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TranState Working Papers

THE GLOBAL LEGAL ORDER
AN INTERNATIONAL LAWYERS' PERSPECTIVE
INSPIRED BY INSTITUTIONALISM

STEFAN OETER

No. 109

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1 INTRODUCTION

Public international lawyers struggle with the concept of an ‘international legal order’ since more than two hundred years. If we speak of a body of law called ‘public international law’, we assume that a kind of legal order exists that organizes the international community. But how does this legal order look like – and how can we conceptualize the underlying international community and the legal order organizing it? These questions always had to remain open to a large degree. Conceptualizing the international legal order in purely normativist terms proved to be a problematic enterprise. The idea of a ‘global legal order’ depends on a number of assumptions on how the international community functions and how the legal order underpinning it is organized – assumptions that are not strictly of legal character. „Theorising the Global Legal Order“ thus is an ambitious enterprise going beyond the limits of traditional normativist attempts at constructing legal rules and institutions.

The best a lawyer could do in the traditional continental European tradition of ‘legal positivism’ would be trying to develop a ‘holistic’ model of a ‘global legal order’ from an internal, normativist perspective. The ‘neo-Kantian’ model of the leading German school, starting from an assumption of a universal ‘international community’¹ - with international law as the legal order of such community – could offer a suitable theoretical tool for such an enterprise.² Even when having strong sympathies for such a theoretical model, however, sympathies nourished by academic descendancy and biography, one should abstain from going that path. A good reason for that abstention should be the intuition that some essential issues would remain out of sight when taking a purely normativist perspective. Seriously theorising the ‘global legal order’ is not possible without reflecting on the place of law in the global order, in the ‘community’ of states. Reflecting on the place (and role) of law in the global order, however, requires some model of how the ‘global order’ looks like and what role international law might play in such order.

The following reflections attempt to go along this way - they try to analyze the ‘global legal order’ from a perspective inspired by social science theory, theoretical bits and pieces mainly borrowed from institutionalism and social constructivism. These reflections cannot give a broad and comprehensive overview of all strands of the theoretical debate on ‘global order’ and how to theorize such global order. The perspective of the essay is in essence a legal one – the reflections try to model the ‘legal order’ of the

¹ See only Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (München: C.H. Beck, 2001).

² See as the seminal masterpiece of this theoretical school Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, (1999) 281 *Recueil des Cours* 9

global community, but they try do do that under taking recourse to social science theories. Inevitably, such a piece of work transgressing the boundaries of academic disciplines will bear to a certain degree the traits of eclecticism. It will single out the parts and parcels of social science theory that seem to fit to legal conceptualizations of the 'global legal order'. The paper will thus have an inbuilt bias towards liberal and constructivist theories of global order – simply because such theories fit better to legal concepts of an international legal community than neo-realist or Marxist theories that deny the self-rationality of legal discourse. The paper will try to demonstrate that lawyers can learn a lot by taking recourse to certain types of social science models of 'global order'. As stressed above, however, the analytical perspective is not a social science perspective in itself, but a legal perspective trying to enlighten the theoretical approaches of international legal doctrine.

2 MODELS OF GLOBAL LEGAL ORDER: METHODOLOGICAL REFLECTIONS

When looking around where a suitable model of global order informing lawyers on how to conceptualize the 'global legal order' might come from, unavoidably one ends up with international relations theory. However, there is not one IR theory, but a whole range of such theories.³ Where should we look for help? The choice, I think, is not that difficult for an international lawyer, in particular for one with a neo-Kantian background. Old-fashioned 'neo-realism'⁴ has not much to offer for him, since international law has not a real place in 'neo-realist' models of global order, in their perspective is not more than a rhetorical device in masquerading the results of power politics. Other approaches attract more attention. As a liberal universalist, one is immediately driven to 'institutionalism'. Scholarship in public international law – thus is the argument of the paper - could profit a lot from linking up systematically with institutionalist strands of

³ See only Beate Jahn (ed.), *Classical Theory in International Relations* (Cambridge: Cambridge Univ. Press, 2006); Cynthia Weber, *International Relations Theory: A Critical Introduction* (London: Routledge, 2nd ed. 2005); Volker Rittberger (ed.), *Regime Theory and International Relations* (Oxford: Clarendon Press, 2002); Ian Clark, *Globalization and International Relations Theory* (Oxford: Oxford Univ. Press, 1999); Michael W. Doyle/G. John Ikenberry (eds.), *New Thinking in International Relations Theory* (Boulder, Col.: Westview Press, 1997); Andrew P. Dunne, *International Theory: To the Brink and Beyond* (Westport, Conn.: Greenwood Press, 1996); Ken Booth (ed.), *International Relations Theory Today* (Cambridge: Polity Press, 1995); James Der Derian (ed.), *International Theory: Critical Investigations* (Basingstoke: Macmillan, 1995).

⁴ See only Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1954).

international relations theory.⁵ Legal scholarship must necessarily rely on theoretical assumptions (and empirical knowledge) that legal work alone cannot provide.⁶ But how can it be avoided that lawyers intuitively rely on their own ‘social constructions of reality’, their own everyday knowledge of the workings of the international system, thus becoming victims of the epistemic trap of unreflected prejudices? Institutional models of international relations may deliver a suitable framework for critically reconstructing the underlying theoretical models and assumptions of the international order, for analyzing the workings of the international legal system that interests most lawyers.⁷ This is not a new insight.⁸ Most international lawyers will share the assessment that integrating international relations (IR) and international law (IL) „can make“ – to cite a famous formula of Anne-Marie Slaughter – „international lawyers better lawyers“.⁹ The diverse theoretical perspectives of IR help lawyers to recognize the (often unspoken) assumptions that underlie their own and others’ legal arguments, readings of texts and doctrines.¹⁰

2.1 Rational Choice Based Paradigms

Liberal institutionalism is based on rational choice paradigms, while recognizing that states (and national interest) are legal fictions that must be set into context by incorporating international institutions and non-state actors into the framework of analysis.¹¹

⁵ See Anne-Marie Slaughter et al., ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 Am. J. Int’l. L. 367.

⁶ From the perspective of philosophical hermeneutics see Friedrich Müller, *Juristische Methodik* 162 et seq. (Berlin: Duncker & Humblot, 6th ed. 1995).

⁷ Kenneth W. Abbott, ‘Toward a Richer Institutionalism for International Law and Policy’ (2006) 1 J. of Int’l. L. & Int’l. Relations 9.

⁸ See Kenneth W. Abbott, ‘Elements of a Joint Discipline’ (1992) 86 Am. Society of Int’l. L. Proceedings 167; Anne-Marie Slaughter et al., ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 Am. J. Int’l. L. 367; see also Kenneth W. Abbot, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’ (1999) 93 Am. J. Int’l. L. 361; Anne-Marie Slaughter, ‘International Law and International Relations’, (2000) 285 Recueil des Cours 12; Kenneth W. Abbott, ‘Towards a Richer Institutionalism for International Law and Policy’ (2006) 1 J. of Int’l.L. & Int’l. Relations 9.

⁹ Anne-Marie Slaughter et al., ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 AJIL 367.

¹⁰ Id.

¹¹ See Peter A. Hall/Rosemary C.R. Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44 Pol. Stud. 936; see also Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 Eur. J. Int’l.

The relevance of the state as central actor becomes relativized, with individuals, business firms, NGOs and other non-state actors entering the scene as more or less equally important actors. Collective preferences (the traditional 'national interest') are modelled here as depending not primarily on objective conditions but on demands of private actors on the national plane. States in this perspective tend to become collective agents that further the aggregate interests of their members.¹² The 'black box' of the state is opened in these analytical models, which enables scholars to focus on the relevance of internal governance structures for international relations, on the input factors influencing the actions of government officials and agencies and on the importance of agency-driven cooperation below the level of formal diplomacy, and (in general) on the interaction between domestic and international politics.¹³ Informal cooperation structures beyond traditional forms of diplomacy and activities of non-state actors across states and in international fora¹⁴ are discovered in liberal institutionalism as important forces shaping as much the workings of international politics as traditional inter-state relations and power struggles determined by 'objective' state-interests that tended to dominate classical 'realist' models of international relations.¹⁵

The state thus tends to lose his central role in the analysis of the global order, although it is beyond doubt that the state (respectively its various organs, agencies and all the actors dependent on it) continue to be a decisive category.¹⁶ The focus of analysis shifts, however, away from a fictitious collective actor called 'the state' towards decision-making at the level of individual actors. The analytical perspective thus shifts to a

L. 503, and Andrew Moravcsik, *Liberal International Relations Theory* (Cambridge, Mass.: Weatherhead Center for International Affairs Working Paper Series 01/2, 2001).

