This chapter reviews the contribution of legal theory to an understanding of international law and its role in shaping international relations. It first considers some of the challenges facing such an enterprise. While the self-description of law as the application of relevant norms to a case is susceptible to traditional “jurisprudential” modes of reflection, the task of legal theory is wider as it brings into focus the background conditions that are not necessarily part of law but that are crucial for its acceptance and “legitimacy.” The theorist attempting to distinguish legal from non-legal norms needs to understand various extra-legal and historically contingent factors and the impact of the many wide-ranging socioeconomic processes encapsulated in the term “globalization.” The chapter then proceeds to examine the concept of law both in terms of social theory and in touching on some of the fundamental discussions within the discipline. The third section takes up the issue of the international “constitution” and the “fragmentation” of the international legal order. Lastly, the fourth section examines the issues of “style” and narratives of progress.

Introduction

Assessing the contribution of legal theory to an understanding of international law and its role of shaping international relations faces several challenges. One is, of course, that the concept of “law” will have to be defined in “system-neutral” terms as otherwise the identification of law with the “command of the sovereign” (Austin 1954) disposes of the problem by a simple definition (since there is no sovereign in international relations, there is no law, q.e.d.). While disposing of a problem by “precise” definitions might score debating points, it is hardly illuminating. It impoverishes analysis by identifying a specific historical configuration, i.e. that of the state, with law in general – even though we had law long before the state – and by surreptitiously collapsing the issue of law and that of its “effectiveness.”

Similarly dangerous is to begin with a preconceived notion of “theory” imposing on the subject matter an inappropriate model, derived either from the highly stylized, problematic model of logical positivism (Popper 1968), or a “rigorous” but limited conception of “rationality” (Searle 2003). When we try to avoid these pitfalls and turn to one of “law’s” most influential self-descriptions, conceiving of it as “ars aequi et boni” (of the equitable and the good), this definition places it clearly within praxis rather than “theory.” Unless however, we
believe that the good and equitable can be grasped intuitively, the terms seem to be empty place-holders rather than clear indicators. Besides, the addition of the term “ars” (art) seems not accidental. Law is seen as an activity rather than an “object” or agglomeration of items that can be treated like natural kinds. Rather, the “equitable” and the “good” are the result of some “artful” process of determination. Thus, even at the time when ontology and values were not yet strictly separated – as after the onslaught of Humean skepticism – the collision of duties and the indeterminacy of the principles all show that the decisive factors for arriving at a decision and of having it accepted by the “audience” might lie beyond the “law,” i.e. its historical and sociological background conditions.

These initial remarks have several corollaries. First, while the self-description of law as the application of relevant norms to a case is susceptible to traditional “jurisprudential” modes of reflection, the task of legal theory is wider as it brings into focus the background conditions that are not necessarily part of law but that are crucial for its acceptance and legitimacy.

Second, while this distinction serves as a “first cut” for separating traditional jurisprudence from a wider “theory” of law, it should also be clear that the distinction cannot be categorical, living up to the ideal of taxonomic exclusiveness. As soon as “jurisprudence” has to reflect on the “sources” of law, it has to transcend the “art aspect” of norm application. Similarly, any “theory” of law focusing narrowly on legal norms and their creation – in order to distinguish legal from other norms (morals, simple courtesy, or “comity”) – has to address “extra legal” matters, such as the Grundnorm (Kelsen 1966).

Third, given that these important elements of law are historically contingent and not a set of simple “functional” needs, any theory of law has to move both on the analytical and on the historical level. Only thus the changing structure of law and of the institutions it engenders become understandable. This does not mean that a theory of law exhausts itself in telling a story of how things came to pass, but it suggests that some historical reflection is crucial for the understanding of law. Law is always more than simply an instrument of regulating present interferences and the inevitable conflicts among self-interested actors; it is also always part of a political project that connects the present via the past to a future “utopia.” In short, it is one of the primary means of making sense in individual and collective life. The individual who “subjects” himself to the law in the social contract, and thus attains “property” and “freedom” (Rousseau 1967), is as significant as the contract by which a people becomes “one” out of different “tribes” as the biblical covenant shows, or where a “recessed” people becomes in the “theory” of popular sovereignty the main source of law. In the international sphere issues of self-determination as well as proposals to limit “sovereignty” when a government fails to “protect” the people are part and parcel of this problem (International Commission on Intervention and State Sovereignty 2001).

A fourth area for critical reflection is therefore the analogies and narratives within which doctrinal legal arguments are embedded. This is particularly important in international law where the link between law and the state project has come under severe pressure from “globalization.” The latter seems to dissolve the most basic boundaries between the internal and the external, and between the public and the private. The issue, then, is less how these changes from the “billiard ball” model of the international system via regimes and institutions led to the present transnational networks, but rather how these changes are assessed by embedding them in a narrative of “progress” whereby international law’s “primitiveness” is overcome.

