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## **The Grammar of Global Law**

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# The Grammar(s) of Global Law

David Roth-Isigkeit

**Abstract:** This essay introduces the theme of the volume: *The Grammar(s) of Global Law*. Legal grammar is understood as the conceptual and linguistic foundation on which legal decisions rest – law’s meta-structure, its argumentative techniques and its systematicity. The essay distinguishes between two ways of thinking about this grammar. The first way of thinking appeals to a grammar as a stabilizing factor, maintaining the coherence of the law. The second way of thinking highlights the asymmetries of power within this structure and perceives legal grammar as the medium carrying the ideological commitments of the law. As the essay ultimately argues, both perspectives react differently to the challenges of globalization that the law is confronted with. While the debate on the grammar(s) of global law is one place where future political order is negotiated, the outcome of the debate is largely open.

Since the second half of the 20<sup>th</sup> century, the relationship between law and linguistics has been explored in great detail.<sup>1</sup> Analytic jurisprudence, starting with Herbert Hart’s reading of Jeremy Bentham, John Austin and Ludwig Wittgenstein, understands law as a form of speaking, a particular abstract language.<sup>2</sup> This abstract language follows certain rules, a sort of grammar, that describes more or less precisely what is acceptable to say in that language. Why, for example, could it be acceptable to think in the context of some harbour regulation of a whale as a fish instead of a marine mammal, whereas this would not be the case in the ordinary usage? The answer to this and other examples of the usage of this language is not necessarily to be found in words or concepts. Rather, as any native speaker of a language intuitively understands, there is a dimension of speech usage that is below the surface of what can be grasped looking merely at formal characteristics.

Within legal research, this “reading between the lines” is well-explored.<sup>3</sup> This special issue revisits old quests in the light of new challenges. In the process of globalization, law undergoes fundamental change. Traditional international legal structures come increasingly under pressure, functionally differentiated regimes partly replace territoriality on the global level,<sup>4</sup> and the extension of regulatory structures beyond the state leads to shifts in the authority of private and public sector.<sup>5</sup> This equally provokes questions related to law’s meta-structure, its argumentative techniques and its systematicity – elements that are here described as its underlying grammar.

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<sup>1</sup> See, generally, *Endicott*, Law and Language, The Stanford Encyclopedia of Philosophy (last modified April 2016), available at <http://plato.stanford.edu/archives/sum2016/entries/law-language/>.

<sup>2</sup> *Hart*, The Concept of Law, 1961.

<sup>3</sup> See *Green*, Dworkin’s Fallacy, or What the Philosophy of Language Can’t Teach Us about the Law, Virginia Law Review Vol. 89, 2003, 1897. *Bix*, Law, Language and Legal Determinacy, 1996. *Fish*, Doing What Comes Naturally, 1989. *Blackburn*, Spreading the Word, 1984.

<sup>4</sup> *Teubner*, Constitutional Fragments: Societal Constitutionalism and Globalization, 2012.

<sup>5</sup> *Roth-Isigkeit*, The Plurality Trilemma – A Geometry of Global Legal Thought (forthcoming).

## 1. LANGUAGE, LAW AND GRAMMAR

In the development of the human species, language takes an irreplaceable role. For example, it is suggested that the explosive development of complex tools and art, symbolic ceremonies and social cooperation, that can be observed approximately 40-50.000 years ago, directly relied on the parallel development of linguistic capacities and symbolic language.<sup>6</sup> Only language made it possible to convey across different human beings guidelines or “rules” how to do and to achieve more or less complex tasks, be it how to connect a stick and a stone to construct a hammer, or how to bury a fellow human in the traditional way. A grammar has a particular role in such development of language. Language that is capable of conveying complexity does not merely consist in the association of words with concepts. Rather, because it is usually in sentences that we express ourselves, it involves knowledge on *how to put words together*.