¹² See Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *Int'l. Org.* 513.

¹³ See Anne-Marie Slaughter, *A New World Order* (Princeton, N.J.: Princeton Univ. Press, 2004).

¹⁴ As to the growing interest in the changing role of international NGOs see only Thomas Risse, 'Transnational Actors and World Politics', in: Walter Carlsnaes et al. (eds.), *Handbook of International Relations* (London: Sage, 2002), at 255; Richard Price, 'Transnational Civil Society and Advocacy in World Politics' (2003) 55 *World Pol.* 579; A. Claire Cutler et al. (eds.), *Private Authority and International Politics* (Albany, N.Y.: State University of New York Press, 1999); Margaret E. Keck/Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell Univ. Press, 1998).

¹⁵ See only Robert O. Keohane/Joseph Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977); Thomas Risse-Kappen (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge Univ. Press, 1995).

¹⁶ See only Allen Buchanan, 'Rawls' Law of Peoples: Ruzles for a Vanished Westphalian World', (2000) 110 *Ethics* 697.

level where it is near to the perspective of legal analysis - a kind of analysis focusing on the normative constraints of decision-making.

2.2 Constructivist Paradigms

The convergence towards the perspective of classical legal research is even stronger if one integrates elements of 'social constructivism' into the arsenal of analytical tools.¹⁷ The idea of legal constraints is easily reconcilable with a 'constructivist' analysis of 'cognitive patterns', of the factors determining the intellectual landscapes that shape decision-making. It is to be admitted, constructivist models do not that easily merge with rationalist schools of thought like institutionalism.¹⁸ Not that constructivism denies the importance of rational calculus. It simply works with the phenomenon that real life patterns of social behaviour are not clinically rational, but that the rationality of real life actors is to a large degree dominated by context specific 'social constructions of reality', by cognitive patterns that give the rationalities of different actors a very distinct shape.¹⁹ Such ideational structures of 'meaning and social value', which may find its expression in particular social constructs of a given 'national interest' or group interest, are identified as being prior to individual actors or 'agents' and the rational calculations that these employ in order to pursue certain objectives.²⁰ The 'anarchical society of states' in this view is not an 'objective' phenomenon as such, but a meaning structure governing the relations of states that is intersubjectively construed and learned – and that could be modified by creating new understandings.²¹ To perceive state agents as rational actors pursuing a mere means-ends rationality seems – in the eyes of constructivist scholars – to be a self-delusion; actors, even when acting as agents of states, are driven primarily by their inclination to behave in conformity with the identities, values and norms to

¹⁷ This argument was made earlier (and more in detail) by me in Stefan Oeter, 'Toward a Richer Institutionalism in International Law and Policy' (2008) No.1 *Univ. of Illinois Law Rev.* 61 at 64-68.

¹⁸ See James Fearon/Alexander Wendt, 'Rationalism vs. Constructivism: a Skeptical View', in: Walter Carlsnaes et al. (eds.), *Handbook of International Relations* (London: Sage, 2002, at 52.

¹⁹ See only Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge Univ. Press, 1999), at 139-190.

²⁰ See Martha Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell Univ. Press, 1996), at 2 et seq., 14-22.

²¹ See Alexander Wendt, 'Anarchy is What States Make of It' (1992) 46 *Int'l. Org.* 391; see also Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge Univ. Press, 1999), at 113-135.

which they have been socialized and which they have internalized.²² Primordial driving-force is less a rational calculus but the push to be consistent with one's values and identities – values and identities that find its expression in legal and social norms and orders of preferences. Social and legal norms in such a perspective are much more important than 'interests'²³ - since 'interests' reflect mostly the values that underlie such norms. The dynamic interdependence of 'interests', values and preferences and legal and social norms have become an important focus of constructivist models, in the sense of a dynamic construction of identities and preferences the modes of which can be modified through social interaction.

2.3 Rational Choice and Constructivist Paradigms – Mutual Exclusivity or Division of Labor?

The theoretical focus of traditional institutionalist and of constructivist models thus is rather different. But is it impossible to combine rationalist models with constructivist theories? I think that both currents fit together much better than usually thought. It is true that one cannot simply merge both lines of thought in a hybrid theory. But I think that both models can coexist in a quite productive division of labour.²⁴ Rationalist models usually work at a much higher level of abstraction than constructivist studies. 'Realism', classical institutionalism, finally all rational choice based theories construe patterns of social interactions in terms of typical model interactions. To a certain degree, these models are necessarily decoupled from specific context, because they are oriented towards constructing models of 'decontextualized' patterns of behaviour. They usually do not explain individual, context-specific behaviour, but typical patterns of such behaviour. They are helpful for social sciences as well as all forms of behaviour-oriented disciplines since they help to understand the general patterns of interest and the average behavioural routines, irrespective of any individual variation.²⁵ As a lawyer, they help to understand why certain institutions of law are necessary in a given social set-up, which types of institutional arrangements (and legal rules) a rational actor will

²² See Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in: Robert J. Beck et al. (eds.), *International Rules: Approaches from International Law and International Relations* (Oxford: Oxford Univ. Press, 1999), at 206-24.

²³ See John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 *Int'l. Org.* 855 at 871-74.

²⁴ In this sense see also Kenneth W. Abbott, 'Towards a Richer Institutionalism for International Law and Policy' (2006) 1 *J. of Int'l.L. & Int'l. Relations* 9 at 19.

²⁵ See also Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford Univ. Press, 2008).

(or should) prefer and which choice we have in designing social institutions, such as law. It would be completely misleading, however, if we would use such models as an analytical tool to explain specific individual action – they tell us more how law typically operates and why people usually obey to the law, without entering always in a calculus on probability and gravity of sanctions for the case that they would not obey. They abide to the law because the law is in the interest of society, and thus also in their personal interest as a member of society, in an ‘enlightened’, medium- or long-term perspective – and they often have internalized that kind of societal calculus and simply perceive a certain law as ‘necessary’ and thus binding.²⁶

If we want to explain why specific actors (or specific groups of actors) act in a specific way, support specific legal rules (or try to evade them), make use of certain arrangements, and not of others, a constructivist model is much more helpful than an abstract ‘rational choice’ model.²⁷ In particular compliance with international norms definitively involves both instrumental choice and social learning, and argues in favour of a synthetic approach to compliance that emphasizes ‘argumentative persuasion’, a process that involves actors and institutions but takes seriously the possibility of preference change through deliberation and social interaction.²⁸ This means, if we want to come to a context-specific model explaining why a treaty was concluded in a very specific form and later implemented, or why actor X expresses one type of ‘opinio juris’ and follows one pattern of practice, while another actor Y adheres to another ‘opinio juris’ and prefers another ‘consuetudo’, we must look to constructivist models.²⁹ ‘Rationality’ of individual actors is – as was already stressed – characterized by specific modes of ‘social construction of reality’, specific ‘cognitive patterns’, and cannot be analyzed without paying attention to these specific factors – factors which might be phrased also as expressions of ‘bounded rationality’ in the terminology of New Institutional Economics.³⁰

²⁶ On conceptions of legitimacy, that often include factors of socialization, see Morris Zelditch, ‘Theories of Legitimacy’, in: John T. Jost/Brenda Major (eds.), *The Psychology of Legitimacy* (Cambridge: Cambridge Univ. Press, 2001).

²⁷ See also Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge Univ. Press, 1999), at 113-138.

²⁸ See only Jeffrey T. Checkel, ‘Why Comply? Social Learning and European Identity Change’ (2001) 55 *Int'l. Org.* 553, at 581.

²⁹ I have made a comparable argument from a perspective of systems theory already some years ago – see Stefan Oeter, ‘International Law and General Systems Theory’, (2001) 44 *German Yearbook of International Law* 72.

