Chapter XII

The Protracted End of the Blocks (since 1945)

Block Formation during World War II, the Early Post-War Period and Decolonisation

The blocks that actually came into existence between 1939 and the end of the 1940s, did not follow the pattern, which revisionist ideologues had envisaged during the 1920s and 1930s. The first major departure from their dreams occurred on 23 August 1939, when the German Empire and the Soviet Union signed a secret toleration and non-aggression agreement dividing Central Europe into German and Soviet "zones of influence" for an unspecified period of time. This so-called „Hitler-Stalin-Pact" did not terminate the Anti-Comintern-Pact that was in existence between the German Empire, Italy and Japan since 1936 but, in the perspective of the German military command, opened the path for the German invasion of Poland without having to take into account immediate retaliation from the Soviet side. Consequently, the involved governments expanded the Anti-Comintern-Pact into the Three-Powers Pact on 27 September 1940. This agreement provided for military cooperation but neither established a military alliance nor facilitated the coordination of military planning with regard to the war theatres in Europe and in East as well as Southeast Asia. The Japanese government concluded its own non-aggression treaty with the Soviet Union on 13 April 1941. Contrary to expectations from the side of ideologues of block formation, the delimitation of blocks in Eurasia resulted from consensus laid down in treaties under international law.

When the Nazi government of Germany launched the invasion of Poland on 1 September 1939, the British government took a strong stand against the German aggression and led the armed resistance against the German Empire with assistance from the USA. Since the truce agreement, signed on 22 and 25 June 1940 between France on the one side, the German Empire and Italy on the other, the UK shouldered the main war effort. A British-Soviet alliance came into existence only after the German invasion of the Soviet Union, which began on 22 June 1941 and effectively abolished the "Hitler-Stalin-Pact".[1] The German declaration of war against the USA on 11 December 1941 resulted in the formation of the "Anti-Hitler-Coalition" against the German Empire. Shortly before, the USA was drawn into the "Pacific War" in consequence of the Japanese attack on Pearl Harbor on 7 / 8 December 1941. The warring parties gathered together into the trans-Atlantic "Anti-Hitler Coalition" on the one side, the partners to the Three-Powers Pact on the other. The Soviet Union then bore the brunt of German aggression and the military defense against it. The German invading forces combined the goal of the military occupation of Soviet territory with the aims of the implementation of the murder of the European Jews and the execution of the enslavement, even "extinction" of populations under Soviet rule as Hitler had threatened it. The USA conducted the war against Japan essentially on its own, as the Soviet Union entered that war only on 9 August 1945, the day of the dropping of the second atomic bomb, thereby breaking its treaty with Japan. The allies in the "Anti-Hitler-Coalition" agreed on the strategy of first defeating the German Empire and then Japan. Up to the end of World War II, there was neither an isolated American continent nor an isolated British Empire nor an isolated Soviet Union. The German war propaganda, according to which, at the end of the war, the Soviet Union would be destroyed and the world fall apart into blocks under German, Japanese and US control,[2] was bare of any correlation with the course of the war.

Following the arrest of Mussolini, the government of Italy accomplished a truce on 3 September 1943. The unconditional capitulation agreement, signed on 7 and 9 May 1945, fixed the surrender of the German armed forces, entailed the dissolution of the government of the German

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[1] Hans von Manegoldt, ed., *Kriegsdokumente über Bündnisgrundlagen, Kriegsziele und Friedenspolitik der Vereinten Nationen* (Hamburg, 1946), p. 49. Gilbert-Hanno Gornig, *Der Hitler-Stalin-Pakt. Eine völkerrechtliche Studie* (Schriften zum Staats- und Völkerrecht, 41) (Frankfurt, 1990).

[2] On the war aims see: Andreas Hillgruber, *Großmacht und Weltpolitik im 19. und 20. Jahrhundert* (Düsseldorf, 1977), p. 233. Hillgruber, *Der 2. Weltkrieg. Kriegsziele und Strategie der großen Mächte*, second edn (Stuttgart, 1983), pp. 68-80 [first published (Stuttgart, 1982)].

Empire and the assumption of government responsibilities by the Allied Powers of the "Anti-Hitler-Coalition". The surrender of the Japanese armed forces on 15 August 1945 through unconditional capitulation resulted in the immediate termination of Japanese government control over all territories beyond the Japanese archipelago. Okinawa came under US occupation regime, the Soviet Union grabbed Sakhalin and the Southern Kurile Islands, government control over China and Korea except for Hong Kong and Macau was restored to governments in control before 1937, 1931, 1910 and 1895 respectively. Likewise, European colonial rule was restored over territories that had come under Japanese military occupation in Southeast Asia and the South Pacific since 1942, while the US government received the "mandate" over the Marianas, Caroline and Marshall Islands from the just established United Nations.

Yet, the platform for common political goals among the members of the "Anti-Hitler-Coalition" beyond the conclusion of the war against the partners to the Three-Powers Pact was narrow. Given the extremely high numbers of casualties on the Soviet side, the Soviet government, after the victory of the Red Army, had no reason to waive its own demands for compensation and redemption from the vanquished states as well as from its allies. As the Western allies were principally in the same situation, compromises were difficult, whence the strategy of dividing rule over the vanquished states was at hand. The allies of the "Anti-Hitler-Coalition" took the first steps into that direction already towards the end of the war. Upon taking government control, they divided the German Empire into "zones", in which Belgian, British, Dutch, French, Soviet and US military contingents operated as occupation forces. The "zones" quickly formed two states, one under the control of the Western allies, the other under Soviet control. Both states became engulfed into the newly establishing blocks, with the border between them termed the "Iron Curtain" according to Churchill's formula. The blocks divided Europe into two parts, the Western part being tied to the USA forming a trans-Atlantic partnership, the other a glacis to the west of the Soviet Union. Already in 1949, the western block converted into a military alliance under the name North Atlantic Treaty Organization (NATO), the eastern bloc following suit in the same year with the founding of the Council for Mutual Economic Assistance (COMECON) and the creation of the Warsaw Treaty Organization (WTO) in 1955. The metaphor of the "Cold War" appeared for the rivalry of the two opposing blocks already during the 1940s. The Soviet Union and the USA rose to the block leaders and their governments claimed for themselves the status of "super powers". This was a term denoting a state with armed capacities sufficient to allow the simultaneous conduct of wars in two or more continents.[3]

The formation of the blocks impacted on international legal theory on both sides of the Atlantic Ocean. In Europe as well as in the USA, Heinrich Triepel's postulate of an international legal community as the social basis of international law gained new popularity. In Europe, the Göttingen theorist of the state and constitutional lawyer Gerhard Leibholz (1901 – 1982) demanded already in 1948 that an "international legal community" (Völkerrechtsgemeinschaft), as he called it, should provide for a "minimum of ideological homogeneity" (Minimum an Homogenität der Weltanschauung), so as to allow the enforcement of international law. In advocating this demand, Leibholz articulated the dogma that international law could not be enforced vis-à-vis states in the Soviet bloc, thereby excluding the Soviet Union and its allies from realm of the validity of international law.[4] In North America, émigré jurists such as Joseph Laurenz Kunz (1890 – 1970) and Kurt Wilk seconded. Kunz diagnosed some "global ideological conflict" between the blocks, which, in his view, obstructed the enforcement of international law.[5] Wilk specified Kunz's statement concluding that the realm of the validity of international laws extended to the limits of the arena of shared values.[6] Like Kunz, Wilk based his conclusion on Triepel's assessment, according to which

[3] William Thornton Rickert Fox, *The Superpowers. The United States, Britain and the Soviet Union. Their Responsilibiliy for Peace* (New York, 1944).

[4] Gerhard Leibholz, 'Zur gegenwärtigen Lage des Völkerrechts', in: *Archiv des Völkerrechts* 1 (1948/49), pp. 415-423.

[5] Joseph Laurenz Kunz, 'La crise et les transformations du droit des gens', in: *Recueil des cours* 88 (1955, part II), pp. 1-104, at pp. 18-19, 25.

[6] Kurt Wilk, 'International Law and Global Ideological Conflict', in: *American Journal of International Law* 45 (1951), pp. 648-670, at pp. 657, 658.

law could only be considered valid within an "international legal community", placed this community under common political values, from which he excluded the Soviet Union, and thereby confirmed the wartime perception that international law could not be conceived without consideration of political values.[7] Wilk's conclusion, like Leibholz's statement, had the consequence that the arena of the validity of international law, in practice, came to be confined to areas categorised as a space of communication[8] and placed under the control of NATO and the other allies of the USA. International legal theorists thus denied to the Soviet Union and the states under its sway the willingness to recognise international legal norms. But post-war Soviet international legal theorists derived their principles of peaceful coexistence, as during the 1920s, from the "basic norm" *pacta sunt servanda*.[9]

Moreover, after World War II, European, Japanese and North American theorists took the view that some "world state" was no longerdictated by the needs of global communication and accommodation among "great powers", as the "international legal community" had been in the early decades of the twentieth century.[10] Instead, they posited the "world state" as the bearer of "world sovereignty" to the end of preventing war. "World sovereignty", these theorists imagined, would either emerge on the basis of the UN charter or from a constitution to be approved by governments of sovereign states and would eventually replace state sovereignty. Jurist Kisaburō Yokota, for one, deemed the world state necessary for the salvation of humankind and the maintenance of the so-called "civilisation". Yokota was an early follower of the legal philosophy of Hans Kelsen, who had regarded the "international legal community" as the sole facilitator of justice on the globe at large.[11] In the USA the "Committee to Frame a World Constitution"[12] argued like Yokota in 1948 and, in doing so, was joined in Europe by pacifist and women's rights activist Rosika Schwimmer (1877 – 1948), founder of the "League for the World State".[13] In the perspective of Socialist theorists, however, these visions of the world state were no more than machinations aimed at the destruction of the sovereignty of Socialist states.[14]

After Soviet armed forces had withdrawn from Yugoslavia in 1944, Norway and Czechoslovakia in 1945, Bornholm, Manchuria and Iran in 1946, Bulgaria in 1947, North Korea in 1948, Austria and Dairen / Port Arthur in China in 1955, Finland in 1956 and Romania in 1958, the Cold War lost intensity eventually through the building of the Berlin Wall in 1961, because the US government understood it as the demarcation of the western border of the Soviet bloc in Europe,

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[7] Gerhart Niemeyer, *Law Without Force. The Function of Politics in International Law* (Princeton, 1941) [reprint (New Brunswick, 2001)].

[8] Karl Wolfgang Deutsch, *Political Community in the North Atlantic Area* (Princeton, 1957).

[9] Evgenij Aleksandrovič Korovin, *Völkerrecht* (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, 43) (Hamburg, 1960), p. 1 [another edn (Leipzig, 1960)].

[10] Max Huber, 'Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft', in: *Jahrbuch des öffentlichen Rechts* 4 (1910), pp. 56-143, at pp. 69-70 [reprinted as a monograph: *Die soziologischen Grundlagen des Völkerrechts* (Internationalrechtliche Abhandlungen, 2) (Berlin, 1928)].

[11] Kisaburō Yokota, *Sekai kokka no mondai* (Tokyo, 1948), pp. 5, 127-189]. Yokota, 'Keruzen "shūken to kokusaihō"', in: Yokota, *Junsui hōgaku ronshū*, vol. 2. (Tokyo, 1977), pp. 137-157. For a study see: Jochen Graf von Bernstorff, *The Public International Law Theory of Hans Kelsen. Believing in Universal Law* (Cambridge, 2000), pp. 108-118. See also: Albert Einstein, 'Towards a World Government [broadcast, 24 May 1946]', in: Einstein, *Out of My Later Years. The Scientist, Philosopher and Man Portrayd through His Own Words* (New York, 1956), pp. 138-140, at p. 138 [first printed (New York, 1950); (London, 1950); reprints (London, 1967); (Westport, CT, 1970; 1975); (Newburyport, 2011)].

[12] Robert Maynard Hutchins and G. A. Borgese, eds, for the Committee to Frame a World Constitution, *Preliminary Draft of a World Constitution* (Chicago, 1948).

[13] Rosika Schwimmer, [Rósza Bédy-Schwimmer], 'Der Weltstaat', in: *Mitteilungsblatt der Weltstaat-Liga*, nr 6 (Munich, 1948), p. 76.