This required knowledge on how to combine single words to meaningful phrases makes human languages immensely complex to understand. The same words in a different order might convey a completely different meaning. This has made linguistic theorists like Noam Chomsky argue that it is essentially an exclusive quality of the human brain to master languages.<sup>7</sup> In particular, Chomsky believes that it is a form of universal capacity that already small children are endowed with. Language learning, in this view, is not merely the association of ideas but only possible through an intuitive ability to process the ‘Universal Grammar,’ describing the basic properties of all languages. What might be different across the multitude of languages is concepts and words, but some fundamental properties remain the same.

This is a far-reaching statement given that there are more than 7000 actually spoken tongues on the globe.<sup>8</sup> Other theoretical positions highlight the difference between several systems of grammar. Benjamin Whorf, for example, argued that “the background linguistic system (in other words, the grammar) of each language is not merely a reproducing instrument for voicing ideas but rather is itself the shaper of ideas, the program and guide for the individual's mental activity, for his analysis of impressions, for his synthesis of his

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<sup>6</sup> Ott, The Evolution of I-Language: Lexicalization as the Key Evolutionary Novelty, *Biolinguistics* Vol. 3, 2/2009, 255, 257.

<sup>7</sup> Chomsky, *Aspects of the Theory of Syntax*, 1965. Cowie, *Innateness and Language*, The Stanford Encyclopedia of Philosophy (last modified January 2008), available at <http://plato.stanford.edu/archives/sum2010/entries/innateness-language/>.

<sup>8</sup> For a detailed account, see the *Ethnologue*, available at <http://www.ethnologue.com>. See also *Nettle, Linguistic Diversity*, 1999.

mental stock in trade.”<sup>9</sup> As much as the grammar is a technical element providing rules how to make adequate statements in a form of language, it equally impacts the formation of ideas through channelling how these ideas can be formulated. Whorf highlights the interdependence of any mental activity with the grammatical structure of the language at its basis.

These paradigmatic positions correspond to difficulties that arise in the attempt to conceptualize the relationship between law and language. On the one hand, language is an important component of the law. On the other hand, law might itself be characterized as a language. This makes it hard to specify what we mean precisely when we think about the linguistic component of law. What role does linguistic analysis play in the attempt to understand the internal structure of the law? Is law a language on its own, like Turkish or Sanskrit? Is it in itself a form of universal language that reaches across the boundaries of civilizations? Do grammatical rules governing languages apply to the law, such as how to build sentences and concepts. Or does the linguistic element in law merely reflect some basic aspects that are present in any form of human speech? While this special issue does not aim at a resolution of these questions about the relationship of law and language, it is nonetheless helpful to keep the different understandings as a mapping device in mind when reading the different approaches.

What this introduction will do is to trace two ways of thinking about legal grammar. The first way understands legal grammar as a pervasive set of argumentative rules that make a statement acceptable in the professional community of lawyers. Legal craftsmanship, in this perspective, is constructive and universal. The second way of thinking tells a story about legal grammar as the underlying ideological structure of the law, particular and culturalist. Here, grammar is the untold, that distorts legal processes with its impalpable influence. Even though such a clear cut might seem artificial at first, since there are continuities and interrelations between both perspectives, this essay argues that these two figurative characterizations boil down to fundamentally different basic principles. In a third step, summarizing the experience from reading the contributions of this issue, this introduction tries to illustrate some challenges of legal globalization that the grammar of global law is confronted with.

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<sup>9</sup> Whorf, *Language, Thought and Reality*, 1956, 214.

## 2. GRAMMAR AS RULES OF ARGUMENTATION

The Chomskyan perspective in mind, this first concept of a global legal grammar appeals to some basic properties that are similar across different legal regimes beyond the state. These shared properties account for a form of discursive unity that permits to situate decisions in a shared context of justification. The central element, in this perspective, are common rules of interpretation and argumentation. Through offering models how rules are supposed to be applied, they make outcomes comparable and predictable and allow for the stabilization of normative expectations in the law. In global law, this task is performed by general principles of international law and the rules of interpretation that the *Vienna Convention of the Law of Treaties* contains.<sup>10</sup> They provide the meta-theoretical backbone of any expression in the language of global law.