³⁰ On the concept of ‘bounded rationality’ see only Herbert A. Simon, ‘Bounded Rationality’, in: John Eatwell et al. (eds.), *The New Palgrave: A Dictionary of Economics* Vol. 1 (London: Macmillan 1987), 266-68; Thomas J. Sargent, *Bounded Rationality in Macroeconomics* (Oxford: Clarendon Press, 1993); Herbert A. Simon, *Models of*

2.4 Law as a Discursive Process

Thus, I think, you need both strands of theory in order to analyze adequately complex institutional arrangements. It doesn't even play such a role whether the interactions and institutional arrangements are open to an analysis at the level of individual actors. Prominent advocates of institutionalism claim that an „enriched institutionalism should remain fundamentally actor-centered and purposive in orientation.“³¹ I do not see the necessity why the analytical tool should be limited so much in its reach. Taking into consideration the complexities of the process which finally leads to grand institutional arrangements, are we not more in a category of social evolution than of 'actor-centered purposive interactions'? A good example for that observation is delivered by customary international law. The setting of a specific corner-stone, in the sense of a decision to opt for a specific expression of *opinio juris*, may be a purposive action. The discursive process, however, of which each individual expression of *opinio juris* is a part and parcel, cannot be modelled suitably in terms of an actor-centered, purposive creation. The resulting rules of customary law are the product of complex and protracted discursive processes, the result of which is difficult to foresee for each individual actor.³² It may be easy – at least in certain cases – to explain the behaviour of individual actors, its opting for specific forms of *opinio juris*, in terms of rational choice. Preferences for certain legal positions often will be closely interlinked with interests and incentive-structures, will reflect a utility calculus. Even this must not always be the case – not that rarely actors will simply opt for a specific *opinio juris* because they have internalized certain norms and values and simply think that practice must conform to these norms and values. But such actor-specific behaviour is suited, at least in principle, to rational choice-type explanations.³³ The interaction between individual expressions of *opinio juris* and the discursive process that results from such interaction, however, belongs to a different category.³⁴ As Kenneth Abbott formulated, „actors are motivated not only by self-

Bounded Rationality Vol.3: Empirically Grounded Economic Reason (Cambridge, Mass.: MIT Press, 1997); Rudolf Richter/Eirik Furubotn, *Neue Institutionenökonomik* (Tübingen: J.C.B. Mohr (Paul Siebeck) 1999), at 4/5; Bryan D. Jones, *Politics and the Architecture of Choice: Bounded Rationality and Governance* (Chicago: Univ. of Chicago Press, 2001); Gerd Gigerenzer/Reinhard Selten (eds.), *Bounded Rationality: The Adaptive Toolbox* (Cambridge, Mass.: MIT Press, 2002); Paul Bourguine et al. (eds.), *Cognitive Economics* (Berlin: Springer, 2004).

³¹ Abbott (footn. 24), at 28.

³² See only the seminal work of Michael Byers, *Custom, Power and the Power of Rules. International Relations and Customary International Law* (Cambridge: Cambridge Univ. Press, 1996).

³³ See also Jack L. Goldsmith/Eric A. Posner, *The Limits of International Law* (Oxford: Oxford Univ. Press, 2005), at 23 et seq.

³⁴ See Oeter (footn. 29), at 87-93.

interest, but also by values and principled beliefs. They pursue law through normative persuasion, rational argument and bargaining, depending on the audiences they address. They view law both as an instantiation of values and norms and as an instrumental tool.³⁵ Such ambivalence is definitely visible with the customary law process, where normative beliefs still play an often stronger role than mere instrumental calculations. Framing positions in *opinio juris* language forces actors to argue primarily in terms of normative beliefs and values, and not in terms of interests. Such ‘encoding’ may first serve as an instrumental tool, but it develops its own dynamic and shifts the entire discursive process.³⁶ Interests are, in the course of this process, not only translated in terms of normative beliefs, but to a certain degree also transcended in norms and values.

Nevertheless, even such institutions might still be analyzed in rational choice terms, although the actor-specific interactions upon which they are based will need an analysis in constructivist terms, since normative beliefs and values tend to dominate the discursive process led in legal code. Actors largely lose control of the side-effects when exposing to such processes of ‘translation’ - with the ensuing results perceived as ‘unintended side-effects’. A comparable process of loss of discursive control may also happen with treaty regimes, because the complexity of modern treaty regimes makes it difficult, if not impossible, to foresee and control all the side-effects of certain institutional designs.³⁷ In principle, however, treaty regimes will be perceived by the actors concerned much more as ‘purposive creations’ than customary regimes, even if such perception may constitute an illusion.

We also should devote increased attention to actor-centered processes of norm diffusion that unfold before norms have been fully internalized, with the ensuing phenomena of ‘strategic social construction’, where persuasion, socialization and internalization play at least as much a role as coercion in the form of shaming and political pressure.³⁸ The crucial role of persuasion, socialization and internalization in the operation of the law is undeniable and appeals to the intuition of every lawyer – an intuition which is nourished by experience.³⁹ Without these mechanisms, law simply could not operate –

³⁵ Abbott (footn. 24), at 27.

³⁶ *Id.*, at 92.

³⁷ See also Harald Müller, ‘Arguing, Bargaining and All That Communicative Action. Rationalist Theory and the Logic of Appropriateness in International Relations’, (2004) 10 *European J. of Int’l. Relations* 395.

³⁸ On internalization as a crucial part of norm-creation and diffusion, see Harold Hongju Koh, ‘Why Do Nations Obey?’ (1997) 106 *Yale L.J.* 2599, and the same, ‘Bringing International Law Home’ (1998) 35 *Houston L. Rev.* 623.

³⁹ See also the abounding literature on ‘epistemic communities’ - comp. e.g. Peter Haas (ed.), *Knowledge, Power, and International Policy Coordination* (special issue) (1992) 46 *Int’l. Org.*.

coercion is too cumbersome and costly to be applied in daily routine. Socialization and internalization stabilize an institutional arrangement that often will be favourable in macroeconomic terms, because it keeps functioning a certain cluster of interactions where transaction costs will be much lower when actors can rely on the expectation that future transactions will follow the same pattern as past ones. In terms of individual utility calculus, loyalty to normative beliefs, based on persuasion, socialization and internalization, might often seem to constitute an expression of 'bounded rationality'⁴⁰ - but perhaps such 'bounded rationality' preserves an institutionally optimal arrangement that puts individual members in a far better position than they would be in a society of radical benefit maximizers that always end up in opportunism eroding any legal arrangement.

Coupled to this there is a final point which deserves attention: the competition between short-term individual (and group) preferences and long-term collective interests.⁴¹ A kind of 'naive' realism that entrusts definition of collective interests of a nation unreservedly to a running administration risks sacrificing long-term interests to short-term interests of specific political elite groups. We know from Public Choice scholarship that politics at national as well as international level is caught in immense 'Principal-Agent' problems.⁴² Tying the hands of political elites in favor of certain long-term interests of societies, be it by constitutional arrangements or by international legal arrangements, makes a lot of sense under this perspective. The wish to be re-elected is a legitimate concern for a leadership in a democracy, and thus also the need to mobilize support, to serve crucial lobbies, to pursue certain ideological objectives. But the space given to these concerns must be limited. A pattern of abiding to the law because it is a law may be very efficient in economic terms, saves a lot of transaction costs – because it avoids the trap of opening up a sheer endless discourse of what are the 'real' interests of a nation, and not only the short-term preferences of a specific administration. In this sense, a crude form of traditional 'realism' may resemble in reality more a phenomenon of 'bounded rationality' than constitute an enlightened rational calculus. The intuition of most professionals of international law revolts against radical kinds of rationalist arguments in terms of a blunt 'realism' (like that of Goldstein and Posner⁴³) – and an in-

⁴⁰ See supra footn. 30.

⁴¹ See on the issue of long-term collective interests and the way how they can best be pursued only the collective volumes edited by Inge Kaul et al. (eds.), *Global Public Goods: International Cooperation in the 21st Century* (Oxford: Oxford Univ. Press, 1999); Inge Kaul et al. (eds.), *Providing Global Public Goods: Managing Globalization* (Oxford: Oxford Univ. Press, 2003).

⁴² See only Dennis C. Mueller, *Public Choice III* (Cambridge: Cambridge Univ. Press, 2003), at 359-385.

⁴³ Jack L. Goldsmith/Eric A. Posner, *The Limits of International Law* (Oxford: Oxford Univ. Press, 2005).

depth analysis of the time aspects of rational choice, of the pay-offs of present non-compliance and future gains of compliance, might prove this intuition to be right. International law is to a large degree a mechanism to ensure consistent policies over time, despite all the volatilities of national politics and the constant shifts of short-term preferences.