[14] Herbert Kröger, ed., *Völkerrecht. Lehrbuch*, 2 vols (Berlin [GDR], 1973), pp. 330-331 [second edn, 2 vols (Berlin, 1981-1982)]. Roland Meister, *Ideen vom Weltstaat und der Weltgemeinschaft im Wandel imperialistischer Herrschaftsstrategien* (Zur Kritik der bürgerlichen Ideologie, 29) (Berlin [GDR], 1973), pp. 35-61 [another edn (Frankfurt, 1973)]. Grigorij Ivanovič Tunkin, *Das Völkerrecht der Gegenwart. Theorie und Praxis* (Berlin [GDR] 1963), pp. 151-159 [first published (Moscow, 1962].

built in stone.[15] During the ensuing 1960s, continuing ideological confrontation became accompanied by an increasingly regulated coexistence of the blocks with border-crossing becoming possible in areas adjacent to the "Iron Curtain" and tourists from the West being welcomed specifically in Yugoslavia and Romania. In other parts of the world, however, block formation took place, without direct relation with the outcome of World War II, in Korea (1950 – 1953) and in Vietnam (1954 – 1975) by hot wars. In East Asian perception, then, World War II was a sequence of military events taking place in Europe, Africa and the Atlantic Ocean. In Japan, specifically, the combat actions, affecting China between 1937 and 1941, received the label "Great East Asian War" (Dai Tō-A Sensō) and the subsequent combat actions, extending towards Southeast Asia, the Pacific and the Indian Oceans, came to be called "Pacific War" (Taiheiyō Sensō). In East Asian perspective, then, the Pacific war theatres appeared separate from the European and Atlantic war theatres. Japan was in the state of war with the USA only from December 1941, with the UK only from the sack of Singapore in February 1942 and with the Soviet Union only for the brief period between 9 and 15 August 1945. While the Red Army occupied the Southern Kurile Islands (Hoppōryōdō), which the Russian government had recognised as Japanese territory[16] in several treaties since 1855,[17] it left the rest of the Japanese Archipelago to US forces. There was no formal establishment of occupation zones, and Japan remained a nominally sovereign state under a government of its own.

The partition of East Asia into blocks followed the end of the Chinese civil war in 1949 after the victory of the People's Liberation Army under the leadership of the Chinese Communist Party, the ensuing establishment of the People's Republic of China and the Korean War (1950 – 1953). The Chinese national army, defeated in the civil war, withdrew to Taiwan, founded a state of its own separate from the People's Republic of China and claimed to represent China as a whole. The NATO allies initially recognised the claim. The Korean War ended in a truce and the making of two states on the peninsula, a northern state under Soviet and a southern state under US control. The government of the People's Republic of China cooperated with the Soviet government without being formally included into the Soviet-led block. In the course of the Korean War, the governments of Japan and the USA, together with 49 further states, but excluding China and the Soviet Union, concluded the peace agreement of San Francisco on 8 September 1951. On the same day, the governments of Japan and the USA agreed upon a bilateral military alliance. No peace agreement has yet been made between Japan and the Soviet Union. The Soviet occupation of Japanese territory in the Southern Kurile Islands has continued together with the partition of Korea and the separateness of Taiwan, which the Chinese government has not recognised. China and Japan concluded a peace agreement in 1978, ending the state of war between the two states.

Southeast Asia became absorbed into processes of block formation only after anti-colonial liberation movements had brought about the collapse of British, Dutch, French and US colonial regimes and setup of new sovereign states drawn on the former colonial dependencies. European and US colonial rule had first been restored after the end of Japanese military occupation during the "Pacific War". The US government withdrew from the Philippines in 1946, the UK from Burma (now Myanmar) in 1948 and from the Malay Federation (since 1963: Malaysia) in 1957, the Netherlands from the Indonesian archipelago in 1947, France from Cambodia and Laos after the Geneva Indochina Conference in 1954 and from Vietnam after the defeat of the French army in 1954. Among the sizeable populations of Chinese origin in the Philippines, the Malay Peninsula and the Indonesian archipelago, the Chinese civil war had kicked off processes of the making of rival parties during the 1920s. These political groupings continued to exist well into the 1950s and offered opportunities to the Chinese Communist Party to boost its political clout in early post-colonial

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[15] John Fitzgerald Kennedy, '[Letter to Willy Brandt, Governing Mayor of (West) Berlin]', edited by Diethelm Prowe, 'Der Brief Kennedys an Brandt vom 18. August 1961', in: *Vierteljahreshefte für Zeitgeschichte* 33 (1985), pp. 382-383. On the letter see: Frederick Kempe, *Berlin 1961. Kennedy, Khrushchev and the Most Dangerous Place on Earth* (New York, 2011), pp. 398-418. Kenneth P. O'Donnell, David F. Powers and Joe McCarthy, *"Jonny, We Hardly Knew Ye". Memories of John Fitzgerald Kennedy* (Boston, 1972), p. 303.

[16] Norbert R. Adami, 'Der sowjetisch-japanische Streit um die Südlichen Kurilen und seine historischen Hintergründe', in: *Jahrbuch des Deutschen Instituts für Japanstudien der Philipp-Franz-von-Siebold-Stiftung* 1 (1989), pp. 365-384. Adami, *Wessen sind die älteren Rechte?* (OAG aktuell, 48) (Tokyo, 1991).

[17] Treaty Japan – Russia, 25 April / 7 May 1875, Art. II, in: *CTS*, vol. 149, pp. 180-185, at pp. 180-181.

Southeast Asian states. Fears of Communist takeovers drove the governments of the Philippines and the Malay Federation into the block of the Western allies. In response to the French defeat in Vietnam, New Zealand, Pakistan, the Philippines and Thailand concluded the Southeast Asian Treaty Organization (SEATO) as a military alliance with France, the UK and the USA that lasted until 1977. Next to the military alliance, the civilian Association of Southeast Asian Nations (ASEAN) came into being in 1967, with initially five member states (Indonesia, Malaysia, the Philippines, Singapore, Thailand), the original goals consisting of fighting Communism and the peaceful settlement of conflicts over borders that the colonial governments had drawn in the region. Already in 1951, Australia, New Zealand and the USA entered into a military alliance (ANZUS) that still exists. Following the defeat of the French army, Vietnam became divided into a northern state under Soviet and a southern state under US influence.

In the South Pacific, the Australian government proposed the establishment of a regional institution soon after the end of the "Pacific War". The body came into existence in 1947 as the South Pacific Commission with the task of easing the coordination of colonial rule. It brought together the colonial governments of Australia, France, the Netherlands, New Zealand, the UK and the USA, then active in the region. Before 1983, only Samoa (then West Samoa) found acceptance into the Commission in 1965 as the only post-colonial state. The Commission performed its task in close cooperation with ANZUS, particularly after the British and Dutch governments had withdrawn. The close cooperation between the Commission and ANZUS ended only with the admission of all 21 then sovereign South Pacific states together with non-sovereign political communities in 1983. The Commission, which changed its name to South Pacific Community in 1997, is the only regional institution of colonial origin that is still active today. It focuses on the comprehensive promotion of sustainable development of the small island states assembled among its members. The Commission's Secretariat forms an international organisation of its own. Since 1971, the Community has coexisted with the Pacific Islands Forum (since 2000: South Pacific Forum) as an institution into which only sovereign states can be admitted as full members, including states that have entered into a "free association" with another state, usually New Zealand or the USA, while non-sovereign states are admitted merely as observers. As in the case of the South Pacific Community, the Forum's Secretariat is structured as an international organisation of its own. The Secretariat has the competence to decide about military interventions in member states. It used this competence in 2003, when it commissioned the Australian government with the military command of an intervention in the Solomon Islands.

Regarding South Asia and Africa, the process of decolonisation, there as well imposed by anti-colonial liberation fronts since 1947, took place outside the blocks. Already on 24 April 1955, governments of newly independent states in Africa and Asia responded to block formation efforts with the attempt to avoid absorption into one of the blocks. In the Indonesian city of Bandung, they signed an agreement aimed at terminating colonial rule outside the blocks. The majority of states gaining independence during the 1960s and 1970s acceded to the agreement. By the early 1970s, British, Dutch, French, and US colonial rule was confined to territories in the Caribbean and the South Pacific, French Guyana in Continental South America, some French controlled islands off the coasts of Canada and some scattered islands under British control in the South Atlantic, the southern Indian Ocean and the Crown Colony of Hong Kong. Belgian control over Burundi, Congo and Rwanda ended with abrupt withdrawal in 1960. The remaining larger colonial dependencies were under Portuguese rule in Africa, South and Southeast Asia together with Macau, under Spanish rule in West Sahara as well as the minority regimes of the Boers and other European settlers in South and Southwest Africa as well as former British South Rhodesia (since 1965). Portuguese colonial rule came to its end in three steps, first through the occupation of Goa, Diu und Damian on the west coast of South Asia through armed forces under the command of the Government of India in 1961; second, in 1975, through the sudden withdrawal of Portuguese colonial administration from Southeast Asia (East Timor) and Africa (Angola, Capeverdian Islands, Guinea-Bissau, Mozambique) after years of unsuccessful warfare against anti-colonial liberation fronts and a domestic revolution shaking Portugal itself in 1974; third by the transfer to Chinese control of Macau in 1999. Only in territories under Portuguese control in Africa did the anti-colonial liberation efforts turn into proxy wars of the Soviet Union and the USA. However, even the independent states emerging from the former

Portuguese colonial dependencies did not formally join a block. Spanish colonial rule over West Sahara, in existence since 1884, ended without involvement of the local population with the partition of the territory between Morocco and Mauretania in 1975. Since then, the anti-colonial liberation front Frente Polisario has conducted armed resistance against the post-colonial regimes. In Southwest Africa, the Union of South African and South Rhodesia, the local African population groups refused to recognise the minority regimes and formed armed anti-colonial liberation movements. These resistance movements succeeded first in South Rhodesia bringing to the fall the minority government of European immigrants settlers in 1980 and proclaiming the independent state of Zimbabwe; then in Southwest Africa where the new state of Namibia came into existence only in 1990, although the Internatoinal Court of Justice had proclaimed illegal the regime of the South African minority government already in 1971; finally, the minority regime in Union of South Africa collapsed after free general elections in 1994.

As a rule, the US and European colonial governments tied their acceptance of independence to the condition that new states should be emerge from the institutions that the colonial rulers had created and that pre-colonial institutions should not be restored. In most cases, this strategy met with staunch popular resistance and obstructed the formation of a consensus about the new states.[18] Pursuing their strategy, colonial governments imposed the borders they had arbitrarily drawn and converted these administrative demarcation lines into international borders of the new states. In doing so, they not only left behind a legacy of problems with the handling of often conflicting interests of population groups assembled with the borders of these states, but also caused grave difficulties with the formation of a purportedly integrated "national identity" of the state population.[19] While colonial governments had done little or nothing to mould collective identities in the territories under their sway, they demanded from early post-colonial indigenous governments to accomplish precisely this task and to do so in a short period of time. Hence, inter-state conflicts over borders arose from the legacies of colonial rule, noteworthily in Africa since the 1960s, in South Asia immediately upon the independence of India and Pakistan in 1947 and in Southeast Asia since the 1950s. Because in most cases, the newly established states were creations from scratch drawn on colonial institutions, the processes of decolonisation were tantamount to the final acts of the destruction of the pre-colonial states, wherever these states had continued under colonial rule. This was the case mostly in "Protectorates" under British rule, where pre-colonial states had been recognised through indefinite treaties under international law.[20] In all of Africa, merely the states of Burundi, Lesotho, Rwanda and Swaziland featured connections to pre-colonial institutions. The British government increased the burden for post-colonial governments by insisting that governments of new states accomplishing independence from British rule should join the Commonwealth of Nations, wherein they were obliged to cooperate with the British government.

The decolonisation process was formal in the respect that it converted dependent colonial institutions of rule into new sovereign states. As a rule, decolonisation did not entail complete autonomy in cultural, economic and political respects, even though these states became recognised as subjects under international law and found admission into international organisations. Yet the

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[18] For example in the British dependency of the Uganda Protectorate, which was converted into the Republic of Uganda. On the decolonisation process see: Mutesa II, Edward Frederick, Kabaka of Buganda, *Desecration of My Kingdom* (London, 1967). Buganda, 'The Lukiiko Memorandum, 1960', in: Donald Anthony Low, ed., *The Mind of Buganda* (London, 1971), pp. 195-210. Next to Uganda the same process took place, among other territories, in the British Protectorate of Nigeria, amalgamated in 1914, with dissent having been put on record by: Obafemi Awolowo, *Path to Nigerian Freedom*, edited by Margery Perham (London, 1947).

[19] As outlined in: Karl Wolfgang Deutsch, *Nationalism and Social Communication* (Cambridge, MA, 1953).

[20] For a list see: Edward Hertslet, *The Map of Africa by Treaty*, third edn (London, 1909) [first published (London, 1895); reprints (London, 1967); (London, 2006); (Hoboken, 2013)]. For an official statement recognising the existence of sovereign states during the colonial era see: Mohammed Bedjaoui, 'Second Report on Succession in Respect of Rights and Duties Resulting from Sources Other than Treaties', in: *Yearbook of the International Law Commission* (1969, part II), pp. 69-100, at p. 88. In 1952, the British government formally recognised the Sultan of Johore and twelve further rulers in Malaya as sovereigns; see: Daniel Patrick O'Connell, 'Independence and Succession to Treaties', in: *British Yearbook of International Law* 38 (1962), pp. 84-180, at p. 171. Mutesa II, Kabaka of Buganda, was invited to take part as head of state in the coronation of Queen Elizabeth II in 1953 (see: Mutesa, *Desecration*, note 18).

capability of decision-making by governments of the new states in the international arena remained limited. The limitations were mainly due to a structural feature inherent in the decolonisation processes. In the course of these processes, the anti-colonial liberation and resistance movements commonly obtained independence through bilateral negotiations with the colonial governments, against which they were directing their campaigns. But they did not reach independence through the involvement of international organisations, such as the UN, even not in cases, where, as in Southwest Africa, the UN acted as the agency "mandating" South African colonial control. The new states therefore did not get their sovereignty awarded as a legal entitlement by international law but through acts of grace filed out more or less reluctantly from colonial governments under pressure from anti-colonial movements.

