102, at 57.

<sup>108</sup> *Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain*, Second Phase, Judgment of 5 February 1970, ICJ Rep 1970, p. 3, para 33; on this see A. Bianchi, 'Human Rights and the Magic of *Jus Cogens*', (2008) 19 EJIL 491.

<sup>109</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Rep 2006, p. 6, at paras 64 and 125.

<sup>110</sup> *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, ICTY Trial Chamber II, Judgment of 10 December 1998, at paras 155–156.

<sup>111</sup> Second report on *jus cogens* by Dire Tladi, Special Rapporteur, UN GA, International Law Commission, Sixty-ninth session Geneva, 1 May-2 June and 3 July-4 August 2017, A/CN.4/706.

On a more general level, this paper propagates that scholarship on the history of international law should engage with the complexity and multicausality of historical developments. Too many historical accounts by international legal scholars ignore that international legal doctrines and institutions often originate from different lines of thinking. Because legal concepts can be applied in different political and historical circumstances, their development is often influenced by divergent actors and factors. Even though such a mediating historical account does not promise to present the only possible objectively true reading of history, it provides a fuller picture than interpretations which write international legal history via the exclusive perspectives of ‘progress’, ‘non-Western contribution’ or ‘dark sides’ respectively. In a time of ‘alternative facts’, academic scholarship should be careful not to fall in the trap of providing straightforward historical narratives for particular political causes. Instead international legal historians should emphasize the complexity of the manifold usages of legal doctrines by divergent actors over the course of time.

## The Author



Dr. Felix Lange, LL.M. (NYU), M.A. is a research fellow at Humboldt University. He studied law and modern history in Freiburg, Uppsala and Berlin. After his first State Exam in law and a „Magister“ in history he received an LL.M. in International Legal Studies from New York University. During his practical training („Referendariat“) he was interning at the Legal Department of the Auswärtige Amt and the Bundesverfassungsgericht. For his PhD thesis („Dissertation“) on the history of international legal scholarship in Western Germany, he received the 2017 Hermann Mosler-Prize of the German Society of International Law. In his post-doc project he is exploring the changing images of international law in the United States, Germany, India and South Africa.

---

The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.