The combination of an institutionalist model with a complementary ‘constructivist’ perspective on the dynamic interdependence of ‘interests’, values and preferences and legal and social norms, as a determinant of decisional behaviour at the level of specific actors, has certain parallels in other models. The most prominent model with resembling features is the model of ‘actor-centered institutionalism’ developed by Fritz Scharpf⁴⁴.

3 WHY DO WE NEED INTERNATIONAL LAW?

What does all this meta-discourse on methodological approaches mean for the enterprise of ‘theorising the global legal order’? This paper admittedly must give an answer to this question. But the question of underlying theoretical approaches is intimately linked with another basic question that has puzzled international relations specialists and international lawyers for decades: Why do we need a body of legal rules governing the relations of states, a body of rules we call international law? Traditional legal positivism cannot give us the answer to this problem, since it does not question the necessity and the binding force of such body of legal rules, but rests on the (seemingly iron) assumption that such rules are needed and that they exercise binding force.⁴⁵ We must come back to institutionalism here. One of the major contributions of institutionalism to the discussions taken up here was to show how states could productively cooperate in the absence of a centralized law-maker or law enforcer.⁴⁶ States, economies and societies are more and more interdependent, which means that there is an ever-growing demand of coordination and cooperation between states and societal actors in general. Without coordination and cooperation, most sectors of economic and societal activity could not function efficiently any more. Even national politics today needs the cooperation of other states in order to achieve the proclaimed objectives in most fields of political action.

Institutionalist writings on problems of ‘collective action’ can tell us a lot on the logic why states enter into international legal obligations and create complex international

⁴⁴ See Fritz Scharpf, *Interaktionsformen. Akteurzentrierter Institutionalismus in der Politikforschung* (Opladen: Leske + Budrich, 2000).

⁴⁵ See also Samantha Besson and John Tasioulas (eds.), *Philosophy of International Law* (Oxford: Oxford Univ. Press 2008).

⁴⁶ See Goldsmith/Posner (footn. 43), at 16.

‘regimes’. To summarize it very briefly at the outset: Collective interests, the need to secure the provision of collective goods and the broad range of various types of coordination problems force states compellingly to cooperate with one another. If states want to avoid jurisdictional and other conflicts that might cost at the end a lot of political energy (and transaction costs), not to speak of damages caused by fighting through inter-state conflicts, they must develop institutionalized mechanisms of coordination. As Posner and Goldstein summarize it: “In cases of coordination, states receive higher payoffs if they engage in identical or symmetrical actions than if they do not.”⁴⁷ Identical or symmetrical action does not come from alone, however, but needs specific arrangements coordinating collective action. Game theory shows us that such collective action, if not coordinated, might end up in dilemma type situations.⁴⁸ In order to avoid such dilemma-type situations, institutionalized arrangements are often necessary, arrangements that tell the actors involved how to behave if the intended coordination shall be achieved. The major instrument of such institutionalization always has been international law, although there may be also more informal modes of institutionalizing certain coordination arrangements. The whole range of literature on transnational administrative networks gives proof to the fact that such informal modes of cooperation play an ever growing role in relations beyond frontiers.

Beyond mere coordination, joint and concerted action in pursuit of a common objective might be feasible. Such deepened cooperation might lead to considerable gains. But again stable modes of interaction are needed to enable efficient cooperation – modes of interaction that might need a strong degree of institutionalization in a legal regime. The intended common objectives might be objectives which are in the interest of two or three states, but might also be specific interests from which the whole community of states might profit.⁴⁹ Climate policy is a good example of the last sort of collective interest – all states suffer, although to different degrees, if climate change goes on without any alteration. Framing climate change would be a collective interest of all states, a ‘common interest of mankind’. Such a ‘collective good’, however, is often difficult to achieve. Positive and negative externalities will create rather divergent incentives to cooperate for states as well as political and societal actors inside states. Some states might be tempted to profit from the costly endeavours of the others as a ‘free-rider’. Others will enter into cooperation arrangements but later might fall into opportunistic behaviour and desert from the required mode of interaction.

⁴⁷ Goldsmith/Posner (footn. 43), at 12.

⁴⁸ See Goldsmith/Posner (footn. 43), at 32-35.

⁴⁹ On the concept of ‘community interests’ of the international community see Paulus (footn. 1), at 250 et seq.

It is evident that such complex cooperation games need institutionalized arrangements if cooperation shall really work. Customary law usually will not suffice here to secure the necessary degree of cooperation.⁵⁰ Much more differentiated treaty regimes will be needed – treaty regimes which include mechanisms that ensure a certain transparency of how states behave under the agreed body of rules and mechanisms of compliance management creating specific incentives (positive or negative) to remain loyal to the undertakings entered into under the regime. There is an interesting body of literature linking international law with rational choice based institutionalist models, and with game theory in particular, that has tried to analyze these complex arrangements of compliance management characteristic for modern treaty regimes.⁵¹

Another prominent line of research shows us that coordination must not necessarily happen in legal forms, but often takes place in informal networks.⁵² An interesting follow-up enterprise would be to model the underlying dilemma-type situations of ‘collective action’, in order to find out in which cases states take recourse to the forms and institutions of international law, create formal bodies of legal rules, so-called ‘treaty regimes’, and institutionalize existing or newly founded networks (or clusters of networks) in an international organization, and in which cases they stick to forms of informal coordination operating through networks that deliberately lack any legal institutionalization.

4 THE FRAGMENTED NATURE OF GLOBAL LEGAL ORDER

The overall legal order resulting from such a structure is a rather fragmented enterprise. The individual treaty regimes are not the result of a coordinated, planned effort, but are products of a very decentralized arrangement. The basic characteristic of the ‘global legal order’ formed out of such networks and regimes is its manifold and fragmented nature. Specialized networks and regimes organize specific bureaucratic and/or expert communities, link together actors from the public (i.e. state) side as well as actors from civil society and the business world. The networks formed between them, irrespectively whether they are networks of public agencies and bureaucracies or networks of business firms and civil society organisations, do not differ that much in substance. Bureaucratic networks depend on the personal and institutional influence of its members as much as societal networks. Transnational coordination does not necessarily involve the state –

⁵⁰ See Goldsmith/Posner (footn. 43), at 37/38.

⁵¹ See in particular Abram Chayes and Antonia Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Regimes* (Cambridge, Mass.: Harvard Univ. Press, 1995); see also Goldsmith/Posner (footn. 43), at 84-91.

⁵² See only Goldsmith/Posner (footn. 43), at 91 et seq.

just to the contrary, research on transnational norm-building networks has shown that private actors from business and the world of NGO's can effectively coordinate patterns of interaction without any state involvement.⁵³ Sometimes cooperation with public bodies and bureaucracies is needed, but often civil society can act on its own by constructing specific networks.

And even if public bodies are involved, it is usually not the state as such, understood in a traditional sense as a unitary collective actor, that is concluding and operating the hundreds of specific treaty regimes, but the specific bureaucracies and agencies that are entrusted with pursuing certain specialized policy objectives.

4.1 Phenomena of Fragmentation

Fundamental for understanding the fragmented nature of global legal order is a step which has been called the 'piercing of the veil' of unitary statehood.⁵⁴ The traditional way how international relations tried to understand the 'global order' - as product of a set of unitary actors, namely states - hinders an adequate conceptualization of the current global legal order. The state as a unitary collective actor is a fiction.⁵⁵ States do not act with one voice in the international arena. Depending on the specific issue and the relevant forum, it is usually a small number of specialized organs and agencies that act vis-à-vis their foreign counterparts. With other words: Traditional 'international' relations through the classical diplomatic channels nowadays are only a small part and parcel of interactions between states and the governmental systems.⁵⁶ The major part consists of so-called 'transgovernmental' activities, "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of these governments".⁵⁷ These 'sectorial' networks represent the plurality of legal subsystems, each of which is trying to stabilize a specific social system.⁵⁸

⁵³ See the recent survey of the relevant debate by Graf-Peter Calliess and Moritz Renner, 'Transnationalizing Private Law – The Public and the Private Dimensions of Transnational Commercial Law', (2009) 10 *German Law Journal* 1341-1355, accessible via Internet under <http://www.germanlawjournal.com>.

⁵⁴ See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton Univ. Press, 2004), at 12 et seq.

⁵⁵ See Slaughter (footn. 53), at 12.

⁵⁶ See only Slaughter (footn. 53), at 10-11, 36-64.

