MPIL 100

Hermann Mosler and „Ius Cogens im Völkerrecht“

Felix Herbert

Hermann Mosler eröffnet das Kolloquium Verfassungsgerichtsbarkeit in der Gegenwart 1961[1]

“It seems to me that all the philosophical and emotional highlights of the discussion on *ius cogens* have already been reached.” – With this assessment from 1969, Hermann Mosler should turn out to be thoroughly mistaken. Numerous states have extensively commented on and criticised the work of the UN International Law Commission (ILC) on *ius cogens* from 2014 to 2022. Within the ILC itself, the discussion on *ius cogens* was equally controversial. On the question of the effects of *ius cogens* on UN Security Council resolutions, for example, a Commission member even warned of the destruction of the UN collective security system and the danger of a third World War. A discussion in the ILC could hardly be more emotional. The philosophical basis of *ius cogens* is far from settled as well. Contrary to Moslers assessment, “*Ius cogens* in international law” thus remains extremely controversial even over 50 years later. However, Mosler’s article, published in the 25th edition of the Swiss Yearbook of International Law (pp. 9-40), cannot simply be dismissed as outdated or obsolete. When revisited, it sheds

[1] Photo: MPIL.

light on the continuing conceptual ambiguities of *ius cogens* (**2.**). At the same time, Mosler's article illustrates how differently than today German scholars on international law approached a universal phenomenon: unashamedly based on German (and European) preconceptions (**3.**).

1. What is, and why did Mosler Engage with Ius Cogens in International Law?

In international law, *ius cogens* refers to universally applicable norms that are endowed with special effects. These effects include, among others, the invalidity of legal acts derogating from *ius cogens* norms. Individual states, for example, cannot conclude a treaty that sets *ius cogens* aside. *Ius cogens* in international law is generally said to include such important rules as the prohibition of aggressive war, the prohibition of genocide, and the prohibition of slavery. However, it is disputed whether and to what extent some norms belong to the body of *ius cogens*, as the details of how a norm acquires *ius cogens* character are not fully clarified. Various effects of *ius cogens* also remain contentious, such as their effect on UN Security Council resolutions. In any case, a widely recognised effect of *ius cogens* is the invalidity of derogating treaties. *Ius cogens* norms are therefore also referred to as peremptory norms, contrasting with dispositive or derogable norms. At first glance, this non-derogable nature of *ius cogens* norms conflicts with the classical principle of international law that states make international law, and are therefore free to abolish or amend its rules. As Mosler summarised: "the *ius cogens* problem thus touches the foundations of international law" (10; quotes translated by the author).

Two circumstances may have prompted Mosler to engage with *ius cogens*. The extrinsic reason was the negotiation and adoption of the Vienna Convention on the Law of Treaties (VCLT) at the time. Article 53 of this treaty states: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. […] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." This formulation also indicates the intrinsic reason that may have sparked Mosler's interest in *ius cogens*: The reference to the international community of states, a motif that would remain central in his further work (notably in his 1974 General Course at the Hague Academy, "The international society as a legal community").

2. Mosler's Unclear 'Clarifications' – Shedding Light on the Ambiguity of *Ius Cogens* Itself

In retrospect, what does Mosler's article contribute to the understanding of *ius cogens*? Mosler identifies two conceptual roots of *ius cogens*. According to him, the first root of *ius cogens* is the "traditional concept of *ius cogens* in domestic law" (9), which refers to a restriction of the freedom of contract. The second root, Mosler argues (14-28), equates *ius cogens* with "*ordre public*". The following sections shall examine and evaluate Mosler's distinction.

Ius Cogens as an Antonym to *Ius Dispositivum*

Mosler characterises traditional *ius cogens* in a domestic law sense as those norms the legislator determines to be norms from which individuals may not derogate through contract, be it in the interest of the community, or to protect particularly vulnerable individuals. *Ius cogens* is thus contrasted with *ius dispositivum*, i.e. those norms individuals are free to derogate from by contract. This distinction presupposes a hierarchical relationship between the legislator and the contracting individuals (15). *Ius cogens* norms, however, need not be hierarchically superior to other norms; the same source of law can contain both non-derogable and derogable norms. Despite all structural differences to domestic law, Mosler holds that this concept is also transposable to international law (16-22), because international law is more than a bundle of bilateral and multilateral relations. The international community of states had always exhibited a minimum level of homogeneity and community character (16-17).