In this volume, this perspective is offered in the contribution by Thomas Kleinlein that analyses how the interpretation of UN Security Council resolutions generally follows this universal grammar.<sup>11</sup> This makes him consider that while the Security Council is embedded in the general practice of international law, some sector-specific particularities apply.<sup>12</sup> Grammar, in this way, can be understood as the fundamental core of global legal argument, that tends to be slightly modulated in the specialized regimes. No area of law beyond the state is free from the general grammatical rules of international law.

This insight suggests an important function of such grammar: to maintain coherence across the fields in which the law applies. Grammar can be the mediating element between vastly different regulatory objects. An appeal to coherence, according to Pulkowski, does not in itself require that international law is actually coherent. Rather, coherence appears as a requirement of rational justification, “a decision that can relate the rules of various international regimes to common values or principles is more likely to appear as a rational decision”.<sup>13</sup> In the rules of the *Vienna Convention*, for example, this requirement for coherence is reflected in Article 31(3)c, requiring interpretation to reflect the general framework of international law.<sup>14</sup>

At the same time, different regimes might stand in fundamental tension to each other, as

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<sup>10</sup> See, in particular, *Pulkowski*, *Universal International Law's Grammar*, in Fastenrath et al. (eds.), *From Bilateralism to Community Interest – Essays in Honour of Bruno Simma*, 2011, 138 (145-50).

<sup>11</sup> *Kleinlein*, *Der UNO-Sicherheitsrat und die Universalgrammatik des Völkerrechts*, in this volume, 89.

<sup>12</sup> *Kleinlein* (note 11), 116-117.

<sup>13</sup> *Pulkowski*, *The Law and Politics of International Regime Conflict*, 2014, 255.

<sup>14</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (2006), paras. 424-432.

the contribution by Dana Schmalz argues. While International Humanitarian Law and International Human Rights Law increasingly overlap in their area of application, Schmalz holds, they build on opposing perspectives with respect to the foundation of rights.<sup>15</sup> In particular the “contrasting judgment on the permissibility to kill a person”<sup>16</sup> illustrates how conflicts are not simply a question of singular divergent rules, but of substantially different grammars. The concrete legal questions arising in the demarcation of the two regimes underline limits of both grammars, especially in the task to address contemporary challenges such as transnational terrorism or targeted killings. The extent to which formal legal argument can mediate between these conceptual collisions appears fairly limited.<sup>17</sup> Rather, Schmalz suggests viewing the relationship between IHL and IHRL as a dialectical process, in which a new grammar might incrementally arise by borrowing from both regimes.

A grammar, in this view, appeals not only to a formal dimension, rather it appears as the conceptual (and philosophical!) basis on which legal decisions rest. This resonates with a perspective that understands the unifying vision of global legal grammar as a more substantive background condition of global legal argument. Klaus Günther argues that along the different logics of sub-regimes, there are criteria that make up a form of universal concept of law. “Such a uniform concept can be spelled out in terms of a legal meta-language which contains basic legal concepts and rules, like the concept of rights and of fair procedures, and the concept of sanction and competence.”<sup>18</sup> This meta-language, according to Günther, is the achievement of historical experiences.<sup>19</sup> This picture of a legal grammar shares the universal aspiration, yet carries more substantive elements. It works as a form of storage for the legal history of a society.

The normative elements included in this grammar are crucially related to the societal frame in which the law applies. While undoubtedly such frame already exists on the level beyond the state, insecurity as to its normative foundations is pervasive. One substantial proposal involves an extension of the normative language of the nation state (and its grammatical foundations) to the global level. In this volume, Matej Avbelj examines the viability of constitutionalism to work as a grammar of global law. He argues that while there is a

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<sup>15</sup> Schmalz, Normative Demarcations of the Right to Life in a Globalized World: Conflicts Between Humanitarian Law and Human Rights Law as Markers, in this volume, 68.

<sup>16</sup> Schmalz (note 15), 69.

<sup>17</sup> Roth-Isigkeit, Promises and Perils of Legal Argument: A Discursive Approach to Conflicting Legal Orders, *Revue Belge de Droit International*, 2/2014, 96.

