

4. The Political Economy of *Jus Cogens*

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I. INTRODUCTION

No concept has greater salience than *jus cogens* in contemporary debates about International Law (IL). It proposes that humanity, unmediated by States or other entities, insists on the recognition of fundamental human rights that all subjects of IL must respect. *Jus cogens* displaces the regular processes of international lawmaking. Its norms occupy the highest level of law's hierarchy and invoke the deepest moral commitments.¹

So stated, the *jus cogens* concept would seem to defy the kinds of analysis that Political Economy (PE) might offer. Its premise is the existence of transcendent moral commitments that exclude normal politics. It implicates constitutional politics, not PE. Economic analysis, with its emphasis on rational self-interest and welfare maximization, would seem to have little to say about such values.

This view of *jus cogens*, however, is too narrow. The core of the concept is not a set of particular claims about human rights. Rather, it is three related assertions: that a body of peremptory norms exists, that these norms operate on a higher plane than normal IL, and that they derive their legitimacy and binding nature from something other than State consent. *Jus cogens* is fundamentally about a lawmaking process, not about the content of the law made.

¹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006); Case T-315/01, *Kadi v. Council*, [2005] ECR II-3649, revised, Joined Cases C-402/05 and C-415/05, *Kadi v. Council*, [2008] ECR I-6351; *Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Bundesgericht* [BGER] [Federal Supreme Court], ¶ 7, Nov. 14, 2007, 133 *Entscheidungen des Schweizerischen Bundesgerichts* [BGE] II 450 (Switz.).

So understood, *jus cogens* readily lends itself to a political-economy analysis. Choices about processes to reach significant outcomes necessarily entail consideration of who will gain, and who will lose, as a result of these choices. The choices are political, and economics can help us think in an orderly manner about what gain and loss means.

I develop this argument in three steps. First, I discuss the history of the *jus cogens* concept in IL. This history demonstrates that the present manifestation of the concept – one that makes human rights central to the enterprise – is only the most recent version. It confirms the appropriateness of looking at the procedural dimension of the concept, rather than any substantive outcome. Second, I describe the basic elements of political-economy analysis as it applies to IL. This discussion concentrates on a particularly significant subset of political economy, namely the theory of public choice. I then show how this theory can inform an analysis of *jus cogens*. In particular, I demonstrate how political economy helps us understand the implications of the majority and dissenting opinions of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State*, that body's most recent and significant consideration of the *jus cogens* concept.

This exercise establishes two things. First, it demonstrates the resiliency and flexibility of political economy as a method of attacking fundamental IL problems. Second, it invites us to reconsider core assumptions about how IL works, and thus opens up space for critical thinking about the field.

As van Aaken and Trachtman propose in the model found at the beginning of this Volume, this Chapter links the domestic politics of preference formation at the national level to the construction of a particular rule of IL (IL as *explanandum*). It considers why particular groups would prefer widespread international recognition of a *jus cogens* idea, and others would not. The Chapter also considers the functional consequences of *jus cogens* within the international system (IL as *explanans*), in part to tie the preferences of its proponents to the outcomes that it generates. Acceptance of the rule redistributes power both among non-State actors and among States. Discovering these results validates the use of the political economy of IL both as a means of explaining the stakes in debates over particular IL constructs, and as a tool for framing a normative assessment of the potential outcomes of these debates.

The concept of *jus cogens* in IL has enjoyed multiple lives.² The term itself has its origins in continental analysis of private law. A ‘peremptory rule’ overrides private preferences in favor of a public policy. The concept thus implied a hierarchical relationship, with otherwise legitimate public law always taking precedence over private law.³

Alfred von Verdross, a leading Austrian academic and diplomat, first borrowed the concept for use in IL, at least among writers in English. He argued that IL contained higher principles that themselves constituted the international system and thus operated independently of the will of States. Writing shortly before the *Anschluss* and anticipating what was to come, he invoked *jus cogens* as a basis for invalidating treaties that destroyed the capacity of a State to function as a sovereign and to fulfill its essential tasks within the international community. He provided as examples maintenance of internal law and order, defense against external attacks, care for the welfare of its subjects, and protection of subjects abroad.⁴ All these disabilities were those that the German Reich soon would impose on victims of its aggression.⁵

After the War, von Verdross acquired surprising bedfellows. The Soviet Union found itself in the unanticipated position of a superpower with extensive international relations, but not the leader of a globally socialist world.⁶ It required a new conception of IL to reflect its international position. Soviet theorists arrived at the concept of peaceful coexistence, a second-order theory of international lawmaking that shared structural elements with von Verdross’s concept. In essence, the theory of peaceful

² In this Section of this Chapter, I draw heavily on Paul B Stephan, ‘The Political Economy of Jus Cogens’ (2011) 44 *Vanderbilt J Transnatl L* 1073, 1081–96.

³ On the private law origins of *jus cogens*, see Levan Alexidze, ‘Legal Nature of Jus Cogens in Contemporary International Law’ (1981) 172 *Recueil des Cours* 219, 233–42.

