

# Alfred Verdross and the Contemporary Constitutionalisation Debate

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## Abstract

Within international law Verdross is an influential figure. Verdross' examinations of international community, *jus cogens* and multilateralism are particularly significant and it is from his exploration of these elements of international law that his insights on international constitutionalisation emerged. His impact can be felt in the contemporary constitutionalisation debate. His influence on the debate is evident, to varying degrees, in the work of several international legal scholars such as Mosler, Tomuschat, Simma, De Wet, Peters and Fassbender. Verdrossian international constitutional theory has become dominant within the various constitutionalisation theories that have emerged, particularly those that centre upon *jus cogens*, international community and multilateralism although arguably it is the theories that rely on core norms within the international legal order which owe the most to Verdross and his nascent development of international constitutionalisation.

## Key Words

Verdross, constitutionalisation, *jus cogens*, international community, constitutionalism

## 1. Introduction

To convince an audience of its validity a theory must possess an extensive historical narrative underpinning its development. Arguably, the international constitutionalisation debate still

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lacks such a narrative.<sup>1</sup> Broadly, constitutionalisation is ‘a process, extending constitutional structures to fora and layers of governance other than nations’ however, differences of opinion among its advocates as to its precise implications makes delineating its character complex.<sup>2</sup> Understanding its historical development should make critique and analysis more coherent. This is not to propose that a single historical theory of constitutionalisation which all of its promoters can agree upon exists or that contemporary attempts to describe its relevance have not been worthwhile but rather that considering the grounds of the debate and its historical roots should enable fuller deliberation.<sup>3</sup>

Verdross is an important figure in the development of international law in the 20<sup>th</sup> Century with a career spanning the First World War until his death in 1980. He was central to the expansion of *jus cogens* and monism, the development of the UN Charter as a centrifugal force in international law as well as the first glimmers of the constitutionalisation debate. This article attempts to examine the connection between the contemporary constitutionalisation debate and Verdross and considers his work in the context of his own emergent constitutionalisation theory. Further, the article attempts to identify those within the constitutionalisation debate whose ancestry are linked to Verdross.<sup>4</sup>

Loughlin argues that

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<sup>1</sup> The first mentions of constitutionalisation in the international context seem to appear in Holtendorff, in 1877, however as Opsahl correctly points out it was much later that a more systematic approach would become evident, T. Opsahl ‘An “International Constitutional Law”?’ (1961) 10 ICLQ 760,761

<sup>2</sup> T Cottier & M. Hertig, ‘The Prospects of 21st Constitutionalism’ (2003) 7 Max Planck Yearbook of United Nations Law 261, 264, for contrasting theories see, P Dobner & M Loughlin (eds) *The Twilight of Constitutionalism* (OUP, 2010), J Klabbers, A Peters & G Ulfstein, *The Constitutionalisation of International Law* (OUP, 2009), D Z Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005), B Fassbender, ‘The United Nations Charter as Constitution of The International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529, E Petersmann ‘How to Reform the UN System? Constitutionalism, International Law, and International Organizations’ (1997) 10 *LJIL* 421

<sup>3</sup> See for example, K. Milewicz, ‘Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework’ (2009) 16 *Indiana J. Global Legal Studies* 41, Fassbender (n 2) 529, Opsahl (n 1), T. Giegerich, ‘The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a “Well-Considered Constitutionalization of International Law”’ (2009) 10 (1) *German Law Journal* 31

<sup>4</sup> Fassbender (n 2) 529, Fassbender has also discussed the role of Verdross in the constitutionalisation debate at 541 - 544

‘the modern idea of the constitution results from a basic shift that took place in conceiving the relationship between government and people: rejecting traditional orderings based upon status and hierarchy, it expressed the conviction that government, being an office established by the people, must be based on their consent.’<sup>5</sup>

International constitutionalisation is a process by which international law moves beyond its sovereign foundations as well as its vertical and western bias, to a system of law founded on a process which is hierarchal, normative and structured.

Constitutionalism is a system of law comprising core norms indelibly linked to a particular structural order. Klabbers argues that constitutionalism is more than legalisation,<sup>6</sup> as such; international constitutionalisation must represent more than a process of legalisation, jurification or other phenomena connected to the normal development of international law.<sup>7</sup> As international law moves beyond a simplex order of equal subjects international constitutionalisation offers a framework to understand these developments and identifies the adoption of norms and structures that could rightly be described as constitutional. Constitutional and public law structures are not exclusive to the domestic sphere.<sup>8</sup> Indeed Walter argues that state and constitutionalism are separable and while the transfer to the non-state sphere requires some contextual changes to adapt to another governance order these are not in-surmountable.<sup>9</sup>

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<sup>5</sup> M Loughlin, ‘What is Constitutionalisation?’ in Dobner & Loughlin (n 2) 47- 48.

<sup>6</sup> Klabbers, Peters & Ulfstein (n 2) 1-3

<sup>7</sup> In contrast to Klabbers, Peters argues that ‘[g]lobal constitutionalism is an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order. A Peters, ‘The Merits of Global Constitutionalism’ (2009) 16 *Indiana J. Global Legal Studies* 397

<sup>8</sup> A Peters, ‘Global Constitutionalism Revisited’ (2005) 11 *International Legal Theory* 39

<sup>9</sup> C. Walter, ‘International Law in a Process of Constitutionalization’ in J E Nijman & A Nollkaemper. *New Perspectives on the Divide between National and International Law* (OUP, 2007) De Wet also argues that there is no reason for not using constitutional law in the international context, explaining that for instance Germany and the United States make use of it in their federal systems and also the EU's use of constitutional language.

International constitutionalisation does not offer a utopian vision of international law. Recognised within these theories are incoherencies which suggest that the international legal order is, as yet, only a partially constituted system.<sup>10</sup> Even if international constitutionalisation never emerges, an examination of international law from a constitutional perspective offers a useful investigative tool for better understanding international law's character. This article seeks to contribute to the constitutionalisation debate and international constitutionalism by suggesting that the writings of Alfred Verdross are core to understanding its development.

This account begins with an outline of Verdross' work on international community, *jus cogens* and multilateralism. A discussion of the contemporary constitutionalisation debate follows with particular focus on the propositions of Mosler, Tomuschat, Simma, De Wet, Peters and Fassbender as examples of Verdross' influence on the constitutionalisation debate. This piece considers what a Verdrossian understanding of constitutionalisation has to offer the participants in the current constitutionalisation debate and in doing so, attempts to gauge Verdross' impact. The variations within the constitutionalisation debate makes tracing Verdross' impact not as straightforward as drawing a direct lineage through the discussions. Collins argues that, '[i]f international legal obligation no longer rests on consent, then a logical line of 'constitutional theory' might develop Verdross' conviction of a foundational core of ethics or morality which binds society together.'<sup>11</sup> This article seeks to understand whether such a core is evident in Verdross' work and what this implies about those modern constitutionalists who follow a Verdrossian form of constitutionalism.

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Erika De Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 52, Neil Walker, 'Taking Constitutionalism beyond the State' (2008) 56 Political Studies 519, 522 For another discussion of the core arguments against using constitutionalism domestically see Cottier & Hertig (n 2) 282 – 296.

<sup>10</sup> For instance Paulus and Habermas both agree that the current system has not evolved into a fully constituted order. J Habermas, (C. Cronin trans) *The Divided West* (Polity Press, Cambridge, 2006) 115 -116, A L Paulus, 'The International Legal System as a Constitution' in J L Dunoff & J P Trachtman, (eds) 'Ruling the World? Constitutionalism, International Law and Global Governance' (CUP, 2009) 72

<sup>11</sup> R Collins, 'Constitutionalism as Liberal – Juridical Consciousness: Echoes from International Law's Past' (2009) 22 LJIL 251, 272

This article does not discuss the validity of the constitutionalisation debate. While important, the aim here is to understand one aspect of the constitutionalisation debate's evolution and not to provide a justification for alternatively undermining or underpinning the theory. Instead, this article hopes to provide a basis for a more nuanced debate on constitutionalisation by providing a better understanding of its roots.

## 2. Verdross and International Law

Over the course of his long career Verdross engaged with a considerable number of topics, far more than can be considered here.<sup>12</sup> His career began prior to the First World War but it was in the age of multilateralism, after the creation of the League of Nations, that it gained significance. His impact on the debates surrounding the Weimar Constitution, the international community and as early as 1937, the nascent concept of *jus cogens*, are amongst his most prescient contributions.<sup>13</sup> Analysing Verdross' work in the post-Charter era is essential as it is here that he placed the Charter at the heart of both international law and community.<sup>14</sup> It is in community, *jus cogens* and multilateralism, that Verdross establishes his approach to international constitutionalisation.<sup>15</sup>

It is important to acknowledge that, as with all long careers, Verdross' approach evolved.

