Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 296

Björnstjern Baade · Dana Burchardt
Prisca Feihle · Alicia Köppen
Linus Mührel · Lena Riemer
Raphael Schäfer (eds.)

Cynical International Law?

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Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy Anne Peters

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Björnstjern Baade • Dana Burchardt •
Prisca Feihle • Alicia Köppen • Linus Mührel •
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Editors

Cynical International Law?

Abuse and Circumvention in Public International and European Law

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Foreword

On the eve of the G20 summit of 2019, the Russian President Vladimir Putin said that liberalism is obsolete.[1] This verdict seems to comprise the entire international legal order which is, after all, based on principles of liberalism in a traditional European sense: a presumption of liberty (in international law the Lotus principle) that stands in a productive tension with the rule of law, and the protection of human rights and fundamental freedoms.

Putin's remark is *cynical;* and his and others' cynicism about international law flows from disappointment. It flows from resentment against 'Western' interference in other regions, from the perception of being left behind and lack of prospects for a decent life in the Global South, and from the inhabitants' of rich industrial states fear of losing privileges and wealth.

Resentment and disappointment have triggered an outright backlash against international law. However, not all that is discussed under that heading is unlawful. It is of course perfectly legal not to accede to a treaty or to denounce it in observation of the prescribed formalities and timelines. But such exercises of state powers recognised or created by international law must happen *in good faith*—the opposite of cynicism.

Pace Putin, I submit that far from being superfluous or outdated, the liberal principles in international law need to be strengthened and related to individuals as the primary units of analysis, for example by creating more points of access to courts (international and domestic) which could monitor compliance with the international rules, much better enforcement of human rights, and strengthened accountability of international organisations. In short, liberalism is not out—it is quite to the contrary needed more than ever.

[1] Barber, L., Foy, H., Barker, A. (2019). Vladimir Putin says liberalism has 'become obsolete'. *Financial Times*, 28 June 2019. Retrieved 30 May 2020, from https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36.

However, while international legal liberalism is necessary, it is not enough. The 'groundswell of discontent' with globalisation, as the President of the European Central Bank Christine Lagarde put it,[2] the insight that unleashing the market forces on a global scale has not created trickle-down welfare evenly, but has actively hurt large groups of people, polluted the environment, and is ruthlessly and irreversibly destroying entire ecosystems and extinguishing species on a weekly basis—all this is fuelling a strong and justified demand for a *more social* and a *greener* international law.

This quest overlaps with the demand to de-Europeanise international law and to 'provincialize Europe'.[3] But this should not lead to giving up achievements such as concern for the human being in interdependence with other humans and the natural environment. Obviously, international law's universality needs to be strengthened. With this I do not mean a hegemonic and totalising claim which only feigns the European states' particular economic, military, and political interests as being *the* global public interest, but a bottom-up universalisation, flowing from attentiveness to the differing needs of people in the various regions of the world, developed in fair and inclusive procedures.

The conference that led to this book took place in one of the wealthiest and best-functioning states on the globe. Refraining from cynical uses of international law in this part of the world would first require giving up double standards. Western states must practice what they preach. It is cynical for a state to condemn violations of international humanitarian law, for example in Eastern Ukraine, when one continues to facilitate targeted drone strikes, and it is cynical to refuse the intake of climate refugees after one has contributed to the most part of global warming oneself. For all what international law is worth, when good faith in making and applying the law is lacking, everything will be lost.

On behalf of the *Deutsche Gesellschaft für Internationales Recht*, I congratulate the *Working Group of Young Scholars in Public International Law* associated with the *DGIR* for putting together this timely conference and book. And of course, I hope that many of you will continue to accompany the evolution of international law in a spirit of constructive criticism throughout your further professional life.

Deutsche Gesellschaft für
Internationales Recht
Würzburg, Germany

Anne Peters

[2]Lagarde, C. (2016). Making globalisation work for all. Sylvia Ostry Lecture, Toronto, 13 September 2016.

[3]Chakrabarty, D. (2000). *Provincializing Europe: Postcolonial Thought and Historical Difference*. Princeton University Press, Princeton.

Acknowledgements

On 6 and 7 September 2019, the Working Group of Young Scholars in Public International Law (*Arbeitskreis junger Völkerrechtswissenschaftler*innen*) and the German Society of International Law (*Deutsche Gesellschaft für Internationales Recht*) organised a conference on 'Cynical International Law? – Abuse and Circumvention in Public International and European Law' that was held at Freie Universität Berlin. The German Society of International Law, known by its German acronym as DGIR, is devoted to the promotion of public international law, private international law and other fields of transnational law.[4] It comprises established experts in these fields. The Working Group of Young Scholars in Public International Law, or AjV, is an informal network of younger scholars in the fields of law, political science and international relations who share an interest in questions of international law.[5] The conference and this volume continue the successful tradition of joint AjV-DGIR conferences.[6]

In the tradition of its predecessors, this AjV-DGIR conference aimed for an exchange between younger and more established academics and practitioners. In five panels, younger scholars presented their contributions which were then commented upon by a group of renowned scholars and practitioners. The exchanges and discussions were intense and fruitful. Many distinguished scholars kindly agreed to comment on the younger scholars' papers and presentations.

[4] http://www.dgfir.de/society/. Accessed 30 April 2020.

[5] The organisational team of the conference and the editors of this volume, accordingly, are composed of a group of seven doctoral and post-doctoral scholars in the field of public international law from Freie Universität Berlin, Humboldt-Universität zu Berlin, and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

[6] 2012 in Düsseldorf: Aust, H., et al. (2012). Demokratie, Wandel, kollektive Sicherheit – Das Völkerrecht und der Umbruch in der arabischen Welt. *Heidelberg Journal of International Law 72*, 443–445; 2014 in Göttingen: Baade, B., et al. (Eds.) (2016). *Verhältnismäßigkeit im Völkerrecht*. Mohr Siebeck, Tübingen; 2017 in Bochum: Wuschka, S., et al. (Eds.) (2019). *Zeit und Internationales Recht: Fortschritt – Wandel – Kontinuität*. Mohr Siebeck, Tübingen.

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We would like to express our sincere gratitude to those who made this conference possible by their support, financial and otherwise: the German Society of International Law, the German Research Foundation, the publishers Mohr Siebeck, Duncker & Humblot and C.F. Müller, as well as the law firm Dentons. We would like to thank the Völkerrechtsblog (www.voelkerrechtsblog.org), which accompanied the conference online—with a symposium and a livestream of the keynote speech.[7] For accepting this volume into the Contributions on Comparative Public Law and International Law, we are greatly indebted to Professors *Armin von Bogdandy* and *Anne Peters.*

Finally, we would like to thank Freie Universität Berlin, its Department of Law and the university administration, for their generous financial and organisational support. We were honoured that the Vice President of Freie Universität, Professor *Klaus Hoffmann-Holland*, gave us an inspiring welcome at the conference.