From these remarks follow the steps in my argument. In the next section, I shall examine the concept of law both in terms of social theory and in touching on some of the fundamental discussions within the discipline.
The third section takes up the issue of the international “constitution” and the “fragmentation” of the international legal order, while the fourth section examines the issues of “style” and narratives of progress.

**The concept of law and its “validity”**

Since the human world is not “natural,” as is the case with “gregarious” animals such as bees, but one of artifice, the importance of language and of “common understandings” for its creation and reproduction has been stressed (Aristotle 1972; Searle 1995). These common understandings might be ontologically compact not distinguishing between the “is” and the “ought” or between further differentiations such as morals, customs, or religion. It seems that for law to emerge as a distinct symbolic order two interconnected innovations have to occur. One is that the reproductive process of social order has to be revolutionized. In archaic understanding the taboo and the “damage” caused by a delict, required exact restitution (lex talionis). Later the notion of an abstract normative order arises that transcends not only the concrete violation but allows for a resolution of conflicts in terms of “new” solutions. Instead of trying to rend the social fabric whole through magic or ritual activity (which might include “casting out” the violator), new notions of retribution, accountability, intention, or negligence develop, even if the common normative order is still thoroughly conventional, i.e. based on unreflected custom (mos maiorum).

These developments are helped by a second innovation, i.e. the development of a specialized cadre which handles “violations” and settles conflicts in terms of the common normative understandings. “Law” becomes an order where a cadre of rule-handlers interprets, e.g. the lex talionis so that not the identical but “equivalent” restitution has to be provided. Law receives its aura from the notion that it is not “made” but that both arbiters and transgressors or contesting parties are “bound” by it. Symmetry, the ordering principle that covered both nature and society in acephalic, segmented societies is increasingly challenged by notions of “hierarchy,” i.e. by claiming to rule on the basis of “law” emanating from a transcendent source. Not accidentally, “law” emerges together with “higher” religions which legitimate hierarchies and substitute for the egalitarian principles of segmented societies. The pharaonic empire and the genesis of a “people” accepting the “law” of god are examples, as is the Athenian synoikismos (the living together of different tribes) where through the creation of a new law (dike) “the people” appear as a potential source of law substituting the old nomos (Meier 1990).

The close connection of law and politics, on the one hand, and of law and “universal” or “natural” principles, on the other, raises several important issues. If law is to stabilize the expectations of its “subjects” via norms, this ordering can only occur if it is generally accepted as “valid.” But this means that the actors have to trust in a system of expectations rather than rely on their own experiences with others. To that extent “law” requires that we do not “learn,” as Luhmann (1983) suggested, and do not adjust our strategies accordingly. Instead, we hold on to our decision premises, based on counterfactually valid norms, even in the face of disappointments. Thus, attempts to explain the emergence of norms in terms of “long-term utility” calculations of non-myopic rational actors in iterative bilateral bargains is often used for “explaining” the emergence of norms in international society. However, this approach is highly problematic (Axelrod 1981) due to its restrictive assumptions (no ambiguous moves, same actors, clear payoffs in iterative, non-decisive rounds) and the acceptance of a “niceness-rule” in the initial round.

The validity of the norms has little to do with the actual agreement among the actors but rather with the establishment of a largely fictive presumption among them so that the
lawbreaker should be isolated in order to separate his actions from the ongoing interactions. Instead of consensus built on coalitions and the packaging of “interests,” the “case” sub judice is “depoliticized” by transferring it to another “forum” where the violator has to face alone the consequences of his actions. Law “works” because we have expectations about expectations (i.e. distinguish “legitimate” from “other” ones) and have, in cases of conflict, expectations about what the “rule-handlers” can “legitimately” do in deciding which expectation about expectations is the “law.” In short, law cannot be identified with the “stability” of expectations since a Hobbesian world where one is fighting everybody else is also characterized by “stability.” This equilibrium is so stable that reaching the Pareto superior solution in a classical Prisoner’s Dilemma is impossible, contrary to Hobbes’s argument of solving the dilemma “by contract” (Hobbes 1968).