Most important among the international organisations that were not directly involved in the decolonisation processes despite competence to do so was the UN. Prepared among the allies of the "Anti-Hitler-Coalition" since 1942, the UN began its operations with the enforcement of the Charter on 24 October 1945. Its overall goal was to replace the League of Nations in an effort to preserve peace. The League dissolved itself on 19 April 1946, leaving the UN as the sole globally operating international organisation with its range of activities not limited to specific policy fields. According to the Charter, only sovereign states could become members. However, the UN followed League of Nations practice not merely in accepting the British Government of India as a founding member, but also in admitting two non-sovereign members, namely Belarus and Ukraine jointly with the Soviet Union as a whole. With its Article 23, the Charter established a hierarchy among member states, placing China, France, the Soviet Union, the UK and the USA as permanent members in the new Security Council, equipping them with a right to veto and thereby raising them above the rank of ordinary member states, which could be represented in the Security Council merely on a non-permanent basis. The governments of each of these states were entitled to use their right of veto individually with regard to Security Council decisions, which they could declare null and void through their votes. The UN Charter featured no reason for the priority of these states over other UN members, which, in fact, derived from political arrangements at the end of World War II but not from a legal norm. Put differently: the governments of states positing themselves as the main victors of the war reserved for themselves a priority over all other UN members and cast it indefinitely in legal terms. In taking this position, these governments implemented an idea, which had first been formulated programmatically in the second half of the nineteenth century and mandated self-appointed "big powers" with control over international organisations.[21] The government of People's Republic of China took the seat of China in the Security Council in 1972.

Moreover, the UN Charter contained an extensive section comprising nineteen articles with exclusive regard to the organisation of colonial rule. The UN thereby took over the legacy of legitimising colonial rule from the League of Nations. In the main, these articles were conditioned by the expectation that the League would, upon its dissolution, transfer competence to regulate its "mandates" to the UN. But the Charter, going into effect before the dissolution of the League, redefined the holding of "mandates" in terms of some "trusteeship" and gave expression to general norms for its implementation without reference to measures the League had taken. Thus, the Charter obliged "trustees" to promote the well-being of the inhabitants of territories under „trusteeship", to advance the peoples settling there with respect to political, economic, social and educational matters and to treat them justly and provide "protection" against abuse; the "trustees" were also to "develop self-government" (Art. 73). Thus, the UN Charter did abandon the rhetoric of "civilisation", to which the League of Nations had committed itself. However, the UN Charter granted no entitlement to the recognition, neither of the statehood nor of the sovereignty of the victims of colonial rule Instead, the UN Charter established an alleged need for some nebulous progressive development of free political institutions in consideration of the specific circumstances in every territory and its populations and their various perceived levels of progress and sets such progress as the condition for the acquisition of sovereignty at an unspecified point of time in the

[21] Johann Caspar Bluntschli, 'Die Organisation des europäischen Statenvereines', in: Bluntschli, *Gesammelte kleine Schriften*, vol. 2 (Nördlingen, 1881), pp. 279-312 [reprint (Libelli, 75) (Darmstadt, 1962); first published in: *Die Gegenwart* (1878)].

future (Art. 73). The UN Charter links the termination of "trusteeship" status to the reception of a certain form of state and government deemed appropriate by the UN, thereby remaining within the confines of the propaganda justifying colonial rule. As late as in 1950, a legal historian could, in perfect agreement with the UN Charter, contend that a "protectorate" (protectorat) was a "contractual relationship" (relation contractuelle) between a state with a "higher civilisation" (civilisation supérieure), "protecting" (protéger) another state.[22]

From its very beginning, the UN laboured hard with the processes of formal decolonisation. On the one side, the UN General Assembly welcomed post-colonial sovereign states as its members. It sanctioned the Union of South Africa, when the minority government of Boers and other European settlers discriminated against the African majority population under the Boerish label of "Apartheid". The word stood for the legally enforced exclusion from political processes of the African majority population and their cultural, economic and social separation from the European settlers. The UN sanction entailed serious disadvantages for the South African economy, but had no impact on the "Apartheid" laws. On the other side, the UN did not actively support the anti-colonial liberation movements, not even the movements struggling against the outlawed South African colonial regime over Southwest Africa. Indeed, the UN General Assembly passed a resolution on the granting of independence to all colonial states and peoples on 14 December 1960, thereby placing decolonisation on its agenda. This resolution proclaimed "the necessity of bringing to speedy and unconditional end colonialism in all its forms and manifestations". It also stated that "the subjection of peoples to alien subjugation, dominion and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" (Art. I). But the resolution failed to explicitly identify colonial rule with "alien subjugation", thereby allowing all the many forms of colonial rule to continue to be perceived as compatible with international law, which had not been brand marked as "alien subjugation".[23] Even after the middle of the 1970s, the UN did not take a tougher stand against the then remaining so-called "non-self-governing territories". It did no more than keep a list of these "non-self-governing territories" with sixteen names. Most of these territories are under the "trusteeship" of the British and the US government. And the editors of the ninth edition of Oppenheim's textbook could, as late as in 1992, declare: "Nothing in the Charter of the United Nations, or in earlier treaties, regards the existence of colonies as anything other than in accordance with international law."[24] Without direct UN involvement, the Namibian anti-colonial liberation movement (SWAPO) brought to the fall the "trusteeship" over Southwest Africa, the minority regime in the Union of South Africa ended due to domestic political changes, the transfer of Hong Kong from British and of Macau from Portuguese to Chinese rule took place in 1997 and 1999 on the basis of bilateral treaties. Instead, the UN resorted to propaganda. It proclaimed the second decade of the twenty-first century as the "third decade of decolonisation". This terminology seems to suggest that colonial rule is still continuing. However, there is no territory anywhere on the globe on which the UN officially uses the term "colony". Instead, the former French colonial dependencies count as "overseas departments", that means, as territories forming integral parts of the French state, and other victims of colonial rule appear on the UN list of "non-self-governing territories". Hence, the UN is proclaiming decolonisation, when there no colonies in its own terminoligcal framework.

The UN and International Law

Even though the processes of formal decolonisation obstructed block formation in Africa, West and

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[22] Robert Redslob, *Traité de droit des gens. L'évolution historique, les institutions positives, les idées de justice, le droit nouveau* (Paris, 1950), p. 134.

[23] United Nations, General Assembly, Resolution 1514, 14 December 1960 [http://www.un.ga.org/en/ga/search/view_doc.sap?=A/RES/1514]. For a comment see: Ram Prakesh Anand, 'Sovereign Equality of States in International Law', in: *Recueil des cours* 197 (1986, part II), pp. 9-228, at pp. 165-166.

[24] United Nations, List of "non-self-governing territories" [http://www.un.org/Depts/dpi/decolonization/trust3. htm]. Lassa Francis Lawrence Oppenheim, *International Law*, ninth edn, edited by Robert Yewdall Jennings and Andrew Watts (Harlow, 1992), p. 282.

South Asia and the South Pacific except Australia and New Zealand, block formation did impact on the activities of the UN. Specifically in the General Assembly and in the Security Council, difficulties arose about facilitating agreement on resolutions across block boundaries. As a rule, these difficulties followed from the lack of compatibility of perceptions and demands articulated from NATO members on the one side and WTO members on the other. Yet, these difficulties did not essentially jeopardise the making of international legal norms through UN-sponsored conventions and multilateral declarations. Among many, the Universal Declaration of Human Rights was passed on 10 December 1948 and the supplementary pacts on cultural, social and economic rights of 3 January 1976 and on civil and political rights of 23 March 1976. The Geneva Convention Relating to the Status of Refugees of 28 July 1951 established the foundations for the granting of rights to refugees under state law. The General Agreement on Tariffs and Trade (GATT) of 30 October 1947 regulated the principles of inter-state trade. The Vienna Convention on Diplomatic Relations of 18 April 1961 transferred the customary law relating to diplomatic intercourse among states into positive law, followed by the Vienna Convention on Consular Relations of 24 April 1963. On 23 May 1969, the Vienna convention on the law of treaties between states came into existence, which again converted customary into positive treaty law.[25] All these declarations, conventions and pacts respected the rights and privileges of sovereign states in accordance with the UN charter, even when some of these privileges stood against specific civil and human rights. For example, the Universal Declaration of Human Rights of 1948 (Art. 13) guaranteed a general right of emigration, but did not grant a general right of immigration, the regulation of which has remained in the competences of state governments and parliaments. The Universal Declaration thus deleted the ancient *ius peregrinationis* from international law and has thereby established an increasingly awkward legacy of inappropriate international migration regulations.

At the same time, the scope and contents of international law have widened steadily. The International Convention on the Law of the Sea of 10 December 1982 sets legal standards for access to the open seas and extends the sovereign rights of coastal states to a seaborne area of 200 nautical miles. It thereby reduces the open seaways to the central parts of the Atlantic, Indian and Pacific Oceans and also sparked numerous conflicts over demarcations of maritime areas. The newly developed space law has so far not provided for an unequivocal general delimitation between state-controlled and international airspace. The Moon Treaty (Agreement Governing the Activities of States on the Moon and Other Celestial Bodies) of 18 December 1979 suffers from the absence of the Soviet Union and the USA from its signatories. Moreover, international law has become conceived as an instrument restricting state capabilities to prevent individuals from claiming civil and human rights. For one, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families went into force on 1 July 2003, granting protection to immigrants found to have violated state immigration law. The convention obliges signatories to grant human rights to such immigrants, including the right of education and unrestricted access to courts of law.[26]

Meanwhile, the number of subjects under international law has steadily risen and has begun to comprise not only states, the Holy See and the Maltese Order, but also non-state agencies and even individuals. In the second decade of the twenty-first century, there were 194 states, and the UN has softened the privilege of statehood as a condition for participation in UN activities. Thus the Palestine Liberation Organisation (PLO) has been granted membership in the General Assembly and the right to speak. Large international congresses admit not only governments of sovereign states as participants but also regional institutions as well as non-government organisations**.** Specifically in international economic law, processes of dispute settlement and arbitration have been provided for through the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.[27] According to the convention, individuals can become

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[25] Vienna Convention on the Law of Treaties, 23 May 1969 [entered into force on 27 January 1980], edited in: Olivier Coxton and Pierre Klein, *The Vienna Conventions on the Law of Treaties*, 2 vols (Oxford, 2011).

[26] United Nations, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Paris, 2003).

[27] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965 [http://www.jus.uio.no].

subjects under international law under certain conditions and claim their rights vis-à-vis states before specially appointed courts of arbitration.

Regional Institutions and International Law

The growth in number of regional institutions was another factor of the expansion of international law, further obfuscating the block structure. In Europe, institutions of regional integration owed their existence to the ravages of World War II and the consciousness among governments that the postwar reconstruction of settlements and industries could only be accomplished in concert. Subsidiarity became the key organisational principle. It meant that political and administrative decisions should be made in institutions most competent and closest to the population groups that were most affected by the decisions.[28] The principle of subsidiarity referred to institutions of governance above sovereign states with competence for all decisions for which governments of these states had to cooperate within a region but not in a globally operating international organisation like the UN. In the NATO part of Europe, issues relevant to the production of coal and steel, the civilian use of atomic energy and the regulation of regional international trade became identified as allocable to regional institutions during the 1940s and 1950s. With regard to these issue areas, the governments of Belgium, France, the Federal Republic of Germany, Italy, Luxemburg and the Netherlands set up the earliest "communities" as institutions of regional integration in Europe, whereas the bureaucratically conceived project of a European Defense Community failed in state parliaments. The Treaty of Maastricht of 1992 tied these several communities together into the European Union. Next to the "communities", the Council of Europe came into existence in 1949 with a broader membership, consisting, since 1950, of the signatories to the European Convention on Human Rights. The European Court of Justice has competence over all members of the Council of Europe.

The UN Charter looked favourably on regional integration processes, even though it did not relate these processes to activities of institutions of governance above sovereign states but declared them in charge solely of matters of "international peace and security" (Art. 52). Thus, the UN has not had a significant impact on the advancement of regional institutions. Moreover, some of these institutions soon after their establishment were drawn into the politics of block formation, unless they owed their very existence to the blocks. In America, the Organization of American States (OAS) was established as a continental institution in 1948. But it expelled Cuba after the 1959 Socialist Revolution led by Fidel Castro (1927 –) and the planned but not implemented deployment of Soviet missiles on the island in 1962. In doing so, the OAS joined the US-led block. ASEAN as a regional institution in Southeast Asia was tied politically to the USA during the Vietnam War, while SEATO continued as a military alliance.