⁴ Alfred von Verdross, ‘Forbidden Treaties in International Law’ (1937) 31 *AJIL* 571 at 574.

⁵ Von Verdross initially had agreed in 1932 to take up a prestigious academic post in Munich, but he withdrew his acceptance after Hitler came to power and remained in Austria. After the *Anschluss* the Nazi government constrained his work but allowed him to continue to do international law. ‘Biographical Note with Bibliography’ (1995) 6 *EJIL* 103 (appended to *Festschrift* commemorating von Verdross).

⁶ See Paul B Stephan, ‘The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy’, in Tatiana Borisova and William B Simons (eds), *The Legal Dimension in Cold War Interactions: Some Notes from the Field* (Martinus Nijhoff 2012) 141, 143–45.

coexistence posited that the prevention of a cataclysmic confrontation between the two social and economic regimes that the Soviets called socialism and capitalism had become the fundamental and overriding imperative of IL. Although the Soviets had supreme confidence in the ultimate triumph of their system, they recognized that the invention of nuclear weapons had raised the possibility of a conflagration that would interrupt history and end civilization of any sort. To hold off such an appalling outcome, IL had to exclude any outcome that would increase the risk of confrontation.

The Soviet argument did much more than define the rules for formation of Customary International Law (CIL). Rather it embraced as a fundamental norm the principle that no IL, including any treaty commitment, could come into being without the consent of the two regimes. In effect, the theory gave the Soviet Union a veto over all IL, conventional as well as customary. To take a concrete instance, the argument provided a basis for arguing that the NATO Treaty, because it facilitated inter-camp armed confrontation, exceeded the capacity of States to make international obligations and hence was profoundly illegitimate.⁷

The approaches of von Verdross and the Soviet Union to *jus cogens* invite comparison and contrast. Both posited the existence of higher order norms that limited the capacity of States to make IL. Both focused on the limiting role of these norms, rather than suggesting that they could form an independent source for an international legal obligation. Both agreed that the norms derived from fundamental principles underlying the international system functioned primarily as a limit on treaty-making. Just as *jus cogens* in private law constrains freedom of contract, *jus cogens* in both the Verdross and Soviet understanding constrains the power of States to make treaty law.

But the premises of the Verdross and Soviet higher order norms differed considerably. Von Verdross regarded these norms as limiting the power of States to surrender their capacity to function as States. State sovereignty formed the heart of his theory, even though it meant, paradoxically, that in one crucial respect it limited sovereignty (specifically, the right to bargain away the attributes of sovereignty).

The focus of the Soviet theory, in contrast, was on the international order. The international order would not tolerate exercises of State

⁷ See Nikita S Khrushchev, 'On Peaceful Coexistence' (Oct. 1959) 38 For Aff 1, 3-4; Grigorij I Tunkin (ed), *Problemy Mezhdunarodnogo Prava [Problems of International Law]* (1961); Leon Lipson, 'Peaceful Coexistence' (1964) 29 Law and Contemporary Problems 871, 872.

authority that threatened the survival of that order. This in turn presupposed the consent of the socialist and capitalist camps (but in any event, that of the Soviet Union) as a condition for the formation of any international norm or treaty.

These streams of IL theory came together in the UN International Law Commission (ILC) and what may be its most important achievement, the Vienna Convention on the Law of Treaties (VCLT). GI Tunkin, the Soviet scholar most closely associated with the theory of peaceful coexistence, served on this body during the promulgation of the treaty, as did von Verdross. Both pushed for explicit recognition of the limits of treaty-making authority based on a hierarchy of norms. Many in the West, particularly the United States (US), the United Kingdom (UK) and France, pushed back against this idea, arguing that the international community had not realized a set of norms that could be said to operate independently of the will of States.⁸ The Soviet view largely prevailed, as embodied in Article 53 of the VCLT.⁹ The text as adopted nodded in the direction of the objectors by limiting the concept to *jus cogens* norms recognized by 'the international community of States as a whole'. But the absence of rules to determine what counts as recognition and to define the 'whole' of the international community meant that the proponents had gained most of what they desired.¹⁰

The next stage in the life of the *jus cogens* concept came with the human rights revolution of the 1970s. Although the movement claims a lineage that passes through Nuremberg and back to natural law traditions, its role as a systematic legal program within IL effectively began with the inclusion of human rights topics in the Helsinki Declaration of August 1975.¹¹ The entire Declaration was framed as a statement of political principles, rather than binding legal commitments. But a wide range of

⁸ See Stephan (n 2) at 1085–88.

⁹ VCLT art. 53, May 23, 1969, 1155 UNTS 331.

¹⁰ Article 53 was one of the provisions that made it impossible for the US and France to join the Convention. For academic criticism of Article 53 as well as the *jus cogens* concept generally, see Georg Schwarzenberger, *International Law and Order* (Stevens and Sons 1971) 27–56; Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974). Hans Kelsen, like Schwarzenberger a prominent international legal scholar whom the Nazis forced to emigrate, kept his distance from the concept but did not attack it head on. Hans Kelsen, 'Limitations on the Functions of the United Nations' (1946) 55 Yale L J 997, 1007.