Finally, given that the emergence of law opens up the space for creative adjustment, it has to be exempted from the suspicion of manipulability in both application and legislation. The semantics developed in the European context range from the idea of a “mixed constitution” (preventing a capricious change of law according to shifting majorities) to the invocation of a “higher law,” be it “nature” or the “ancient” constitution (Pocock 1987) and to the lawmaker’s subjection to “god’s” law (or customary rules that could not be changed). Even Bodin (1962), who emphasizes the legislative power of a sovereign “absolved” from all particular laws, limits the legislative capacity of the sovereign. He cannot change customary law (such as the lex salica regulating succession) or tax the subjects without their consent. The sovereign’s “rule” remains firmly anchored in both tradition and natural law. Whenever these limits are undermined by “internalizing” law’s legitimacy and viewing it as the “will” of the sovereign, countertendencies can be noticed. By advocating some form of judicial review, or an inquiry into the inner morality of law (Fuller 1964), issues of legitimacy can be reopened instead of being simply reduced to “legality” (Habermas 1993). Sometimes the result seems contorted such as when the International Commission on Kosovo concluded that NATO’s response was “illegal” but “legitimate” (Independent International Commission on Kosovo 2000).

These considerations are relevant for deciding whether international law is “proper law.” As suggested, what counts as law cannot simply be read off from the type of norms (such as sanction), or from the origin or pedigree of a rule (Hart 1994). Such criteria are too narrow, leaving out “constitutive rules” that only indirectly sanction acts as “invalid,” if not done in accordance with the stipulated provisions. Rather, what makes rules “legal” is their principled use in application (Kratochwil 1989). It is here that the weakness of international law appears. Since there is no general jurisdiction of the International Court of Justice or any court – except when some freestanding regimes include compulsory jurisdictional clauses – and the decisions of the world court have strictly speaking not precedential value, what the law is remains often unclear. Legal arguments frequently remain entirely on the level of ex parte arguments without an authoritative resolution of the issues. Thus, the “closure” of the legal systems occurs not through adjudication or legislation but largely through doctrinal elaboration in which notions of “coherence” (Franck 1990), of justice, or of some “transcendental” conditions (both in a naturalist or in a Kantian sense) are invoked to fill the gaps. Such moves, however, transfer the difficulties only to another level without ending the arguments. Here formal distinctions such as lex lata and lex ferenda, lex specialis, lex posterior, or more substantive considerations, such as the nature and hierarchy of the “sources,” jura cogens, obligations erga omnes (Paulus 2005; Tomuschat and Thouvenin 2006), “community expectations,” and “policies” provide the appropriate topoi. In short, the set of issues is far more extensive than the truncated debate between
“realists” and “idealists” suggest. Neither position is, however, consistently sustainable. Politics always has an intrinsic part a “vision” which contains normative elements, as the “original” realist Carr (1964a) noticed, and neither norms nor “interest” can determine choices in a causally efficient way. Are we then condemned to move endlessly between apology and utopia (Koskenniemi 1989), or do we have to submit to a more or less blind decisionism à la Hobbes or Carl Schmitt (1996)?

This argument points to a genuine dilemma that runs from the free will/determinism to the theoretical/practical reason controversy and pits conception of scientific explanation against methods of “verstehen” (Hollis and Smith 1990). Unpacking some of these controversies, therefore, seems necessary.

While dilemmas cannot be “solved,” they can be circumvented when we recognize how they arise and on which conceptual presuppositions they rest. Thus, the failure to see how law molds decisions might be due more to some problematic theory of action that (mistakenly) holds that only efficient cause explanations shall count as an explanation rather than to the “failure” of law per se (inde-terminacy of rules and principles, and contestability of the deontic status of norms or principles when applied to a “case”). But as the discussions about “constitutive explanations” have shown (Wendt 1999: ch. 2) not all explanations are “causally efficient” even in the natural sciences. Besides, rule-following is not simply a function of “sanctions” but is frequently informed by institutions (making X count for a Y e.g. by designation something as “money”) that enable actors to pursue their goals. Furthermore, given that in the social world often “multiple equilibria” exist, “interests” are insufficient as explanations since even a rational choice approach needs interest plus coordination norms for explaining a particular outcome.

Seen from this perspective the narrowness of the vision just elucidated becomes clear. It is a particularly problematic version of the “Humean fork” problem. Since I cannot get by logical inference from an “is” to an “ought,” am I like Burnin’s ass—condemned to oscillate between apology and utopia? As we have seen, this dilemma is the result of a conception of reason that is badly adapted to practical questions. After all, we do make choices and the Humean “desire plus belief model,” where only “passion” can motivate while reason remains eternally its “slave” (Hume 1948), is on all fours with our practical experience as well as with the concept of “expected utility.” Here the introduction of “sentiments,” of “imagination” which counteracts the immediacy of passions by conjuring up “future delights,” and of “secondary preferences” are to provide the necessary (but problematic) bridging principles.

All of this is hardly news and neither is the fact that law has always to move between “facticity” and “validity” (Habermas 1993). Ultimately, no rule can “decide” a case, and a “fact” by itself cannot determine its normative force. Nonetheless, decisions must be buttressed by arguments and these arguments are guided and constrained by a “style” or rhetoric (Kennedy 1994b; Koskenniemi 2000). In a way, we thereby return to a tradition where rhetoric is simply not a term for elocutionary flourish or “cheap talk” but for finding non-idiosyncratic reasons for deciding issues of praxis (Aristotle 1980).