Two examples are his approaches to *jus cogens* and the Charter. In 1937, Verdross claimed

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<sup>12</sup> See for example A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), *Völkerrecht* (Springer, 1937), *Antike Rechts - und Staatsphilosophie* (Springer, 1948), *Die Quellen des Universellen Völkerrechts: eine Einführung* (1973), *Neutralité permanente de l'Autriche* (Verlag für Politik u. Geschichte, 1978), (with B. Simma) *Universelles Völkerrecht: Theorie und Praxis* (3rd ed., Duncker u. Humblot, 1984). Unfortunately for the non-German speaker, much of Verdross' work is still only available in German however this should not prevent a wider audience from engaging and understanding his work.

<sup>13</sup> Verdross 'Die Verfassung' (n 12), A. Verdross, 'Reichsrecht und Internationales Recht. Eine Lanze für Art 3 des Regierungsentwurfs der Deutschen Verfassung', (1919) 24 *Deutsche Juristenzeitung* 291, A. Verdross, 'Forbidden Treaties in International Law, Comments on Professor Garner's Report on "The Law of Treaties"' 31 (1937) *AJIL* 571, 571

<sup>14</sup> A. Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 *AJIL* 55, Proposals and comments submitted by Mr. Alfred Verdross regarding the draft provisional articles on consular intercourse and immunities (A/CN.4/L.79)

<sup>15</sup> The publication in 1926 of *Die Verfassung der Völkerrechtsgemeinschaft* is the first clear evidence of Verdross interest in a constitutional approach.

there were two *jus cogens* categories. Eventually this became three classes.<sup>16</sup> Initially, his arguments on constitutionalisation were not linked to any specific institution but eventually were tied to the Charter. Thus, in presenting Verdross' constitutionalisation theory care is necessary to not overstate the development of a firm Verdrossian perspective.

This section will examine Verdross as a natural lawyer, his view of international community and finally discuss Verdross' approach to *jus cogens* and the role of multilateralism. This will touch upon the key aspects of what has arguably developed into Verdrossian constitutionalisation.

### **A. The Natural Law and International Community**

While Verdross was ensconced within the Kelsenian School, having first been a student and then a colleague of Kelsen, it is from within the natural law that his international legal theory developed.<sup>17</sup> A natural law ethic is evident in two aspects of his work; community and *jus cogens* and both are pivotal in the development of a Verdross' theory on constitutionalisation. This section addresses Verdross' understanding of community and the natural law. The Stoic-Christian tradition of international community, Aquinas' writing on the false nature of the subordination of the individual to the state and allegiance extending beyond the nation are significant in understanding Verdross' view of the role of international community.<sup>18</sup> This is

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<sup>16</sup> Verdross 'Forbidden' (n 13), A Von Verdross, 'On the Concept of International Law' (1949) 43 AJIL 435, Verdross, 'Dispositivum' (n 14)

<sup>17</sup> For examples of his views see A Verdross, 'Two Arguments for an Empirical Foundation of Natural-Law norms: An examination of Johannes Messner's and Victor Kraft's approaches' (1975) 3 Syracuse Journal of International Law and Commerce 151, Verdross, 'Concept' (n 16) and A. Verdross, 'Fundamental Human Rights, The Journey of an Idea' (1979-1980) 8 Human Rights 20 (Trans. J D Gorby, Originally published Anzeiger der Philosophen-historischen Klasse der österr Akademie der Wissenschaft, 1954 355) J. Kunz, 'The 'Vienna School' and International Law' (1933-1934) 11 New York University Quarterly Law Review 370, J. Kammerhofer, 'Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law' (2009) 22 LJIL 225, 246 - 247, A. Truyol y Serra 'Verdross et la théorie du droit' (1994) 5 EJIL 55, 56

<sup>18</sup> A. Verdross & H. Franz Koeck, 'Natural Law: The Tradition of Natural Law and Reason' in R. St. J. Macdonald, D M Johnston, (eds.) The Structure and Process of International Law (Brill, 1983) 18 – 19, 22, Verdross, 'Fundamental' (n 17) 23, T Aquinas, A Treatise on Law (trans. R J Egan) (2000), T. Aquinas, Selected Political Writings (trans. J. G. Dawson) (1959) Seneca's Fifth Letter to Lucilius quoted in A Rorty, The Many Faces of Philosophy (2003), The Republic, The Laws (trans N. Rudd) (1998)

evident in Verdross' opposition to totalitarian regimes but also his view of the international community as connected, but not subordinate, to the state.<sup>19</sup>

The views espoused by the Spanish School of international law are critical.<sup>20</sup> Suárez's notion that international law emerges in a 'universal community-orientated philosophy' where the community requires a legal order to govern their relations with each other influenced Verdross.<sup>21</sup> Verdross uses Suárez's community, one that may be adapted or changed, but which is based within law as an essential aspect of the functioning of a legal order, and adapts it for 20<sup>th</sup> century international law.

As a natural lawyer, Verdross confronted the positivist approach to international law that questioned both its existence and operation. While Verdross sought to suggest, if possible, solutions to any divergences that arose in practice between the two theories, he still maintained that the natural law is the correct approach.<sup>22</sup> The claim that the law of nations has not developed sufficiently to be truly "law" is a key distinction between positivism and natural law.<sup>23</sup> For positivists international law is dependent on sovereign will.

A good contrast between a positivist and natural law approach to the international order is Hegel and Verdross. Three key tenants underpin Hegel's approach to international law. First, he argues that the nation state is the highest order of power.<sup>24</sup> The state is the highest moral power and law is always of the state; as such international law is but a norm which cannot be

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<sup>19</sup> Verdross, 'Fundamental (n 17) 232, B Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 EJIL 33 at 38 It is also important to keep in mind the evolving political situation, particularly in the inter-war period when Verdross was writing and the impact this may have had on his work.

<sup>20</sup> Verdross & Koeck (n 18) 19 -21, Simma (n 19) 38.

<sup>21</sup> G L Williams, A Brown, J Waldron, 'Selections from Three Works of Francisco Suárez, S.J., *De Legibus*, ac deo Legislatore, 1612, *Defensio Fidei Catholicae, et Apostolicae Adversus Anglicanae Sectae Errores*, 1613, *De Triplici Virtute Theologica Fide, Spe, et Charitate*, 1621'. Volume II, The Translation (Clarendon Press, Oxford, 1944) 341, Simma (n 19) 39, R. S. Hartigan, 'Francesco de Vitoria and Civilian Immunity' (1973) 1 Political Theory 79

<sup>22</sup> Verdross & Koeck (n 18) 19 - 21, Verdross & Simma, *Universelles Völkerrecht* (n 12) 16.

<sup>23</sup> For example Hobbes asserted that a lack of superior authority robs international law of its status as law T. Hobbes, 'Leviathan' (1991) 244

<sup>24</sup> Anonymous, 'Hegel's Political Philosophy of the State' (1917-1918) 31 HLR 78

achieved as its existence is on the whim of the state. Second, Hegel affirms that it is within the state that the individual's rights are realised and thus, it is the only community of consequence. Universal justice is based within the state and international law is a derivative of state interactions based on the sovereignty and autonomy of states, as such, the state and the exercise of individual freedom are intertwined.<sup>25</sup> Third, Hegel believes that the state, as the realisation of a moral idea, is legitimate simply due to its existence.<sup>26</sup> For Hegel, the state has no imposed limitations; state sovereignty does not allow any other interpretation. To recognise a Verdrossian civil society of states overarching the sovereign state an international community is required and, to Hegel, this would be an anachronism.

Verdross argued that an international community does not rely on such a positivist paradigm.<sup>27</sup> Verdross' monist interpretation of municipal and international law is essential to understanding how he came to this position.<sup>28</sup> He regards international and domestic law as one system and thus the truncation of the development of community at state level does not arise and an international community *can* develop. Verdross argues that the domestic constitution is intertwined with the international legal order and as such both are part of the same international legal order and therefore one community.

A key example of the differences between the Hegelian and Verdrossian approaches are the debates surrounding the Weimar Republic's Constitution and its accommodation of international law.<sup>29</sup> A positivist proposal placed the state at its core, thus enabling Germany to choose when and in what manner to be bound by international law. In Hegelian international law, as the state and its community are always supreme and the optimal model

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<sup>25</sup> L. Miraglia, 'Comparative Legal Philosophy Applied to Legal Institutions' Modern Legal Philosophy Series, Vol. III, (1912). (J. Lisle, trans., reprinted 1968) 69

<sup>26</sup> Anonymous (n 24) 81.