[7]The Keynote Speech by Professor Simpson on 'how to be cynical: some suggestions', as well as the introduction by Professor Hoffmann-Holland, are available at https://medien.cedis.fu-berlin.de/cedis_medien/projekte/rewiss/2019/voelkerrecht/cynical_international_law.mp4.

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Contributors

Helmut Philipp Aust Freie Universität Berlin, Berlin, Germany

Björnstjern Baade Freie Universität Berlin, Berlin, Germany

Elisabeth Baier Danckert, Bärlein, Sättele, Berlin, Germany

Dana Burchardt Freie Universität Berlin, Berlin, Germany

Jesse Claassen Radboud University, Nijmegen, The Netherlands

Andrea Faraci University of Bologna, Bologna, Italy

Prisca Feihle Freie Universität Berlin, Berlin, Germany

Helene Hayden Austrian Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, Vienna, Austria

Philipp Janig Universität der Bundeswehr München, Neubiberg, Germany

Konstantin Kleine Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland

Alicia Köppen Humboldt-Universität zu Berlin, Berlin, Germany

Shiri Krebs Deakin University School of Law, Melbourne, VIC, Australia

Heike Krieger Freie Universität Berlin, Berlin, Germany

Gabriel Lentner Danube University Krems, Krems an der Donau, Austria

Stanford University, Stanford, CA, USA

Caroline Omari Lichuma Georg-August-Universität Göttingen, Göttingen, Germany

Luigi Lonardo King's College London, London, UK

Nele Matz-Lück Christian-Albrechts-Universität zu Kiel, Kiel, Germany

Linus Mührel Technische Universität Dresden, Dresden, Germany

Andreas Paulus Georg-August-Universität Göttingen, Göttingen, Germany

Christian Pogies Goethe-Universität Frankfurt, Frankfurt, Germany

Max-Planck-Institute for European Legal History, Frankfurt, Germany

Daniel Quiroga-Villamarín Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland

Theresa Reinold Universität Duisburg-Essen, Duisburg, Germany

Lena Riemer Freie Universität Berlin, Berlin, Germany

Hengameh Saberi Osgoode Hall Law School, York University, Toronto, ON, Canada

Raphael Schäfer Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Dominik Steiger Technische Universität Dresden, Dresden, Germany

Patrícia Galvão Teles Autonomous University of Lisbon, Lisbon, Portugal

Abbreviations

BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China and South Africa
CUP	Cambridge University Press
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
HCJ	High Court of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IDF	Israel Defense Forces
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Rome Statute	Rome Statute of the International Criminal Court
TFEU	Treaty on the Functioning of the European Union
TWAIL	Third World Approaches to International Law
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights

UNCLOS	UN Convention on the Law of the Sea
UNHCR	United Nations Human Rights Council
UNCITRAL	United Nations Commission on International Trade Law
UNTS	United Nations Treaty Series
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

How (Not) to Be Cynical in International Law

Björnstjern Baade, Dana Burchardt, Prisca Feihle, Alicia Köppen, Linus Mühlrel, Lena Riemer, and Raphael Schäfer

'Don't talk like that, Dill,' said Aunt Alexandra. 'It's not becoming to a child. It's – cynical.'
'It ain't cynical, Miss Alexandra. Tellin' the truth's not cynical, is it?' 'The way you tell it, it is.'

Harper Lee, To Kill a Mockingbird

Abstract This chapter introduces the concept of cynicism in international law. It argues that looking at international law through the prism of 'cynicism' can contribute to the discussion about a 'crisis' of, or 'backlash' against, international law. The chapter develops a concept of cynicism in international law from the varying understandings among philosophers and legal scholars. It then provides a brief overview of the contributions to this book.

The first step in addressing a problem is acknowledging that there is one. The role of international law in the world and its impact on the lives of people around the globe is no longer as largely seen to be a positive one as it might have been in the

B. Baade · D. Burchardt · P. Feihle · L. Riemer
Freie Universität Berlin, Berlin, Germany

A. Köppen
Humboldt-Universität zu Berlin, Berlin, Germany

L. Mühlrel (✉)
Freie Universität Berlin, Berlin, Germany

Technische Universität Dresden, Dresden, Germany

R. Schäfer
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

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1990s.[1] More recently, international lawyers have begun to address this change by discussing a 'crisis' of, or 'backlash' against, international law.[2] It is our understanding that looking at international law through the prism of 'cynicism' can make a meaningful contribution to this discussion by looking beyond examples of overt disregard for international law or international cooperation, for example non-compliance or withdrawals from treaties.[3] The concept can serve to analyse and criticise structural features and specific uses of international law that seem detrimental to international law in a more subtle way.

1 Cynicism as a Concept

To engage with 'cynicism' in international law, it is important to gain an understanding of the concept's meaning. The ancient Greeks' philosophical understanding of cynicism was linked to a form of independent thinking, a 'plebeian antithesis against idealism' that was used as a basis for the critique of power and the powerful.[4] The life of Diogenes, the ascetic philosopher who is said to have defied not only most social conventions but even Alexander the Great by asking him to 'stand a little out of his sun', is emblematic for this understanding.[5] In this ancient meaning, cynicism may offer a perspective of distance to the object of study of international law and serve as a basis for—constructive—critique. This might be more necessary than ever to meet today's challenges.

Peter Sloterdijk in his *Critique of Cynical Reason* suggested a shift in the meaning of cynicism: from the ancient Greek understanding to a modern form of cynicism. Modern cynicism, Sloterdijk argues, 'switched sides': it now also serves the powerful as an antithesis to their own purported idealism, which is thus revealed as

[1] For this change in perception, cf. Krieger and Nolte (2019).

[2] See inter alia Nijman and Werner (2018), Madsen et al. (2018). Note that before the present discussions of 'crisis' and 'backlash', legal scholars pointed to some of the issues that are now raised by certain actors of the current 'backlash', see, e.g. Anghie (2005) and Koskenniemi (1989).

[3] See for these e.g. Breuer (2019).

[4] Sloterdijk (1983), p. 222.