However, Mosler's subsequent reasoning does not clarify what this reference to the international community means for his understanding of *ius cogens* in international law. First of all, Mosler emphasises that conceiving states as the legislators of international law would entail that they could also determine which norms to endow with what status or effects – conferring *ius cogens* status on some, and *ius dispositivum* status on other norms. With this understanding, regional *ius cogens* norms are well conceivable: A group of states can create a regional norm by treaty or regional customary law and confer, within their relations, *ius cogens* status on it. Mosler does not explicate this possibility, but implies it when he cites restrictions on the freedom of contract of the member states of the European Communities as an example of *ius cogens* (20-21). In a later section on the emergence of *ius cogens* (37-39), however, Mosler refers exclusively to norms of *general* international law (i.e. applicable to all states), as does the Vienna Convention cited above. This would exclude the possibility of regional *ius cogens*. In the end, Mosler's view on the universality of *ius cogens*remains unclear. Secondly, with this understanding, the content of *ius cogens*norms could be completely trivial. If states are free to confer *ius cogens* status on any norm they create, *ius cogens* norms may have any content. It is unclear how this characteristic can be reconciled with the connection of *ius cogens* to the community character of the international legal order, which Mosler initially emphasised.

Finally, however, Mosler claims that certain *ius cogens* norms also arise "from rationally recognisable necessities of coexistence" (18). Thus, some *ius cogens*norms could be made by states, others would be removed from states' law-making powers. From today's perspective, Mosler's openness to different types of *ius cogens* norms is astonishing and thought-provoking. Current scholarship still disagrees whether *ius cogens* norms acquire their status by states conferring it, or from a source beyond states' control, which can be described as natural or rational law. These two potential sources of *ius cogens* status are widely regarded as mutually exclusive – in stark contrast to Mosler, who apparently accepts different sources for

different *ius cogens* norms. Overall, Mosler is in favour of understanding *ius cogens* in international law as an antonym to *ius dispositivum*, in keeping with domestic *ius cogens*.

Ius Cogens as the *Ordre Public* of International Law

Eindrücke aus dem Institutsleben: Teilnehmende des Kolloquiums Staatshaftung 1964[2]

In contrast, Mosler is sceptical about the second conceptual root of *ius cogens*he identified, *ius cogens* understood as an international *ordre public*. According to Mosler, *ordre public* refers to "norms whose respect is necessary for the preservation of the international legal community" (24). These norms protect "legal values that serve the purpose of the legal community". *Ius cogens* in the sense of *ordre public* would be significantly broader than in the domestic sense described above. Beyond restricting freedom of contract, *ius cogens* so understood would prohibit factual conduct of states (25-26). Mosler uses the example of the prohibition of the use of force as a norm of *ius cogens* to illustrate this difference: in addition to the invalidity of a treaty derogating from the prohibition of the use of force, there would then be a prohibition of the individual act of aggression. Mosler ultimately

[2] Photo: MPIL.

rejects this expansion of *ius cogens*, arguing that there was no reason to give the clear domestic concept of *ius cogens* a different content in international law.

However, Mosler then proceeds to argue for a certain expansion of international *ius cogens* beyond the domestic concept. In international law, *ius cogens* could also bind states that are "outsiders to law-making" (26), i.e. those that have not participated in or even reject the creation of the norm in question. Such an effect is irrelevant for domestic *ius cogens*, since all individuals are bound by the law regardless of their will or their participation in law-making. This aspect of Mosler's article has prevailed: Even a state that constantly protests against them (the so-called persistent objector) is bound by *ius cogens* norms regardless of its protest.