<sup>27</sup> Simma (n 19) 42.

<sup>28</sup> H. Janzen, 'The Monism of Alfred Verdross' (1935) 29 American Political Science Review 387

<sup>29</sup> Verdross, 'Reichsrecht' (n 12), Simma (n 19) 41, Simma writes that Verdross was influenced by Blackstone in his interpretation of the incorporation of international law into domestic law.



of governance, it at this level where constitutive decision-making should occur. Such a view requires a dualist model of international law where the state constitution is always the arbitrator of legitimacy.<sup>30</sup>

In contrast, Verdross argued that the validity of international law is not a question for domestic constitutions. The only matter left to the domestic order is how international law is integrated into state law and not its validity.<sup>31</sup> Verdross addressed the differences between universalism and state individualism and argues that universalism derives from the notion of the moral unity of mankind as a norm, whereas individualism centres on factual occurrences and, as such, is too caught up in their significance.<sup>32</sup> A Hegelian positivist approach rejects this; since the state and the individual are indelibly intertwined the state is the only legitimate community, as such, an international or universalist community, lacking such a nexus, results in negative consequences for the individual. In contrast, for Verdross, international law is developed by the community of states; either through custom, treaty or via other sources of law. Critically, adherence cannot be made or unmade by any individual state.<sup>33</sup> Following Verdross' questioning of its commitment to international law the positivist draft was rejected.<sup>34</sup>

The Verdrossian community centres on a universalist ethic rooted in the natural law. Verdross argues that 'we must ask what are the moral tasks states have to accomplish in the international community.'<sup>35</sup> The sphere of action is limited to the universal ethics of the international community that establishes an 'ethical minimum.'<sup>36</sup> This is not unproblematic as

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<sup>30</sup> G H Hegel, *Philosophy of Right* (Original Published 1821, Cosmo Press, 2008), 196-198, W E Conklin *Hegel's Laws: The Legitimacy of a Modern Legal Order* (Stanford University Press, 2010) 298

<sup>31</sup> Simma (n 19) 40.

<sup>32</sup> Ibid 40.

<sup>33</sup> Verdross did not accept the idea of instant custom. H Mosler, 'Book Review: Die Quellen des universellen Völkerrechts: eine Einführung,' (1974) 68 AJIL 350 at 351

<sup>34</sup> Verdross, 'Reichsrecht' (n 12).

<sup>35</sup> Verdross, 'Forbidden' (n 13) 574.

<sup>36</sup> Ibid 574.

identifying the attributes of this ethical minimum is almost as difficult as ascertaining the members of the international community.<sup>37</sup>

A key characteristic of Verdross' constitutionalisation is its reliance upon international community. Verdross divided the international community between the pre- and post-Charter era. In the former the community existed but was disorganised, in the latter period, the community became organised.<sup>38</sup> As well as being an example of the evolution of Verdross' own approach to international law, this foreshadows the importance of the Charter to Verdross' constitutionalisation and marries the international community to the UN.

### **B. The Natural Law and *Jus Cogens***

Verdross was instrumental in the development of *jus cogens* as an important aspect of international law.<sup>39</sup> Verdross developed *jus cogens*, from a narrow concept in 1937 to a broad cohort of norms underpinning all aspects of international law in the late 1960s. *Jus cogens* norms are also important to his constitutionalism and the threads of his constitutional narrative may be observed in his analysis of them. This section considers the development of *jus cogens* over the course of Verdross' career.

The influence of both the natural law and Suárez are important in how Verdross characterises *jus cogens*. Contemporaries of Suárez considered international law to have developed through necessity and consent,<sup>40</sup> whereas Suárez argued that the main difference between natural law and *jus gentium* is that the natural law can serve only good, whereas *jus gentium* may permit

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<sup>37</sup> See for examples the work of D Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Social and Legal Studies 337, R Buchanan & S Pahyja, 'Law, Nation and (Imagined) International Communities' (2004) 8 Law, Text, Culture 137, C Douzinas, Human Rights and Empire, The political philosophy of cosmopolitanism (Routledge Cavendish, 2007) 142, Dino Kristiotis, 'Imagining the International Community' (2002) 13 EJIL 961

<sup>38</sup> Verdross, 'Fundamental' (n 17) 23.

<sup>39</sup> Verdross, 'Forbidden' (n 13) Verdross, 'Concept' (n 16), Verdross, 'Dispositivum' (n 14).

<sup>40</sup> D Kennedy, 'Primitive Legal Scholarship' (1986) 27 HJIL 1 at 4

‘some evils’ as it may, by consent, adapt over time.<sup>41</sup> The idea of change by consent and necessity is an anathema to the proponents of *jus cogens* norms.<sup>42</sup> Indeed, according to Verdross, the decisive element that elevates *jus cogens* is that ‘they do not exist to satisfy the needs of the individual states but the higher interest of the whole community.’<sup>43</sup> As with international community, *jus cogens* are divided between the pre- and post-Charter era.<sup>44</sup>

Verdross argues that neither treaty nor customary law is based upon the internal wrangling of states, and as such authority in international law is not based upon domestic constitutions. He contended that the legitimacy of international law was not reliant upon the recognition of its validity by state constitutions.<sup>45</sup> Higher norms, such as *jus cogens*, supersede domestic constitutions. This does not dismiss states as vital to the development of international law, but recognises their role as subordinate, particularly in the recognition of *jus cogens*. Arguably, this places *jus cogens* at the apex of Verdross’ international legal, and potentially constitutional, order.

Jenzen argues that Verdross’ theory, from a pragmatic perspective, appears more expedient because it is not predicated on the dogma of sovereignty.<sup>46</sup> The norms established in *jus cogens* exist independent of state consent. Kunz argues this form of analysis incorporates two conceptions of sovereignty, ‘[s]overeignty as a presupposed conception and sovereignty as a

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<sup>41</sup> ‘Selections from Three Works of Francisco Suárez’ (n 21) 352-353, 343-349, 354

<sup>42</sup> For an overview of *jus cogens* in current international law see A Orakhelashvili *Peremptory Norms in International Law* (OUP, 2006)

<sup>43</sup> Verdross, ‘Dispositivum’ (n 14) 220.

<sup>44</sup> The three articles in the development come from 1937, 1949 and 1966 respectively. Verdross, ‘Forbidden’ (n 13), Verdross, ‘Concept’ (n 16) 435, Verdross, ‘Dispositivum’ (n 14) 55

<sup>45</sup> Verdross, ‘Reichsrecht’ (n 13). The unstable nature of domestic law and succession of states to international obligations is further evidence of this. This is true of treaty law and to an extent customary law. The rules regarding subsequent and persistent objectors could be a counter to this as seen in *Anglo-Norwegian Fisheries case*, (1951) ICJ Rep 116

<sup>46</sup> Janzen (n 28) 402.

conception deriving from the contents of inter-national law.<sup>47</sup> Placing sovereignty within the realms of international law implies that it is not absolute but rather a creature of law.<sup>48</sup>

Verdross argues that only those who wish to rely on the will of states, and as such only on treaty law, can exclude the existence of *jus cogens*. He suggests that,

'[t]he existence of such norms in general international law is particularly contested by those authors who base the whole international law on the agreement of the wills of the states...the possibility of norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties, cannot be denied *a priori*.'<sup>49</sup>

Thus, *jus cogens* norms are not reliant upon states, or domestic constitutions for their legitimacy. Nonetheless, he also argues even if a state-centric claim is accepted, the law of treaties presupposes the existence of rules of international law and thus the use of treaties alone is insufficient to disregard *jus cogens*.<sup>50</sup>

Higher norms form a vital aspect of Verdross' international constitutionalism. Verdross asserts that positive law develops through a hierarchical system of norms instituted by organs in the international legal order. This is core to Verdross' monism and is also linked to his discourse on positivism versus the natural law. The international legal order's "unwritten constitution" is discoverable through an examination of the legal acts at the bottom of the hierarchy and tracing where these acts receive their authority. Verdross argues that the

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<sup>47</sup> Kunz (n 17) 398.

<sup>48</sup> Ibid 400.

<sup>49</sup> Verdross, 'Forbidden' (n 13) 572.