[5] Plutarch, Lives, vol. VII: Demosthenes and Cicero, Alexander and Caesar (Harvard University Press: Cambridge/London 1919), Alexander XIV, p. 259: '[M]any statesmen and philosophers came to him [Alexander] with their congratulations, and he expected that Diogenes . . . would do likewise. But since that philosopher took not the slightest notice of Alexander, and continued to enjoy his leisure in the suburb Craneion, Alexander went in person to see him; and he found him lying in the sun. Diogenes raised himself up a little when he saw so many persons coming towards him, and fixed his eyes upon Alexander. And when that monarch addressed him with greetings, and asked if he wanted anything, "Yes," said Diogenes, "stand a little out of my sun." It is said that Alexander was so struck by this, and admired so much the haughtiness and grandeur of the man who had nothing but scorn for him, that he said to his followers, who were laughing and jesting about the philosopher as they went away, "But verily, if I were not Alexander, I would be Diogenes."'

'ideology and as masquerade'.[6] In that sense, cynicism nowadays refers not to a bold critique of power but to a strategy of furthering one's interests by pragmatic or, if you will, tactical behaviour. Such behaviour refuses to publicly acknowledge the disregard for ethical idealism and the law, which it in fact practices.

In its modern form and applied to international law, cynicism denotes uses and abuses of international law that are meant to further the one-sided interests of certain actors in unspoken disregard of the legal structure that it applies. Such actors try to profit from the legitimacy of lawful conduct, while arguably acting against the spirit of the law.

Countering such actions, for example by prohibiting an abuse of rights, faces the difficulty that delimiting use from abuse can be a very delicate affair.[7] An action cannot be considered abusive merely because the legal arguments are in part used to achieve political aims. One would not say that a claimant in a civil trial is acting cynically or in bad faith because she is using the law and legal procedures to further her self-interest.[8] It is a normative decision to consider an action as abusive or non-abusive.[9] In the decentralised legal order of international law, an impartial arbiter like a court will not always be at hand to make such normative decisions in an authoritative manner. However, although these decisions might be hard to make for certain cases in international legal practice, there are other cases which are quite clear-cut. Russia's argument that it was protecting Russian nationals in the annexation of Crimea is one of the most recent and blatant examples of cynical legal argumentation by a state.[10]

However, states might not be the only ones that act in a cynical way. Among the group of other potentially cynical actors, international lawyers have received particular attention in the discussion about cynicism in international law. As *Martti Koskenniemi* noted, international lawyers that profess progressive and internationalist beliefs must take seriously the charge, brought against them in the context of the current backlash against the international legal order, that they as well might be acting cynically, or might at least be perceived to be doing so. He depicts international lawyers' dialectic between commitment—a 'sentimental attachment to the field's constitutive rhetoric and traditions'—and cynicism—a 'pervasive and professionally engrained doubt about the profession's marginality, or even the identity of one's profession, the suspicion of it being "just politics" after all'.[11] International lawyers' commitment to the pursuit of global equality and justice might result in cynical resignation when the gap between their ambition and reality becomes all too

[6] Sloterdijk (1983), p. 222.

[7] See the contributions of Helene Hayden and Philip Janig in this volume, delineating abuse in European tax law and international investment law, respectively. Cf. on the problem posed by populist governments in this regard: Krieger (2019), pp. 976, 994.

[8] See the contribution of Shiri Krebs in this volume.

[9] See the contribution of Andrea Faraci and Luigi Lonardo in this volume.

[10] See e.g. Marxsen (2014), pp. 372–374.

[11] Koskenniemi (2017).

apparent.[12] Cynicism about international law can thus be seen to stem from a 'gap between expectation and experience'.[13] This might also be the reason why one of the most prominently discussed examples in this volume is the International Criminal Court, which international lawyers currently perceive to be falling short of its promise.[14] The 'gap between expectation and experience' regarding the International Criminal Court seems to be perceived as particularly wide.

However, a different form of cynicism might sit even more uncomfortably with the self-image of international lawyers. Cynicism might result from the realisation that legal expert knowledge does not, in most cases, yield answers that are uncontestably true. International lawyers may be yet another elite caste that uses its expert knowledge and language to condescendingly impose their values on the world. This is at least the impression that some proponents of a backlash against international law seem to have or propagate.[15] When international lawyers nonetheless insist on the truth of their claims, critical observers might perceive this as a hypocritical move that aims to insulate elite values from political contestation.[16] Regardless of whether this impression is accurate or not, it is an important aspect of the debate about cynicism in international law. In this volume, *Shiri Krebs*' contribution addresses this aspect. She shows that expert discourses can be perceived as a cynical tool in the pursuit of political aims in the context of international humanitarian law.[17] Ultimately, the law cannot fulfil its function if both sides to a conflict can, at first sight at least, plausibly claim that the other one is using the law cynically, in bad faith, as a form of lawfare.[18]

Gerry Simpson suggests an understanding of cynicism that includes not only the hegemon's cynicism and the cynicism inherent in international legal rationality, but also a playful cynicism that seeks to expand the juridical realm.[19] Much like Diogenes expanded the realm of what was until then understood as philosophical, international lawyers can and should explore what lies beyond a narrow understanding of what it is that international lawyers do, *Simpson* argues. In this volume, *Hengameh Saberi* takes a similar approach, highlighting the opportunities that philosophical cynicism might offer for a constructive development of international law.

The contributions to this volume show that cynicism as a concept is closely connected but not identical to hypocrisy[20] and scepticism. Sloterdijk's modern cynicism of the powerful often takes the form of hypocrisy. While publicly

[12] *Id*., p. 65; see the contributions of Hengameh Saberi and Elisabeth Baier in this volume.

[13] Koskenniemi (2018).

[14] See the contributions of Elisabeth Baier and Gabriel Lentner in this volume.

[15] Koskenniemi (2019), pp. 19, 22; cf. also e.g. Davis (2013).

[16] Koskenniemi (2019), pp. 19, 22.

[17] See the contribution of Shiri Krebs in this volume.

[18] Cf. *id*.; and the contribution of Christian Pogies in this volume.

[19] Simpson (2019).

[20] See Koskenniemi (2017) p. 52; see the contribution of Elisabeth Baier in this volume.

professing to safeguard democracy and human rights, one may actually work in bad faith to undermine these values or at least to exempt oneself from them. In this volume, *Elisabeth Baier* provides an example for such hypocrisy: the United States' unwillingness to subject its own nationals to international criminal jurisdiction while supporting the prosecution of other states' nationals.[21] Further, as *Caroline Lichuma* argues in her contribution, some objections raised by states to the implementation of economic, social and cultural rights might also be understood in that manner. Non-state actors may likewise act hypocritically, for example when they abuse tax law to minimise their taxes—a practice that *Helene Hayden* analyses in this volume.