Constitutive moments and their projects

According to traditional wisdom “Westphalia” and “sovereignty” mark the transition from medieval universalism to a territorial form of rule with internal hierarchy and “horizontal” equality among all members, a conception against which all change can be assessed (Black and Falk 1969–1972). Modern scholarship traced this near mythical rendition of the historical events to a particularly successful act of
persuasion by Leo Gross (Gross 1948). It also has significantly corrected the historical and analytical claims of the Westphalia syndrome (Osiander 1994, 2001). To that extent Westphalia represents a “mid-point” in a longer transformative process rather than a radical new beginning.

That these criticisms do not concern minor corrections of historical facts but go to the very heart of international law’s problematique can be seen from the examination of sovereignty, usually considered the cornerstone of the Westphalian order. Its significant “innovation” – i.e. the right to “make alliances” (ius amentum) – was, however, part of the old system of self-help exercised by the imperial “estates.” It is, therefore, not as Krasner (1993a) implied a new right of emerging “states.” To read back the meanings of the late eighteenth and early nineteenth century is not only problematic, it also suggests that “sovereignty” is like a thing that once “invented” remains rather stable as an a-historical “systemic structure.” Similarly, as Grewe (2000) has shown, the roots of international law as “law” lie in the feudal practices (infeodation of the pope as exemplified in the “division” of the New World at Tordesillas 1494) and in the encounters of the Europeans with the New World and its inhabitants. The latter sparked the debate of de Vitoria and Sepulveda, and the subsequent elaborations of Suarez. Both practices set the stage for discussing the “rights” of infidels and for marking off Europe as a different zone (with different rules) from the “colonial” territories.

It might therefore be useful to deal with issues of the constitutional order, its fragmentation and new articulation, by visiting various sites where these issues are debated. This glimpse at developments stretching across the disciplines of international relations, political theory, international law, and sociology has to be rather sketchy. Furthermore, there exist many overlaps, and one or several authors could fit in more than one category. Thus, no neat taxonomy is possible, but people do emphasize different elements of the constitutional problem, use different vocabularies, and exhibit different sensibilities.

Beginning with the IR debates, there are two schools which develop out of opposition to the dominant theme of an international “anarchy”: one realist and one more socio-logically/historically oriented. The “realist” version focuses on the role of hegemonic powers and their role in providing at least a rudimentary order. International systems are therefore (weakly) hierarchical in which uneven growth of power and the ability of the hegemon to make some rules and enforce them provide the dynamics. Derived from a particular interpretation of Thucydides, Gilpin (1981) developed an elaborate “theory” of hegemonic stability.

In this sense, Ikenberry (2001) who deals more recently with “constitutional moments” at the end of great wars is picking up on this challenge. He investigates the particular “constitutional” bargains underlying the orders after 1815, 1919, and 1945. The common theme is that leading power(s) lock in other states in a favorable set of relations that mitigate the latter’s fears of abandonment and of domination by imposing some self-restraint on the preponderant power(s) through institutionalizing certain “rules of the game.” Some work (Keohane 1984) addressed the puzzle why the post-war order remained relatively stable even when the lead position of the U.S. “weakened.” In particular in the international political economy, states, despite increasing divergences in goals, did not escalate the conflicts or take unilateral action so familiar from the beggar thy neighbor policies of the interwar period. The answer was that a privileged group of industrialized nations could provide the collective goods and that robust “regimes” (Krasner 1983) had developed in the meantime.

The focus on regimes could have provided a new integrating “puzzle” for multidisciplinary work across law, sociology, and political science. But the mostly positivist orientation of political “science” prevented the lively
debate to cash out in a new research program. The old Humean fork separating strictly the “is” and the “ought” and claiming that only “causal” explanations counted prevented an appreciation of how norms and rules “mold” (but do not determine) decisions and how institutions mediate between the “is” and the “ought.” Thus, with the exception of “compliance” in which bridges between the “process” school of law and international relations analysis were built in arms control, in some areas of the political economy, and in environmental issues, the main sites concerning constitutional (system) questions remained within their separate disciplines.

The English school (Dunne 1998; Linklater and Suganami 2006), our second site, mounted perhaps the most spirited attack on the anarchy problematique. The existence of, for example, a balance of power required both a historical/comparative and an analytical examination. Thus, as Hume had remarked before, the existence of a balance of power was far from universal, and systems differed widely according to the institutional structures they had developed historically. Neither messengers nor spies functioned like diplomats, even though all of them served certain information functions (Wight 1977). It was perhaps a pity that the analytic discussion was not as lively as the one of the systems of states, which ironically reached its crescendo at a time when the state project was already under siege. Growing interdependencies had made it increasingly difficult to “cage” economic forces through the fetters of a “national economy” and to shield oneself from the forces which impacted at home although they were created elsewhere. Already in the interwar period states tried through the extension of jurisdictional claims to “protect” themselves (vide Alios), but these infringements had to be “balanced” by comity. Now, new designs were required. The dense network of “multilateral” international organizations (Ruggie and Kratochwil 1986) made assertions of exclusive “domestic jurisdiction” difficult to maintain.