⁵⁷ Robert O. Keohane and Joseph S. Nye, Jr., 'Transgovernmental Relations and International Organizations', (1974) 27 *World Politics* 39, at 43.

⁵⁸ See Andreas Fischer-Lescano and Gunther Teubner, 'Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit', in: Matthias Albert and Rudolf Stichweh (eds.), *Weltstaat und Weltstaat-*

The institutional arrangements entrusted with the task of creating some kind of consistent voice to the outside world are relatively weak and have proven to be not really capable to achieve the objective of preserving the ‘unity’ of the state as an outside actor. In institutional and procedural terms, it is mostly not the Foreign Office and the diplomatic apparatus that is sending out its emissaries in order to negotiate on a new regime, but this is usually done on the initiative and under the direction of the responsible sectorial ministry and/or agency that harbours the relevant expert know-how on the specific issue.⁵⁹ If an environmental problem is to be solved, it is the Ministry of the Environment that is negotiating and concluding the agreement. If it is an issue of economic policy, it is the Ministry of the Economy, and accordingly it is in the other cases. Admittedly, the Foreign Ministries are still informed and participate in negotiations, but not as the leaders and with an exclusive role in outside relations, more with a coordinatory function.

Thus the responsables in terms of international policies are the issue-specific expert communities. Most policy sectors and sub-sectors have its own expert communities forming a kind of separate ‘epistemic community’.⁶⁰ The orientations, modes of professional socialization and ‘cognitive patterns’ of national bureaucrats and experts resemble each other very much in such ‘epistemic communities’ – much more than between ministries in the same governmental structure. In such ‘epistemic communities’, members find it much easier negotiating with their counterparts in other states than coordinating their policies internally with neighboring ministries. Such plurality of actors and sub-systems reflects in its modes of operation the need to respect the rationality of the social operations of different social systems – social systems the stability of which the various legal sub-systems have to guarantee.⁶¹

4.2 ‘Disaggregating the State’ as an Analytical Requirement

It is accordingly necessary to engage in an effort of analytically “disaggregating the state”, as Anne-Marie Slaughter formulated it⁶². This means in an analytical perspective dissecting the state into its parts and parcels, into the myriads of special bureaucracies,

lichkeit. Beobachtungen globaler politischer Strukturbildung (Wiesbaden: VS Verlag für Sozialwissenschaften 2007), at 37.

⁵⁹ See Slaughter (footn. 53), at 41-64.

⁶⁰ As to the concept of ‘epistemic communities’ see only Peter Haas (ed.), *Knowledge, Power, and International Policy Coordination* (special issue) (1992) 46 Int'l. Org..

⁶¹ See Gunther Teubner, ‘Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts, in: Hauke Brunkhorst and Matthias Kettner (eds.), *Globalisierung und Demokratie* (Frankfurt a.M.: Suhrkamp 2000), at 240.

⁶² See Slaughter (footn. 53), at 12 et seq.

agencies, regulators and individual actors forming the cluster of public authorities that we usually call the state. The traditional idea that all these actors operate in such coordination that we can deal with them as a kind of single, unified collective actor has proven to be mere fiction. The different bureaucracies and agencies represent different interests and are interwoven with different sectors of society.⁶³ Their specific construction of the 'common good' usually incorporates sector-specific interests of their societal partner organizations and groups, represents sectorial interests of a client network. In interacting directly with their foreign counterparts in the governmental bureaucracies of other states, they form powerful networks that are able to pursue such specific interests also on an international level, in a transnational (or 'transgovernmental') mode of interaction. The resultant shift from government to governance marks "a significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them."⁶⁴ The consequence "is to advantage 'experts and enthusiasts', the two groups outside government that have the greatest incentive and desire to participate in governance processes".⁶⁵ With that in-built bias in 'transnational governance', however, we will encounter a serious problem. As Anne-Marie Slaughter has put it: The various governmental actors "can and should interact with a wide range of non-governmental organizations (NGO's), but their role in governance bears distinct and different responsibilities. They must represent all their different constituencies, at least in a democracy; corporate and civic actors may be driven by profits and passions, respectively. 'Governance' must not become a cover for the blurring of these lines, even if it is both possible and necessary for these various actors to work together on common problems."⁶⁶

The cited passage from Anne-Marie Slaughter's "New World Order" highlights several issues that are of utmost importance for the current global legal order and its further development.

- Firstly, the growing role of transnationally operating corporate and civil society actors, mostly in the form of transnational enterprises and international NGO's.⁶⁷ These

⁶³ See only Benner/Obser/Reinicke/Witte, 'Global Public Policy: Chancen und Herausforderungen vernetzten Regierens', (2001) *Zeitschrift für Politikwissenschaft*, 359 et seq.

⁶⁴ Martin Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance', (2001) 8 *Indiana J. of Global Legal Studies*, 369, at 369.

⁶⁵ Slaughter (footn. 53), at 9-10.

⁶⁶ Slaughter (footn. 53), at 10.

⁶⁷ As to the growing importance of these non-governmental actors see Ghils, 'International Civil Society: International Non-Governmental Organizations in the International System', (1992) 44 *Int'l. Social Science J.* 417 et

non-governmental actors operate on their own terms on a transnational plane and have begun already a long time ago to create their own body of rules and institutions.⁶⁸ The networks created and operated by these societal actors have proven to be rather successful in a whole range of issues. Not only supply-chain networks and their normative complementary, the institutionalization of ‘corporate social responsibility’ via agreements inside such networks, have become a success story that influences the world as much as governmental action does. Also a variety of other networks and transnational rule-making operated by non-state actors has started to frame decisively our global order.⁶⁹

- Secondly, the blurring line between these actors and governmental actors deserves utmost attention. Specific bureaucracies and agencies are not only closely interwoven with these corporate and civic actors, strongly influenced by them in gathering information and also in constructing their specific perspective of the ‘common good’, but are also to a growing degree coalescing with these actors, closely coordinating activities up to advanced forms of cooperation in order to pursue common objectives.

Thus, specialized bureaucracies and agencies often form coalitions with corporate and civic actors from the same sector, as well as with its partner bureaucracies and agencies from other states, in order to overcome opposition from other government actors in their own governmental system. Transgovernmental networks, but also international regimes and international organizations resulting from such regimes, may serve as organizational tools in such campaigns and turf warfare against other sectors of government.

4.3 Consequences for Law-Making in the Global Legal Order

The repercussions on international law-making are manifold. But there is one primordial result: Institutional fragmentation mirrors in fragmentation of international law-

seq.; Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law* (Berlin. Duncker & Humblot 1999); Higgott (ed.), *Non-State Actors and Authority in the Global System* (London and New York, 2000).

⁶⁸ See de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (After the Law)*, (Routledge, 1995); Gunther Teubner, ‘Global Bukowina’. Legal Pluralism in the World Society’, in: Gunther Teubner, *Global Law Without a State* (Aldershot, 1997), at 3 et seq.; Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington, 2001).

⁶⁹ See only the overview given by Peer Zumbansen, ‘Transnational Law’, in: Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law* (Cheltenham, 2006), 738 et seq., comp. also Claire Cutler, *Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy* (Cambridge, 2003), as well as Robert Wai, ‘Transnational Private Law and Private Ordering in a Contested Global Society’, (2006) 46 *Harvard Int'l. L. J.* 471.

making – and a fragmented process of international law-making inevitably leads to a fragmented body of international legal rules.⁷⁰ The ‘unity’ of international law as a legal order in itself is a mere fiction.⁷¹ Negotiated in specialized fora by specialized bureaucracies and agencies, international treaties form not a consistent body of rules, but a plethora of segmented legal regimes that are based on divergent assumptions and ‘cognitive patterns’, follow different objectives, use different tools and instruments and might end up in contradictory provisions.⁷² If concluded as formal international legal treaties with binding force for national legislators, such treaties still need the approval of national parliaments. But the procedures of parliamentary approval are not of such a nature that they could sort out inconsistencies and contradictions with treaty obligations from other sectors. Parliamentarians usually are too ignorant concerning problems of international legal order to solve in advance problems of coordination and to prevent inconsistencies. Problems of consistency usually come up only at a later stage, in the implementation phase, and then it is the task of the implementing agencies and of the relevant courts and tribunals to sort out the problems and to attempt to find a solution.