¹¹ The Final Act of the Conference on Security and Cooperation in Europe, Part VII, August 1, 1975, 14 ILM 1292; Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

political movements – particularly anti-Soviet nationalists in Central and Eastern Europe, opponents of authoritarian regimes in Latin America and Southern Europe and foes of apartheid – sought to translate the principles into law. *Jus cogens* offered itself as a useful mechanism, dispensing as it does with impediments such as State consent or evidence of State practice. Once these political movements prevailed, the triumph of human rights as a bedrock concept of the international system seemed inevitable.

In the US, the transition from the Carter to the Reagan Administration added salience to this move. The Carter Administration was the first postwar US government to move human rights to the foreground in foreign policy, while at least some of Reagan's foreign policy intellectuals embraced authoritarian regimes for anticommunist purposes. US international lawyers sought to entrench human rights in the legal system, where courts could protect them from the vagaries of the political branches.¹² As a result, by the 1980s US courts and lawyers, although not necessarily the US government, had fully embraced a version of *jus cogens* that mandated respect for human rights. Many other publicists around the world also signed up for this new conception of *jus cogens*.¹³

This latest version of the *jus cogens* concept marked a break from past iterations in at least two respects. Like its predecessors, it presumed a set of higher order norms that exist independent of State consent and thus arise outside the normal international lawmaking process. But the differences are profound. First and most obviously, the new *jus cogens* substantive norms derive not from claims about sovereignty or the international order, but from the perceived needs of humanity. Moreover, the rights claimed extend against all subjects of IL, including, most importantly, the claimant's own sovereign.

¹² The most concrete aspect of this entrenchment was the US government's amicus brief in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a case that opened up the federal courts to human rights litigation. See PB Stephan, 'Courts, the Constitution, and Customary International Law – The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States' (2003) 44 VJIL 33.

¹³ Christopher A Ford, 'Adjudicating Jus Cogens' (1994) 13 Wisconsin Int L J 145; GD Haimbaugh, Jr., 'Jus Cogens: Root and Branch (An Inventory)' (1987) 3 Touro L Rev 204, 207–11; Stefan Kadelbach, 'Jus Cogens, Obligations Erga Omnes and Other Rules – The Identification of Fundamental Norms', in C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 21; Karen Parker and Lyn B Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 Hastings Int Comp L Rev 411.

Second, under this version *jus cogens* norms function not only as a limit on the making of IL, but on all exercises of State authority. The shift is subtle, but significant. The concept evolved from a constraint on the ability of States to bind each other through IL to an international-law-based limit on the State's ability to dispose of matters within its own territory and regarding its own subjects. In Hohfeldian terms, earlier versions of *jus cogens* created privileges in favor of a State, and non-rights on the part of the international order. In other words, the von Verdross–Tunkin conception gives States the privilege of transgressing an obligation that violates *jus cogens*. Correspondingly, the international order has no right to require the State to adhere to an obligation that *jus cogens* treats as invalid.

The human rights conception of *jus cogens*, in contrast, creates a right on behalf of humanity and the international community as a whole and a corresponding duty on the part of States. States must comply with this duty, and rights holders may hold them accountable. The new conception thus combined a different set of substantive norms with a more comprehensive enforcement mechanism, all while asserting continuity with a past concept.¹⁴

This brief history demonstrates several things. First, the modern idea that IL, although fully secular and thus divorced from religious mandates, still might rest on higher level norms that limit the discretion of States, has proven useful in several quite different historical and geopolitical periods. Second, the content of these higher level norms has changed dramatically, in part because the concept is not self-defining. Each period finds its own imperatives, which show no continuity with past ones. Third, the concept has functioned as something of a wild card, enabling an actor dissatisfied with the status quo to ascribe legal status to norms that under conventional criteria seem to be only aspirations. Fourth, the concept can function either as a limit on international lawmaking (as illustrated by von Verdross and the Soviet theory of peaceful coexistence) or as an extension (as the contemporary human rights movement insists).

The broader point is that the concept of *jus cogens* is neither fixed nor inevitable. The current conception of *jus cogens*, in other words, is an episode, not a conclusion. Asserting the existence of the concept *vel non*, as well as choosing which variant of the concept to embrace, rests on a calculus in which interest plays a part.

¹⁴ Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (2013) 23 Yale L J 16, 32–44; Stephan, (n 2) at 1077 n 10.

Having established the historical contingency of the *jus cogens* concept, I now consider how the concept might be adapted to new challenges. Political economy enters the story as a form of positive analysis that relates various political and economic configurations to particular uses of the concept. In the US, it plays an important role in many legal fields, although it has come to IL relatively recently.