Critical scepticism is necessary for scholars to adequately exercise their role.[22] But cynicism seems to have a way of inviting more cynicism.[23] An exaggerated scepticism may lead to universal distrust, a kind of cynicism that sees everyone and everything as acting in bad faith.[24] An exaggerated scepticism might also be used cynically to deflect well-founded criticism.[25] Recurring disappointment about the gap between ideal and reality in international law may facilitate the use of such strategies. 'Destructive cynicism' is appealing because it 'is convenient and easy'. As a result, it seems at times 'fashionable to be a deeply sceptic and sarcastic cynic to remain interesting in debates'.[26] In contrast, constructive scepticism tends to be much more difficult and makes its authors vulnerable to cynical attacks.

Nonetheless, cynics acknowledge the existence of legal—or other social—standards. The ancient cynics acknowledged them to breach them, modern cynics acknowledge them to hypocritically circumvent them or to criticise everyone and everything for failing to meet them until nothing legitimate remains. Cynicism thus is neither nihilism nor anarchism; cynical actors accept a rules-based order. However, cynicism has the potential to undermine a rules-based order at its very basis: if everyone is acting in bad faith anyway, why should one care about norms rather than one's immediate self-interest? This sentiment could ultimately lead to a nihilism that discards with the necessity—or possibility—of legal (or moral) standards altogether.

There is no common understanding of cynicism, neither among the contributors to this volume nor among scholars in general. It is therefore difficult to apply cynicism as an analytical tool that relates to a clearly circumscribed phenomenon, as *Heike Krieger* notes in her Concluding Observations. Cynicism ultimately remains an elusive phenomenon. It might even be an essentially contested concept in the way that many different conceptions of it are conceivable and none of these conceptions can claim to be the right one.[27]

[21] See the contribution of Elisabeth Baier in this volume.

[22] See the contribution of Gabriel Lentner in this volume.

[23] See the contributions of Elisabeth Baier and Caroline Lichuma in this volume.

[24] See the contributions of Caroline Lichuma, Shiri Krebs and Elisabeth Baier in this volume.

[25] See the contributions of Caroline Lichuma and Shiri Krebs in this volume.

[26] See the contribution of Elisabeth Baier in this volume.

[27] Cf. Ehrenberg (2011), p. 219. Cf. also the different uses of 'cynicism' in Lee (2002), pp. 232, 244.

Nonetheless, the concept refers to social practices in international law in a way that strikes a chord with many observers. Some emphatically confirm the existence of cynicism in international law in many shapes and forms. Others reject the concept as an unwarranted (cynical?) attack on the legitimacy of the project of international law. We, the editors of this volume, hope that our project on the question of 'Cynical International Law?' is not itself perceived to be cynical. We rather hope that it can contribute to better understand the current challenges international law faces and provide insights that might help to meet them.

2 Cynicism in International Law

In the current discussions about a 'crisis' of, or 'backlashes' against, international law, cynicism has not been a key aspect yet. We believe however that the concept of cynicism can provide valuable insights for this discussion. Cynicism might be a symptom or a cause for the current 'crises'; alternatively, it might be a chance for international law if it provides the basis for constructive critique. This volume seeks to provide a framework for discussing the phenomenon and its relevance to international law in a more coherent, overarching way that comprises approaches from international relations, international legal theory, public international and European Union law.

In this volume, two different perspectives on cynicism in international law are reflected: first, the cynicism that may be *inherent* in international law, either structurally in the law itself or in certain actors, such as scholars or courts; second, the cynical *use* of international law, and the question of whether international law provides tools to react to such use. The contributions in this volume explore the significance of such cynicisms in current debates of various fields, theoretical as well as more practical ones, and investigate the phenomenon empirically.[28] Draft versions of many of these chapters also inspired *Völkerrechtsblog's* online symposium 'Cynical International Law?' published alongside the conference that brought together the contributors of this volume.[29]

The **first part** deals with potentially cynical foundations of international law. To start with, *Theresa Reinold* argues that international law enjoys some degree of autonomy from power. While open to certain political stimuli, international law is not merely window-dressing for the preferences of powerful actors, but actually constrains what they can argue and do. Powerful actors are thus limited in their attempts to use international law in a cynical way. According to *Reinold*, the conceptual basis for this (relative) autonomy and its restricting effect on a cynical use of international law is an aspiration for coherence among international actors: legal change requires a consensus that powerful actors cannot achieve unilaterally.

[28]For the latter, see the contributions of Jesse Claassen and Shiri Krebs in this volume.

[29]See https://voelkerrechtsblog.org/symposium/cynical-international-law/.

Gabriel Lentner sees cynicism and critique as discursive practices that inadvertently contribute to upholding the status quo. Such practices not only fail to remedy injustices; they can even contribute to a kind of fatalism that accepts current injustices as unavoidable, cementing them and their underlying power relationships. *Lentner* thus argues that cynical and critical approaches can be an obstacle to 'real change'.

Hengameh Saberi suggests seeing cynicism in a more favourable light. Revisiting the philosophical origins and development of the concept of cynicism, she argues that cynicism as a philosophical concept has the potential to empower political agency against exclusionary social structures. Against this backdrop, she reflects on how perceiving international law from a cynical perspective can make use of this potential, for example as a tool to empower marginalised actors.

The **second part** attempts to identify potentially cynical actors. *Konstantin Kleine* analyses the work of the International Law Commission. According to his findings, the work of the International Law Commission is characterised by legalism and originalism, two approaches that emphasise state sovereignty while neglecting the impact of political interests on state behaviour. *Kleine* considers these approaches to enable states to use international law in a cynical fashion, and calls upon the International Law Commission not to give a legal cover to states' political interests.

In her comment, *Patrícia Galvão Teles* inter alia stresses the International Law Commission's continuous relevance for international law-making. *Teles* provides concrete examples, particularly the work of the International Law Commission on the new topic 'Sea-level rise in relation to International Law', to demonstrate the added value of this work and to show how the Commission can successfully address complex and contemporary legal challenges.

Transnational judicial activism by international and national courts is the subject of *Daniel Quiroga Villamarin*'s contribution. Long considered to be a force for the progressive development of international law, particularly human rights, such judicial activism might also be used to advance illiberal aims.

In his comment, *Andreas Paulus* inter alia underlines that since judges are constrained by positive law their potential for innovation and activism is limited. Judges have to balance community interests with rights of states and individuals and are not a vehicle of revolution but at best evolution.

Christian Pogies shows that international law's capacity to contain and settle disputes can be limited when parties to an arbitration engage in 'lawfare'. The South China Sea arbitration is taken by *Pogies* as a vivid reminder that history and China's experience of colonisation may serve to construct narratives of international law that are mutually perceived as cynical.