However, Mosler's invocation of the North Sea Continental Shelf case of the International Court of Justice (ICJ) to justify this feature of *ius cogens* is not convincing. The ICJ had assumed that Germany could, under certain circumstances, be bound against its will by a norm of international law invoked by Denmark and the Netherlands. According to Mosler, this assumption only makes sense if one accepts that *ius cogens* could create such a binding obligation against the will of the state in question (28). Mosler's reasoning is not cogent though, because the ICJ's assumption makes sense even without recourse to *ius cogens*; it may be justified by the rules regarding the creation and effect of customary international law. A contrary intention alone does not prevent a state from being bound by a rule of customary international law; rather, according to the persistent objector rule, this intention must also be clearly expressed in due time, and persistently upheld. Only if the ICJ had established, firstly, that the disputed norm had attained customary international law status and, secondly, that Germany fulfilled the requirements of the persistent objector, would the question have arisen as to whether Germany was still bound by the norm by virtue of its *ius cogens* character. Accordingly, the North Sea continental shelf case did not play a role in later debates on *ius cogens*. Perhaps Mosler's reference to the case simply stemmed from the fact that he had been involved in the ICJ case as an *ad hoc* judge. Overall, Mosler's article does not present a stringent account of *ius cogens*.

3. Mosler's method: Using Exclusively German and European Examples

In addition to these weaknesses in terms of content, Mosler's article also suffers from methodological flaws. Mosler's two-step argumentation on *ius cogens* as an antonym to *ius dispositivum* (first: *ius cogens* as a principle in domestic law; second: transfer of the principle to international law) is reminiscent of a recognised method for determining general principles of international law. It is surprising how frankly Mosler contended himself in the section on *ius cogens* in domestic law (14-16) with looking only at the German legal system to establish 'the' domestic meaning of *ius cogens* that he then used for his further argument. According to the uncontended understanding of Article 38 of the ICJ Statute, also at the time,

general principles of law are only such that are recognised in the national legal systems of many different states. Mosler cites the German Civil Code (15) but does not turn his attention to any other national legal system. Other sections of his article are also dominated by examples from the German legal system, be it the principle of federal loyalty enshrined in the Basic Law (31), the concept of the margin of discretion in administrative law (32), or the jurisprudence of the Federal Constitutional Court on unconstitutional constitutional law (38).

At least Mosler's European spirit (serving as a judge at the European Court of Human Rights since 1959) is recognisable. Mosler refers to the jurisprudence of this court (32) and, as already mentioned, cites the European Communities as organisations whose member states have consented to a restriction of their freedom of contract (20-21). Nevertheless, examples beyond the German or European legal sphere are completely absent. This is particularly surprising given that Mosler was, at the same time, director of an institute whose expertise includes comparative legal research outside the borders of Europe. The fact that Mosler initially presented his (later revised) article as a lecture to the Swiss Association for International Law can hardly serve as an explanation either, as Mosler makes no reference whatsoever to Swiss law.

The impression therefore arises that Mosler's reflections on *ius cogens* in international law were restricted by German and European preconceptions. Today's international legal scholarship would rightly criticise reading universal international law through such a lens as Eurocentrism and epistemic nationalism. According to Anne Peters, who coined the term, one characteristic of epistemic nationalism is that approaches to international law are coloured by preconceptions from national law and therefore cannot deliver on their universal claim. It is precisely this danger that permeates Mosler's article by limiting itself to predominantly German examples.

4. Uncertain Prospects

Despite its methodological and conceptual weaknesses of Mosler's article, his distinction between two conceptual roots underlying *ius cogens* in international law is enlightening. On the one hand, *ius cogens* is still seen today primarily as restricting the treaty-making power of states, similar to *ius cogens* as an antonym to *ius dispositivum*. In this context, *ius cogens* serves as a regulatory technique open to any content, and to regional *ius cogens* norms. On the other hand, *ius cogens* today is widely linked to fundamental values of the international community, as emphasized by the *ordre-public*-conception and recently reflected in the conclusions of the ILC on *ius cogens*. The unresolved tension between these two conceptual roots of *ius cogens* explains the persisting ambiguity of *ius cogens* in international law. It remains to be seen how *ius cogens* will evolve in international law and international legal scholarship. Contrary to Mosler's assessment from 1969 quoted at the beginning, it seems to me today that it would be inappropriate to claim an ultimate assessment

of the philosophical and emotional highlights of the discussion on *ius cogens*, as would be a prediction of future developments of public international law entailed thereby.