A third site for vetting constitutional issues is the intersection between political theory and international relations. Here purposes of the state, on the one hand, and issues of distributive justice in the international arena, on the other, provided the foci. For those emphasizing the moral purposes of states (Reus-Smit 1999), notions of an international community had also to be different from those who saw the state as an Oakshottian “practical association” (Nardin 1983) designed simply to enable individuals to pursue their goals with minimal agreement on more substantive notions. Rather than a fundamental conception of the good life, the primacy of the “right” over the “good” and a basic notion of liberty as negative freedom is the key. The similarity to Rawls and the liberal tradition is obvious, although Rawls (1971) did enlarge the set of issues by including the “difference” principle. This in turn spawned a debate whether the principles of justice could be applied to international arrangements. A lively debate, largely unnoticed by international lawyers, ensued about different redistributive schemes and the limits of state autonomy for which the journals Philosophy and Public Affairs and Ethics and International Affairs became the main outlets. Among lawyers, who eschewed such de lege ferenda proposals, the debate focused instead more on the limits to state action and the emergence of a ius cogens (Verdross and Simma 1984) and the obligations erga omnes (Tomuschat and Thouvenin 2006).

This leads us to a fourth site, i.e. the “move to institutions.” Starting with the recognized need of further development of international law, the focus on codification and the “peaceful settlement of issues” had been characteristic of the Hague system. It had been powerfully shaped by a general cultural belief in technical solutions to international problems and by the recognition to attend to problems resulting from technological change. It counteracted the traditional positivist preoccupation with the “will problematic” of law that had been part of the state
project and of “sovereignty.” It had led to the quandary that from this perspective no “higher law” could be conceived and only the self-limitation of the sovereign could explain and justify the existence of an international legal order (Jellinek 1882).

The technocratic vision of “functionalism” attempted to replace politics by tying claims to rule to particular forms of knowledge and social strata. The claim that modernity needed technical intelligence, instead of theology or philosophy, becomes oddly reconfigured in the “move to institutions” in the aftermath of the Second World War (Kennedy 1987). Thus the League was not only to mark a decisive break with the “non-institutionalized” past but it insisted that a peaceful order required a new organizational design, a theme that became even more important after the Second World War. It was one of the lessons of the interwar years that both “high politics” and “low politics” had to be institutionalized since the neglect of the “low politics” of welfare had been the reason for the rise of fascism and the collapse of the League. The bitter truth was that the old recipes of laissez faire were no longer adequate, and that the changes in the configuration of politics required the simultaneous solution to both welfare and security issues (Kratochwil 1998). Similarly, old hopes that the progressive development of international law in conjunction with public opinion would suffice, and that by “outlawing” war or threatening sanctions a new world order could be forged, had been thoroughly disappointed. Besides, the rise of socialism and communism introduced new welfare goals as proper domains for state action. It required regulatory rather than simple laissez faire regimes at both domestic and international levels as well as their mutual compatibility.

The functioning of a “collective security” system presupposed the continuation of the Alliance against the axis powers (the original United Nations), not only as an insurance against revanchism but simply because peace could not be secured against any “great power” without another world war. But no challenge to the “universal” order could be managed unless the great powers themselves were institutionally bound to uphold that order and to overcome their collective action problems. The design solutions consisted in the adoption of the veto, the institutionalization of the great powers in the Security Council, and a variety of “multilateral” regulatory organizations linked to the U.N. framework. Even if with the onset of the cold war the hopes for a “global” order were disappointed, the organizational blueprint provided the framework for the “free world” (nobly ignoring the developing world).