In her comment to *Christian Pogies*' chapter, *Nele Matz-Lück* points out that despite the UN Convention on the Law of the Sea's inherent limitations and the valuable questions that can be raised regarding its genesis and the validity of its norms, it remains the primary source for a peaceful order of the ocean.

This volume's **third part** examines EU Law and a selection of sub-fields of public international law. *Jesse Claassen* explores the strategic use of the ECJ's preliminary ruling procedure by national courts. He argues that it can be a form of cynicism when national courts use the preliminary reference procedure with the aim of overruling the decisions of other national actors, including other courts and the legislator. *Claassen* illuminates such (potentially) cynical use by empirically analysing Dutch courts' decision-making.

Caroline Lichuma analyses the way in which many states used to and still reject a more prominent role for economic, social and cultural rights; a rejection that has its roots in the political tensions of the Cold War era. Recognising that legitimate concerns exist concerning these rights' application, *Lichuma* points to cynical justifications of non-compliance in some instances, and that in particular the wording of Article 2(1) International Covenant on Economic, Social and Cultural Rights, which gives leeway to states to 'take steps', facilitates such arguments.

In his comment, *Dominik Steiger* inter alia points out that, while states may have wanted to limit their commitment to economic and social rights, they nevertheless did commit themselves. Furthermore, *Steiger* argues that approaches rooted in the political sciences and economics offer insights for dealing with the problems standing in the way of the full realisation of economic and social rights.

Shiri Krebs examines the perception of international humanitarian law in the Israeli-Palestinian conflict and finds that a legal cynicism is widespread among Israeli citizens. These findings are based on a survey experiment fielded in Israel in 2017 with a representative sample of 2,000 Jewish-Israeli citizens. Drawing on observations of the US legal system, *Krebs* defines legal cynicism as a fundamental distrust in the basic intention of the laws and legal authorities. Based on an empirical and qualitative analysis, she argues that actual or perceived politicisation of institutions and the indeterminacy of the law may result in an amplification of factual and legal disagreement.

Elisabeth Baier traces the challenges that the International Criminal Court has been facing since its inception. The high hopes that accompanied the Court's beginnings created an enormous *Fallhöhe*,[30] which generated a potential for cynical actions towards the Court that were not only conducted by states, but by the judicial culture at the Court itself. *Baier* suggests a distinction between different forms of cynicism surrounding the International Criminal Court: dismissive, abusive, discursive and institutional cynicism. In contrast to such merely negative forms of cynicism, *Baier* proposes that the cynical struggle should be used by the International Criminal Court as part of its coming-of-age story—as a chance to regenerate itself as an institution, to demystify its aims and to return to realistically and clearly defined maxims in the spirit of philosophical cynicism.

The **fourth part** is dedicated to the concept of abuse of rights. *Andrea Faraci* and *Luigi Lonardo* explore the origins of the concept of an abuse of rights in Roman law,

[30]Elisabeth Baier in this volume: 'The higher the position of the hero, the deeper his fall, and this fall is expected and even wanted by the audience.'

which was developed based on the principles of *aequitas* and *bona fides*. These principles provided the rigid Roman legal system with flexibility and permitted the introduction of extra-legal considerations such as morality. The authors demonstrate that the general principles of law of good faith and equity may equally form the basis of the prohibition of abuse of rights in international law. However, as welcome as the ability of the prohibition of abuse to counter cynical uses of the law might be, the authors warn against its potential to masquerade cynicism by international law's most powerful actors.

In his comment, *Helmut Aust* inter alia warns against calling too openly for transcending the exclusive positivism of international law through the doctrine of abuse of rights as this could be a classic case of 'be careful what you wish for'.

Helene Hayden notes that, to the general public, aggressive yet lawful tax planning and abuse of tax regulations[31] may seem equally cynical, but for many companies the distinction is crucial. While a 'limited right to cynicism' exists to opt for the most efficient tax arrangement, artificially creating conditions to profit from tax benefits may cross the threshold into an abuse of rights. *Hayden* analyses both the case law of the European Court of Justice as well as EU secondary law to carve out specific criteria for finding an abuse and thereby illustrates the difficulties the EU legislator faces in drafting generally applicable anti-abuse rules.

Philipp Janig considers the prohibition of an abuse of rights with regard to nationality planning in international investment law, where investors seek to maximise protection from certain international investment agreements. While legitimate nationality planning by corporate investors is one-sidedly meant to further their particular interests, such behaviour might hardly be considered downright cynical. The line to cynicism—and to abuse of right—might, however, be crossed where such practices would lead to the protection of investors that only purport to conduct business within a certain state with the sole aim to fall under the protection of a certain treaty. He analyses the evolving arbitral jurisprudence on the concept of abuse of rights which seeks to carve out the thin line between legitimate nationality planning and an illegitimate abuse of right.

In her Concluding Observations, *Heike Krieger* rejects the idea that the notion of cynicism has merit for a positivist legal analysis. She argues that actors' potentially cynical intentions do not matter to the law and the law itself cannot be considered 'cynical' in a meaningful way. As an elusive notion, as an empty signifier, cynicism risks being used as an argumentative shortcut. Understood as a political emotion, however, cynicism can have a negative impact on the authority of the law and, in that sense, it is relevant to the current crisis of international law: 'an attitude of good faith is an indispensable element for the political culture in which international law can flourish'.

[31]To be distinguished from criminal tax evasion, see Helene Hayden in this volume.

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Björnstjern Baade is a senior research fellow at the Institute for Public and International Law of Freie Universität Berlin and postdoc in the working group 'Towards a Proceduralization of International Law?' of the Max Planck Institute for Comparative Public Law and International Law.

Dana Burchardt is a senior research fellow at Freie Universität Berlin and member of the Berlin Potsdam Research Group 'International Rule of Law – Rise or Decline?'.

Prisca Feihle is a doctoral candidate and research fellow at Freie Universität Berlin.

Alicia Köppen is a doctoral candidate at Humboldt Universität zu Berlin, law clerk at Berlin Appellate Court (Kammergericht Berlin) and member of the Völkerrechtsblog editorial team.

Linus Mührel is a doctoral candidate at Freie Universität Berlin and research fellow at Technische Universität Dresden.

Lena Riemer holds a PhD from Freie Universität Berlin where she previously worked as a research fellow.

Raphael Schäfer is a doctoral candidate at Ruprecht-Karls-Universität Heidelberg and research fellow at the Max Planck Institute for Comparative Public Law and International Law.