II. POLITICAL ECONOMY

The field of political economy involves the use of economic principles to analyze the making of political choices.¹⁵ It does not exclude normative goals, such as moral justification, which may shape preferences for which actors seek optimal satisfaction. It does not, however, itself provide normative goals and generally is agnostic as to moral justification. Accordingly, some critics see the field as wicked.¹⁶

A scholar who uses the insights of political economy to explore the generation and application of IL might justify this method as necessary but not sufficient for prescribing law. One cannot translate moral claims into social action, the argument goes, without considering the mechanisms that constrain social action. To the extent one believes that morally attractive arguments in and of themselves induce desirable social behavior, political economy is irrelevant. One cannot take political economy seriously unless one is willing to concede that something more than moral conviction matters in making social choices.

Political economy involves identifying the interests of relevant actors as well as the characteristics of the institutions through which they pursue their interests. In the case of IL, the actors include the governments of States, legislators that hold these governments accountable, domestic judges, international officials and judges, jurists seeking to shape IL, and various private organizations generating information and publicity about international legal arguments (what I will call activists).¹⁷

Political economy assumes that actors seek to maximize whatever it is that they want. It posits that actors, besides pursuing preferences based

¹⁵ See the chapter of Joel Trachtman and Anne van Aaken, above in this Volume, at 9.

¹⁶ For example, Jeffrey Rosen, 'Overcoming Posner' (1995) 105 Yale L J 581.

¹⁷ See Paul B Stephan, 'International Law as a Source of Law', in Francesco Parisi (ed), *Production of Legal Rules – Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2011) 255.

on moral conviction, seek to maximize interests such as prestige, influence and material resources (on either a personal or affiliation-group basis). These forces drive social behavior, including political contestation. To put it simply, even morally convinced actors wish to maximize their influence, if only to fulfill their convictions. And political economy rests on the assumption that persuasion through rational appeal is not the only way to maximize influence.

Within the general subject of political economy, the theory of public choice has a prominent place. These ideas, associated particularly with the Nobel Prize winning work of the economist James Buchanan, look at how the design of decisionmaking institutions affects the kinds of choices made. It concentrates on the structure and incentives of coalitions that influence democratic decisionmaking. It observes that asymmetries in access to information as well as the ability to capture private benefits from public law (commonly called rents, in analogy to the returns from property rights) enable compact, homogenous groups to have outsized influence in the lawmaking process. More generally, the theory explores the incentives facing public actors as well as those who seek public action.¹⁸

One can trace back the application of public choice theory to IL over many years.¹⁹ In the last two decades, however, Eyal Benvenisti and I have independently drawn the attention of international lawyers to the subject. We argue that the public choice literature provides a useful toolbox for international lawyers to attack problems of collective action and the distribution of rights and duties.²⁰

¹⁸ On public choice theory as a branch of political economy, see James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962); Dennis C Mueller, *Public Choice III* (CUP 2003); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965). On the closely related field of institutional economics, Nobel Prize winning work includes Douglass C North, *Institutions, Institutional Change and Economic Performance* (CUP 1990); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990); Herbert A Simon, *Administrative Behavior* (2nd edn, MacMillan 1961); Oliver E Williamson, *The Economic Institutions of Capitalism* (Chengeng Books 1985); Ronald H Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

¹⁹ For example, Vilfredo Pareto, *Manual of Political Economy* 324 (AS Schwier & AN Page eds, AS Schwier trans, 1971) (1927).

²⁰ Eyal Benvenisti, 'Exit and Voice in the Age of Globalization' (1999) 98 *Michigan L Rev* 167; Paul B Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy' (1996–97) 17 *Nw J Int L Bus* 681; Paul B

What does public choice theory have to say about *jus cogens*? In the previous part of this Chapter, I demonstrated that the principal feature of *jus cogens* arguments in IL is the premise that a higher order set of rules either limit or expand the set of international obligations that otherwise rest on State consent. To refer back to the civil law origins of the term, *jus cogens* sets boundaries on the freedom of contract that States possess and exercise in the construction of IL, just as public law limits private law. Definition of those boundaries in turn permits arguments that do not rest on traditional sources of authority in IL, such as treaty texts or State practice. *Jus cogens* both enlarges the set of arguments that one might make concerning the content of IL and frees the person making the argument from having to defer to traditional sources of authority.

By hypothesis, this enlargement in the range of arguments and outcomes should most serve the interests of those actors who do not directly participate in the conventional processes of IL formation. State practice varies, of course, but in general foreign offices (in the US, the Department of State) have the most direct responsibility for engagement in the conventional processes. Other specialists in national bureaucracies, such as career military lawyers, also might have an interest in the lawmaking status quo. These are the actors, then, that public choice theory predicts will show the greatest resistance to *jus cogens*, because they have the most to lose.

Extending this hypothesis, one can make further predictions about the popularity of *jus cogens* arguments among various interest groups. Litigation provides an interesting case. Judges play various roles in societies, and scholars debate the shape of the judicial welfare function, that is, the interests that judges seek to maximize. In earlier work I have suggested that, absent other constraints such as screening by appointing authorities, patronage or risk of removal, judicial welfare functions might correspond roughly to those of the lawyers who appear before judges.²¹ This correspondence rests on several factors: In many systems, especially those based on the Anglo-American model, judges are drawn from the ranks of litigators; litigators have some control over the distribution of litigated claims, leading judges to reach outcomes that reflect the median preference of these litigators; and resisting outcomes generally preferred by litigators will cost judges greater effort.