If such treaties are open to judicial dispute-settlement, it could be the task of international courts and tribunals to harmonize the inconsistent undertakings resulting from different sectorial treaties.⁷³ But the world of international courts and tribunals again is a fragmented world.⁷⁴ The International Court of Justice is far from having any kind of

⁷⁰ See Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, UN-Doc. A/CN.4/L.682 of 13 April 2006, available under http://www.helsinki.fi/oik/globalgovernance/Mallisivusto/tutkimus/L_682_E%5B1%5D.pdf.

⁷¹ See Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (Frankfurt a.M.: Suhrkamp, 2006), in particular at 25-40; see also Martti Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’, (2004) 17 Cambridge Rev. Of Int’l. Affairs, at 197..

⁷² Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law: Postmodern Anxieties’, (2002) 17 Leiden J. of Int’l. Law, at 553 et seq.; Andreas Fischer-Lescano and Gunther Teubner, ‘Diversity or cacophony? New Sources of Norms in International Law’, (2004) 25 Michigan J. of Int’l. Law, at 1059-1073.

⁷³ See Robert O. Keohane, Andrew Morawcsik and Anne-Marie Slaughter, ‘Legalized Dispute Resolution: Interstate and Transnational’, (2000) 54 International Organization, at 137-180.

⁷⁴ See Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford 2003); Patrizia Vigni, ‘The Overlapping of Dispute Settlement Regimes’, (2001) 11 Italian Yb. of int’l. Law 139 et seq.; Thomas Buergenthal, ‘Proliferation of International Courts and Tribunals: Is it Good or Bad?’, (2001) 14 Leiden J. of Int’l. Law 267 et seq.; Vaughan Lowe, ‘Overlapping Jurisdiction in International Tribunals’, (1999) 20 Australian Yb. of int’l. Law 191 et seq.; Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’, (1999) 31 NYU J. of Int’l. Law & Policy 791 et seq.;

monopoly over judicial dispute settlement in international law – just to the contrary, its ambit of jurisdiction is still relatively limited and insular, and with its current organization it would have difficulties of acting seriously as the major ‘judicial function’ in the global legal order.⁷⁵ The traditional way out of this dilemma has been the creation of a series of new (regime-specific) specialized fora of judicial dispute settlement, specialized fora that can react much more flexibly to the specific requirements of dispute settlement in specific sectorial regimes. In such specialized mechanisms, speedy forms of procedure may be created (as in the WTO dispute settlement system), specific technical expertise may be taken on board, and the risks entered into by states by subjecting themselves to a *gouvernement des juges* may be limited due to the sectorial limitation of acceptance of judicial dispute settlement.⁷⁶ Result of such ‘proliferation’ of judicial dispute-settlement bodies, however, is an obvious fragmentation of judicial dispute settlement – a fragmentation which constitutes the price to be paid for the growth of judicial dispute settlement as such.⁷⁷ There are some mechanisms that help to avoid open conflict between various bodies of judicial dispute settlement.⁷⁸ However, the basic results of such trends of fragmentation are obvious: ‘judicialization’ is uneven in scope and

Jonathan I. Charney, ‘The Impact on the International Legal system of the Growth of International Courts and Tribunals’, (1999) 31 NYU J. of Int’l. Law & Policy 697 et seq.; Hugh Thirlway, ‘The Proliferation of International Judicial Organs and the Formation of International law’, in: Wybo P. Heere (ed.), *International Law and the Hague’s 750th Anniversary* (The Hague 1999) 434 et seq.; Gerhard Hafner, ‘Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?’, in: Lucius Caflisch (ed.), *Règlement pacifique des différends entre États* (The Hague et al. 1998) 25 et seq.; Gilbert Guillaume, ‘The Future of International Judicial Institutions’, (1995) 44 ICLQ 848 et seq.

⁷⁵ See also Judge Shigeru Oda, ‘The Compulsory Jurisdiction of the International Court of Justice. A Myth’, (2000) 49 ICLQ 251-265.

⁷⁶ See Stefan Oeter, ‘The International Legal Order and its Judicial Function’, in: Pierre-Marie Dupuy et al. (eds.), *Völkerrecht als Wertordnung/Common Values in International law. Festschrift für Christian Tomuschat* (Kehl et al.: N.P. Engel, 2006), 583 at 591; see also on the achievements of WTO dispute settlement from a political science perspective Bernhard Zangl, ‘Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO’, (2008) 52 International Studies Quarterly 825-854.

⁷⁷ See Karin Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’, (2001) 5 Max Planck Yb. of United Nations Law 67 at 71 et seq.; M.C.W. Pinto, ‘The Court and Other International Tribunals’, in: Connie Peck and Roy S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (The Hague et al. 1997) 281, at 282-284.

⁷⁸ See in particular Jonathan I. Charney, ‘Is International Law Threatened by Multiple International Tribunals?’, (1998) 271 Recueil des Cours 101 et seq.; Georges Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’, (1999) 31 NYU J. of Int’l. Law & Policy 919 et seq. at 926.

intensity, and the perspectives and objectives of different dispute settlement bodies vary to a great degree.

5 TRANSNATIONAL NETWORKS AND COMPLIANCE MANAGEMENT

The current global legal order accordingly is characterized by strong features of fragmentation, uneven growth and resulting asymmetries. As explained above, this is to a large degree result of the complex, organic network character of the global order. Networks organize the interactions between state actors and the corporate as well as civic actors working on a transnational plane.⁷⁹ The hundreds, if not thousands of networks of transnational as well as transgovernmental character described above serve a whole range of functions in the global order.

Formal law-making at the international level, at least as far as the creation and modification of treaty regimes is concerned, usually is rather formalized, and is reserved to formal institutional fora like international organizations and inter-state conference structures.⁸⁰ The results of the cumbersome procedures applied in these fora regularly need the approval of national parliaments, which makes such kind of formal law-making even more cumbersome. The informal networks and international regimes in which states organize the needed coordination and cooperation at agency-level, on the other hand, rarely serve the purpose of law-making in itself, at least as far as binding legal rules are concerned. This does not exclude altogether standard-setting in such networks – but such standard-setting will then lead to standards which in a legal perspective can be qualified only as ‘soft law’.⁸¹ Nevertheless, such informal standards may play an important role in enabling efficient coordination between state actors, in organizing cooperation, may sometimes even serve as an informal tool of harmonization of national regulatory standards, as the example of the Basel Committee and the Basel standards for banking regulation demonstrate.⁸² But delegated law-making or standard-setting entrusted to specialized networks still remains an exception. In some international organizations, usually of a very technical nature, formal law-making powers delegated to the organs of international organisation exist, although to a limited degree.⁸³ In general,

⁷⁹ See Slaughter (footn. 53), at 2 et seq.

⁸⁰ See only the chapter on the ‘legislative function’ in the global legal order contained in the Hague Academy’s general course of Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, (1999) 281 *Recueil des Cours* 9 at 305 et seq.

⁸¹ As to the category of ‘soft law’ see Tomuschat (footn. 78), at 349 et seq.

⁸² See Slaughter (footn. 53), at 42-43, 210-220.

⁸³ See again Tomuschat (footn. 78) at 341-344.

however, formal law-making still is a prerogative of classical diplomatic mechanisms involving foreign ministries and national parliaments.

The task of informal networks and formalized regimes usually is relatively limited. It consists of, firstly, the gathering and spreading of information, and secondly, monitoring the implementation of the legal rules agreed upon previously.⁸⁴ In an institutionalist perspective it is the implementation function which is of particular interest – of particular interest because it sheds light also on the old question how international law works in practice, why states obey given rules. A complex set of mechanisms is used here. Starting point is an enlightened self-interest of states to achieve a certain coordination and cooperation, to solve problems of collective action, to provide collective goods.⁸⁵ Peer-group pressure and formal mechanisms of monitoring are often the tools used in order to ensure that states follow such enlightened self-interest, even if tempted by political (short-term) gains that might be reached when defecting from legal standards.⁸⁶ There is always a danger of ‘opportunistic behaviour’, a danger that relevant actors drop out from the required course of action and try to gain advantages as ‘free-riders’ from the rule obedience of others. Accordingly, safeguards are needed in most international regimes in order to induce relevant actors to keep to the rules.

An institutionalist perspective helps us to understand the specific role of mechanisms of compliance control.⁸⁷ Linking up the international regimes with actors from civil society helps to strengthen compliance control and augments political pressure put on states to abide by the rules of international law.⁸⁸ If needed, instruments of ‘capacity building’ may also be vital tools to ensure loyal implementation of agreed rules – failed and/or precarious states often are simply not capable to implement ambitious legal undertakings, even if wanting to do so.⁸⁹ Not that state actors only comply with international legal obligations when they are forced to do so. In most cases, state actors will opt for compliance because they have internalized patterns of ‘rule of law’ and think

⁸⁴ See Slaughter (footn. 53), at 51-61.