Part I
Cynical Foundations of International Law

Cynicism and the Autonomy of International Law

Theresa Reinold

Abstract This contribution explores the limits encountered by actors trying to use international law for cynical purposes and seeking to manipulate it as they see fit. It defends the idea that present-day international law is not cynical per se; that it is merely a structure created by agents who might then use this structure for cynical purposes (or not). Although the international legal system is more prone to being politicised and abused by powerful actors than domestic legal systems, there are limits to what international law allows powerful actors to do. Put differently, international law enjoys a certain autonomy from politics. The present contribution seeks to identify the basis of the law's autonomy, arguing that international law should be viewed as a coherence-seeking system. This 'coherence bias' not only accounts for the law's responsiveness to political stimuli but also forms the basis of its autonomy, because (ab)uses of the law that are too cynical to be perceived as being coherent with the values of the international community at large will not be allowed to affect the substance of the law.

1 Introduction

Watching the news these days might lead to the impression that world politics is dominated by warmongering, megalomaniac orange men, cartoonesque looking dictators toying with weapons of mass destruction, murderous Arab princes, and many other unsavoury figures, all of whom bend and break the law as they see fit. The apparent mushrooming of such ruthless, cynical actors might lead one to believe in the triumph of *realpolitik* and the irrelevance of international law.[1] Is cynicism in international law thus inevitable? And are there ways to counteract the usurpation of

[1]The link between cynicism and realpolitik will be explained further below.

T. Reinold (✉)
Universität Duisburg-Essen, Duisburg, Germany

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international law by cynical actors? The answer to the first question will be rather brief: yes, of course, cynicism will always be present in international law, because international law—as all law—is a product of human interaction, and as human beings have both moral and cynical impulses, this will also be reflected in the ways they (ab)use the law. The answer to the second question, by contrast, requires more elaboration and will be the subject of this chapter. This contribution defends the idea that present-day international law is not cynical per se; that it is merely a structure created by agents who might then use this structure for *cynical purposes* (or not). It has become commonplace to assert that power politics permeate international legal discourse and that the international legal system is more prone to being politicised and abused by powerful actors than domestic legal systems. At the same time, however, there are limits to what international law allows powerful actors to do. As the editors of the present volume have pointed out, the concept of cynicism and its relation to (ab)uses of the law remain poorly understood—the term is often invoked rather loosely by legal scholars and political scientists commenting on powerful actors' violating, bending, or circumventing the law (and getting away with it). The editors also stress that this modern-day understanding of the term cynicism is actually at odds with the original meaning of the concept, which, in ancient Greece, was used to denote a form of independent thinking, a way of critiquing the powerful. In its modern usage, the concept, as they say, 'has switched sides': now cynicism is not about challenging the powerful anymore, it is about legitimising and cementing their preponderance and about eliminating or coopting opposition to the exercise of power. Cynical actors thus perceive international law as both an instrument of power and an obstacle to its exercise: if the law can be utilised to further the pursuit of selfish and myopic interests of these actors, the latter will pay lip service to the law; however, if the law resists such instrumentalisation, cynical actors will simply ignore it. Cynics thus do not care about international law; their behaviour manifests a blatant disregard for the spirit of the law, and, even worse, the law seems helpless in the face of such attempts at usurpation.

But is international law really that helpless? Or does international law possess tools enabling it to react to attempts at usurpation by the powerful? As the title of the present contribution already indicates, I am inclined to answer the latter question in the affirmative. To further our understanding of the concept of cynicism in international law, this chapter therefore seeks to theorise the basis of international law's autonomy from politics, autonomy being a relative concept rather than an all-or-nothing proposition. Literally, autonomy means freedom from external influence. In domestic legal systems, the Luhmannian notion of 'normative closure'[2] ensures the autonomy of the law from other spheres such as the political system, the economy, etc. The concept of normative closure means that the law itself sets the parameters for legal change, and *not* powerful actors participating in the legal process.

International law, by contrast, cannot be considered normatively closed in the same sense because in international law political—even plainly illegal acts—may

[2]Luhmann (1988b).

change the substance of the law. According to theorists of legal autopoiesis—a concept that will be elaborated upon further below—the law's autonomy is imperiled if the distinction between legal and illegal is diluted, if political communications are allowed to directly trigger changes in the legal system.[3] However, in the progressive development of international law, the distinction between legal and illegal, lex lata and de lege ferenda, is often difficult to uphold. An act of non-compliance may actually trigger the formation of a new legal rule that would universalise the preferences of the non-compliant actor. Hence, if international law lacks normative closure, what then prevents international law from becoming an apology for the pursuit of cynical purposes? How can the autonomy of international law be conceptualised, if not on the basis of normative closure?

This contribution proposes to view international law as a coherence-seeking system, in that inconsistencies within the legal system but also contradictions between legal and important non-legal norms and practices provide an impetus for legal change. The implications of this assumption are two-fold: on the one hand, the desire for coherence accounts for the law's responsiveness to political stimuli, because to retain its compliance pull, the law must be seen as being responsive to fundamental non-legal values. On the other hand, it forms the basis of international law's autonomy from politics, because (ab)uses of the law that are too cynical to be perceived as being coherent with the values of the international community at large will not be allowed to affect the substance of the law.

In the following, I will first review the existing literature on the autonomy of international law from politics, before elaborating my argument in greater detail. The autonomy of international law is not an all-or-nothing proposition. Merely asking if the law is autonomous or not does not get us very far; rather, we should accept that the autonomy of the law is a matter of degree and investigate 'how the multiple influences on the development of the law interact'.[4] State power is certainly one of these influences, but it is not the only one. International law is not *determined* by powerful, possibly cynical actors seeking to universalise their particularistic preferences as some strands of International Relations (IR) theory would have it. There are at least two more factors in the equation: other actors that have their own sets of preferences that may or may not be in line with those of the hegemon, and the law itself, which, because of its internal wiring, imposes limits on cynical actors seeking to manipulate it as they see fit. This contribution focuses on the latter factor in the equation—the relative autonomy of international law. 'The intuition behind the "relative autonomy" formula', Hugh Baxter writes,

> is that law is neither wholly independent of, nor entirely reducible to, political, economic and other social processes. Sensible as this intuition is, however, the idea of 'relative autonomy' by itself remains purely negative. It excludes two unpalatable extremes – pure formalism and

[3] *Id*., pp. 346–347.

[4] Kornhauser (1998), p. 772.

> pure instrumentalism – but it does not by itself characterize, in positive theoretical terms, the relation between law and other social discourses or practices.[5]

Matthias Goldmann equally points out that '[t]he autonomy of the law, as much as the mainstream in international law may take it for granted and rely on it in their daily practice, is in a theoretical sense hanging in the air'.[6] The present contribution seeks to bring it down to earth.