<sup>18</sup> Günther, Legal Pluralism or Uniform Concept of Law – Globalisation as a Problem of Legal Theory, No Foundations – *Journal of Extreme Legal Positivism* Vol. 5, 2008, 16.

<sup>19</sup> Günther (note 18), 16.

fundamental need for a grammatical backbone of global legal argument, constitutionalism in its different historical forms might only unsatisfyingly perform this role.<sup>20</sup> If, as Günther suggests, such grammar is the result of historical experiences, the differences between the histories of the globe might seem too large to be bridged by a common theory. Conscious of the disparity of contexts, Avbelj appeals to a more modest approach: “[D]ifferent forms of constitutionalism could be preserved (or developed) for different ‘environments’, taking into account their disparate historical, social and overall political characters.”<sup>21</sup> This minimal approach re-iterates the perspective that Kleinlein puts forward with respect to the interpretation of Security Council Resolutions. A combination of common elements and sectoral specificities might bridge the differences between legal regimes.

A perspective of a grammar as a specific set of argumentative rules frequently relates to the idea of the discipline, the professional community that educates and determines the native speaker in their field. To learn to draw on certain argumentative models is an essential part of legal training. Quite frequently, in classic international law, this professional community has been associated with humanistic ideals, an “invisible college” pulling the threads behind the scenes, thus selflessly working towards a better future.<sup>22</sup> Whether an argument is considered admissible or not in this professional discipline crucially determines its validity. In the current pluralization of interactions between different legal orders, however, this validity criterion seems to be weakened.

This necessity for arguments to be accepted in a professional community of international lawyers, however, results in some particularities with respect to the legal grammar. On the one hand, as a positive aspect, experiences that are part of international law’s history become automatically part of the legal grammar. Such view, for example, allows us to make distinctions that go beyond formal criteria of recognition, between substantive arguments and merely rhetorical practice, which have been raised in the case of the Russian Annexation of the Crimea.<sup>23</sup> On the other hand, the roots of the grammar in the discipline leads to the perpetuation of existing power relations.<sup>24</sup> Critical scholars assert

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<sup>20</sup> Avbelj, *Global Constitutionalism as a Grammar of Global Law?*, in this volume, 49.

<sup>21</sup> Avbelj (note 20), 64.

<sup>22</sup> See *Schachter*, *The Invisible College of International Lawyers*, *Northwestern University Law Review* Vol. 72, 2/1977-78, 217.

<sup>23</sup> *Marxsen*, *The Crimea Crisis – An International Law Perspective*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* Vol. 74, 2014, 367. *Mälksoo*, *Russian Approaches to International Law*, 2015, 180-181.

<sup>24</sup> *Kennedy*, *Legal Education and the Reproduction of Hierarchy*, *Journal of Legal Education* Vol. 32, 1982, 591.



that the bias in legal decision-making hides in the background conditions of legal practice and is thus hard to detect.

### 3. LEGAL GRAMMAR AND THE ASYMMETRIES OF POLITICAL POWER

The bias of the professional language of international law is a particularly prominent theme in the scholarship of Martti Koskenniemi. According to him, the quality of legal arguments does not determine the outcome of legal cases. Rather, the indeterminacy of the law provides room for political elements of choice. “The argumentative architecture allows any decision, and thus also the critique of any decision without the question of the professional competence of the decision-maker ever arising.”<sup>25</sup> This structural indeterminacy of the law is also a (frequently deliberately intensified) weakness of the legal grammar to determine legal decisions.

This diagnosis of the indeterminacy in Koskenniemi’s work appeals to (and ultimately opposes) a Schmittian theme: the normativity of facticity. Schmitt analyses the way in which international legal grammar operates as an instrument of political power. The importance of international law, according to Schmitt, lies in the elasticity of its central concepts.<sup>26</sup> “It is one of the most important phenomena in legal and intellectual life of humankind in general, that the one who has true power is able to determine for himself concepts and words. *Caesar dominus et supra grammaticam*: the Emperor rules over the grammar.”<sup>27</sup> The outcome of legal decisions is as much the product of who decides with which political interest as it is a matter of legal language.