These developments were in the U.S. accompanied by a significant shift from the “settlement” of disputes (adjudicative perspective) to one emphasizing the problem-solving capacities of law. In Europe, on the other hand, the “unity” of the legal system – as in the case of international law without the existence of a rule of recognition as a capstone – continued to dominate the discussion. Arguments in favor of a unitary conception of law were opposed by a dualistic conception along the internal/external divide. American postwar legal scholarship emphasized process and was united in its criticism of formalism as practiced both by naturalists and positivists. This can be seen most clearly in legal scholarship that developed out of the application of the Ehrlich and Sacks process approach (O’Connell 1999) to international problems by Chayes (Chayes and Chayes 1995). But, an anti-formalist stance paired with an emphasis on problem solving went farther. Here the New Haven school of McDougal and his associates represented one side of the spectrum with the Columbia school at the other end. The Yale school focused on “policy” and the processes of claims and counter claims by which decision-makers pursue their goals, whereby the goal of human dignity allows for the appraisal of the normative status of an advanced claim. The Columbia school around Friedmann (1964), Henkin (1979), and Schachter (1985)
emphasized more the centrality of rules in enhancing cooperation in an ideologically divided world while at the same time arguing against the resurgence of positivism and the shibboleth of “sovereignty.” Thus, while the Columbia school wanted to create a normative order transcending the policy differences among the antagonistic “blocs,” the Yale school was much more influenced by the tradition of American legal realism and much more favorable towards sovereign autonomy, notwithstanding its universalist rhetoric (McDougal 1955). Here only the new approaches of Koh (1996b) and Higgins (1994) provided an alternative.

The last site for constitutional discussions is the intersection of legal practice and sociological theory. Here three main themes can be identified, all of which are loosely connected with the problem of globalization. The emergence of global networks among “disaggregated” states (Slaughter 2004b) or new patterns of cooperation between public and private actors become respective foci (Cutler 2003; Hall and Biersteker 2002). While the new organizational form of networks gives these inquiries an unifying theme, the “disaggregated” state version emphasizes still “public” power for the solution of problems created by a quantum leap in interdependencies. This approach adds to the familiar argument of the “internationalization of the state” (Cox 1981) and of multilateralism as its organizational form. They engage in boundary spanning exercises of information sharing and regulatory activities after the disappearance of the unified state. Such an activity remains, however, a “technocratic model” of cooperation rather than one in which “the people” can more effectively exercise their voice. Whether such defects can be remedied by the inclusion of private actors or elements of civil society (as e.g. in World Bank projects) remains also doubtful, given the difficulties in identifying the relevant stakeholders and the vast asymmetry in information between outsiders and insiders.

In addition, two other topics have been: the judicialization of international politics and the “fragmentation” of the international legal order given the 125 existing international tribunals. In a sense, both topics rehearse in a new way the old Weimar agenda (Koskenniemi 2000: 29f.) that pitted Morgenthau and Schmitt, on the one side, against the formalism of Kelsen, on the other side. The former accorded primacy to political decisions and claimed that political decisions ought to be “non-justiciable” (Morgenthau 1929). In international law, this thesis led to Sir Hersch Lauterpacht’s (1933) argument “establishing” the justiciability of all legal disputes. Nonetheless, in both theory and practice Morgenthau’s victory can be gathered not only from the dominance of “realism” and instrumentalization of law by political projects, but also in the sluggish adherence to the “optional protocol” of the ICJ and to the inclusion of self-defining “reservations” (see the Connolly reservation for the U.S.).

In the legalization debate for which the special International Organization issue is perhaps the most prominent example, the seemingly neutral specification of three key concepts (precision, delegation, and obligation) was to guide an interdisciplinary debate among international lawyers and political scientists. While perhaps the concept of “obligation” linked directly to the debates of “hard” and “soft law,” the reasons for choosing the other two concepts remained unclear, as they were not systematically related to legal theory (Finnemore and Toope 2001a). Nevertheless, the choice of the vocabulary was far from innocent. The term “delegation” immediately suggests the contractarian basis of a “liberal” conception of law, i.e. free and independent actors consenting to be subject to adjudication. As if much of international law were not customary or applied by national courts which “double up” as institutions of the international legal order (Scelle 1932–1934)! Here courts have both fact and rule discretion. To that extent the remarks of one of the authors seems rather strange: “to
paraphrase Clausewitz, law is a continuation of political intercourse with the addition of other means” (Abbott, et al. 2000: 419).

Similarly problematic is the emphasis on “precision.” It is obviously derived from a misleading conception of “science” in which terms have meaning by their reference. “Precision” then actually “measures” the match between the concept and the “world out there.” While this is already a highly misleading conception of scientific procedures – many key theoretical terms have no match at all – it is totally inappropriate for law. Even the clearest statement of a rule cannot decide its own application! Both the open texture of rules – forget that in most decisions indeterminate (imprecise) principles rather than rules do most of the justifying and explaining – and the difficulties of interpretation have been amply discussed in legal theory.

Does the “clear” injunction “No dogs on the escalator” apply only to dogs, but not to “Ulysses,” my (single) dog accompanying me? Does it apply also to a cat or a pet puma, or to a boa constrictor which lazily hangs around my neck and is arguably not “on” the escalator? In short, the idea that norms can be treated in a context-free fashion, and that interpretations need not constantly move from facts to norms and higher order principles and back, is a myopia of social “scientists” who think that their methods apply in a “one size fits all” fashion.