Stephan, 'Barbarians Inside the Gate: Public Choice Theory and International Economic Law' (1995) 10 *American U J Int L Pol* 745.

²¹ Paul B Stephan, 'The Political Economy of Extraterritoriality' (2013) 1 *Pol Gov* 92.

Litigators, one may presume, are likely to have at least a mild preference for *jus cogens* arguments. Moderate increases in legal instability raise the value of their services by increasing demand for them. *Jus cogens* also opens up the range of permissible legal arguments, rewarding creativity and ingenuity. If judges in turn are drawn at least in part to satisfying litigator preferences, a conjecture that impartial and independent judges should be more open to *jus cogens* arguments than officials working in the government and legislature would be plausible.

Jurists and activists also should prefer *jus cogens* arguments, perhaps even more strongly than litigators and judges. Persons in these groups are less likely to have a direct role in the traditional means of international lawmaking. To maximize their influence and prestige, they need to challenge the State monopoly over this process. *Jus cogens* provides the perfect mechanism for achieving this.

Finally, these arguments also indicate the likelihood of dynamic interactions among governmental and legislative actors, judges and litigators, and jurists and activists. To protect their asserted monopoly over international lawmaking, government and legislative actors might push back against those victories for the *jus cogens* concept that materialize in the courts or elsewhere. Such resistance would not affect the international consequences of these victories, because the concept precludes State nullification of its norms. But domestic political actors might adjust the domestic legal landscape. They also might try to weed out judges who showed excessive receptivity to *jus cogens*. Some of this screening might take place during the appointment process in those jurisdictions where political actors have a say in judicial selection. Political actors also might veto the reappointment of judges who rely too much on the concept, in those contexts where political approval of reappointment exists.

Also by hypothesis, not only would the competences of particular actors affect their attitude toward *jus cogens*, but, *ceteris paribus*, those States that have the greatest investment in the legal status quo would be most likely to resist a destabilizing, open ended theory that makes it possible to dispense with prior international norms. Symmetrically, State actors with the least stake in the legal status quo would be most receptive to *jus cogens*. These actors would prefer both to reshape IL to their own purposes and to avoid veto points such as the consent of other States.

Accordingly, a State that has experienced a rapid and profound change in its geopolitical position might most welcome the construction of new international norms without the cost of obtaining agreement with other actors. The Soviet concept of peaceful coexistence, for instance, gave a newly powerful and internationally engaged State a theoretical basis for

editing the existing set of international norms so as to exclude those it found inconvenient. *Jus cogens* solved a dilemma for the newly hegemonic Soviet Union: it reconciled the use of IL as authority with the need to jettison much of the legal status quo.

In summary, the theory of public choice offers several hypotheses about the scope and impact of the *jus cogens* concept. These hypotheses, one must stress, focus on the concept as a mechanism, rather than on any particular set of substantive norms (such as human rights) that might be ascribed to *jus cogens*. They presume, in other words, that actors might embrace or reject the concept independently of what norms currently are seen as *jus cogens*, because of the concept's capacity for advancing different norms in the future.

III. THE POLITICAL ECONOMY OF *JURISDICTIONAL IMMUNITIES OF THE STATE*

Having derived hypotheses from public choice theory, and political economy more generally, about the expected receptivity of various actors and regimes to *jus cogens* arguments, one then must devise a strategy for testing them. Ideally, one might develop a large database of incidents where *jus cogens* could arise to determine which actors embrace, and which reject, the concept. This approach would meet the highest standards of social science.

Such a quantitative analysis presents significant challenges, however. There simply are not enough instances of international lawmaking to generate a sizable data set susceptible to robust testing. Even more fundamentally, definition of negative findings – instances where an actor might have embraced a *jus cogens* argument but did not – presents great challenges.

Solutions to these problems doubtlessly exist, but this Chapter will not offer any. Instead, it will discuss an especially salient instance of contestation over *jus cogens*, the ICJ's decision in *Jurisdictional Immunities of the State*.²² It explores which actors invoked the concept, which resisted it, and how these actions conform to the hypotheses developed in

²² *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment (Feb. 3, 2012), available at <http://www.icj-cij.org/docket/files/143/16883.pdf> [hereinafter ICJ Judgment]. For my earlier discussion of the decision, see Paul B Stephan, 'Sovereign Immunity and the International Court of Justice: The State System Triumphant', in John N Moore (ed), *Foreign Affairs Litigation in the United States* (Brill/Nijhoff 2013) 67.

the previous part of this Chapter. This case study lacks the empirical rigor of quantitative analysis, but it does illuminate the hypotheses derived from political economy. It establishes their relevance, if not necessarily their conclusiveness.

The dispute in *Jurisdictional Immunities of the State* involved private lawsuits brought in Greek and Italian domestic courts against the Federal Republic of Germany. The plaintiffs alleged that they suffered grave human rights injuries at the hands of the German Reich during World War II. Successive German governments and legislatures had adopted various compensation schemes for many victimized by the Reich's atrocities, but none extended to the particular Greek or Italian plaintiffs. These victims brought civil suits for compensation, first in Greece and later in Italy.