Legal grammar, in this view, carries the ideological structure of the law and perpetuates the implementation of interests.<sup>28</sup> The grammatical structure of the law, understood in this way, exercises power, but not in the form of coercion. Rather, relations of power perfidiously diffuse into all areas of society, promoting a biased conception of the common good that Antonio Gramsci described as *hegemony*. It is “an organic and relational whole, embodied in institutions and apparatuses, which welds together a historical bloc around a number of basic articulatory principles”.<sup>29</sup> Legal argumentation is a crucial part of this

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<sup>25</sup> Koskenniemi, *From Apology to Utopia*, Rev. Ed. 2006, 589 (emphasis omitted).

<sup>26</sup> Schmitt, *Völkerrechtliche Formen des modernen Imperialismus*, in: Schmitt (Ed.), *Positionen und Begriffe im Kampf mit Weimar*, 1932, 202.

<sup>27</sup> *Ibid.* (my translation).

<sup>28</sup> See, for example, Kennedy, *Law and the Political Economy of the World*, *Leiden Journal of International Law* Vol. 27, 2013, 7. See also, for further references, Beckett, *Critical International Legal Theory*, Oxford Bibliographies (last modified April 2012), available at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0007.xml>.

<sup>29</sup> Laclau / Mouffe, *Hegemony and Socialist Strategy*, 2<sup>nd</sup> ed. 2001, 67.

organism. The legal grammar is “the substantive reference framework of various norms and decisions that fixes in time solutions once found and thus makes them reproducible, establishes legal figures, enables systematization and stores manifold model solutions and bygone conflicts. Doctrine [...] acts as a stopping rule for justification-seeking argument”.<sup>30</sup> Here, the constraints of legal grammar are understood as a perfidious tool of hegemonic rule to which subversion is the only plausible answer.

In the post-modern picture, such an approach to legal grammar can be radicalized further. Assuming with Jean-François Lyotard that language itself is radically fragmented, fragments of language receive a completely different meaning when they are in different contexts: a fragment in the law will be understood differently than in arts, economy or sports.<sup>31</sup> The focus on common grammatical rules in legal discourse, however, tends to blind out the socially determined narrative character of legal decisions and concepts in seemingly scientific argumentation. Legal grammar is to be found in the narrative dimension of the law, in the non-articulated background assumptions about political, economic and ethical conditions that remain unprocessed in the use of formal legal language.

In this volume, Julia Otten provides a perspective on these narrative background conditions in international law. Her contribution traces the use of narratives as legal “stories.” Narrators, as the ones who are writing the story, have an immense power over the way the grammatical structure of the law develops, because they are the ones in the position to influence its most basic rules. “Narrators can use several tools to persuade their audiences. First, within narratives they can merge fiction, which is generally considered a non-issue in international law, and reality in a way that becomes unnoticeable to the reader. The fictitious aspects of a story, whether those are characters or events (for example, the international community or State sovereignty) are intertwined with the storyline and become a real and, most important, a necessary part of the development of the story.”<sup>32</sup> Her contribution opens a perspective how legal knowledge and the underlying background conditions of legal argumentation are shaped. In particular, the normativity of the law remains crucially connected with the formal, narrative structure of the story. Recalling Whorf’s perspective on the cognitive influence of a grammatical structure, Otten

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<sup>30</sup> *Buckel / Fischer-Lescano*, Gramsci Reconsidered: Hegemony in Global Law, *Leiden Journal of International Law* Vol. 22, 3/2009, 437, 446.

<sup>31</sup> *Lyotard*, *The Differend*, 1983, transl. Van Den Abbeele 1988. See also *Kronenberger*, *Theorien der Radikalen Fragmentierung*: Ladeur, Weber, Wiethölter, in: *Buckel et. al. (eds.), Neue Theorien des Rechts*, 2<sup>nd</sup> ed., 2008, 229, 240.