Within the internal debate among international lawyers on “fragmentation,” the ICJ decision in the Teheran hostage case played a significant role as here the notion of a freestanding or self-contained regime was raised (ICJ, United States of America vs. Iran, 1979). Similarly, the remarks of the ICJ president on the danger of a fragmentation of the legal order, and finally the charge to the International Law Commission to study the issue (International Law Commission and Koskenniemi 2006) represent some of the main markers of this controversy.

In the hostage case the court had largely to decide whether the existence of a special regime (Vienna Convention of Diplomatic Relations) exhaustively regulated the issue area (ICJ 1979: 40). Similarly, the ICTY Tadic decision highlighted the problem of contradictory judgments for the international rule of law. While, of course, no regime can be entirely freestanding since any interpretation of the applicable rules will always have to refer to the general principles of international law (Simma and Pulkowski 2006) such as the law of treaties etc., different regimes often develop their own “imperialist” reading of a controversy, especially if they possess appropriate dispute-settling mechanisms, such as the WTO. Could the WTO invalidate sanctions taken by a state which is a member of the Kimberly diamond agreement while the complaining (sanctioned) state is not?

The traditional notion of dealing with self-contained regimes in terms of the *lex specialis* supervening general legal principles suddenly appeared problematic (see also Act 55 of the ICL articles on state responsibility). Given that the *lex specialis* argument depends also on the construal of a single legislative will but that under modern conditions treaties and custom increasingly are the result of particular bargains and package deals, the presumption of a unified will of a state across various issue areas is hardly convincing. Judges have therefore to decide on the basis of extraneous factors rather than on ascertaining the will of the parties. After all, the law of presumption belongs clearly to municipal law.

When faced with inconsistencies of decisions, norm collisions, or doctrinal disagreements, the tendency of “law” is to fall back on a *leges* hierarchy and thus on a domestic ordering scheme. The question remains, however, whether such a visceral response does justice to complexities of legal ordering in a post national world. Strangely enough, efforts to counteract fragmentation by domestic legal instruments might be a bit too optimistic (of what can be achieved) and too pessimistic (because of being too restrictive) at the same time. Especially if we no longer simply focus on law via “compliance and
sanction” but understand it as a system of communication possessing a logic of its own, we understand this paradox.

Since the law creation process no longer is limited to states and their internal and external law-making capacity (legislation or contractual undertakings, declarations) it has been opened up to communicative processes of all kinds. Normative expectations do not solely emerge from state practice but result increasingly from the activities of other social systems (Luhmann 1995b; Teubner 1997). The role of the media and of social movements using spectacular events to “scandalize” the public and initiate a process of normative change comes here to mind, counteracting strict pessimism. Whether these influences of civil society on the process of law-making provide a viable alternative to the traditional legal order remains, of course, to be seen. In other words, the fragmentation of law is more radical than often suggested since it reflects the multidimensional fragmentation of global society. The functional differentiation remains, however, overlaid by territorial segmentation. To that extent the optimism of “domestic” solutions seems unwarranted. Consequently, fragmentation cannot be combated directly by some ordering of “public” international law, since public law itself has lost much of its ordering function. Perhaps the best we can hope for is the compatibility of the fragments through constant “translation” and adjustment (Fischer-Lescano and Teubner 2004).

Theoretical reprise: elements of style, narratives, and the role of the “professional”

For someone looking at these debates from the outside there is an odd disconnection between law and politics. Thus, the vision of a world constitutional moment or the efficacy of a constitutional discourse might be far too optimistic. The subtext here is that quite different from politics the international legal order is still “primitive” (see even Kelsen 1960) and needs to be remedied through decisive judicial and legislative action. Actually, nothing could be farther from the truth. The international legal system is quite a sophisticated assembly of practices (institutional rules), and primary and secondary rules (sources) that relies on conceptual distinctions unknown to systems of primitive law (distinction between ethics, customs, public and private etc.). When compared to this, the international political system is truly “primitive” in relying on both bargaining and force with no mediating representative institutions that can both claim effectiveness and legitimacy. It seems that the hope of improving the legal system by imitating the experiences of the state – by creating courts or new legislative initiatives – while being blind to all the enabling background conditions that determine the fate of the rule of law – betokens a professional myopia of considerable proportions.

It is here that the constitutional metaphor becomes strained in the international legal discourse. While the ICJ in the Lockerbie case (1992: 160ff.) speaks of any action taken by a U.N. organ as being subject to assessment in terms of a “co-ordinate exercise of powers” analogous to a constitution, it is hardly surprising that in the absence of a legislative body – not to speak of the enforcement problem – everything in the international arena falls to the judiciary. But it is also hard to see how outside “the profession” such arguments will resonate and lead to acquiescence. This is not only because many of the institutions familiar from domestic political process, such as parties aggregating and vetting interest, are missing. The problem is that “constitutional” politics by attempting to place an issue “above” normal politics and thus induce societal acquiescence, hardly ever works that way even in the domestic arena (Michelman 2003).