⁸⁵ See Chayes/Handler Chayes (footn. 51), at 3 et seq.

⁸⁶ See Chayes/Handler Chayes (footn. 51), at 135 et seq., 154 et seq.

⁸⁷ See also, in addition to the ground-breaking work of Chayes/Handler Chayes (footn. 51), Goldsmith/Posner (footn. 43), at 100 et seq.

⁸⁸ See Chayes/Handler Chayes (footn. 51) at 250-270.

⁸⁹ See Slaughter (footn. 53), at 57-58; comp. also Stefan Oeter, ‘Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung’, in: Regina Kreide and Andreas Niederberger (eds.), *Transnationale Verrechtlichung*, Frankfurt/New York: Campus, 2008, 90, at 101, 109.

that legal obligations should be respected as such.⁹⁰ In addition, state actors tend to accumulate ‘social capital’ as law-abiding actors – and you do not devalue such ‘social capital’ easily.⁹¹ ‘Reputation’ really matters.⁹² But behind such behavioural and cognitive factors stand also certain incentive structures. In most cases, it is also a requirement of rational behaviour to respect international legal obligations. And institutionalized mechanisms of compliance control are instrumental devices to create such incentive structures, inducing state actors to take certain legal obligations seriously. Much could be said about this issue – Abram Chayes and Antonia Handler Chayes have written a seminal book of some four hundred pages about the issue, and there is still more to be studied.

6 GLOBAL LEGAL ORDER AND THE CRISIS OF STATEHOOD IN THE SOUTH

There is another issue which we must bear in mind when dealing with the problems of global legal order – the crisis of statehood in large parts of the South. Modern statehood is a model imposed upon global society by European colonialism – a model which does not have strong roots in societies in Africa, Asia and Latin America. As time goes by, the façade of ordered statehood falls apart in one state after the other.⁹³ The remaining structures of public authority resemble forms of modern statehood in its external imagery – they have a government, a capital, an army and a foreign service. However, all the forms of public administration and public services that are typical for modern statehood constitute only a kind of ‘surface law’⁹⁴ but do not work sufficiently in order to fulfil the functions that modern international law presupposes for its usual mode of functioning.⁹⁵

⁹⁰ This is neglected by Goldsmith and Posner when they argue that so-called ‘noninstrumental reasons’ do not provide a good explanation for compliance with international law – see Goldsmith/Posner (footn. 43), at 100, 104-105.

⁹¹ See also Goldsmith/Posner (footn. 43), at 101-104.

⁹² See only Guzman (footn. 25), at 71-117.

⁹³ See only Tobias Debiel and Dieter Reinhardt, *Staatsverfall und Weltordnungspolitik. Analytische Zugänge und politische Strategien zu Beginn des 21. Jahrhunderts*, (2004) 18 *Nord-Süd aktuell*, at 525-538.

⁹⁴ See William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge Univ. Press 2008), Chapter 10.

⁹⁵ See Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990); Marina Ottaway, ‘Rebuilding state Institutions in Collapsed States’, in: Jennifer Milliken (ed.), *State Failure, Collapse & Reconstruction* (London: Blackwell, 2003), 245-266.

More and more norms of public international law are based upon certain stata infra-structure at national level.⁹⁶ The proper functioning of human rights protection presupposes a functioning judiciary that keeps all the organs of public authority under control and imposes sanctions if violations of rights occur.⁹⁷ Humanitarian law rest on a well-organised disciplinary and military justice system at national level – and if that is lacking, the military actors on the ground soon start to ignore the relevant rules. WTO law requires an extremely elaborate infrastructure of customs and excises administration – and if one looks into TRIPS, a highly developed judiciary that grants all the necessary possibilities to enforce immaterial property rights at national level. International environmental law rests upon the precondition that a state possesses an efficient environmental administration – or how else do you administer challenging rule systems on climate change, water resources management or marine protection. One could prolong that list nearly indefinitely.

What we can draw from these few examples is a simple but brute fact: Large parts of modern international law will not work adequately if the necessary administrative and judicial infrastructure is lacking that most treaty regimes presuppose in the current system of multi-level governance.⁹⁸ The architecture of global legal order may react in two very different ways to these shortcomings. One could, firstly, stick to the challenging assumptions on the capacities and capabilities of underlying national statehood – and where these preconditions are evidently not met, the community of states could try to invest resources into the capacity-building at the level of national administrations and judiciaries. To a certain degree such a strategy might work – but this requires that the mismatch between implicitly assumed capacities and existing deficiencies is not too large. The other avenue would be to lower the level of commitments required from national governmental systems. Here and there international law already works with such strategies – think of WTO’s system of preferential treatment for least-developed countries that liberates such low-capacity members of the system from the burden of a whole series of obligations.

In the details of regime architecture, international law already takes into consideration the described problems. At a general level, however, the issue is very rarely raised as an important point. International law theory must, however, and this is my firm conviction, confront the resulting problems very openly and must start a general debate on

⁹⁶ See the examples given in Stefan Oeter, ‘Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung’, in: Regina Kreide and Andreas Niederberger (eds.), *Transnationale Verrechtlichung*, Frankfurt and New York: Campus, 2008), 90, at 98-105.

⁹⁷ See only Twining (footn. 91), Chapter 12.

⁹⁸ See more in detail Oeter (footn. 93), at 96 et seq.

the topic. What can we expect realistically from the national level in the global system of multi-level governance when we are dealing with technical issues implying for its implementation a well-functioning administrative and judicial apparatus? A structured discussion on the problem has not even started sincerely until now.

7 LEGITIMACY AND EFFECTIVITY OF INTERNATIONAL LEGAL NORMS

An issue linked to questions of implementation is the issue of legitimacy and effectivity of international legal norms. Procedural aspects play a key role here – procedural fairness in the formation of legal rules is a basic requirement to perceive the relevant obligations as ‘legitimate’.⁹⁹ Such procedural fairness, or ‘input legitimacy’, must be seen in a close relationship with arguments of ‘effectivity’, or ‘output legitimacy’. The relevance of both aspects of legitimacy differs according to the special characteristics of the different segments of international law. In some areas, international law stresses solely the procedural side, whereas in other areas substantial results of the regime are the final yardstick.¹⁰⁰

A third issue will be of relevance in a number of cases – the value systems structuring societies and the degree to which norms of international law conform to (and confirm) societal value systems. Current debates in legal theory and philosophy stress here the differences between communitarian approaches, grounded in an old-European ‘Aristotelianism’, on the one hand, and liberal ‘individualism’, as e.g. known from human rights theory and from ‘methodological individualism’ in economic scholarship, on the other hand. This is not a mere debate of academic scholars from Europe and other OECD-countries.¹⁰¹ The debate on ‘Eastern Asian values’, questing for a different interpretation of international human rights instruments, is a telling example of that same fundamental debate, as well as the recent discussions on the role of Islamic legal traditions in conceptualizing international law.¹⁰² These discussions remind us that most in-

⁹⁹ See Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford and New York: Oxford Univ. Press, 1990), and more recently also Ian Clark, *Legitimacy in International Society* (Oxford: Oxford Univ. Press, 2007).

¹⁰⁰ See also Rüdiger Wolfrum and Volker Röben (eds.), *Legitimacy in International Law* (Berlin et al.: Springer, 2008), in particular the introductory chapters by Rüdiger Wolfrum, ‘Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations’, *ibid.*, at 1 et seq., and of Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’, *ibid.*, at 25 et seq.

¹⁰¹ See also H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford Univ. Press 2004).

¹⁰² See only, on the one hand, Yash Ghai, ‘Human Rights and Asian Values’, (1998) 9 *Public Law Rev.* 168, and on the other hand Abdullahi An-Naím, *Islam and the Secular State: Negotiating the Future of Shariá* (Cambridge, MA: Harvard Univ. Press 2008).

ternational law can serve as a mirror of value conflicts – think of Sharia lawyers resistance towards any form of ‘universality’ of some of the concrete human rights guarantees that were embodied in the Universal Declaration of 1948 and in the two UN Covenants.