In Africa, by contrast, regional institutions emerged outside the blocks, but not aloof from influence by colonial governments. For one, the British government authorised the creation of the East Africa High Commission in 1948 unilaterally and without involvement of the African

[28] For explications see, among others: Louise Bielzer, *Perzeption, Grenzen und Chancen des Subsidiaritätsprinzips im Prozess der europäischen Einigung. Eine international vergleichende Analyse aus historischer Perspektive* (Munster and Hamburg, 2003). Peter Blickle, Thomas Otto Hueglin and Dieter Wyduckel, eds, *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft* (Rechtstheorie, 20) (Berlin, 2002). European Institute of Public Administration, Subs*idiarity. The Challenge of Change. Proceedings of the Jacques Delors Colloquium* (Maastricht, 1991). Andreas Føllesdal, 'Subsidiarity', in: *Journal of Political Philosophy* 6 (1998), pp. 231-259. Stefan Gosepath, 'The Principle of Subsidiarity', in: Andreas Føllesdal and Thomas Rogge, eds, *Real World Justice* (Doordrecht, 2005), pp. 157-170. Thomas Otto Hueglin, 'Federalism, Subsidiarity and the European Tradition. Some Clarifications', in: *Telos* 100 (1994), pp. 37-55. David O'Brien, 'The Search for Subsidiarity. The UN, African Regional Organizations and Humanitarian Action', in: *International Peacekeeping*, vol. 7, nr 3 (2000), pp. 57-83. Soipong Peou, 'The Subsidiarity Model of Global Governance in the UN-ASEAN Context', in: *Global Governance* 4 (1998), pp. 439-459. Stefan Ulrich Pieper, *Subsidiarität* (Völkerrecht – Europarecht – Staatsrecht, 6) (Cologne, 1994). Trutz Rendtorff, 'Kritische Erwägungen zum Subsidiaritätsprinzip', in: *Der Staat* 1 (1962), pp. 405-430. Alois Riklin,ed., *Subsidiarität* (Baden-Baden and Vaduz, 1994). Marc Wilke and Helen Wallace, *Subsidiarity* (London: Royal Institute of International Affairs, 1990).

population. The Commission was to act as a roof agency above the British colonial administrations for the Kenya Colony, the Tanganyika Mandatory Territory, the Uganda Protectorate and Zanzibar, in charge of regulating cross-border communication. Between 1961 and 1963, the four colonial dependencies obtained independence as sovereign states, but after a revolution in Zanzibar in 1964, the island merged with Tanganyika to become Tanzania. In the course of the decolonisation process, the East Africa High Commission obtained the new name of East African Common Services Organisation (EACSO), without changing its range of activities. In 1967, it was replaced by the East African Community (EAC), again without significant changes of activity.[29] Under World Bank mediation, the governments of Kenya, Tanzania and Uganda dissolved the Community,[30] after it had suffered from serious restrictions in its work since the military takeover in Uganda in 1971. In this case, the colonial legacy forming part of the regional institution contributed to its failure. However, in 1999, a new East African Community was founded with a broader membership that has included Burundi and Rwanda since 2007 and South Sudan since 2011.

Likewise, the influence of colonial governments on the establishment of regional institutions in West Africa was paramount. Even though regional integration had been envisaged as a strategy to fend off penetration by colonial governments into West Africa,[31] the earliest institution came into existence only in 1959, when the French colonial government commanded the set-up of a customs union for its West African dependencies. The customs union expanded into a monetary union under the name Communauté Financière Africaine (CFA) in 1962, whose currency, the CFA-Franc, has continued to be pegged to the French currency. The CFA still comprises only the francophone West African post-colonial states, whose governments, in French perspective, are expected to maintain close ties with France. Following the termination of Portuguese colonial rule in 1975, governments of fifteenth West African states, including all CFA states, agreed on the establishment of the Economic Community of West African States (ECOWAS), in order to promote economic integration. But ECOWAS, like the parallel foundation of the Economic Community of Central African States (ECCAS, since 1983), had to operate under the constraints of continuing heavy influence from the former colonial governments, specifically with regard to trade and monetary policies. Against these odds, both regional institutions transgressed block borders in facilitating political cooperation of their members both with the Soviet Union and the USA. Moreover, ECOWAS, as the first regional institution worldwide, approved of the Protocol of Mutual Assistance on Defence and Other Matters (PMAD) in 1981. On the basis of the Protocol, a regional rapid deployment force came into existence (Allied Armed Forces of the Community, AAFC) with the mandate to intervene in a member state should domestic unrest erupt. Drawing on this mandate, ECOWAS intervened in domestic wars in Liberia 1990, Sierra Leone 1998 and Guinea-Bissau in 1998 under Nigerian leadership. The South African Development Council (SADC), established in 1992, has the same mandate and used it in interventions in Lesotho and the Democratic Republic of Congo in 1998.

Above these regional institutions, the Organization for African Unity (OAU), established in 1963, comprises, since 1994, all states on the African continent together with islands off its western and eastern coasts, except Morocco. The OAU came into existence as a roof organisation of anti-colonial liberation movements, which had become recognised as governments of post-colonial states. Although the ultimate goal of the OAU was the uniting of the African continent into a single state, on the way to the accomplishment of this goal it had to accept the international borders of states as the colonial governments had drawn them. Hence, in order to avoid military conflicts over border rectification plans, the OAU had to act as the legitimiser of the colonial borders, with the

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[29] Treaty for East African Cooperation Kenya – Tanzania – Uganda, Kampala, 6 June 1967, in: *Basic Documents of African Regional Organizations*, edited by Louis Bruno Sohn, vol. 3 (Dobbs Ferry, 1972), pp. 1145-1269.

[30] Victor Hermann Umbricht, *Multilateral Mediation. Practical Experiences and Lessons. Mediation Cases. The East African Community and Short Comments on Mediation Efforts between Bangladesh-Pakistan-India and Vietnam-USA* (Dordrecht, 1989).

[31] Edward Wilmot Blyden, *The Three Needs of Liberia* (London, 1908). James Africanus Beale Horton, *West African Countries and Peoples* (London, 1898) [reprints (Chicago, 1996); (Nendeln, 1970); (Edinburgh, 1970); (Cambridge, 2011)]. For a study see: Hollis Lynch, 'Edward W. Blyden. Pioneer West African Nationalist', in: *Journal of African History* 6 (1965), pp. 373-388.

consequence that all OAU members had to pledge recognition of these borders. Nevertheless, the OAU contributed to the widening of the range of human rights through its African Charter of Human Rights approved in Banjul (The Gambia) in 1981.[32] On the basis of the Charter, the African Commission on Human and Peoples' Rights has been established, which has decided on several cases of human rights violations and established the principle that no derogation exists legitimizing exemtions from the Charter. Moreover, the Charter constituted for Africa the right of nations to dispose of the natural resources on the territory of their states as well as the right for peace and development. The OAU as a whole had stood above the blocks. In 2000, it changed its name to African Union (AU). To accomplish this goal, the sub-continental regional institutions have been admitted as one of the "Pillars" of the AU, which has continued to work for the integration of the entire continent into one single state.

Within regional institutions, even when they were not always able to stay aloof from the blocks, a new type of law emerged enforced through the institutions' or member states' agencies. Innerhalb der regionalen Institutionen bildete sich schnell, auch wenn diese sich nicht immer von This regional law has taken a middle position between state and international law. The capability of law-making agencies within regional institutions did not suffer from colonial legacies, even if regional legal norms were not always immediately enforceable. Since the early 1990s, however, processes of regional integration have engulfed virtually the entire globe. A multitude of regional institutions has sprung up, many of which, specifically in Africa, America and Central Asia, have not only tolerated but also promoted multiple memberships. Thus, complicated systems of regional cooperation have been constituted, for which the Inter-American Development Bank (IDB) has coined the term "Spaghetti Bowl".[33] This term lends expression to the principle that regional integration should not lead to the formation of exclusive clubs of states. Hence, since 1991, institutions of and programmes for regional integration have been freed from the fetters imposed upon them by the blocks. Regional integration, based upon the subsidiarity principle, has evolved into a standard procedure for inter-state cooperation outside the globally operating international organisations, and has occurred at multiple levels ranging from cross-border cooperation schemes among local governments to continental integration.

The Impact of International Law and Regional Legal Systems on the Blocks

In the long run, international law and the systems of regionally enforced legal norms contributed to the process of the mollification of the blocks, which anyway had never engulfed the entire globe. Even though, between the late 1940s and the early 1980s, its political clout was limited, specifically within the Security Council, the UN did help advance this process. After the collapse of Portuguese colonial rule in 1975 and the end of the Vietnam War with the ensuing restoration of one single Vietnamese state in the same year, the capability of the block leaders to constrain government decision-making began to wane. Also in 1975, the Helsinki Conference on Security and Cooperation in Europe (CSCE) concluded with an accord about cooperation across block boundaries. The accord removed contentious issues from the daily political agenda and allowed confrontation to be replaced with regulated coexistence under continuing ideological rivalry. However, newly arising conflicts, such as the controversy over the justification of the Soviet invasion of Afghanistan in 1979, provoked the impression, as if the blocks were maintaining their strength, even more so as the governments of both the Soviet Union and the USA continued to insist upon their "super power" status and underlined this claim through increases of armaments during the early 1980s. But even the piling up of weapons arsenals did not place the block leaders into a position where they could guarantee the continuation of the blocks under their sway. Thus, the US government could not

[32] Emmanuel G. Bello, 'The African Charter on Human and Peoples' Rights. A Legal Analysis', in: *Recueil des cours* 194 (1985, part V), pp. 9-268. Inger Österdahl, 'The Surprising Originality of the African Charter on Human Rights and Peoples' Rights', in: Jarna Petman and Jan Klabbers, eds, *Nordic Cosmopolitanism. Essays in International Law for Martti Koskesnniemi* (Leiden and Boston, 2003), pp. 5-32.

[33] *Beyond Borders. The New Regionalism in the Americas* (Washington, DC: Inter-American Development Bank, 2002), p. 90.

prevent SEATO from dissolving itself in 1977, thereby boosting the impression that the Vietnam War had ended in a US defeat. And already in the early 1980s, ongoing warfare fuelled the assessment that the Red Army might not gain complete control of Afghanistan. Ignoring these indicators still at the end of the 1980s, some theorists committed themselves to the expectation that the blocks were solid, and circulated fears of the rise of military conflicts following the waning of the blocks.[34]

Although, indeed, the dissolution of the blocks was formally accomplished through the collapse of the Warsaw treaty Organisation in 1990 and 1991, the dissolution of the Soviet Union in 1991, the simultaneous emergence of fourteen new sovereign states on the territory of the Soviet Union as well as the reorientation of NATO as a military alliance not directed against Russia, these events were embedded in processes of the transformation of municipal and international law that had started outside the block structure already during the 1960s. Hence, it is not possible to link the manifest dissolution of the blocks only with the revolutionary changes in Eastern Europe between 1988 and 1991 as its sole cause. Most consequential among these changes were transformations of the post-colonial states. These states proved to be unstable due to the burdensome colonial legacies. Southeast Asia witnessed the creation of the federal state of Malaysia in 1963, comprising parts of the Malay Peninsula and the northern part of the island of Borneo. But the new state expelled the island of Singapore in 1965 forcing it into sovereignty. In 1984, the Sultanate of Brunei Darussalam, surrounded by Malaysian territory, accomplished sovereignty and found admission into ASEAN. In South Asia, warfare between the Bengal liberation movement and the government of Pakistan ended with the establishment of the sovereign state of Bangladesh in lieu of East Pakistan in 1971. In Africa, the attempt by the state of Biafra, founded through secession from Nigeria in 1967, to accomplish recognition of its sovereignty failed, as the Nigerian federal army defeated Biafra and forced it back into the Federation. In South Sudan and in Eritrea armed groups called into question the existing states of Sudan and Ethiopia from the 1950s and 1960s respectively. Eritrea accomplished recognition of its sovereignty from Ethiopia in 1991, South Sudan in 2011. Eritrea was the first African state to gain admission to the OAU after secession from another OAU member state. By contrast, the "Independent Republic of Somaliland", in existence at the Horn of Africa since 1991, has not gained recognition as a sovereign state. All these manifestations of the desire to change the existing state system took place outside the block structure and were not affected by the events taking place in Europe between 1988 and 1991. The block leaders, thus, were far from ever acting as the givers of order and stability of inter-state relations, despite their claims for "super power" status. In fact, the potential for revisions of the existing state structure has continued to be strong. Within 153 recognised sovereign states, political scientist Philip G. Roeder counted 658 movements seeking changes of existing international borders of states and transformations of state structures. In Africa, virtually all currently existing sovereign states are home to several such potentially secessionist movements.[35]

Likewise, the Chinese Communist Party and the government of the People's Republic of China enforced a transformation of Chinese domestic and foreign policy outside the block structure. The transformation set in with the acceptance of the People's Republic as the representative of China in the UN Security Council in 1972. Even though the Chinese constitution has proclaimed the People's Republic as a Socialist state under the exclusive control of the Communist Party, it has remained outside the blocks. Even during the Vietnam War, when it supported the Khmer Rouge in Cambodia from 1970, the Chinese government conducted a foreign policy of its own without the goal of creating a new block under its control. Since 1978, government and the Communist Party launched a reform program, aimed at expanding relations with other states into a global network. Hence, reforms of domestic policy occurred side by side with the buildup of new diplomatic relations, including military cooperation. The buildup was first targeted primarily at states in the Arab world and other Muslim states in West Asia and North Africa, but has included mineral-rich states in Africa and Latin America since the 1990s. However, some "Confucian-Islamic Connection", which NATO ideologues alleged as the overall goal of Chinese foreign policy,[36] has not materialised.