Thus, there is an inherent paradox in that “constitutional politics” cannot achieve what it pretends, i.e. provide “the legitimacy of higher law – irreversible, irresistible and comprehensive” (Howse and Nicolaïdis
The idea that constitutionalism can lift mankind into an apolitical space ending all disagreements because “ultimate values” demand respect and are able to silence objections is utterly mistaken, as it fails to notice that any reference to those “values is itself immensely and intensely political” (Klabbers 2004: 54). Nevertheless, two common themes among international lawyers are the fear of political interference with law and that of a constitutional remedy. It ranges from Petersmann (2002) who wants to protect against overarching and short-sighted decisions of governments which could ruin the world trading system to Cass’s (2005) argument that the WTO’s appellate body could become a “constitutional order.” By “doctrine amalgamation,” a new style of justifications reflecting deeper “constitutional” values is emerging. There is also Franck’s attempt to replace politics with law, but not a law of codes but with a practice of “balancing between the imperatives of constitutionalism and flexibility” (Franck 1992: 128). In the latter case, we nearly encounter the Aristotelian *spoudaios*, characterized by a particular style of reflection and attitude (*hexis*).

This leads to two further questions: one paradoxical, one more speculative. The paradoxical question concerns the issue why in the face of the experiences in the constitutional law discourse, this project enjoys such prestige in international legal thought. Might it be that after the hopes placed in expertise (functionalism and multilateral management) the self-confidence of the international “professionals” has suffered? Both policy failures (poverty reduction, financial crises) and de-legitimization attempts by social movements have damaged the aura of a self-justifying “special knowledge” (Kratochwil 2006). Is it the dialectics between legality and legitimacy which explains this phenomenon?

The more speculative question concerns the following: how is a “*spoudaios*” possible in the absence of an ontological order or some “ultimate” source that declares what is the case and what is to be done? Perhaps indeed only “translations” remain and the international lawyer can no longer serve as “rector” à la Wolff (Onuf 1998) to shape discourse and projects. Furthermore, given that with the death of god, the “people” became the main source of legitimacy, how can any legal ontology – after the “deconstruction” of historical and concrete people, and the subsequent efforts to deny moral (and often even legal) significance to particular institutions – still mediate the tension between the particular and the universal? Strangely enough, the “rights of man” have become more recessed – and not for chauvinistic reasons I suspect – so that the concept of man or woman as moral agents no longer dominates the discourse. The actor no longer claims rights in virtue of his or her personhood but s/he becomes the place-holder for ascribing rights. Given also the official agnosticism about “the good,” anything desirable, or considered valuable, becomes in this procedural world a subjective human right. Thus, we have a “right to democracy” (Franck 1992) or a “clean environment” (Tomuschat 2003).

The popularity of these slogans notwithstanding, arguing for a “right to democracy” is simply committing a category mistake. Democracy is a way of organizing a particular polity; it does not constitute a “right” that accrues to a person qua human being. Similarly, the right to a clean environment – aside from containing the last flickers of the religious idea of man as the “crown of creation” (species chauvinism) – is misleading since the inviolability of nature is not at issue, but a specific use of natural resources within a particular social and political project (Haas 1975).

Another gambit is to utilize the narrative of progress. It creates through the division of a “before” and “after” two points through which we can lay a straight line leading to an all encompassing end state. All the differences of politics can then be discounted since they are just “reactionary” or not yet fulfilled.
aspirations. What is important and what gives legitimacy to a decision is whether it “serves” this ultimate goal. We know what to do when we know whether or not we are on the side of “progress!” That such a “theory” is likely to end up in imperial pretensions (Goldsmith and Posner 2005) or in coalitions of the willing is hardly news. The problem lies, however, far deeper.

As we see from Locke’s famous narrative: “[I]n the beginning the whole world was America” (Locke 1689: para. 49), such a gambit is not at all innocent. It is not only dividing the world in a before and after, but it valorizes the “after” by telling how the “primitive stage” was soon overcome. As such it served to silence not only the resistance of the “primitives” and justified their dispossession. It also reduces law from an effort to create meaning by an open-ended historical process in which the pluri-vocality of politics gets sedimented in specific historical institutional structures to one of instrumental reason. Here the virtually exclusive focus on “dispute settlement” among “rational actors” and a rather disconnected “universal” goal towards which everything is evolving provide the parameters. It would be a lamentable outcome indeed, if the strange combination of “universalism” and “instrumental reason” which one notices lately in the international legal discourse would not only discount the “local” (where most of us still live) but also deprive us from finding meaning in acting together politically in order to shape our destinies.

Note

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