<sup>50</sup> Verdross, 'Forbidden' (n 13) 571-572.

international community creates a positive legal system and this system is based on a common ethical understanding of core standards of international law reflected in *jus cogens*:

‘As these norms are always created by an organized community of states, this writer calls them the “internal law of the community of States” (*internes Staaten Gemeinschaftsrecht*). Under this name this writer means such rules of private, criminal, administrative and disciplinary law as may be issued by a community of *states* for the regulation of the conduct of *individuals* immediately subject to this community of *states*. This group of norms must not be confused with the norms governing the conduct of the *states* united in this community. As the latter have as their object the organization of the particular community of states and form, therefore, its constitutional law, it is of a community of states.’<sup>51</sup>

Initially, Verdross divided *jus cogens* into two groups.<sup>52</sup> The first group consisted of single compulsory norms, one-off examples of laws from which there are no derogation.<sup>53</sup> The second group were norms which established laws *contra bonos mores*. This group emerged from the commonality of all juridical orders that ‘regulate the rational and moral coexistence of the members of a community.’<sup>54</sup> The exact nuance of this original division is somewhat unclear. Verdross maintains that there is no juridical order, including an international juridical order that could accept a norm which would be contrary to the principles of the community.<sup>55</sup> While he did acknowledge that the ethics of the international community were not as developed as the ethics of national communities, and as such the range of sources

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<sup>51</sup> Verdross, ‘Concept’ (n 16) 438.

<sup>52</sup> Verdross, ‘Forbidden’ (n 13) 571.

<sup>53</sup> Ibid 572.

<sup>54</sup> Ibid 572-573.

<sup>55</sup> Ibid 574.

available to judicial systems was not necessarily comparable, he argues these differences are overestimated since in international law there are ethical minimums.<sup>56</sup>

Acknowledging the altered situation brought about by the Charter, Verdross reconceptualised *jus cogens* into three distinct groups.<sup>57</sup> The first group protect third states from treaties encroaching upon their sovereignty. This first group is similar though not identical to the original 1937 group. Yet, this first group is not as specific as it encompasses treaties which could impose upon the rights of third states such as rights over the high seas, as per the original first group. Nonetheless, this first *jus cogens* group is somewhat narrower as a consequence some of the original first category is subsumed into two new groups.<sup>58</sup>

In the second category (in 1937 this held aspects of group two), Verdross places norms that substantiate humanitarian ideals that protect the individual over the state.<sup>59</sup> These norms, based upon humanitarian grounds, come within the conception of *contra bonos mores* but are more specific than the original group. The third group of norms evidences the chief transformation of *jus cogens* by the Charter and its articles on the use of force.<sup>60</sup> It centres the Charter at the core of international law and the newly organised community.<sup>61</sup>

Verdross considered these three groups as incontrovertible parts of international law.

‘a norm having the character of *jus cogens* can practically be created only by a norm of general customary law or by a general or multilateral convention. Indeed, the customary law of the former unorganized international society had already accepted certain limits on the liberty of states to conclude treaties by its recognition of the

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<sup>56</sup> Verdross, ‘Forbidden’ (n 13) 573 he followed this article several years later in Verdross, ‘Dispositivum’ (n 14) 217.

<sup>57</sup> Verdross, ‘Concept’ (n 16), Verdross, ‘Dispositivum’ (n 14).

<sup>58</sup> The two main Conventions of the Law of the Sea are The 1958 Geneva Conventions on the Territorial Sea, Continental Shelf, the High Seas and Fishing and Conservation and the 1982 UN Convention on the Law of the Sea

<sup>59</sup> Verdross, ‘Dispositivum’ (n 14) 58-60.

<sup>60</sup> Ibid 58-60.

<sup>61</sup> Verdross also discusses these distinctions in Verdross, ‘Dispositivum’ (n 14).

“general principles of law recognised by civilised nations” as a subsidiary source of international law. Article 38, paragraph 3, of the Statute of the Permanent Court only codifies an old practice of international arbitration in this field’<sup>62</sup>

Verdross maintains the older form of *jus cogens* to the extent that they existed in a ‘disorganised community.’<sup>63</sup> Thus, the establishment of the UN resulted in an organised community centred upon the Charter. This focuses the idea of community and *jus cogens* into the operation and function of the UN, though Verdross’ reference to the Statute of the Permanent Court broadens this approach slightly.

This approach excludes other, particularly economic, organisations, from a place at the heart of the international legal order. The first category of *jus cogens* could encompass, for example, trade law. The treaties which operate under the WTO incorporate the most favoured nation doctrine which, by its very nature, impacts upon third states that are not bound by the organisation.<sup>64</sup> Therefore, it would seem pertinent to have a broader scope than the UN to this first category to accommodate a wider application of international law.

Mosler argues that the hierarchy of norms established by Verdross reflects his natural law inclinations and suggests that his work on *jus cogens* and the sources of international law are indicative of the ‘constitutional principles’ established in Verdross’ earlier work.<sup>65</sup> Verdross’ central tenant is that the will of the state is not paramount. This is clear in his arguments regarding the Weimar Constitution and in his development of *jus cogens* norms.<sup>66</sup>

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<sup>62</sup> Verdross, ‘Dispositivum’ (n 14) 61.

<sup>63</sup> Ibid 62.

<sup>64</sup> This includes aspects of the General Agreement on Tariffs and Trade (GATT) Article 1 and General Agreement on Trade in Services (GATS) Article II. Members of the WTO who have regional trade agreements with non-members of the WTO also extend some of the legal parameters of the WTO beyond the membership of the organisation.

<sup>65</sup> Mosler, ‘Book Review’ (n 33) 350.

<sup>66</sup> Verdross, ‘Reichsrecht’ (n 12), ‘Verdross, ‘Forbidden’ (n 13).

Fundamentally, the natural law foundations of international law exclude as improbable a state-centred approach.

*Jus cogens* are at the heart of the international legal order and are central to the development and workings of the hierarchy of norms.<sup>67</sup> The placement of *jus cogens* at the core of international law is linked to the Charter however *jus cogens* remains the focal point of Verdrossian constitutionalisation. Orakhelashvili references and relies on Verdross in his seminal work on *jus cogens*.<sup>68</sup> He states that, '[p]eremptory norms prevail not because the States involved have so decided but because they are intrinsically superior and cannot be dispensed with through standard inter-State transactions.'<sup>69</sup> This description is clearly linked to Verdross' depiction of *jus cogens*.

While the Vienna Convention on the Law of Treaties does not define *jus cogens* its limitations on state action appears to fall in-line with Verdross' approach, though this is unsurprising given, at the time of its final drafting, his place on the International Law Commission.<sup>70</sup> In line with Verdross, the International Law Commission's 1966 Report on the draft articles acknowledged the relative recent maturity of *jus cogens*, its limitation on state action, and its non-derogable character.<sup>71</sup> While, for example, the International Court of Justice has been slow to fully grapple with *jus cogens*, their existence, largely in line with Verdross' articulation, are accepted as part of the operation of the international legal order.<sup>72</sup>

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<sup>67</sup>M Akehurst, 'The Hierarchy of Norms in International Law' (1974–75) 47 BYIL 273, 282. Akehurst acknowledged the evolution of Verdross' thinking in this piece. L Hannikainen, 'Peremptory norms (*jus cogens*) in International Law: Historical Development, Criteria, Present Status' (Finnish Lawyers Publication Company, 1988) 154, 426.

<sup>68</sup> Orakhelashvili (n 42) 9, 37, 39, 48, 53, 68, 577.

<sup>69</sup> Orakhelashvili (n 42) 8.

<sup>70</sup> Verdross was a member of the ILC from 1957-1966, for a discussion of Verdross' role in the drafting of the VCLT see F Cede & C Binder, 'Is there an Austrian Contribution to the Codification of International Law' in U. Fastenrath, B. Simma, R. Geiger, D. Khan, A. Paulus, S. Von Schorlemer, C. Vedder (eds) 'From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma' (OUP, 2011) 651-652, Article 53, 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331, Simma (n 19) 53.

<sup>71</sup> ILC Draft Articles on the Law of Treaties with commentaries (1966) 247-294

<sup>72</sup> Orakhelashvili (n 42) 489 – 517.



Verdross' influence as a pioneer of *jus cogens* is evident in the accepted characterisations of its operation.