Greek and Italian courts apply the CIL of State immunity, because these countries are not parties to treaties that supplant this law and their legislatures have not enacted domestic statutes regulating this subject. The Greek *Areios Pagos* held that CIL recognized an exception to the general rule of State immunity from domestic judicial process in the case of claims based on allegations of grave human rights abuses.²³ The Italian *Corte Suprema di Cassazione* reached a similar conclusion a few years later.²⁴ After German courts refused to enforce the Greek judgment, the plaintiffs sought to collect in Italy.²⁵ Germany then invoked a treaty which required Italy to resolve such disputes of this sort in the ICJ. The

²³ *Prefecture of Voiotia v. Germany*, Areios Pagos [A.P.] [Supreme Court] 11/2000 p. 2 (Greece), summarized in M Gavouneli and I Bantekas, 'Sovereign Immunity – Tort Exception – Jus Cogens Violations – World War II Reparations – International Humanitarian Law' (2001) 95 AJIL 198. Two years later a higher Greek tribunal denounced this decision. *Germany v. Margellos*, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece), translated in 129 ILR 525 (2002), summarized in Maria Panezi, 'Sovereign Immunity and Violation of Jus Cogens Norms' (2003) 56 Rev hell dr int 199.

²⁴ *Ferrini v. Federal Republic of Germany*, cass., sez. un., 11 marzo 2004, n. 5044, Giustizia Civile 2004 II, 1191, reprinted in (2004) 87 RDI 539, summarized in Andrea Bianchi, 'Ferrini v. Federal Republic of Germany' (2005) 99 AJIL 242.

²⁵ *Bundesgerichtshof* [BGH] [Federal Court of Justice] 2003 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 155 (Ger.), summarized in Sabine Pittrof, 'Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case' (2004) 5 German L J 15.

ICJ confirmed its jurisdiction in the main case but rejected an Italian counter-claim for compensation, ruling that it lacked jurisdiction over the latter.²⁶

On the merits, a large majority sided with Germany and ruled that the lawsuits fit within no recognized exception to the CIL of State immunity.²⁷ It framed the inquiry as whether State practice had emerged that could provide a basis for an exception, and found none. No States other than Italy and Germany in the cases before the Court, and no international tribunal, had recognized any exception to sovereign immunity for grave human rights abuses. The Court was unwilling to create such an exception on its own.

As a technical matter, the majority understood the concept of State practice rather broadly. It did not simply add up national court cases that had addressed the existence of a CIL exception to immunity. Many courts have rejected the idea of a *jus cogens* exception of immunity, but most of these based their conclusion on interpretation of a national statute or, in the case of the European Court of Human Rights (ECtHR), the text of the European Convention on Human Rights (ECHR).²⁸ The ICJ treated these cases as significant because it regarded a State's decision to decline the exercise of jurisdiction, whatever the legal theory on which it relied, as significant. State practice, the ICJ assumed, means acts by accountable State actors, whether legislatures in enacting immunity laws or courts in applying them.

In striking contrast to all the other opinions in the case, including the other dissents, Judge Cançado Trindade rejected the proposition that a question of fundamental moral importance, such as the abolition of

²⁶ *Jurisdictional Immunities of the State (Germany v. Italy)*, [2010] ICJ 310.

²⁷ Besides the opinion for the Court (above n 22), three other judges wrote separate opinions expanding on the meaning of the decision. Separate opinion of Judge Koroma, <http://www.icj-cij.org/docket/files/143/16885.pdf>; Separate opinion of Judge Keith, <http://www.icj-cij.org/docket/files/143/16887.pdf>; Separate opinion of Judge Bennouna, <http://www.icj-cij.org/docket/files/143/16889.pdf>. Three judges dissented, two on the grounds that State practice had recognized exceptions to immunity limited to the specific circumstances of the case, Dissenting opinion of Judge ad hoc Gaja, <http://www.icj-cij.org/docket/files/143/16895.pdf>, and dissenting opinion of Judge Yusuf, <http://www.icj-cij.org/docket/files/143/16893.pdf>, and one on the ground that State practice was irrelevant in questions involving the rights of humanity, Dissenting opinion of Judge Cançado Trindade, <http://www.icj-cij.org/docket/files/143/16891.pdf>.

²⁸ The cases relied upon by the ICJ include those from Canada, France, Slovenia, New Zealand, Poland and the UK, as well as the ECtHR. *Jurisdictional Immunities of the State (Germany v. Italy)*, (above n 22) ¶¶ 85–90.

impunity for grave human rights violations, could rest on State practice. He instead combined references to the aspirations of prominent jurists with arguments from moral principles. Overall, the opinion is much more deductive than inductive. Its stance is fearless. Past precedents, including the Court's, present no impediments. He hoped to open up the Court to the pleas of moral reasoning and the interests of all humans, unmediated by States or even the Court's past jurisprudence.