However, when reviewing the existing literature, I discovered that the autonomy of international law does not seem to be a wildly popular research topic. When entering the terms autonomy and international law in Google Scholar, one does get a long list of hits, but most of them deal with issues of self-determination and secession, some with party autonomy in arbitration, judicial autonomy at the International Court of Justice, the autonomy of international organisations, etc. In the following, the scant literature on the autonomy of international law will be reviewed in more detail. To begin with, I will discuss different strands of international relations theory with a view to the autonomy (if any) these schools of thought accord to normative structures. Thereinafter, existing international law scholarship on the issue will be reviewed, and finally, I will outline my own perspective on the autonomy of international law.

2 International Relations and International Law Perspectives on the Relationship Between Politics and Law

2.1 Power and International Law: The International Relations Perspective

According to international relations realists, states exist in a self-help world and their preferences are uniformly conflictual—ranging from, at a minimum, self-preservation, to, at a maximum, the quest for universal domination.[7] While neo-realism assumes that structure shapes international outcomes, it claims that only *material* structures have this effect, whereas normative structures are believed to be epiphenomenal. International norms and institutions are viewed as a reflection of the underlying distribution of power, created by hegemonic states seeking to make the exercise of power more efficient by reducing enforcement costs.

However, the explanatory power of neo-realism was called into serious doubt by the end of the Cold War, and these days it is a legitimate question *if anybody is still a realist* (which was already posed two decades ago by Legro and Moravcsik in their

[5] Baxter (1997/1998), p. 1987.
[6] Goldmann (2016), p. 454.
[7] Waltz (1979), p. 118.

eponymous contribution to *International Security* (1999)). Neo-realists' quest for parsimony led them to develop a theoretical account of world politics in which everything is reduced to the interaction of only two factors—the ordering principle of anarchy and the distribution of material capabilities. On paper this made neo-realism extremely appealing—after all, as scientists we aspire to explain a lot with a little, and neo-realism offered a beautifully parsimonious, elegant, and deterministic account of why things were the way they were. Yet this parsimonious theory turned out to be ill-equipped for dealing with the complex interaction among states, international organisations, non-governmental actors, etc. that characterises world politics in the twenty-first century—actors who are not merely regulated, but *constituted* by the normative structures in which they are embedded. Neo-realism's 'monocausal mania'[8] thus ended up in reductionism.

In contrast to neo-realism, neo-liberal institutionalism—as indicated by the label—accepts a much greater role for norms and institutions in shaping state behaviour. Both schools of thought share a number of central premises—the assumption of actor rationality, state-centrism, a tendency to black-box what is going on within states, the central role accorded to anarchy—yet neoliberal institutionalists believe that cooperation is both desirable and possible. Whereas realists maintain that under conditions of anarchy, accepting the constraints of international law would be imprudent and potentially suicidal, neoliberal institutionalists argue that welfare-maximising states are well-served by participation in international regimes. While the lack of an overarching authority poses a significant hurdle to cooperation, this can be remedied by the establishment of international regimes. Regimes facilitate cooperation by providing information, building trust, lowering transaction costs, institutionalising reciprocity, and creating a 'shadow of the future'. Neoliberal institutionalists' interest in international regimes led to intensified cooperation between the disciplines of International Relations and International Law, which resulted in the publication of the seminal *Legalization and world politics* special issue in *International Organization* two decades ago.[9] In the following years, interdisciplinary research blossomed.[10]

However, although neoliberal institutionalism posits that the causal arrows flow in both directions—from politics to law and vice versa—the influence accorded to international law remains nonetheless limited. Participation in international regimes does constrain the menu of options available to states, which means that norms and institutions *restrict* state behaviour, yet they are not seen as *constituting* actor identities and preferences.

This is where constructivism comes in, which is based on the fundamental assumption that agents and structures are co-constituted. The brand of

[8]Moravcsik and Legro (1999), p. 50.

[9]Goldstein et al. (2000).

[10]See e.g. Armstrong et al. (2007), Barker (2000), Benvenisti and Hirsch (2004), Byers (2000), Dunoff and Pollack (2012), Goodman and Jinks (2004), Heupel and Reinold (2016), Holzgrefe and Keohane (2003), Koh and Hathaway (2004), Reus-Smit (2004), Simmons and Steinberg (2007).

constructivism informing my argument is what Samuel Barkin has labelled 'realist constructivism'.[11] Realist constructivism looks

> at the way in which power structures affect patterns of normative change in international relations and, conversely, the way in which a particular set of norms affect power structures.[12]

It thus accepts a certain degree of autonomy for international law, without, however, theorising what exactly the autonomy of normative structures is based on. International relations constructivists draw on a long tradition in sociology according to which the relationship between agents and their environment is one of mutual constitution.[13] Constructivists have imported this nexus into international relations theory, arguing that agents (states, transnational networks, individuals, etc.)—through their discourses and practices—contribute to the production, reproduction, and transformation of international structures, while at the same time international structures shape the identities and practices of agents.[14] International law therefore not only regulates state behaviour but constitutes these actors in the first place, shapes their conceptions of self, and how they define their national interests.

States are thus simultaneously creators and subjects of the law. Assuming the mutual constitution of agents and structures means accepting that international law is not a static set of rules, but is always in process as the relevant actors engage in legally relevant behaviour. The legal process is one of continuous challenge of existing rules, their adaptation and transformation through the practices of jurisgenerative actors. The concept of practice is therefore a fundamental category in constructivist international relations theory. Equally essential, however, is the role of discourses, i.e. 'structures of signification which construct social realities'.[15] While constructivists agree that hard power still matters, and that anarchy does make cooperation more difficult, they argue that

> self-help and power politics do not follow either logically or causally from anarchy and that if today we find ourselves in a self-help world, this is due to process, not structure. There is no 'logic' of anarchy apart from the practices that create and instantiate one structure of identities and interests rather than another.[16]

Consequently, *anarchy is what states make of it*.[17]

In sum, there is considerable overlap between basic tenets of constructivist international relations theory and fundamental assumptions held by international legal scholars: both constructivists and many international legal scholars would

[11] Barkin (2003).

[12] *Id.*, p. 337.

[13] Berger and Luckmann (1969), p. 65.

[14] Checkel (1998), p. 326; Dessler (1989), p. 452; Wendt (2001), pp. 185–186.

[15] Milliken (1999), p. 229.

[16] Wendt (1992), pp. 394–395.