### C. Verdross and Multilateralism

The importance of multilateralism to Verdross is evident in the changes brought about by the Charter. A further example in his work is the debate on “the crises of neutrality” in the inter-war period, particularly the legal ambiguity regarding neutrality and the League of Nations.<sup>73</sup> During this period, neutrality cycled between being an accepted aspect of international law, to a period of desuetude and back to primacy once again.<sup>74</sup> Contrasting neutrality under the Charter and the Covenant is useful in understanding Verdross' division of the disorganised and organised international community.<sup>75</sup>

In the optimism of the League's early years neutrality was no longer considered necessary.<sup>76</sup> However as the League waivered in its attempts to maintain world peace neutrality was reasserted. Neutral Switzerland joined the League,<sup>77</sup> but changed the basis of its membership and eventually left when the incompatibility of neutrality and the League became clear.<sup>78</sup> The Covenant did not have the substance to maintain its members through successive crises and this underpins Verdross' separation of the disorganised and organised community. The Swiss finally became members of the UN, albeit it could be argued that neutrality is even less compatible with the Charter. It suggests something of the Charter's nature and Verdross' idea of an organised community that Switzerland felt compelled to join. While there was a

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<sup>73</sup> A Verdross, 'Austria's Permanent Neutrality and the United Nations Organization' (1956) 50 AJIL 61, A O'Donoghue, 'Neutrality and Multilateralism after the First World War' (2010) 15 JCSL 169

<sup>74</sup> See generally, J L Kunz, 'Neutrality and the European War' 1939-1940 (1941) 39 Michigan Law Review 719, M O Hudson, 'Membership in the League of Nations' (1924) 18 AJIL 436, R R Wilson, 'Neutrality of Éire' (1940) 34 AJIL 125. Upon joining the League of Nations, the League accepted Swiss neutrality; however, by 1938 it was clear that permanent neutrality and membership of the League were incompatible. Council of the League of Nations Resolution, February 17<sup>th</sup> 1920. (1920) 1 League of Nations Official Journal 57

<sup>75</sup> Verdross, 'Fundamental' (n 17) 23.

<sup>76</sup> O'Donoghue (n 73) 59.

<sup>77</sup> Though it was exempted from military action it was involved in economic sanctions. This is difficult to reconcile with neutrality.

<sup>78</sup> O'Donoghue (n 73) 59, There were also obviously many other factors in the Swiss withdrawal in 1938, at this point the new experiment in collective security had well and truly failed.

disorganised international community Switzerland was able to maintain an equivocal position, but in the post-Charter era this was no longer credible.<sup>79</sup>

Verdross contends that the Security Council, in inviting members to take part in actions, does not have the same scope for mandatory action which the Covenant possessed.<sup>80</sup> This may not necessarily be the case. While the Security Council may ask individual states to act it also can require states to take collective action under Chapter VII, which may not result in active participation in the use of force, but it can result in what, in other circumstances, would be a violation of the laws of neutrality.<sup>81</sup>

It is true states have maintained their neutrality alongside UN membership, however this dual position has never been given a satisfactory legal explanation. Verdross argues that as the aims of the Covenant and the Charter are the same neutrality should be treated similarly.<sup>82</sup> Although the aims of the organisations were and are to maintain international peace and security, the Charter's remit is broader. If the laws on the use of force under the Charter are indeed *jus cogens* as Verdross contended in 1966, then there can be no opt-out allowing individual states to maintain neutrality and membership of the UN.

This theory of neutrality is more akin to what Verdross espouses regarding the pre-Charter disorganised community. In adding the Charter's regulation of the use of force to the pantheon of *jus cogens* there is an assertion that the legal order established by the Charter is superior to other international legal obligations.<sup>83</sup> This characterisation of the Charter or, at least part of it, as superior law to the rest of international law is an example of positivism and

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<sup>79</sup> Admittedly its membership was a long time after the establishment of the organisation

<sup>80</sup> Verdross, 'Austria' (n 73) 66.

<sup>81</sup> As an example of both kinds of Security Council act are the resolutions passed after the Iraqi invasion of Kuwait in 1990. Security Council Resolution 661 and 678 Iraq and Kuwait, (1990) Verdross also argues that some kind of amendment may be possible to amend the Charter. He also suggests that the Security Council may give an individual state and opt-out. This has not been done, nor is it a viable option if uniform action and coherent international cooperation is to be maintained. Verdross, 'Austria' (n 73) 66-67

<sup>82</sup> Verdross, 'Austria' (n 73) 68.

<sup>83</sup> Simma (n 19) 41, Here Simma argues that this is the natural progression of Verdross' natural law arguments. Also see Article 103 UN Charter

does not sit comfortably in Verdross' explication of international law and community. The UN represents the organised community.<sup>84</sup> Utilising Verdross' analysis, WTO membership, for example, is not a requisite of the organised community. It may be possible, however, to argue that as membership grows and its trade rules extend beyond the membership it is on a similar path to becoming part of the organised community.

Simma argues that when they came to write their textbook together, Verdross regarded the Charter as the written constitution of the international community. After the death of Verdross and the publication, with Simma, of the 3<sup>rd</sup> edition of *Universelles Völkerrecht: Theorie und Praxis*, the UN had almost universal membership.<sup>85</sup> Verdross argued that the Charter constituted the constitution of the international community, though not necessarily a world constitution. This claim is no longer as radical as it once might have seemed. An evolution of the understanding of international law has occurred, regardless of disagreement as to the extent of this change.

Carty argues that the most difficult part of Verdross and Simma's constitutionalisation is the description of the transition from pre-civil to civil society reliant upon the Charter and its defects.<sup>86</sup> Norms must legitimate the international community for it to exist. This is not suggesting that Verdross or Simma believed that the Charter provides a perfect constitutional document. Such a claim of idealism would, as Carty points out, reject the notion of politics in the development of international law and belies the evolution of international law, an essential character of Verdross' constitutional perspective.<sup>87</sup> Carty identifies two themes in

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<sup>84</sup> Jellinek asserted that there is no way to compel a state to join the international community but Janzen correctly points out that, 'States join this community and abide by its rules because they have to do so. Life in international society can no longer be non-civic. Complete separateness of states is impossible because human interests can no longer be hedged in by state-frontiers.' Janzen (n 28) 392

<sup>85</sup> Verdross & Simma, *Universelles Völkerrecht* (n 12)

<sup>86</sup> A Carty, 'Convergences and Divergences in European International Law Traditions' (2000) 11 EJIL 713, 716

<sup>87</sup> Ibid 84.

*Universelles Völkerrecht*.<sup>88</sup> The first is a commitment to multilateralism and the Charter as a constitution of the world community. This Carty describes as idealistic, guided by Kantian normative political theory.<sup>89</sup> This summation, however, does not fully account for Verdrossian constitutionalism as it does not relate the nuance in Verdross' approach to *jus cogens* as norms of the constitutional order. What is clear is that the organised community centres upon the Charter and, as such, multilateralism is key to understanding Verdross' approach to constitutionalisation.

#### **D. Verdrossian Constitutionalisation**

The degree of debt owed to Verdross by participants in the constitutionalisation debate that rely on *jus cogens* and community is examined next, but first it is crucial to establish a clear idea of what is encompassed within a Verdrossian constitutionalisation. Verdrossian constitutionalisation has two clear basis, *jus cogens* and international community. A third component, the Charter could also be included, but the degree to which this is essential to Verdrossian constitutionalisation is disputable. Certainly, the advent of the UN had a significant impact upon Verdross which is evident in his approach to constitutionalism and community. The importance of multilateralism is apparent early in his work, indeed, he recognised that 'this constitution is ... not set down in a document as is the case in most modern states and the League of Nations, which is at present the most comprehensive partial legal community.'<sup>90</sup> Verdross argues that the legal order is hierarchical, interlinking with constitutional law, statutory law, executive decrees, administrative ordinances and decisions.<sup>91</sup> The international community establishes a legal order with common ethical

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<sup>88</sup> Ibid 715-716.

<sup>89</sup> Carty identifies both of these as particularly German attitudes to international law and groups Germany and Austria together in their theories and attitudes to international law. The second, which is not discussed here, is the relationship of the people to the state

<sup>90</sup> Verdross quoted in B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Brill, 2009) 29

<sup>91</sup> Kunz (n 17) 398.

standards epitomised in *jus cogens*. As such, *jus cogens* remains at the core of constitutionalisation.

For Verdross, constitutionalisation was possible without a written document and it was some time after the UN's creation that it became part of his constitutional approach. This suggests that Verdross saw international constitutionalism as potentially separate from any institutional framework. This early version, has as Simma argues, much in common with Kelsen.<sup>92</sup> Arguably, taken as a whole, Verdross' approach does not inevitably lead to the Charter, but could alternatively result in a wider approach to international constitutionalisation. This broader constitutional model relies on international norms such as *jus cogens* and *erga omnes* combined with their hierarchical evolution as the basis for a non-codified constitutional structure. This alternative wider approach is arguably more attractive as it is not bound to the post Second World War era or to the deficiencies in the Charter.

Verdross' proposed constitutionalisation is not complete. The omission of entire sectors of international law, such as economic or environmental law, requires Verdross' ideas to be developed further, a point discussed in the next section. Whether Verdrossian constitutionalisation can evolve without the Charter at its core is open to debate. This point becomes clearer in the following section which explores the varied theorists who could be described as Verdrossian in their analysis of constitutionalisation.