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[34] Colin S. Gray, *The Geopolitics of Super Power* (Lexington, KY, 1988), pp. 102, 105-107.

[35] Philip G. Roeder, *Where Nation-States Come From. Institutional Change in the Age of Nationalism* (Princeton, 2007), p. 38 [reprint (Princeton, 2011)].

[36] Samuel Paul Huntington, 'The Clash of Civilizations?', in: *Foreign Affairs* 72 (1993), pp. 22-49, at p. 45.

Instead, the so-called Arab or Jasmine Revolution, starting in December 2010, has entailed a steady decline of Chinese government influence on Muslim states in West Asia and North Africa, with merely a few strongholds remaining in Iran, Sudan (Khartoum) and Syria. At the same time, ASEAN governments, weary of persistent Chinese penetration into the South China Sea, have shown willingness to hedge the influence of the Chinese government.

Change and Continuity of International Legal Theory at the Turn towards the Twenty-First Century

Since the Briand-Kellogg-Pact of 1928, war has been outlawed as a means of state policy.[37] Consequently, the UN Charter avoided the use of the word war as an instrument that the Security Council might apply to the end of enforcing its decisions (Art. 42). But the concept of war remained firmly entrenched in theories of politics and international law in accordance with the definition the Hague Conferences of 1899 and 1907 had provided.[38] But even when word war remained out of use, the Hague rules impacted on international legal statutes, not only the UN Charter, but also other statutes, such as the so-called "Seven Nuremberg Principles". These principles had been set up in order to guide the tribunal that had been convened to sentence defendants indicted for gross war crimes and crimes against humanity after World War II.[39] By these statutes, war was no longer legitimised in accordance with the moral criteria of justice, but due to the degree by which the existing positive law of war had been abided by. Accordingly, war could not be just, but might be legal as a means of defense against an aggressor, having acted in breach of the law of war. The sixth of the "Nuremberg Principles" specified the preparation of a war of aggression and conspiracy as crimes in context of the law of war and further defined murder, enslavement, deportation together with further inhuman acts as crimes against humanity.[40] This definition of war admitted the restitution of previously incurred injustice as the sole cause for a legal war. Even though some theorists were ready to use assets of natural law theory after World War II,[41] they supported the equation of just with legal war and could, by consequence, declare any war, including as the Vietnam War, as just that happened to be fought within the law of war.[42]

After the end of the Vietnam War and the conclusion of the Helsinki Accord, publications on international legal theory began to feature new terms, obviously seeking to avoid the word war and its derivatives. Among these neologisms were straightforwardly paradoxical phrases, such as the formula of "international legal injustice" (völkerrechtliches Unrecht), which conflated in itself law and injustice,[43] "intervention" or "humanitarian intervention"[44] as well as "Peace Keeping Operations" (PKO) and even "Peace Enforcement Operations" (PEO).[45] Obviously, the use of military force labeled "intervention" or the like, from the point of view of military planning, can be distinguished from war by the criterion of the absence of the intention of directing combat actions to

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[37] Yōrām Dinštein, *War, Aggression and Self-Defence* (Cambridge, 1988), pp. 102-103 [second edn (Cambridge, 1994); third edn (Cambridge, 2001); fourth edn (Cambridge, 2005); fifth edn (Cambridge, 2012)]. Alfred Verdross, *Abendändische Rechtsphilosophie* (Vienna, 1958), p. 23.

[38] As used, for example, by: Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York, 1977), p. 41.

[39] Yehuda Melzer, *Concepts of Just War* (Leiden, 1975), pp. 61-62.

[40] Joseph Laurenz Kunz, 'Bellum Iustum and Bellum Legale', in: *American Journal of International Law* 45 (1951), pp. 528-534.

[41] Dinštein, *War* (note 37), p. 172.

[42] Walzer, *Wars* (note 38), pp. 41-44.

[43] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht*, third edn (Berlin, 1984), p. 845 [first published (Berlin, 1976)].

[44] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect. Report* (Ottawa, 2001), pp. 11-18. Ann Orford, *International Authority and the Responsibility to Protect* (Cambridge, 2011), pp. 27-33.

[45] Katharina B. Coleman, *International Organizations and Peace Enforcement. The Politics of International Legitimacy* (Cambridge, 2007).

the goal of winning.[46] Also, it will be hard to convert the stated goal of "intervention", say for the purpose of providing security to an identified population group, into the undeclared goal of winning over an enemy, due to the necessity of changes in logistics that are difficult to conceal. Therefore, a combat action, once declared to be an "intervention" can hardly be placed under a different goal, while the combat is going on. Yet all these forms of the use of force can, at least in the perspective of affected population groups, entail losses of life and property, thereby seriously jeopardising security. In so far, "interventions" can have consequences that do not differ categorically from the type of combat actions enshrined in the concept of the "little" or "small" war.[47] They are subject to international law, as long as they are implemented as sanctions under the UN Charter. Nevertheless, such sanctions did feature violations of the law of war, such as in Afghanistan since 2001, even though the combat actions occurring there were not classed as a war in the sense of Hague Conventions. Hence, long before the end of the military confrontation between NATO and the WTO, international legal theory had given up classing wars as the exclusive business of the block-based military alliances. Instead, combat actions have occurred, with increasing frequency, as conflicts within states with or without authorisation by the UN.

International legal theorists, analysing these processes, have emphasised the increase in the number of positive international legal norms as well as of full-scale statutes.[48] They have ranked international law as a globally valid system of norms, derived it, following Triepel, from the concurrence of state wills in pursuit of compatible goals and have thus set international law apart from systems of legal norms that are prepared in institutions of regional integration. In contradistinction to international relations theorists,[49] theorists of international law have neither followed the explications of the acceptance of norms above states in accordance with the approaches to natural law theory of the early 1900s,[50] the 1920s and early 1930s,[51] nor have they taken up the so-called "Grotian tradition of international law"[52] in order to advance international law into an instrument for the legitimation of states, regional institutions of governance above states and international organisations. New debates arose about UN reform, after initial attempts had not come to fruition during the 1960s.[53] But these debates have focused on changes of specific articles of the UN Charter, mainly Article 23 regulating the composition of the Security Council, but neither on the

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[46] Gary, Domke and Jenny Solon, *Handbook 93-8. Operations Other Than War*, vol. 4: Peace Operations (Fort Leavenworth, KS: Center for Army Lessons Learned, 1993).

[47] Barry Gordon Buzan, *People, States and Fear* (Brighton, 1991), at pp. 93-123. Buzan, Ole Wæver and Jaap de Wilde, *Security. A New Framework for Analysis* (Boulder, 1998). Keith Krause and Michael C. Williams, 'From Strategy to Security. Foundations of Critical Security Studies', in: Krause and Williams, eds, *Critical Security Studies* (Minneapolis, 1997), pp. 33-59. Ole Wæver, 'Securitization and Desecuritization', in: Ronnie D. Lipschutz, ed., *On Security* (New York, 1995), pp. 46-86. Kisaburō Yokota, 'Sekai kokka ron', in: *Sekai*, nr 9 (September 1946), pp. 17-29.

[48] Verdross, *Völkerrecht* (note 43), pp. 321-423.

[49] Ian Clark, *Legitimacy in International Society* (Oxford, 2005), chap. 12. Clark, *International Legitimacy and World Society* (Oxford, 2007). Clark, *Hegemony in International Society* (Oxford, 2011), especially at pp. 49-50.

[50] Ludwig von Bar, 'Grundlage und Kodifikation des Völkerrechts', in: *Archiv für Rechts- und Wirtschaftsphilosophie* 6 (1912), pp. 145-158, at pp. 145-146. Ernst von Beling, *Die strafrechtliche Bedeutung der Exterritorialität. Beiträge zum Völkerrecht und zum Strafrecht* (Breslau, 1896), pp. 12-13.

[51] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), pp. 192, 241-248 [reprints (Tübingen, 1928); (Aalen, 1960; 1981)]. Kelsen, *Reine Rechtslehre* (Leipzig and Vienna, 1934), pp. 71-72 [English version (Oxford, 1996; 2007); second edn (Vienna, 1960); reprints (Vienna, 1967; 2000); another reprint, edited by Stanley L. Paulson (Aalen, 1985); student edn, edited by Matthias Jestaedt (Tübingen, 2008)].]

[52] Hersch Lauterpacht, 'The Grotian Tradition in International Law', in: *British Yearbook of International Law* 34 (1946), pp. 1-53 [reprinted in: Lauterpacht, *International Law*, vol. 2 (Cambridge, 1977), pp. 307-365; reprint of this edn (Farnham, 2009); also reprinted in: Richard Falk, Friedrich Kratochwil and Saul H. Mendlowitz, eds, *International Law. A Contemporary Perspective* (Studies in a Just World Order, 2) (Boulder, 1985), pp. 10-36; Malcolm Evans und Patrick Cappa, eds, *International Law*, vol. 1 (Farnham, SY, and Burlington, VT, 2009), pp. 95-148].

[53] Rudolf Laun, 'Naturrecht und Völkerrecht', in: *Jahrbuch für internationales Recht* 4 (1954), pp. 5-41, at pp. 160-161. Louis Bruno Sohn and Grenville Clark, *World Peace through World Law*, second edn (Cambridge, MA, 1960) [first published (Cambridge, MA, 1958)].

novellation of the Charter as a whole nor on the theoretical problem of the derivation of the "basic norm" *pacta sunt servanda*. Against the complex business of setting ever more comprehensive new legal norms and statutes, historically minded international legal theorists have developed their consciousness of the colonial legacies transported through international law, specifically legacies flowing from the global enforcement of legal norms of ultimately European origin, thereby ignoring or even destroying deviating legal traditions specifically in East and South Asia.[54] Likewise, jurists concerned with international environmental law have complained on good reason that attempts at setting international legal norms for the preservation of the environment have failed to take seriously or have even ignored the often century-old experiences of local populations with the maintenance of environmental stability outside Europe.[55] In these respects, international law seems more remote from world law than ever before.

Moreover, theorists considering international law within ideological frameworks pursued well-beaten tracks within the European tradition of international legal theory. Until 1991, this was established practice in the Soviet Union and has continued in China. In 1947 and again in 1960, Soviet theorists adhered to the position that "international law was the entirety of norms regulating relations among states engaged in struggle as well as in cooperation, whereby these norms give expression to the will of the ruling classes, have been established through agreements between states, have the goal of preserving peace in the whole world and the peaceful coexistence of two opposing systems and are guaranteed by the force that states are executing individually or collectively".[56] With their statement that international law should have resulted from the self-obligation of states through "binding agreements", these theorists returned to the position that their predecessors had taken late in the nineteenth century. Merely the admission of the dependence of international legal norms upon ideologies of rule together with the insertion of the strategy of maintaining "peaceful coexistence" represented innovations that were directed against international legal theories current in the NATO area. Even Evgenij Korovin, who had made an essential contribution to the composition of Soviet international legal theory during the 1920s, voiced his agreement with this definition in 1960.[57] The strategy of "peaceful coexistence", raised to a legal concept, was not taken to be valid only for the equivalent of a truce,[58] but was meant to be binding for a longer period of transition, as Korovin had argued already during the 1920s.[59] The concept and strategy of "peaceful coexistence"

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[54] Ram Prakesh Anand, *New States and International Law* (Delhi, 1972). Anand, 'Sovereign Equality of States in International Law', in: *Recueil des cours* 197 (1986, part II), pp. 9-228. Anand, 'Family of "Civilized" States and Japan. A Story of Humiliation, Defiance and Confrontation', in: *Journal of the History of International Law* 5 (2003), pp. 1-75. Yasuaki Ōnuma, *A Transcivilizational Perspective on International Law. Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (Leiden, 2010) [first published in: *Recueil des cours* 342 (2009), pp. 81-418]. Ōnuma, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective', in: *Journal of the History of International Law* 2 (2000), pp. 1-66. Ōnuma, 'Self-Determination and the Right of Self-Determination: An Overview from a Trans-Civilizational Perspective', in: Jörg Fisch und Elisabeth Müller-Luckner (Hrsg.), *Die Verteilung der Welt. Selbstbestimmung und das Selbstbestimmungsrecht der Völker* (Schriften des Historischen Kollegs, Kolloquien 79) (Munich, 2011), pp. 23-37.