Finally, the *Corte costituzionale della Repubblica Italiana* provided an epilogue to the dispute. Once the Italian parliament adopted a law implementing the Court's decision, the plaintiffs asserted that barring their suit would violate their right under the Italian constitution to judicial protection of their fundamental rights. The Italian constitutional tribunal agreed. Because IL as authoritatively determined by the ICJ transgressed a constitutional right, it could not serve to justify the law implementing the decision. Instead Italy would defy the Court, privileging constitutional order over IL.²⁹ Accordingly, *jus cogens* dropped out of the story.

In this episode, who made claims based on *jus cogens* and who resisted? In no jurisdiction had a legislature responded to the appeal of the *jus cogens* argument by carving out an exception to immunity from judicial process. Nor did any government support the argument in domestic courts, although Italy and Greece did defend the outcomes of domestic litigation once called to do so before the ICJ. Rather, the lawyers representing the Greek and Italian plaintiffs advocated the *jus cogens* claim, and the courts, indifferent to the enactments or views of the respective governments, agreed.

What should one make of actions of the ICJ itself? PE would begin with the observation that, whatever its honor and accomplishments, the ICJ functions under greater political constraints than does a typical national court. By custom, the power to appoint jurists to the Court rotates among certain States. The UN General Assembly (UNGA) ratifies these choices, but rarely if ever does this body upset these nominations. Thus individual States screen candidates and are likely to exclude individuals whose professional accomplishments might indicate a risk of voting to undermine important national interests. Moreover, the possibility of reappointment exists, which means judges once appointed must

²⁹ 'Accordingly, the incorporation, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights.' Italian Constitutional Court, Judgment n. 238 of October 22, 2014, at ¶ 3.4. Unofficial English translation by Alessio Gracis, available at <http://italyspractice.info/judgment-238-2014>.

take into account the reaction of the nominating State to particular votes. None of these mechanisms achieves anything like domination and control, but they do make it less likely that the persons who serve on the Court will embrace outlier positions that significantly undermine the interests of selecting States.³⁰

Nor is the power to nominate distributed randomly. The five permanent members of the UN Security Council – China, France, the Union of Soviet Socialist Republics, then Russia, the UK and the US – have had a disproportionate number of their nationals on the Court.³¹ Not only do these States share a veto power in the Council, but they all are relatively large, have extensive international engagements, and are the only States with a legal right to possess nuclear weapons. One might predict that they would have a moderate to strong preference for the international legal status quo, that they would want to manage human rights issues through governments rather than by independent adjudication (especially in other countries' courts), and that they generally would worry about an international court that marginalized the importance of State involvement in the making of IL.³² Perhaps not surprisingly, then, all five of the P5 judges, as well as most of the others, rejected a strong reading of the *jus cogens* principle.

The prominent exception, of course, is Judge Cançado Trindade. His position in *Jurisdictional Immunities of the State*, however, is consistent with his earlier career as an academic, human rights advocate and a judge on the Inter-American Court of Human Rights (IACtHR). The Brazilian government that nominated him to the Court was somewhat to the left of its immediate predecessors and populated by politicians who had begun their career opposing a military junta that had committed many human rights abuses. The strongest advocate of *jus cogens* on the Court thus was a person who made his way in advocacy and international service, rather than working mostly within a State's foreign relations structure, and who was nominated by a government that had a relatively low investment in

³⁰ For empirical evidence providing some support for the proposition that the votes of ICJ judges tend to align with national interests, see Eric A Posner and Miguel FP de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 J Leg Stud 599.

³¹ In the 68-year history of the Court, a French, Soviet or Russian, UK and US judge has served all or nearly all of time. A Chinese judge has served for 39 years, with a gap from the Cultural Revolution to 1985, when the competing claims of Taiwan and the People's Republic were clarified.

³² For example, China, Russia and the US have declined to accept the jurisdiction of the International Criminal Court.

the international legal status quo and that relied on human rights advocacy to strengthen its domestic legitimacy.

Finally, the scholarly community generally has greeted *Jurisdictional Immunities of the State* critically. More moderate authors have tried to find some daylight in the decision for enforcement of human rights, while the stronger critics have deplored the decision as conservative and short-sighted. Interestingly, proponents of *jus cogens* largely have taken the connection to human rights for granted and have not explored the broader implications of procedural mechanism that is the foundation of the concept.³³

All of these outcomes are broadly consistent with what this Chapter's political-economy analysis would predict. In *Jurisdictional Immunities of the State*, persons and institutions interested in freeing themselves from the traces of the past pressed *jus cogens* arguments. Affected States as well as institutions over which national governments have substantial influence resisted.

This one case, I must repeat, does not prove that a political-economy analysis unlocks all mysteries in the development of international legal doctrine. It does not even prove that the interests of the principal actors in the drama caused their actions. What the case does is establish the conditional plausibility of the analysis and lend great shade and color to the theory. It illustrates a great deal, even if it proves nothing.