### **3. Constitutionalisation in International Law**

International constitutionalisation theories are many and diverse and analysing all of them in this article is impossible. Nonetheless, several theorists engaged in the constitutionalisation

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<sup>92</sup> Simma (n 19) 49.

debate, Mosler, Tomuschat, De Wet, Peters, and Fassbender, are discussed to consider the impact of Verdross' constitutionalisation theory. Some aspects of Verdross' work, such as the Charter, are more clearly observable in the work of Fassbender or Simma yet theories that focus on *jus cogens*, community, or multilateralism are also significant in understanding his influence. The first group Mosler, Tomuschat, De Wet and Peters focus on core norms of constitutionalism while the second group Simma and Fassbender are fixed within the institutional constitutionalisation debate. Verdross' influence in both groups is discussed. Simma and Fassbender are clear in their reliance on Verdross and Peters recognises his impact while others such as De Wet and Tomuschat cite Verdross but are not as direct in their transposition of his ideas.<sup>93</sup>

Within constitutionalisation the place of *jus cogens* varies between being a core essential and only partially representing the debate.<sup>94</sup> At times, *jus cogens* are used as ready-made constitutional norms, putting them in priority over obligations *erga omnes*, human rights or other aspects of international law.<sup>95</sup> Arguably, this conception of international constitutionalisation, linking *jus cogens* and community, comes from a Verdrossian development of *jus cogens*.<sup>96</sup> As with Verdross, *jus cogens* are combined with other aspects

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<sup>93</sup> A Peters, 'Global Constitutionalism in a Nutshell', in K Dicke, S Hobe, K Meyn, A Peters, E Riedel, H Schütze & C Tietje. *Weltinnenrecht: Liber amicorum Jost Delbrück* (2005) 536, Fassbender, 'The United Nations Charter' (n 90) 28, 77, Fassbender (n 2) 541- 544, B Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer, 1998) B Simma, *From Bilateralism to Community Interest* 250 *Rec. Des. Cours* (1994-VI) 258-283, Verdross & Simma, *Universelles Völkerrecht* (n 12) De Wet (n 9) 51, von Bogdandy describes Verdross as one of the earliest proponents of constitutionalism along the common values and goods A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *HJIL* 223, 223

<sup>94</sup> According to Klabbers, *jus cogens* were used in the Yusuf and Kadi cases by the Court of First Instance to suggest a fundamental unity on the basis of 'shared and common values.' Klabbers, Peters & Ulfstein (n 2) 2

<sup>95</sup> See for example, A Orakhelashvili 'Peremptory Norms as an Aspect of Constitutionalisation in the International Legal System' in M Frishman & S Muller (eds), *The Dynamics of Constitutionalism in the Age of Globalisation* (T.M.C Asser Press, 2011). For a narrower approach to *jus cogens* see A L Paulus, 'The International Legal System as a Constitution' in J L Dunoff & J P Trachtman, (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP, 2009) 89

<sup>96</sup> von Bogandy (n 93) 235, P Dupuy, 'Taking International Law Seriously: On the German Approach to International Law' *EUI Working Paper Series Law* 2007/34

of international law such as the Charter, community and multilateralism in developing constitutionalisation theories.

Mosler, an early proponent of constitutionalisation, concentrates on the link between a common public order and international law norms. He differs in focus from Verdross in starting with *erga omnes* obligations. Whereas *jus cogens* are ‘a cogent law limiting freedom of contract,’<sup>97</sup> it is *erga omnes* which underpin international constitutional principles.<sup>98</sup> Further, Mosler did not identify the Charter as central to constitutionalisation, though he did suggest that at some point it may become vital. Mosler observes that the difficulty with treaties such as the Charter (and arguably the WTO Agreement) is that their object is restricted compared with the traditional understanding of the subject remit of a constitution thus marrying international constitutionalisation to the domestic evocations of constitution.<sup>99</sup> As a near-contemporary of Verdross, Mosler’s use of *jus cogens* and *erga omnes* is significant as it places them at the heart of a constitutional order which is established exclusive of an institutional structure and focuses instead on a common public order. Both Mosler and Verdross are concerned with community, but it is in the character of the norms that underpin that community they differ.<sup>100</sup>

In contrast to Verdross, where *jus cogens* pre-date the organised community, for Tomuschat the existence of *jus cogens* norms establishes an international community based upon,

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<sup>97</sup> H Mosler, Rec. des Cours (1974-IV)

<sup>98</sup> Indeed as Fassbender has pointed out such constitutional arguments are values oriented B Fassbender, ‘The Meaning of International Constitutional Law’ in R St. J Macdonald and D M Johnston (eds). Towards World Constitutionalism, Issues in the Legal Ordering of the World Community (Nijhoff, 2005) 845

<sup>99</sup> Fassbender (n 2) 547, Mosler did acknowledge that it was becoming common to refer to statutes of various international organisations as constitutions and those they possessed some of the essential features of a constitution. Mosler (n 97) 32.

<sup>100</sup> Mosler (n 97) 32.

‘axiomatic premises other than State sovereignty.’<sup>101</sup> For Tomuschat, *jus cogens* are declaratory, as no additional corroboration is necessary. As such it is the differentiation between consensual and non-consensual elements of international law that is central to constitutionalisation.<sup>102</sup> Verdross' influence is apparent in the description of a shift from a disorganised to an organised community which is interdependent and reliant on non-consensual norms of international law.<sup>103</sup>

Similar to Mosler, Tomuschat suggests the limited competence of the Charter means that it cannot be considered a constitution of humankind.<sup>104</sup> Tomuschat's constitution is founded on the assumption that there are central rules to the system which states, from their inception, are instituted into and this is the basis upon which international law operates. He describes how meta-rules, the rules that lay out how other rules are to be made, enter into force and are implemented. This, he argues, together with executive and judicial functions, form the constitution of any system of governance.<sup>105</sup> Tomuschat is reliant on Verdross' development of *jus cogens* but his constitutionalism varies from Verdross to the extent that *jus cogens* exist as part of the international legal order, whereas for Verdross *jus cogens* are independent of community, though not necessarily independent of constitutionalism.

De Wet identifies constitutionalisation as the ‘process of (re)organisation and (re)allocation of competencies among the subjects of the international legal order, which shapes the

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<sup>101</sup> C Tomuschat, *Obligations Arising for States without or Against Their Will*, 241 Rec. des Cours 195 (1993-IV) 307, 75-76 While Tomuschat makes various uses of community to serve a variety of purposes, the concept is not as embedded as it is within Simma's constitutionalism. Bogdandy (n 93) 223.

<sup>102</sup> Tomuschat (n 101) 307, this is also clear in the analysis of Wyler and Papaux who consider *jus cogens* to be ‘miserably short of applications... [i]ts contents remain vague and undefined yet no one disputes its quality as positive law.’ E Wyler & A Papaux, ‘The Search for Universal Justice’ in R St. J Macdonald and D M Johnston (eds) *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community* (Brill, 2005) 290.

<sup>103</sup> See Cottier and Hertig supra note 2 at 264 at 270-271.

<sup>104</sup> C Tomuschat, ‘Constitutive Elements of the Present Day International Legal Order’ 241 (1999) *Recueil des Cours* 25 at 86 and 211.

<sup>105</sup> Tomuschat (n 101) 216.



international community, its value system and enforcement.’<sup>106</sup> De Wet recognises constitutionalism as a system of governance that ‘provide[s] a legal framework for the political life of a community.’<sup>107</sup> De Wet argues that the international constitutional order consists of an international community, an international value system and a basic structure for its enforcement.<sup>108</sup> Taking hierarchy, international community, a value orientated order and liberal constitutional traditions as a starting point De Wet establishes a form of incremental constitutionalisation.<sup>109</sup> Importantly, De Wet pins constitutionalisation to a value oriented scheme which relies upon a Verdrossian form of *jus cogens* norms as underlying principles of constitutionalism.

According to De Wet, it is in the post-Charter era that *jus cogens* became accepted, which while accurate to the extent of its adoption into the Vienna Convention on the Law of Treaties runs counter to Verdross’ description of the development of these norms. Yet, for both Verdross and De Wet *jus cogens* norms are central to understanding the development beyond the core norms of a value system binding on the international legal order.<sup>110</sup> These are followed by customary international law which is characterised by emerging *erga omnes* norms.<sup>111</sup> She states that ‘[i]t is of a layered nature as it includes the (sometimes overlapping) layers of universal *ius cogens* norms and *erga omnes* obligations.’<sup>112</sup>

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<sup>106</sup> E De Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 LJIL 611 at 611-612, E De Wet, ‘The International Constitutional Order’ (Amsterdam University Press, Amsterdam, 2005) 5-7, S Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19 EJIL 749

<sup>107</sup> De Wet, ‘The International Constitutional Order’ (n 106) 5.