[55] Obiji Ofor Aginam, 'The Tortoise, the Turtle and the Terrapin. The Hegemony of Global Environmentalism and the Marginalization of Third World Approaches to Sustainable Development', in: Aginam and Chinedu Obiora Okafor, eds, Humanizing Our Global Order. Essays in Honour of Ivan Head (Toronto, 2003), pp. 12-29. Aginam, *Global Health Governance. International Law and Public Health in a Divided World* (Toronto, 2005). Karin Mickelson, 'South, North, International Environmental Law and International Lawyers', in: *Yearbook of International Environmental Law* 11 (2000), pp. 52-87.

[56] Sergej Krylov, 'Les notions principales du droit des gens (La doctrine soviétique du droit international)', in: *Recueil des cours* 70 (1947, part I), pp. 407-476, at p. 420. D. B. Levin and G. P. Kaljužnaja, eds, *Meždunarodnoe pravo* (Moscow, 1960),p. 12-13 = Boris Meissner, ed., *Sowjetunion und Völkerrecht. 1917 bis 1962* (Dokumente zum Ostrecht, 4) (Cologne, 1963), p. 65.

[57] Korovin, *Völkerrecht* (note 9), p. 1.

[58] Meissner, *Sowjetunion* (note 56), p. 57.

[59] Evgenij Aleksandrovič Korovin, *Das Völkerrecht der Übergangszeit*, edited by Herbert Kraus (Internationalrechtliche Abhandlungen, 3) (Berlin, 1929) [first published (Moscow, 1923); second edn (Moscow, 1925); reprint of the first Russian edn (Berlin, 1971)].

attracted the interest of many Soviet international legal theorists after World War II. During the 1950s and 1960s, they dissected the strategy into twelve elements, the non-use of military force, the renunciation of a "policy of strength", the respect for the sovereignty of states, the guarantee of human and basic civil rights together with the right of the choice of the form of state and government, the prohibition of the "export of the revolution", the guarantee of a sustainable system of collective security", the recognition of the peaceful arbitration of disputes, the sanctity of treaties, the affirmation of multilateral international cooperation as well as the peaceful and friendly competition.[60] In Soviet perspective, then, "peaceful coexistence" was more than the absence of war; it constituted a legal framework for the conduct of political relations among states in accordance with the "basic norm" *pacta sunt servanda*.[61] The International Law Association (ILA) discussed the strategy of "peaceful coexistence" during its convention at Dubrovnik in 1956, thereby documenting its position that the foundations of the strategy were debatable within international legal theory.[62] On this occasion, Soviet theorists could, without raising opposition, argue that, in their view, "peaceful coexistence" was compatible with the UN Charter and had, upon the acceptance of the Charter, become a feature of international law.[63] In stark contrast with this sober discussion, Hans Kelsen, in 1955, could claim that Soviet jurist were unwilling to accept international law as a general standard, drawing on Korovin's declaration of self-criticism of the early 1930s,[64] and he could claim that Soviet theory had restricted the realm of the validity of international legal norms to the Soviet-led block.[65] Different from his colleagues in the International Law Association, Kelsen, together with some jurists on both sides of the Atlantic Ocean during the intense phase of the Cold War,[66] thus was not willing to grant intellectual honesty to at least some Soviet theorists.

Kelsen may have had in mind politically motivated Soviet statements, claiming that no theories other than those supported by Soviet international lawyers could find approval. But Kelsen overlooked that Soviet theorists themselves warned against the making of such exaggerations and demanded that not all international legal norms in existence outside the Soviet-led block should be condemned fully and wholly. Instead, these theorists propagated one "single world science of international law"[67] transgressing the boundaries of "intellectual communities". Hence, Soviet international legal theorists conceived "peaceful coexistence" not only for the conduct of international relations, but also for the making of international legal theory.[68]

In the People's Republic of China, the government first used the concept of "peaceful coexistence" as a "principle" in its treaty with the Tibetan government of 23 May 1951 in conjunction with the pledge to respect the borders, legal equality, sovereignty and mutual benefit of states.[69] However, according to this treaty, these "five principles" were to become applied only to

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[60] G. P. Zadorožnyj and F. I. Koževnikov, 'XXIIS-ezd KPSS i nekotoye osnovnye voprosy sovetskoj teorii meždunarodnogo prava', in: *Institut meždunarodnych otnošenij, Učenye zapiski*, nr 10 (Moscow, 1962), pp. 3-26, at p. 12 = Meissner, *Sowjetunion* (note 56), p. 21. Grigory Ivanovič Tunkin, 'Co-Existence and International Law', in: *Recueil des cours* 95 (1958, part III), pp. 1-81, at pp. 50-78. Tunkin, 'Theoretische Fragen des Völkerrechts', in: Wilhelm Wengler, ed., *Modernes Völkerrecht: Form oder Mittel der Außenpolitik. Eine Gegenüberstellung der Lehre von M.A. Kaplan und N. de B. Katzenbach, USA, und G. I. Tunkin, UdSSR* (Berlin, 1965), pp. 211-373, at pp. 238-240, 242-244.

[61] Miroslav Potočný and Stanislav Mysil, *Legal Principles of Peaceful Coexistence* (Prague, 1968), p. 14.

[62] Edward McWhinney, *"Peaceful Coexistence" and Soviet-Western International Law* (Leiden, 1964), pp. 34-35.

[63] Boris Meissner, Dietrich Frenzke and Erika Chilecki, eds, *Sowjetunion und Völkerrecht. 1962 bis 1973* (Dokumente zum Ostrecht, 9) (Cologne, 1977), p. 78.

[64] Evgenij Aleksandrovič Korovin, '[Selbstkritikerklärung, 9. Mai 1935]', in: Aleksandr N. Makarov, 'Die Völkerrechtswissenschaft in Sowjetrussland', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6 (1936), pp. 486-487.

[65] Hans Kelsen, *The Communist Theory of Law* (London and New York, 1955), p. 156 [reprint (Aalen, 1976)].

[66] Kunz, 'Crise' (note 5), pp. 1-104. Erich Kordt, 'Weltherrschaftsstreben und Völkerrecht', in: *Festschrift für Rudolf Laun zu seinem achtzigsten Geburtstag* (Jahrbuch für internationales Recht, 11) (Göttingen, 1962), pp. 178-200, at p. 199. Leibholz, 'Lage' (note 4). Wilk, 'Law' (note 6).

[67] Kazimierz Grzybowski, *Soviet International Law and the World Economic Order* (Durham, NC, 1987), p. 8.

[68] Grigory Ivanovič Tunkin, *Theory of International Law* (Cambridge, MA, 1974), pp. 21-48.

[69] Treaty China – Tibet, Beijing, 23 May 1951, Art. 14 [http://www.tibet-initiative.de/Kap2/Kap2_2-2.html].

relations with third states; but, the treaty conspicuously lacked the explicit pledge not to interfere into domestic affairs. Subsequently, the Chinese government saw to it that "peaceful coexistence" was inserted into the preamble to its treaty with India of 29 April 1954.[70] In this text, it appeared as the last of the "five principles", which both governments were obliging themselves to honour in the conduct of their foreign policy. The list comprised the pledges of the mutual respect of the sovereignty and territorial integrity of states, the mutual assurance not to use force, the mutual assurance not to interfere into domestic affairs and to mutually respect the legal equality of states jointly with the legitimacy of the aspiration to accomplish advantages. The Chinese government reaffirmed its commitment to the "five principles" during the Bandung Conference of 1955, and Government of India did likewise by declaring valid the same principles under the term "Pañca Sïla".[71]

During the 1950s and 1960s, international legal theory in the People's Republic of China stood under the main but not exclusive impact of the reception of positions that Soviet theorists had formulated since the 1920s, as there remained a legacy of universalism even after the revolution of 1949. In 1952, the government authorised the publication of a textbook on the modern history of China, it saw to it that a text was appended by a map representing China as covering not only its state territory but also the territories of Nepal, Sikkim, Bhutan, the Andamans, Malaya, Thailand, Vietnam, Cambodia, Taiwan with the Pesacadores, the Sulu Archipelago of the Philippines, the Ryūkyū Islands and Korea.[72] However, when the Chinese government began to emphasise the need to study international law in 1978, it promoted the publication of a Chinese version of the seventh edition of Lassa Oppenheim's handbook on international law, edited by Hersch Lauterpacht,[73] together with several textbooks written by Chinese authors, such as the 1981 work *Guó jì fã* by Tie-ya Wang (1913 – 2003).[74] Wang defined international law as the "entirety of the principles and rules regulating relations mainly among states" and again followed Triepel in rendering every treaty by international law as a "convention of the acting wills of states".[75] The "five principles" of foreign policy retained their validity. In 1990, Wang even claimed Chinese authorship for the "five principles", insisting that Chinese international lawyers had established these principles as a "systematic and coherent whole".[76]

In fact, however, not only the strategy and concept of "peaceful coexistence", but also the four remaining "principles" have been on record in part or wholly outside China at the latest since the middle of the twentieth century. The recognition of the sovereignty of states had obtained the status of a positive legal norm in the Covenant of the League of Nations.[77] The renunciation of the use of force and the assurance of non-intervention into domestic affairs also featured in the

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[70] Treaty China – India, 29 April 1954, preamble, in: United Nations, *Treaty Series*, vol. 299 (1958), nr 4307, pp. 57-82, at p. 57 [http://treaties.un.org/doc/publoication/unts/volume%2099/v299.pdf].

[71] Lazar Focseanu, 'Les cinq principes de la coexistence et le droit international', in: *Annuaire français de droit international* 2 (1956), pp. 150-180.

[72] Robert Heuser, 'Völkerrechtswissenschaft und Völkerrechtstheorie in der Völksrepublik China (1979 – 1988) ', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 49 (1989), pp. 301-342, at p. 307. Pei-hua Liu, *Zhongguo chin tai chi en shi* (Beijing, 1952) [another edn (Beijing, 1954)]. On the map see: T. Luke Chang, *China's Boundary Treaties and Frontier Disputes* (London, Rome and New York, 1982), p. 3.

[73] Lassa Francis Lawrence Oppenheim, *International Law*, vol. 2 (London and New York, 1906) [second edn (London and New York, 1912); third edn, edited by Ronald F. Roxburgh (London and New York, 1920-1921); fourth edn, edited by Arnold Duncan McNair (London and New York, 1926); fifth edn, edited by Hersch Lauterpacht (London and New York, 1935); sixth edn, edited by Hersch Lauterpacht (London and New York, 1944);seventh edn, edited by Hersch Lauterpacht (London and New York, 1948; 1952-1953); eighth edn, edited by Hersch Lauterpacht (London and New York, 1955; 1957; 1963); ninth edn, edited by Robert Yewdall Jennings and Andrew Watts (Harlow, 1992; 1996; 2008)].

[74] Heuser, 'Völkerrechtswissenschaft' (note 72), pp. 308-311. Tie-Ya Wang, ed., *Guó jì fã* (Beijing, 1981).

[75] Wang, *Guó* (note 74), pp. 8-9 = Heuser, 'Völkerrechtswissenschaft' (note 72), pp. 320, 326.

[76] Tie-Ya Wang, 'International Law in China', in: *Recueil des cours* 221 (1990, part II), pp. 195-369, at pp. 264-265, 277-278. Han-Qin Xue, 'Chinese Contemporary Perspectives on International Law. History, Culture and International Law', in: *Recueil des cours* 355 (2011, part III), pp. 41-234, at pp. 92-93.

[77] League of Nations, Covenant, Art. X, in: David Hunter Miller, ed., *The Drafting of the Covenant*, vol. 2 (New York and London, 1928), pp. 720-743, at p. 727 [reprint (New York and London, 1969)].