IV. CONCLUSION: THE FUTURE OF *JUS COGENS*

The evolution of IL from a set of norms made exclusively by sovereigns to an open legal system with multiple points of entry and a wide range of acceptable claims reflects profound underlying changes in the world

³³ Excluding work by Italian scholars who criticized technical aspects of the opinion, the negative scholarly chorus includes Christopher A Whytock, 'Foreign State Immunity and the Right to Court Access' (2013) 93 Boston U L Rev 2033; Winston P Nagan and Joshua L Root, 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory' (2013) 38 North Carolina J Int L Com Reg 375; Suzanne Katzenstein, 'International Adjudication and Custom Breaking by Domestic Courts' (2012) 62 Duke L J 671; Paul C Bornkamm, 'State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in *Jurisdictional Immunities of the State*' (2012) 13 German L J 733; Markus Krajewski and Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' (2012) 16 Max Planck UN Yb 1.

economy, global culture, and the alignment of geopolitical forces.³⁴ *Jus cogens* constitutes only one mechanism by which IL has diminished the juridical monopoly of sovereigns. For all the reasons that explain the growth of privatization in IL, one should expect the *jus cogens* concept to persist.

Seen in this perspective, the outcome of *Jurisdictional Immunities of the State* is an episode, not a definitive moment. The failure of the concept to make much headway in the ICJ does not preclude others from embracing these arguments. National courts and international tribunals that face fewer national checks still might use *jus cogens* to override legal rules that they dislike.³⁵

How might *jus cogens* evolve? If the human rights community has its way, it ultimately will overcome procedural as well as substantive obstacles to the vindication of fundamental human rights. Debates in the future might focus on what constitutes a fundamental human right and what qualifies as an obstacle, but the basic thrust of the concept will become conventional wisdom.

PE asks what kind of alignment of political, economic and technological forces will compel such an outcome. Moral education alone might demand a full victory for the human rights movement, but an economic analysis of political decisionmaking cannot stop there. Here I must admit to a failure of imagination. I do not see how to sustain a devolution of power to judges, jurists, academics and activists, whatever the short-term appeal of such a move. Blunders will beget cynicism, some will be revealed as wielding this authority for personal gain, and a backlash will emerge. This unhappy future is not inevitable, but neither is it unlikely.

Another possibility is that a new international actor might take advantage of a significant change in the correlation of forces to propose new work for *jus cogens*. At the moment China seems the most likely candidate for occupying this position, based on its remarkable economic growth and increasing willingness to project its economic and military

³⁴ See Paul B Stephan, 'Privatizing International Law' (2011) 97 *Virginia L Rev* 1573; Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *AJIL* 1.

³⁵ Presumably the ECtHR, for example, might embrace the principle, as State influence over the selection of judges is less than with respect to the ICJ. After *Jurisdictional Immunities of the State*, however, the European Court affirmed an earlier ruling, based on the ECHR rather than CIL, that States need not create a torture exception to sovereign immunity in civil suits. Case of *Jones et al. v. United Kingdom*, Applications Nos. 34356/06 and 40528/06, Jan. 14, 2014.

power externally. How might a less risk-averse and conservative Chinese leadership than we see at present recruit *jus cogens* to advance its interests?

It is not too wild to imagine China embracing something not too removed from von Verdross's conception of *jus cogens* as a sovereignty-protecting structure. This concept would limit State discretion to bargain away inherent practical powers long associated with exclusive State authority, such as ownership and control of subsurface resources. This concept might nod in the direction of the 'matters which are essentially within the domestic jurisdiction of any State' that the UN Charter excludes from international regulation.³⁶ References to the 'New International Economic Order' of the 1970s also would pop up.³⁷

Such a repurposing of *jus cogens* might serve as a useful mechanism to reconfigure the IL of trade and investment protection, and particularly to shift power from large private actors to States. China might object in particular to the liberal idea of private power as a check on State power, a concept that runs through contemporary trade and investment law. *Jus cogens* might serve to correct what it might see as an imbalance in current IL.

This speculation is, of course, only a thought experiment. How the world system might evolve, how these changes would create new interests and imperatives, and how these imperatives might find themselves expressed through *jus cogens* is unknowable. Still, the enterprise has a point.

The modern conception of *jus cogens* is seen by its proponents as providing a foundation for the international legal system, a centripetal force that can check pernicious fragmentation and lost legitimacy.³⁸ But, as PE teaches us, it is the structure rather than the content of *jus cogens* that over time does the heavy lifting. Procedurally, *jus cogens* can make it

³⁶ UN Charter art. 2(7).

³⁷ See, for example, Burns H Weston, 'New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon the Contemporary International Law Debate', in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 89.

³⁸ For example, Tomer Brode, 'Fragmentation(s) of International Law: Normative Integration as Authority Allocation', in Tomer Brode and Yuval Shany (eds), *Sovereignty, Supremacy, Subsidiarity: The Shifting Allocation of Authority in International Law* 99 (Hart 2008) (criticizing argument).

harder, not easier, to make IL, and thus can undermine rather than bolster the international legal order. When we think about *jus cogens*, we must be careful about what we wish for.