<sup>108</sup> De Wet (n 9) 51.

<sup>109</sup> De Wet, ‘The International Constitutional Order’ (n 106) 5- 6.

<sup>110</sup> E De Wet, ‘The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation’ (2009) 5 European Constitutional Law Review 284, 294-295

<sup>111</sup> De Wet (n 9) 62, though this third category is omitted from the list in another article on the same theme, See De Wet, ‘Emergence’ (n 106) 617.

<sup>112</sup> De Wet (n 9) 57.

While, De Wet bases her constitutionalism on the assumption of an ever ‘increasingly integrated international legal order,’<sup>113</sup> evidently Verdross’ development of *jus cogens* is influential. Significantly, De Wet considers a constitutional order to be beyond the remit of an institutional structure which, as with Verdross, is, in any case, reliant on core norms. De Wet regards the Charter as a connecting factor of importance which remains central for structural enforcement of the value system of a constitutional order.<sup>114</sup> The Charter embeds a hierarchy established in *jus cogens* and *erga omnes* and in turn the fundamental norms core to international constitutionalisation.<sup>115</sup>

For De Wet the Charter ultimately fails as a constitution since the international community extends beyond states while the UN is actively state-centric.<sup>116</sup> Such criticism could be extended to the regional and functional organisations which De Wet also considers part of the international community.<sup>117</sup> De Wet points to the adoption of the Charter as a ‘constitutional moment’ in international law increasing the speed of change.<sup>118</sup> Yet, De Wet’s international community remains tied to the function of the international legal order *in situ*. De Wet moves beyond Verdross and in doing so highlights the difficulties with his reliance on the Charter. As the international community expands beyond states, the Charter’s limitations become more evident.

Despite these differences both the community and value based ethic of De Wet’s approach has a Verdrossian perspective to its constitutionalisation. While the pre-Charter development of *jus cogens* and community is largely omitted from De Wet’s constitutionalisation a clear lineage may be drawn in her understanding of the Charter’s role. As with Verdross, the

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<sup>113</sup>De Wet (n 9) 53, E De Wet, ‘Chapter VI Powers of the United Nations’ Security Council’ (Hart, 2004) 92 - 115 alongside the emergence of regional value systems De Wet, ‘Emergence’ (n 106) 91.

<sup>114</sup> See De Wet (n 9) 64-67 & 56.

<sup>115</sup> Ibid 57.

<sup>116</sup>See De Wet (n 9) 54, De Wet, ‘Emergence’ (n 106) 287, Walter argues against the Charter as a constitution for the global community, Walter (n 9) 195-196, See De Wet (n 9) 54.

<sup>117</sup> De Wet, ‘The International Constitutional Order’ (n 106) 7-9, De Wet, ‘European Courts’ (n 110) 287.

<sup>118</sup> De Wet (n 9).

Charter is core to De Wet's constitutionalisation, but also, in kind with Verdross, the Charter is not the bastion of the constitutional values underpinning the process of constitutionalisation.

Peters acknowledges Verdross' work as seminal, particularly with regard to the international community however his work is also evident in other aspects of her work.<sup>119</sup> Peters' constitutionalism is firmly rooted within the present legal order, though with a reformist eye, and argues for a constitutional re-interpretation of international law.<sup>120</sup> This constitutional re-interpretation does not require a reinvention of international law or constitutionalism but rather a reimagining of the order as it is currently constructed.<sup>121</sup> What sets Peters' constitutionalisation theory apart is the claim that a process which de-constitutionalises states is underway. The move away from consent-based international law allied with the fundamental norms present in an international constitutional order substitute for the loss of authority within states and the expansion of the international legal order.<sup>122</sup> This is a form of a compensatory constitutionalism.<sup>123</sup> In Peters' model, representation of interests can move between orders, from the state to the international level.<sup>124</sup>

Significantly, Peters rejects the formal constitution and regards the core norms of the international legal order as the basis for constitutional function.<sup>125</sup> Peters argues that rather than formalist rules, constitutional norms are more significant in understanding law's substance.<sup>126</sup> She relies upon a community-based constitutional order not founded upon

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<sup>119</sup> Peters 'Nutshell' (n 93) 536.

<sup>120</sup> Peters (n 8) 40 & Peters (n 7) 397.

<sup>121</sup> Peters (n 8) 40.

<sup>122</sup> A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579 and her contribution to Klabbers, Peters & Ulfstein (n 2)

<sup>123</sup> *ibid* 579 This is related to Tomuschat's arguments that see international constitutional law as an indelibly linked to domestic public law, see Tomuschat 'International Law' (n 104) 10

<sup>124</sup> See also Peters discussion of democracy in Klabbers, Peters & Ulfstein (n 2) 263- 341 & Anne Peters, 'Dual Democracy' EJIL Talk, [www.ejiltalk.org/dual-democracy/](http://www.ejiltalk.org/dual-democracy/)

<sup>125</sup> Peters 'Compensatory' (n 122) 580

<sup>126</sup> A Peters, 'The Constitutionalization of International Law: Conclusions' in EJIL Talk, [www.ejiltalk.org/the-constitutionalization-of-international-law-conclusions/](http://www.ejiltalk.org/the-constitutionalization-of-international-law-conclusions/)

solidarity but rather upon identifiable elements of international law which she describes as global goods.<sup>127</sup> This is not linked to an identification of the content of such a community though Peters does recognise a global constitutional community consisting of individuals, states, international organisations, NGOs, and business actors while acknowledging the current strong position of the state.<sup>128</sup> While this places states at the centre of Peters' arguments, she nonetheless acknowledges the difficulties with norms such as democratic legitimacy in the current international legal order.<sup>129</sup> Importantly, particularly from a Verdrossian constitutional perspective, as human rights are the principal norms, state sovereignty coupled with a loosening of state consent, is foundational only from what she describes as an 'ontological' perspective.<sup>130</sup> What is of most relevance in Peters' work is her concentration on constitutional norms, identifiable within the non-consensual elements of international law, as the basis for analysis. The Charter does not serve the organised community in the same manner for Peters as for Verdross, nor are *jus cogens* as central for Peters. Nonetheless, it is in the core norms of international law which underpin the community where their kindred approach is evident.

Both Peters and De Wet in centring constitutionalisation upon core norms and not particular institutional structures are very close to what Verdross was describing when discussing the international constitutional order and thus are closer than what may first appear to Verdross. This first branch of the constitutionalisation debate has considerably claims to Verdross than other, more initially obviously connected, approaches.

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<sup>127</sup> Peters 'Compensatory' (n 122) 589.

<sup>128</sup> A Peters, 'Membership in the Global Constitutional Community' in EJIL Talk, [www.ejiltalk.org/membership-in-the-global-constitutional-community/](http://www.ejiltalk.org/membership-in-the-global-constitutional-community/)

<sup>129</sup> Klabbbers, Peters & Ulfstein (n 2) 271 - 333 & Peters, 'Dual Democracy' (n 124).

<sup>130</sup> Peters (n 7) 398.

As a prime exponent of the second form of Verdrossian constitutionalisation, Fassbender is one of most ardent advocates of the Charter as a constitution for the global legal order.<sup>131</sup> Fassbender considers the establishment of the Charter as coming ‘out of the fog’ of indistinct constitutional rhetoric.<sup>132</sup> Significantly, he credits Verdross as one of the earliest proponents of constitutionalisation and firmly places Verdross within the Charter-based approach.<sup>133</sup>

Fassbender’s approach is significant as it assumes the UN is on a different plain to, for example, the WTO. Proof of its character, suggested by Fassbender, is the Charter’s lack of definite guidance on non-original members of the UN signing or ratifying the Charter, which he suggests deviates from traditional treaty-making and elevates the Charter.<sup>134</sup> Fassbender recognises the state-based nature of the Charter as significant particularly with regard to the community and constitutionalism. According to Fassbender within the international community constituent power lies with the ‘Peoples of the United Nations’ who act through their governments.<sup>135</sup> This maintains a statist approach to both constitutionalisation and community.