Covenant[78] and were taken over into the UN Charter (Art. 1). The same Charter obliged UN members to peaceful cooperation (Art. 55). The recognition of the legal equality of states formed part of the standard repertory of theories of the law among states and international law since the later sixteenth century.[79] Merely the assurance of the legitimacy of aspirations for advantages, included in the fourth "principle", as a legal norm, not as a political goal, may rank as having originated in China. However, the norm, as it stands, does not specify how which party is to determine what constitutes advantages. In this regard, the Chinese government has persistently given articulation to its political goal of orientating relations with other states to the generation of "win-win" situations, meaning the accomplishment of mutual advantages. Yet, it has always insisted that it reserves for itself the privilege to determine what these alleged advantages should consist in for which of the parties, and has not accepted deviating assessments of "win-win" situations. Moreover, this part of the fourth "principle" was not part of the ancient Chinese tradition of the law of war and peace, which does not link up with the "five principles". Consequently, Chinese international legal theorists, during the second half of the twentieth century, gave out bits of the European tradition of political thought as Chinese legal theory. Last but not least, the Chinese government denied the application of the "five principles" to Tibet, which the Chinese army occupied in 1951, and then used the treaty of 23 May 1981 to retroactively legitimise its use of force. This treaty has the form and substance of a treaty of cession in complete accordance with nineteenth-century European and US practice and was concluded in Beijing, that is, not on neutral territory. The Tibetan side has ever since maintained that it was forced to accept the treaty.[80]

The Resumption of the Concept of the "Family of Nations" as the "Society of Peoples" at the Turn towards the Twenty-First Century

Without taking consideration of sources on the theory of international law, the law among states and the law of war and peace, liberal legal philosopher John Rawls (1921 – 2002), towards the end of his life, restated the postulate that what he chose to term the "Law of Peoples" should comprise "a particular political conception of right and justice that applies to the principles and norms of international law and practice".[81] Rawls set his "Law of Peoples", thus defined, as valid for what he called "Society of Peoples", and he wished it to be based essentially on the acceptance of mutual respect. Such acceptance, Rawls assumed, should constitute the "Society of Peoples" into which, he believed, "all those peoples who follow the ideals and principles of the Law of Peoples in their mutual relations" would gather.[82] While in these formulations, the old phrase of the "family of nations" rings, Rawls even straightforwardly paralleled his "Society of Peoples" with the colonial "family of nations" by providing criteria for the exclusion of states from his "Society". According to Rawls, three types of states were to be excluded from this "Society of Peoples": first, "outlaw states", which he deemed expansive and aggressive and in which the principles of right and justice were not applied, such as Germany in recent times, France, Spain and "the Hapsburgs" in early Modern Europe;[83] second, societies "burdened by unfavorable conditions", that were neither expansive nor aggressive but appeared to "lack the political and cultural traditions, the human capital and

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[78] Ibid., Art. X, p. 727.

[79] Focseanu, 'Principes' (note 71).

[80] Treaty China – Tibet (note 69). The official version of the course of events leading to the conclusion of the treaty, according to which the Chinese armed forces had liberated Tibetans from a clerical dictatorship, thereby granting them development opportunities, is in: [www.tibetinfor.com.cb/tibetzt-en/question-e/index.htm]. For a study see: Anne-Marie Buffetrille and Katia Buffetrille, eds, *Le Tibet est-il Chinois? Réponse à cent questions chinoises* (Paris, 2002).

[81] John Rawls, *The Law of Peoples. With The Idea of Public Reason Revisited* (Cambridge, MA, and London 1999), p. 3 [another edn (Cambridge, MA 2003)].

[82] Ibid., p. 3.

[83] Ibid., p. 105-106.

know-how and, often, the material and technological resources to be well-ordered",[84] with members of the "Society of Peoples" having the duty to assist these "burdened societies";[85] third, "benevolent absolutisms", which are neither expansive not aggressive but where the ruled are denied "a meaningful role in making political decisions".[86] Only states that have, according to Rawls, been accepted as members of his "Society of Peoples" have, so Rawls thought, "the right to war in self-defence".[87] Rawls denied to the "burdened societies" the entitlement for the equal treatment under international law and, moreover, made them dependent upon grants by grace from the side of the members of the "Society of Peoples". Hence, his implicit plea for the provision of Official Development Assistance (ODA) was based on the same allegations of the purported lack of indigenous governmentality as the political and cultural conditions for self-government in some "well ordered" state, which ideologues of colonial rule had made explicit late in the nineteenth century.[88] This criterion, if applied, would exclude the majority of currently existing states from the "Society of Peoples". It replaces the assertion of lack of "civilisation" with the contention that democratic constitutions in Rawls's sense are lacking.

Rawls supplemented his list of criteria of exclusion by adducing the existence of a purportedly liberal democratic constitution as the condition for the admission of states into the "Society of Peoples" with the specification that within states "basic institutions meet certain specified conditions of political right and justice (including the right of citizens to play a substantial role, say through associations and groups), in making political decisions and lead citizens to honor a reasonably just law for the Society of Peoples."[89] Rawls referred to states that he considered eligible, either as "liberal" when they stood under democratic constitutions, or as "decent" when they stood under "non-liberal" constitutions. Both types of states he grouped under the label "well-ordered", which he claimed to have taken from Jean Bodin's theory of the state. Explicitly, he described his "Society of Peoples" as religiously neutral, whereby, however, he limited himself to mentioning Christian and Muslim states. He reserved the attribute "liberal" to the Christian states, the attribute "decent" to the Muslim states within his "Society of Peoples".[90] Rawls ascribed to all members of the "Society of Peoples" the duty to make sure that the society was concerned with maintaining "relations of *mutual respect* among peoples, and so constitute an essential part of the basic structure and political climate".[91] Rawls set the "Law of Peoples" as pluralist. He derived his explanation for the pluralism of the "Law of Peoples" from the postulate that the justice ruling the "Society of Peoples" as "well-ordered" political communities came about as the result of some process of contractualisation similar to the process of contractualisation constituting "well-ordered" state institutions.[92] However, Rawls insisted that his "Society of Peoples" would not come into existence through some form of contract but would arise from reasonable insight into its usefulness. This, Rawls deemed to be the case because the "Law of Peoples" would respond to "fundamental political questions as they arise for the Society of Peoples".[93] Under this condition, the "Law of Peoples"

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[84] Ibid., p. 106.
[85] Ibid., p. 106.
[86] Ibid., pp. 63, 105-106.
[87] Ibid., p. 91.
[88] Franz von Holtzendorff, *Eroberungen und Eroberungsrecht* (Sammlung gemeinverständlicher wissenschaftlicher Vorträge, series 6, vol. 144) (Berlin, 1871). Holtzendorff, ' Staaten mit unvollkommener Souveränität', § 27, in: Holtzendorff,ed., *Handbuch des Völkerrechts auf Grundlage europäischer Staatenpraxis*, vol. 2 (Hamburg, 1887), pp. 98-117, at pp. 115-116. Ferdinand Lentner, *Das internationale Colonialrecht im neunzehnten Jahrhundert* (Vienna, 1886), pp. 42-50. Alphonse Pierre Octave Rivier, *Lehrbuch des Völkerrechts*, § 1, second edn (Stuttgart, 1899), p. 3. Karl Michael Joseph Leopold Freiherr von Stengel, 'Deutsches Kolonialstaatsrecht mit Berücksichtigung des internationalen Kolonialrechts und des Kolonialstaatsrechts', in: *Annalen des Deutschen Reiches für Gesetzgebung, Verwaltung und Statistik* (1887), pp. 309-398, 865-957, at pp. 329-330. Stengel, 'Die Deutschen Schutzgebiete, ihre rechtliche Stellung, Verfassung und Verwaltung', in: *Annalen des Deutschen Reiches für Gesetzgebung, Verwaltung und Statistik* (1889), pp. 1-212, at p. 14.
[89] Rawls, *Law* (note 81), pp. 3, 59-60.
[90] Ibid., p. 4.
[91] Ibid., p. 122.
[92] John Rawls, *A Theory of Justice* (Cambridge, MA, 1999), pp. 118-123 [first published (Cambridge, MA, 1971)].
[93] Rawls, *Law* (note 81), p. 123.

would have to fulfill the criteria of the reciprocity of its legal rules and of the equality of the members of the "Society of Peoples": "It asks of other societies only what they can reasonably grant without submitting to a position of inferiority or domination."[94] When applied "reasonably" and on the basis of "mutual respect",[95] the "Law of Peoples" was to be universalisable, even if non-members of the "Society of Peoples" would not have legal claims to reciprocity and legal equality. Only "liberally" and "decently" constituted states would demand from the members of the "Society of Peoples" "what they can reasonably endorse once they are prepared to stand in a relation of fair equality with all other societies".[96] The essential privilege which the "Law of Peoples does … assign" to all members of the "Society of Peoples" was "right to war in self-defense".[97] But non-members, not seemingly honouring the "Law of Peoples" were to remain excluded from the "right to war in self-defense".

In his speculative theory of international law, Rawls implicitly recast into his own terminology doctrines of international legal positivism of the turn of the nineteenth and twentieth centuries. Like positivists from the period of high imperialism, Rawls postulated the existence of the "international legal community" as an institution within which law above states could be regarded as enforceable. Like these positivists, Rawls limited the number of states that he deemed eligible for membership in his "Society of Peoples". Like these positivists, Rawls considered sovereignty and legal equality as the core feature of the states he wished to gather in the "Society of Peoples". Like these positivists, Rawls considered as a core condition for the emergence of the "Society of Peoples" the willingness and capability of governments of sovereign states to engage in relations with other states. And, like the positivists, he restricted the *ius ad bellum* to members of the "Society of Peoples", thereby proclaiming the inter-state war as the sole type of "legal" war. He left unanswered the question how non-members were to defend themselves legally, that is, in accordance with Article 2 of the UN Charter, which was drawn on the Briand-Kellogg pact of 1928.

Rawls was aware of the fact that his "Law of Peoples" could not be derived from some form of hypothetical social or government contract. Nevertheless, he pretended as if the same mechanism seemingly soliciting the justice of states and municipal law could also have produced the "Society of Peoples" as a purportedly universal "legal community". The "Society of Peoples" could not have been directly derived frm some contract, because, prior to its existence, it would have to have regulated the procedure of its own contractualisation. This could not have happened because Rawls refused to construct the "international legal community" as a given in terms of natural law but had it flow from "peoples's" wills. Under this condition, the "Law of Peoples" could not possibly have been derived from a pre-existing contract. His idiosyncratic term "Law of Peoples" pastes over this break in the argument by suggesting that this system of legal norms originated from the will of "peoples" rather than state governments. Yet, Rawls made no effort to explain how the binding force of the law could have come into existence through such a procedure and on what grounds the largest part of humankind could possibly have remained excluded from this law. Explicitly, he linked his term to the classical Latin formula *ius gentium*, apparently (though wrongly) equated gens with "people" rather than nation. He did so in order to set his speculative "Law of Peoples" apart from the concept of international law which, in his context, would have been too narrow. Yet Rawls overlooked that, since the Middle Ages, *ius gentium* had no longer been applied solely to groups but to institutions of rule as well and that, at the latest since around 1600, *ius inter gentes* had become a term for the law among states. Hence, his claim that his "Law of Peoples" should be based on groups rather than on institutions is not even borne out by his choice of words. Moreover, Rawls constantly oscillated throughout his text between setting political communities as referent subjects for his "Law of Peoples" and states as assemblages of institutions of rule. Paradoxically, he consistently referred to states as "societies". Yet the holders of legal subjecthood were, according to Rawls, always states, as he did not admit any institutions other than state governments to act within the "Society of Peoples". Such equivocal terminology cannot conceal the strong bias in favour of the minority of states Rawls classed as "liberal" and "decent". In this respect, he is unwilling to grant applicability

[94] Ibid., p. 121.
[95] Ibid., p. 122.
[96] Ibid., pp. 121-122.
[97] Ibid., p. 91.

of the "Law of Peoples" to states seemingly remaining outside the "Society of Peoples". As Rawls himself admits: "To the objection that to proceed thus is ethnocentric or merely western, the reply is: no, not necessarily. Whether it is so, turns on the content of the Law of Peoples that liberal societies embrace."[98] In other words, it was to be "liberal" states that set the standard of reasonability. Consequently, the outcome of Rawls's conceptualisation of the "Law of Peoples" is the fatal discrimination of the "burdened societies", to which he denied reciprocity, recognition of equality, sovereignty and even capability of self-government. As these allegedly "burdened societies" were, in Rawls's perception, recipients of ODA, he effectively excluded the majority of the world's population from his "Society of Peoples". Rawls concept of the "Society of Peoples" therefore is nothing but the "family of nations", first cleansed from colonialist propaganda and then converted into legal philosophy. Rawls's theory of the "Law of Peoples" is, therefore, neither relevant for the theory of natural law, even though his theory of the social or government contract connected closely with natural law, not does it support demands for the admission of legal pluralism in the international arena.[99]

Summary

Contrary to Rawls, some international legal theorists attempted to combine positivist positions with the natural law tradition during the years immediately following the end of World War II. But these attempts have been futile. For one, Alfred Verdroß argued that both, theories informing positivism and natural law theories, were incompatible only within the framework of positivism. In Verdroß's view, positivists straightforwardly rejected natural law as a whole, whereas natural law theorists had always acknowledged the effectiveness of positive legal norms. Like eighteenth-century theorists, Verdroß concluded that natural law arose from "human nature" and consisted of primary legal norms, valid for all humankind, and secondary ones valid for one "nation" only.[100] Since the seventeenth century, Vedroß believed, "nations", starting in Europe, had "developed and unfolded an international legal community".[101] The "complete reception of these norms" (totale Rezeption der Grundsätze) had, however, occurred only upon the independence of the European settler colonies in America.[102] Since then, some "universal international legal order" had, Verdross postulated, come into existence "on the basis of the idea that the pluralism of states established a comprehensive community" in which international law is valid.[103] Verdroß drew on Christian Wolff's *civitas maxima* for his institutional concept of the "international legal community",[104] although Wolff had explicitly rejected the idea that his *civitas maxima* could be an institution.[105] Moreover, Verdroß, in direct opposition to Wolff, refused to accept his "international legal community" as given by natural law, but ascribed to it a contingent genesis through the expansionist power politics of European colonial governments. Yet Verdroß gave out his "universal international legal community" as a club of states and linked the validity of international law, inclusive of customary law, to its acceptance by the members of the "community". In consociating, at least indirectly, the enforceability of international law to power politics of governments of states, Verdroß reduced to mere lip service his previous affirmative statements on the self-enforcing capability of natural law from the earlier part of the twentieth century, rather than following Catholic Church doctrine, laid down in Pope John XXIII's encyclical *Pacem in terris* of 11 April 1963. According to this encyclical, political power not

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98 Ibid., p. 121.