[17] *Id.*

subscribe to the view that international legal rules are socially constructed, and both emphasise the significance of (state) practice and intersubjective beliefs, or opinio juris, respectively. Both international relations and international law, moreover, share the assumption of the mutual constitution of agents and structures. Further, constructivists and many international legal scholars would subscribe to the view that law is a dynamic, sometimes contested, social process. Both disciplines moreover use similar methodological tools, studying the role of legal discourses, which are characterised by the necessity to construct coherence, or normative fit, between one's own norms and those of the interpretive community as a whole. I shall return to this point below. Before, however, let us have a look at how international legal scholars have conceptualised the role of power in the international legal process.

2.2 *Power and International Law: The International Law Perspective*

From a legal formalist perspective, international law ought to be seen as the antidote to power, as the best defence for the weak seeking to protect themselves against subjugation by the strong. Legal formalists assume that the law is radically determinate, that there is only one correct interpretation of any given legal norm, and that legal reasoning is autonomous from other kinds of (moral or political) reasoning. Critical legal scholars, by contrast, such as those united in the Third World Approaches to International Law (TWAIL) movement[18] would oppose this view of the law as reductionist. TWAIL scholars conceive of international law as a radically indeterminate product of state power, which universalises certain narratives while silencing others, thus perpetuating existing hegemonic structures. TWAIL scholarship draws much of its insights from postcolonial thinking.[19] Its central preoccupation is with empowering those actors whom Antonio Gramsci has described as the subaltern, a term that TWAIL scholars use rather generically to encompass all those who have been silenced and excluded by dominating relationships.[20] The principal aim of TWAIL scholars is to transform international law from being a language of oppression to a language of emancipation.[21] As such, TWAIL clearly qualifies as 'unsettling jurisprudence'[22] because it has thrown into sharp relief the need to democratise international law as well as international legal scholarship. In the latter field, the TWAIL movement remains marginalised, as Antony Anghie and Buphinder Chimni regret:

[18]See e.g. Anghie (2006), Anghie und Chimni (2003), Baxi (2006), Buchanan (2008), Gathi (2000), Mickelson (1997/1998), Mutua (2000), Otto (1996), Rajagopal (2006).

[19]See e.g. Said (1978).

[20]Otto (1998/1999), p. X.

[21]Anghie and Chimni (2003), p. 79.

[22]Skouteris (1997), p. 417.

> How do we identify what counts as acceptable scholarship in the field of international law? Here a powerful international division of intellectual labor prevails: Northern scholars and Northern institutions set these important standards.[23]

The North's de facto monopolisation of international legal discourse has certainly made it rather difficult for TWAIL to establish itself in mainstream jurisprudence, yet to be fair one should also note that the TWAIL agenda—which has been more about advocacy and less about theory-building—has equally contributed to TWAIL's marginalisation.

Despite these shortcomings, TWAIL scholars and other critical legal thinkers have successfully demonstrated that the assumption of sovereign equality notwithstanding, power does play a central role in the international legal process, both in customary and in treaty law. This is especially true for the creation (rather than application) stage of new treaty law, and for the conclusion of bilateral as opposed to multilateral treaties, as in the creation of the former, political clout translates into greater bargaining power than in the making of the latter. The role of power is moreover salient in custom formation. As Nico Krisch points out,

> customary rules are usually vague enough to allow for a broad impact of power at the application stage. Multilateral treaties, though, in particular those with precise rules and enforcement mechanisms, do not allow for this latitude, and the more they form the centre of the international legal system, the more constraining the effects of sovereign equality become for dominant states.[24]

The Vienna Convention on the Law of Treaties[25] contains a variety of provisions that seek to ensure that power differentials do not taint the law-making process, at least as regards the most blatant exercises of political power. Note, however, that apart from these obvious forms of political interference, there are many other possibilities for powerful states to shape the conclusion and content of international treaties that are not covered by the Vienna Convention. Hence the Convention offers only a partial assurance against the politicisation of international treaty law. In the Preamble of the Vienna Convention it is declared that 'the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized'. Consent as a reflection of the sovereign equality of all states thus lies at the heart of international treaty-making. On the *pacta sunt servanda* principle, the Vienna Convention clarifies that this principle is not absolute and must be read in conjunction with other fundamental norms of international law, such as the prohibition of the threat or use of force. Thus, part V of the Convention, which addresses the invalidity, termination and suspension of the operation of treaties, regulates the limitations applicable to the *pacta sunt servanda* principle: Articles 51 and 52 of the Convention deal with situations in which consent to a treaty has not been obtained freely but

[23] Anghie and Chimni (2003), p. 86.

[24] Krisch (2005), pp. 377-378.

[25] Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force on 27 January 1980.

through coercion,[26] spelling out the consequences of such coercion on the validity of said treaty. Article 51 of the Convention stipulates that

> [t]he expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52 in turn posits the nullity of a treaty 'if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. In sum, the secondary rules governing the formation and transformation of treaty law enshrined in the Vienna Convention cannot eliminate entirely the possibility of politicising the process of treaty-making and application. However, at the very least they provide certain safeguards aimed at frustrating the most blatant forms of political interference.

The process of custom formation is more elusive than treaty-making, and thus particularly receptive to hegemonic influence due to the absence of formalised procedures in this area, and due to the crucial role played by state practice in the development, maintenance, and transformation of custom. The absence of hard-and-fast criteria governing the formation of customary rules favours those with the power to adapt the process to suit their needs—an insight that underlies the concept of hegemonic law-making.[27] An early account of hegemonic law-making can be found in Wilhelm Grewe's *Epochen der Völkerrechtsgeschichte*.[28] Grewe argues that hegemons of each age left a discernible mark on their epoch's normative structure by universalising their own expansionist ideologies.[29] The main premise underlying the concept of hegemonic law-making is that hegemons—by virtue of their superior material (and possibly also soft) power—enjoy a competitive advantage over other states in shaping the international legal architecture. They command hard power assets such as large armies and the economic prowess necessary to fund these armies, develop sophisticated armoury, etc. Some may object that these power resources matter in international politics but not in international law. However, they do matter in the realm of international law as well because state practice is a constitutive element of customary international law. Consequently, states with the resources to act have more opportunities to contribute to the formation of customary rules than states that lack these resources. Their preponderant resources enable powerful states, for instance, to initiate change in customary law through the creation of precedents such as military interventions.[30] In contrast to weaker states, hegemons are not only able to put forward novel claims and popularise these on the level of discourses; they moreover possess the hard power resources necessary to back their claims through actions. Weaker states, by contrast, may lack the resources to engage

[26] On the concept of coercion in treaty-making, see De Jong (1984).

[27] See e.g. Alvarez (2003), Byers (1999), Byers (2005), Byers and Nolte (2003), Krisch (2005), Vagts (2001).

[28] For a critical reception of Grewe's work, see Fassbender (2002).

[29] Grewe (1984), pp. 43–44.

[30] Byers (2005).