Universality of international law, and in particular of human rights, is an ambitious normative statement.¹⁰³ Empirically, such statement of universal validity is wrong, since the value system expressed in international human rights covenants is not an expression of genuinely universal values, but of European values spread over the world in the course of the expansion of the European state.¹⁰⁴ Nevertheless, in a normative perspective, ‘universality’ serves a noble purpose – reminding states that what they have signed and ratified as treaty law, in order to be perceived as a ‘civilized state’ in international diplomacy, constitutes a binding legal standard for them. But even beyond that purely normativist argument, ‘universality’ has an important dimension of international legal policy. Proclaimed ‘universality’ implicitly has an emancipatory function towards traditional communitarian value systems – non-governmental organizations, opposition movements and repressed segments of society can use ‘universal’ human rights as a basis for their claims of political and social change, can use it as a tool in trying to transform traditional power structures and the inequalities and the repression resulting from them.¹⁰⁵ ‘Universal’ human rights thus have a potential to erode traditional authorities and traditional modes of societal organization.¹⁰⁶ But that is part of the problem, and the reason why the debate on the ‘universality’ of international legal norms will go on for quite a time. The representatives of traditional society realize just that emancipatory – if not to say: revolutionary – potential that is built into ‘universal’ human rights and accordingly try to limit human rights to small legal reserves, if they do not reject the whole idea as a Western import designed to ‘colonize’ non-European societies in cultural terms. The statement of ‘universal’ values of global society thus is not an innocent

¹⁰³ See Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford univ. Press 2nd ed. 2006); Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge: Cambridge Univ. Press 2006); Conor Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge Univ. Press 2006); James Griffin, *On Human Rights* (Oxford: Oxford univ. Press 2008).

¹⁰⁴ See Ram Prakash Anand, *Studies in International Law and History* (Leiden et al.: Nijhoff, 2004) and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge Univ. Press, 2005).

¹⁰⁵ See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff 2006),

¹⁰⁶ See also Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton Univ. Press 2006), at 423.

factual statement but a normative claim that has a strong transformative potential if applied to societies outside Europe.¹⁰⁷

8 CONCLUSIONS: THE 'GLOBAL LEGAL ORDER' - PROBLEMS AND PROSPECTS

In trying to restate the results of the 'tour d'horizon' which was undertaken in this paper in order to map the crucial problems of how to conceptualize a 'global legal order', one is thrown back to some basic form of epistemic scepticism. At least one observation is beyond doubt: The concept of a 'global legal order' is not an innocent description of a body of rules that organizes the 'international community', but is in itself a prescriptive, and to a certain degree conflictive, constructivist project.¹⁰⁸ We – the international lawyers – would like to construct such an order and tend to inscribe most of our wishes and normative aspirations in such a project. 'Real existing' international law, however, is a very provisional and fragmentary body of legal rules and standards that have evolved from the manifold interactions of a fragmented global society – a society that comprises the traditional 'society of states', but also a wider array of societal networks that link up firms and civil society actors at regional as well as global level. The body of rules organizing this 'anarchical society' is far from being consistent, does not embody a plausible idea of justice and bears some rather disquieting features. One of these features is the fragmented nature of the substance of international law, of the body of legal rules, but also of the institutional structure characterizing the 'global legal order'. Such institutional structure is marked by a strong degree of organizational fragmentation. The organizational backbone of 'global legal order' is not a unitary structure of global government, but is an anarchical array of transgovernmental and transnational networks linking specialized bureaucracies and agencies, but also private business and civil society actors throughout the world. As fragmented as the modern state is in its internal structure, with a plethora of more or less independently acting specialized state organs, administrations, agencies and semi-private satellites of the state, as fragmented is also the international system, with all these administrations and agencies reaching out transnationally and coalescing with their counterparts in other states, but also with like-minded corporate and civil society actors that help these networks of state actors to push through their issues.

Such fragmentation leads to a certain amount of inconsistency in substance, but also to strong inequalities in the degree of 'legalization' of international relations. In some

¹⁰⁷ See also Twining (footn. 91), at Chapter 13.

¹⁰⁸ See only Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge Univ. Press 2003), at 22.

sectors 'legalization' has progressed rather far, with strong institutions at international level; in other sectors coordination happens only through loose networks. Such an asymmetric state of 'legalization' again might end up in frictions – there is a danger that strong legal regimes 'colonialize' neighbouring fields where a strong normative consensus has not been found until now. The described 'colonialization' might subject certain areas to the systemic rationality of another field, thus disturbing its proper normative evolution. It is of extreme importance that legal doctrine develops a clear idea of such asymmetries (and the dangers inherent in it). Only when international lawyers in their positive legal work take cognizance of such asymmetries and develop a set of tools how to deal with them, international law can avoid the traps of 'legal imperialism'. The traditional understanding of international law as a unitary body of rules forming a consistent 'legal order' hinders the development of an adequate sensibility for the problems described above under the headings of 'fragmentation' and 'asymmetry'. Raising a certain degree of conscience for these issues was a primordial task of the paper – and for gaining a clear picture of these phenomena it is necessary to take recourse to bits and pieces of social science theory.

Other dangers that call for attention in doctrinal legal work are inherent in current international law as well. In normal cases, international law is applied in a loyal spirit by state actors because the 'internalized' patterns of 'rule of law' suggest that international legal obligations should be honoured. There are also reputational arguments that speak in favour of applying international legal rules automatically, without calculating in each case whether the relevant rule is really furthering state interests (if one can identify such collective interests so easily at all). But underneath complex international regimes, with its resultant legal obligations, there must exist as a fundament an arrangement of incentives that induces states to take the obligations seriously, and deters them from defection into 'opportunistic' behaviour. The construction of international regimes can influence such incentive structures, and can heighten the costs of defection considerably by trying to create as much transparency on compliance as possible, and by institutionalizing adequate organs that monitor compliance, warn other members if states defect and thus put a certain pressure upon states to abide by the rules. Linking these mechanisms up to non-governmental actors, such as transnational enterprises and NGO's, can put additional pressure on governments to comply with its undertakings under international law. A strong learning curve in engineering such mechanisms is observable when new international regimes are constructed or existing ones are reorganized. For developing a constructive perspective on the functions which such arrangements should fulfil, it is important to link up the debates in international law and in private lawyers' discourses on transnational law. Real life does not follow the artificial boundaries of academic disciplines – and the real-existing 'global legal order' is a hybrid of international and trans-

national arrangements that can only be understood adequately if perspectives of public and private law are brought together.

Why is the issue of compliance so crucial for an understanding of the evolving 'global legal order'? 'Effectivity' of legal regimes is vital for its legitimacy – and we must accordingly pay much more attention to issues of 'effectivity' than traditional international legal doctrine has done. Looking to 'effectivity', however, requires empirical studies and a sound understanding of social science theories on international relations. But 'effectivity' alone cannot always secure legitimacy. Another dimension of legitimacy is procedural fairness in the formation of such regimes – fairness that includes a serious level of participation in rule-formulation as well as the observance of certain basic procedural standards. A third dimension is the linkage to prevailing concepts of 'justice', the value-dimension of international law. Law must not always in a strict sense be an expression of ideas of 'justice', but it must at least respect societal values (and should definitively not contradict such values). The current 'global legal order' has a severe problem with this 'justice dimension', because we still lack a consistent and uniform set of societal values all over the world. 'Universality' of human rights, to take an example, still is more a normative claim than a societal reality. The 'universal' value system expressed in international human rights treaties is a product of European legal evolution, spread over the world by the expansion of the European model of statehood. Practically no state can abstain from paying at least lip-service to such values, if it does not want to be qualified as a 'fragile' or even 'failed' state. But the retreat of the European state model in large parts of the South means that the façade of 'universal' values is falling apart. The legitimacy of parts of international law, and with it international law as such, will become object of a more and more intense dispute. But international lawyers would betray their mission if they would retreat in the face of such resistance. Modern international law has always been a normative, if not to say prescriptive project, and not a simple description of social reality. Such normative project is even more desperately needed if mankind shall survive in the face of severe challenges like dramatic economic inequalities on a global scale, escalating violence, environmental catastrophes and rising tides of migration. Accordingly, we need a conceptualization of the project of the 'global legal order' that reformulates the normative vision of international law while taking cognizance of all the empirical and theoretical intricacies and fallacies of such a normative project. The debate on how such a conceptualization might look like is still in an embryonic phase. A lot still needs to be done – in academic as well as in political terms.

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