99 Lauren A. Benton and Richard J. Ross, eds, *Legal Pluralism and Empires. 1500 – 1850* (New York, 2013).

100 Verdross, *Rechtsphilosophie* (note 37), pp. 231-234, 246-247.

101 Alfred Verdross, *Die Quellen des universellen Völkerrechts* (Freiburg, 1973), pp. 18-20.

102 Verdross, *Völkerrecht* (note 43), p. 22.

103 Ibid., pp. 18-19. Verdross and Heribert Franz Köck, 'Natural Law. The Tradition of Universal Reason', in: Ronald Saint John Macdonald and Douglas M. Johnston, eds, *The Structure and Process of International Law* (Development of International Law, 6) (The Hague, Boston and Lancaster, 1983), pp. 17-50, at p. 42.

104 Verdross, *Völkerrecht* (note 43), p. 22.

105 Christian Wolff, *Jus Gentium methodo scientifico pertractatvm* (Halle, 1749), pp. 9-10 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, series. B, vol. 25) (Hildesheim and New York, 1972)].

only of governments of states but of other types of power holders as well, could be justified solely in service to general wellbeing in the sense of the natural law tradition.[106] More importantly, Verdroß, like ideologues of colonial rule at the turn towards the twentieth century, equated the club of states, he posited as the sole generator of international law, with the colonialist "family of nations", newly fathomed into "universal international legal community". Like contemporary jurists,[107] Verdroß proceeded with this identification in full awareness of the stringent criticism that the equation of the "family of nations" with a global community of states had met specifically in Africa and Asia,[108] but not only there,[109] since the 1960s. Critics of this equation revealed the facts that "the foundations" of international law of the nineteenth and twentieth century were inseparable from a "colonialist component";[110] that states in Africa and Asia had not come into existence through acts of grace by members of the "family of nations" but had been in existence prior to the onset of colonial rule;[111] that the non-reciprocal treaties concluded during the period of colonial rule as well as during the process of formal decolonisation were unacceptable for the victims of colonial rule;[112] that the critical stance taken in Africa and Asia against international law was due to the predominance of European governments in generating international legal norms and that, in response to this legacy, governments in Africa and Asia had to be given a fair share in the advancement of international law after the end of colonial rule;[113] that the mere contention, voiced in Europe, that some "international legal order" should exist, was not identical with the existence of a "legal order for the whole world";[114] and that, last but not least, positivist international legal theorists themselves had destroyed the basis for the global acceptance of that law by rejecting the natural law theoretical view of the given validity of principal international legal norms.[115] Taken together, these criticisms have become tantamount to the recourse to natural law as the instrument of the legitimation of resistance against international law perceived as unjust. This recourse on natural law theory as an instrument for resistance against unjust law is on record already from the nineteenth century. In February 1868, the Meiji government of Japan, immediately after taking office, made it clear that it regarded itself as bound by the non-reciprocal treaties it had been forced to sign, but that it would request the revision these treaties on accordance with "universal public law" [udai no kōhō].[116] Because the Japanese government then adduced unwritten law, it can only have had in mind an idea of natural law positioned above sovereign states.

The recourse to natural law in Africa and Asia puts on record that, even in the twentieth

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[106] John XXIII, Pope, *Pacem in terris* [11 April 1963] [http://www.vatican.va/holy_father/John-XXIII/encyclicals/documents/hf_j-XXIII_enc_11041963_pacem_en-html], nr 136, 138.

[107] Verdross, *Quellen* (note 101), pp. 18-20.

[108] Georges M. Abi-Saab, 'The Third World and the Future of the International Legal Order', in: *Revue égyptienne de droit international* 29 (1973), pp. 27-66. Ram Prakesh Anand, *New States and International Law* (Delhi, 1972). Taslim Olawale Elias, *Africa and the Development of International Law* (Leiden, 1972) [second edn (Dordrecht, 1988)]. Felix Chuks Okoye, *International Law and the New African States* (Law in Africa, 33) (London, 1972). Bernard Victor Aloysius Röling, *International Law in an Expanded World* (Amsterdam, 1960, pp. 74, 88. Surya Prakash Sinha, *New Nations and the Law of Nations* (Leiden, 1967), p. 26. Joop J. G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (The Hague, 1961), pp. 29-112. Okon Udokang, 'The Role of the New States in International Law', in: *Archiv für Völkerrecht* 15 (1972), pp. 145-166, at p. 146.

[109] Konrad Ginther, 'Die Einwirkung der Dekolonisierung auf die Grundlagen des Völkerrechts', in: *Schweizerisches Jahrbuch für internationales Recht* 38 (1982), pp. 9-27, at pp. 12-16. Röling, Law (note 108), pp. 74, 88. Antonio Truyol y Serra, 'L'expansion de la société internationale au XIX^{e} et XX^{e} siècles', in: *Recueil des cours* 116 (1965, part III), pp. 89-179, at pp. 160-165.

[110] Ginther, Einwirkung (note 109), pp. 13-14.

[111] Stengel, 'Schutzgebiete' (note 88), pp. 17-18.

[112] Röling, *Law* (note 108), pp. 74, 88.

[113] Sinha, *Nations* (note 108), p. 26.

[114] Abi-Saab, 'World' (note 108), pp. 28-29.

[115] Udokang, 'Role' (note 108), p. 146.

[116] Japan, Gaimushō: [Note of the Meiji government, 8 February 1868 on the treaties in force between Japan and other states, written by Toshimichi Ōkubo and Munemitsu Mutsu], in: *Dai Nihon gaikō bunsho*, nr 97, vol. 1 (Tokyo, 1936), pp. 227-228, at p. 228.

century, natural law theories by no means originated necessarily in specific cultures or religions but could come into existence anywhere. Despite much disagreement about details of form and contents of treaties and the procedures of making and enforcing them, there were no conflicts about the application of the principal norms of the law of treaties, as long as all involved parties took these norms to be givens as part of natural law. First and foremost, these principal norms related to the recognition of sovereigns as legitimate parties to treaties between states. They formed the platform, upon European and the US governments concluded agreements with partners in Africa and Asia since the beginning of the nineteenth century. Even Lord Lugard, one of the staunchest protagonists of European colonial rule, confirmed that there was, at his time, a law of treaties between states in Africa, comprising, among other norms, the obligation of honoring the "basic norm" *pacta sunt servanda*.[117]

Empirical evidence thus shows that relations among groups even at greater distance were governed by unset legal norms. The validity of these principal norms was taken as a given. The norms might be broken on occasions, when, for example, treaties were abrogated unilaterally. But such breaches of the law could not jeopardise the consciousness that law existed on principle. Without norm-setting activities, precisely that confidence in the existence of law above states prevailed, which twentieth-century legal theorists identified as the most important condition for the abidance of the law next to the belief in the justice of legal norms.[118] By contrast, the nineteenth-century and subsequent attempt to establish confidence in the existence of legally binding norms through treaties under international law has provoked skepticism concerning the justice of the norms thus established. With the imposition of colonial rule since the 1880s, the skepticism sparked open as well as hidden resistance. Put differently, the positivism of international legal theory has, since the nineteenth century, given rise to conflicts about the acceptance of a certain type of international law that has come to be laid down in treaties and statutes. By contrast, up to the nineteenth century, empirical evidence testifies to the widely spread confidence that natural law could govern relations among groups across the boundaries of culture and religion. This evidence does not preclude the usefulness of setting international legal norms. But the deep foundation for the acceptance of international law cannot be brought into existence through arguments about usefulness. Rather, acceptance of international law must rest on the belief in its principal justice, which cannot be extracted from contracts in the international arena.

The theory of legal positivism, as it arose during the nineteenth century, leaves unanswered fundamental questions about the generation and enforcement of international legal norms. The complex machinery of the making of international legal norms, which has reached an unprecedented size since the end of World War II, has acerbated the old problem of providing legitimacy to culturally specific positive legal norms. Hence, efforts to set globally valid legal norms stand against the desire for the preservation of normative diversity or, to use a recent catchphrase, legal pluralism. The long history of international law shows that the rivalry between efforts to establish unity and to preserve diversity is old, the earliest evidence being on record in Antiquity. Within this perspective, the so-called expansion of European international law during the nineteenth and twentieth centuries is not a unique phenomenon.

In the historiography of international law, the globalisation of European international legal norms has repeatedly been narrated as a success story during the twentieth century.[119] However, this

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[117] Already on record in: Frederick John Dealtry Lugard, The Rise of Our East African Empire, vol. 2: Uganda (Edinburgh, 1893), pp. 33, 579 [reprints (London, 1968); (Hoboken, 2013)].

[118] Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', in: *Süddeutsche Juristen-Zeitung* 1 (1946), pp. 105-108 [reprinted in: Radbruch, *Gesamtausgabe*, edited by Winfried Hassemer, vol. 3 (Heidelberg, 1993), pp. 83-93; also in: Radbruch, *Rechtsphilosophie*, sixth edn, edited by Erik Wolf (Stuttgart, 1963), pp. 347-357; also in: Radbruch, *Rechtsphilosophie. Studienausgabe*, edited by Ralf Dreier and Stanley L. Paulson, second edn (Heidelberg, 2003), pp. 211-219; first edn of this version (Heidelberg, 1998)]. Radbruch, *Vorschule der Rechtsphilosophie. Nachschrift einer Vorlesung*, edited by Harald Schubert and Joachim Stoltzenburg (Willsbach, 1947) [second edn (Göttingen, 1958); third edn (Göttingen, 1965)].

[119] Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988) [written in 1941; first printed in an unpublished version (Leipzig, 1945); first book trade edn (Baden-Baden, 1984); English version (Berlin, 2000)]. Arthur Nussbaum, *A Concise History of the Law of Nations*, second edn (New York, 1954)

narrative rested on the often implicit assumption that only international legal norms of European provenance should be regarded as globalisable. In turn, this assumption has been drawn on the allegations that European international legal norms contain universalisable elements and become expressed in universalisable diction. Yet, neither these allegations nor the assumptions derived from them are self-evident. This is so because the core features of international legal theory, separating international legal norms in Europe from legal theories current elsewhere in the world, did not come into existence before the nineteenth century. European international legal theory turned specific vis-á-vis initially similar theories elsewhere in the world, essentially first through the European postulate that some "international legal community" should be placed in charge of generating and enforcing international legal norms and, second, through the demand that abidance by the generally accepted basic norm *pacta sunt servanda* should be linked to the use of writing as the medium for the transmission of the treaties and that literacy should form the condition for the acceptance of the validity of international legal norms. The postulate that some "international legal community" should exist presupposed agreements about the criteria determining access to that community. As these criteria remained not only culturally specific but also controversial, and as the demand for the use of writing raised serious problems of agreement about a standard common language, European international legal theory impeded universalisability rather than boosting it. Moreover, these specifications of European international legal theory ushered in a harsh rejection of those natural law theories that had, up until the nineteenth century, formed the basis for the acceptance of basic international legal norms. The postulated "international legal community" often bore the name "family of nations" and resurfaced at the turn towards the twenty-first century under the label "Society of Peoples". However, given the rejection of natural law theories, the postulated "international legal community" has remained a controversial construct, as long as membership in the community has not been accepted as given and access has been handled restrictively. By consequence, the perception has gained currency among victims of colonial rule that international law has been globalised as and still is the house law of a club of states operating to their disadvantage.

Next to the European international law, the tradition of Muslim law of war and peace had, from the middle of the nineteenth century, only sporadically impacted on government decision-making in Muslim states, mainly in Turkey. Since the end of World War I, Muslim law of war and peace lost all influence on politics in the international arena. The Soviet international legal theory came to its end with the dissolution of the Soviet Union. A Chinese international legal theory has not continued to exist beyond the nineteenth century. What has remained is a purportedly "universal" international law, equipped with the claim for global validity but burdened with legacies of colonialism and, consequently, not credited with legitimacy in all respects. [120]

[first published (New York, 1947); reprinted (New York, 1950)].

[120] Verdross, *Völkerrecht* (note 43). Martti Antero Koskenniemi, 'The Legacy of the Nineteenth Century', in: David Armstrong, ed., *Routledge Handbook of International Law* (London and New York, 2009), pp. 141-153, at p. 144.