A second aspect of Fassbender’s approach is the establishment, by the Charter, of a hierarchy of norms. The core benefit of placing the UN, as Verdross did in his later work, at the centre of international constitutionalisation, is in establishing the relationship between general

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<sup>131</sup> Fassbender (n 2), Fassbender, ‘Security Council Reform’ (n 93) B Fassbender, ‘Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order’ in J L Dunoff & J P Trachtman, (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP, 2009), Fassbender, ‘The Meaning’ (n 98), B Fassbender, ‘We the Peoples of the United Nations’ Constituent Power and Constitutional Form in International Law’ in M Loughlin & N Walker (eds.), *The Paradox of Constitutionalism* (OUP, 2008), also M. J. Herdegen, ‘The Constitutionalization of the UN Security System’ (1994) 27 *Vanderbilt Journal of Transnational Law* 135

<sup>132</sup> Fassbender, ‘We the Peoples’ (n 131) 281- 285.

<sup>133</sup> Fassbender, ‘The United Nations Charter’ (n 90) 28, 77, Fassbender (n 2) 541-544, Fassbender, ‘Security Council Reform’ (n 93) 28-36.

<sup>134</sup> Fassbender, ‘The United Nations Charter’ (n 90) 93, The WTO allows for accessions based on negotiations between existing members and new members, while the UN’s membership is open to peace loving states that accept the obligations of the Charter. The exact difference between ‘signing and ratifying’ the Charter or the Agreement Establishing the WTO is not clearly set forth by Fassbender. Agreement Establishing the World Trade Organization (1994) 93 ILM 1125, Article XI & XII

<sup>135</sup> Fassbender, ‘The United Nations Charter’ (n 90) 94 and Fassbender, ‘We the Peoples’ (n 131) 26.

international and UN law.<sup>136</sup> UN governance is central to Fassbender's approach to how law is made and adjudicated. Accordingly, the Charter comprises rules on governance in the international community such as how international law is formed and applied as well as international adjudication.<sup>137</sup>

Fassbender regards the General Assembly as the closest to a representative organ within the international order. Fassbender argues that state sovereignty is clarified by the Charter and displaces questions regarding the nature of representation. Here, there is a disconnect with Verdross' international community and his view of sovereignty. Designating the General Assembly as representative of the world is dependent upon state officials in a state-centric model. The General Assembly is representative of state views certainly, but not necessarily representative of the international community. Second, Fassbender's state centric form of constitutionalism places a particularly flawed governance system at the core of both the Charter and international constitutionalism. This distinction between seeing the Charter as constitutional and drawing analogies from the perspective of interpretation or reform of the Charter is significant as it is more closely akin to Verdross' perception of the role of the Charter in an organised community.

Verdross' position on the Charter as epitomising constitutionalisation appears equivocal when its significance is weighed against the importance of *jus cogens*. This combination of *jus cogens* norms and the Charter is close to Verdrossian constitutionalisation yet the reliance on the Charter first, with norms dependent upon its governance structure places Fassbender apart from Verdross and highlights the placement of a flawed document such as the Charter at the centre of a this form of constitutional order.

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<sup>136</sup> Fassbender, 'We the Peoples' (n 131) 281.

<sup>137</sup> Ibid.

Simma sees constitutionalism as combining two elements; first it has precedence over other law, and second it sets out a basic governance structure.<sup>138</sup> Simma applies this test to the Charter and finds it constitutional.<sup>139</sup> Yet, this test relies on the Charter to establish its content. This explanation could not be applied to either another treaty document, such as the WTO Agreement, or to a broader conception of constitutionalism that could be identified across several doctrines or documents. This characterisation of constitutionalism centres on the assumption that it will be the Charter that will fulfil the criterion.<sup>140</sup> The Charter is combined with *jus cogens* and *erga omnes* to establish a version of constitutionalisation centred on the state and Charter as the fulcrum around which international law operates.<sup>141</sup> This is major departure from the Verdrossian perspective which is more incremental in its division of international law into the pre- and post- Charter eras and is not centred on the Charter as the source of constitutionalism. While Verdross placed the Charter within constitutionalisation this was in combination with *jus cogens* which are the foundation of the international legal order. In displacing *jus cogens* and placing such emphasis on the Charter arguably Simma is moving beyond the core of Verdross' theory of constitutionalisation.

Verdross' perspective on the role of *jus cogens* in constitutionalism is evident in most of the theories just discussed; however how well this has been translated into a fully realised Verdrossian form of constitutionalisation is disputable. In their reliance on norms Mosler, Tomuschat and De Wet certainly are Verdrossian in their constitutionalism however, they diverge in how they have developed it beyond Verdross' reliance on norms. De Wet's focus on *erga omnes* may be contrasted with Simma's and Tomuschat's concentration on *jus cogens*. Peters, in setting aside all institutional structures and focusing upon a community and

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<sup>138</sup> Simma, 'From Bilateralism' (n 93) 258.

<sup>139</sup> Ibid 261.

<sup>140</sup> Ibid.

<sup>141</sup> For a discussion of the text of the Charter and its drafting see B Simma, *The Charter of the United Nations: A Commentary* (OUP 2002) or with regard to judicial review by the ICJ, B Sloan, 'The United Nations Charter as a Constitution' (1989) 1 *Pace International Law Review* 61, 72-76.

norms is closer to Verdross than may at first appear evident, yet Mosler, Tomuschat, De Wet and Peters do not place much significance on the Charter. While the second group, Fassbender and Simma, do regard the Charter as core to constitutionalisation, in starting with the Charter they arguably lose sight of Verdross' focus on *jus cogens*.

A purist Verdrossian approach to constitutionalisation is established by a community which creates a positive legal order with core common standards as epitomised by *jus cogens*. The traces of *jus cogens*, community and international governance evident in each of the theories establishes a Verdrossian vein, though not emulation in the contemporary debate. Arguably, it is the first group which centres upon core norms that has the most in common with Verdross. The second Charter-based group, in remaining so close to the Charter are, arguably, continue the weakest aspect of Verdross' theory.

#### 4. Conclusion

Fassbender argues that, in 1926, Verdross was the first to make use of international constitutionalism.<sup>142</sup> Indeed, while constitutional language may be traced to Holtzendorff, in 1877, or Bridgeman in 1911,<sup>143</sup> Verdross was the first to use it in a systematic fashion. Simma argues, that by constitution, Verdross meant 'the norms that regulate the basic order of a community, that is, its structure, organisation, and allocation of competences.'<sup>144</sup> In this, Verdross relies on core principles such as *jus cogens*, the overall unity of the system of international law and the hierarchy or 'pyramid' of sources of law. His wider contribution to the development of *jus cogens*, the Charter and a natural law ethic is also evident and assures that even where Verdrossian constitutionalisation is disputed or considered ill-advised the impact of his work is still felt.

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<sup>142</sup>Fassbender, 'The United Nations Charter' (n 90) 28, indeed Simma makes a similar claim, Simma, 'Bilateralism' (n 93) 259.

<sup>143</sup> Opsahl (n 1)761.

<sup>144</sup> Simma, 'Bilateralism' (n 93) 123.



In addressing Verdross' impact upon international constitutionalisation there are certain key motifs in his work. The most obvious of these is his reliance on *jus cogens*, community and the Charter. In arguing for a more nuanced international legal order beyond the remit of the pure consent of states, in acknowledging that the international law cannot simply be explained away by sovereignty and is, in fact, a complex legal order, Verdross has been highly influential.

Verdross' contribution to international law in the 20<sup>th</sup> Century and his considerable influence on the expansion of the international constitutionalisation debate is clearly acknowledged by those who claim direct ancestry such as Simma and Fassbender, but is also apparent, though perhaps in a less direct fashion, in the work of other figures such as De Wet, Peters, Tomuschat or Mosler. In his systematic approach to *jus cogens*, community and the natural law, Verdross established a constitutional perspective on the international legal order which has resonated in many of the theories that have followed. He enabled other international legal theorists to consider constitutionalisation without as much scepticism as may have otherwise been the case. While Simma and Fassbender are the most obvious adherents to the Verdrossian view of international constitutionalisation others, particularly De Wet and Peters, may be considered to be following in the path and arguably are closer in spirit, to a norm-based constitutionalisation as advocated by Verdross.

As one of the first proponents of a coherent constitutional analysis of international law Verdross' offers a rationale understanding of the place of constitutionalisation within the international legal order. While Simma located this constitutionalisation within the Charter, arguably it is Verdross' reliance on identifiable core norms of a higher order, which is most significant for the contemporary debate. The evolution and role of *jus cogens* and the Charter

as well as other aspects of the debate are intrinsically linked to Verdross and require a return to him to understand their development. Indeed, in re-examining some of Verdross' claims it may lead to rejection of the constitutionalisation cause but it may also engender more coherence in the claims made upon Verdross and constitutionalisation more generally.