<sup>32</sup> *Otten*, *Narratives in International Law*, in this volume, 47.

demonstrates how content-based argumentation can turn into a mental tool through seemingly simple story-telling.

The view of legal argument resulting from this perspective is one of continuous contestation instead of harmonizing consent. Otten argues: "Since there is a plurality of narratives, rhetorical techniques of persuasion are needed in the struggle over authority of interpretations and readings of international law. Rhetoric should not be dismissed as a negative instrument; instead it is existential for international law. Narratives are a powerful tool to establish, overthrow or reinforce this authority in international law."<sup>33</sup> This view highlights that international legal argument is a process in which the grammatical structures determining the validity of normative statements as law are themselves subject to contestation and change.

#### **4. GRAMMAR AND LEGAL GLOBALIZATION**

In particular, the currently observable change of law beyond the state in the process of globalization sheds a new light on the questions related to legal grammar. Will it be possible to contain societal change within rationalizing grammatical structures, upholding the historically grown order of the nation state? Or will globalization dissolve the traditional legal grammar and establish a new background condition of legal argument in the global realm? Is it possible to "conserve the great democratic achievements of the European nation state, beyond its own limits,"<sup>34</sup> (Habermas) or will the modern democratic concept of law be replaced by other grammatical structures? More radically, the time of structure might be over altogether. Ultimately, the modern concept of law, Luhmann argued, could be nothing more than a "European anomaly."<sup>35</sup>

In dealing with legal globalization, there are several strategies available.<sup>36</sup> The constitutionalist strategy appeals to the stabilizing dimension of a legal grammar and transfers the model of the nation state to the global realm. Sometimes, this transfer is perceived as a mere necessary complement to an (in any case) deteriorating world of statehood.<sup>37</sup> Other authors emphasize the normative and factual pull of supranational

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<sup>33</sup> *Otten* (note 32), 48.

<sup>34</sup> *Habermas*, *Why Europe Needs a Constitution*, *New Left Review* Vol. 11, 5/2001, 5.

<sup>35</sup> *Luhmann*, *Law as a Social System*, 1993, transl. Ziegert 2004, 490.

<sup>36</sup> *Roth-Isigkeit* (note 5).

<sup>37</sup> *Peters*, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, *Leiden Journal of International Law* Vol. 19, 2006, 579.

institutions.<sup>38</sup> In both cases, it is the grammatical structure of the nation state that is considered suitable to deal with global challenges.

Klaus Günther has spelled out how such a meta-code that preserves the historical experiences from the nation state might look like: The *universal code of legality* contains the essential normative principles of a democratic concept of law.<sup>39</sup> Dispute about what these principles might mean strengthens rather than weakens this structure: “The more we struggle about contested universals [...] the more we get entangled into the requirements of fair procedures which meet democratic requirements as the legitimate medium for the interpretation and institutionalisation of the code of legality.”<sup>40</sup> Since the rationality of fair dispute resolution is inscribed in law’s grammatical foundations, it can be preserved in the multipolar processes of global law. This resonates well with the view of Stefan Kadelbach, who argues that the argumentative structure in this discourse has already reacted to today’s challenges by attaching obligations to actors rather than territorial entities.<sup>41</sup> Accordingly, a thin layer of universal principles, adapted to the respective legal cultures, has the potential to gradually bridge the gaps that open between different legal regimes in the course of fragmentation.<sup>42</sup>

In this issue, a similar perspective appears in the contribution by Matej Avbelj. Here, it is argued that a constitutionalist and a pluralist perspective on the grammar of global law might be complementary rather than opposing. Avbelj suggests that the project of a grammar of global law ought to be a process of continuous searching: “we should be, as in a mosaic of concentric circles, collecting different conceptual and practical expressions of constitutionalism to build a complementary framework.”<sup>43</sup> He illustrates how this interplay between a pluralist search for a constitutionalist theory might relate to the concept of a legal grammar. “[I]n legal grammar too, morphology and syntax are not sealed categories, but often form a morphosyntax. The meaning of the words is formed not only through syntax, by way the words are combined into sentences, but also by the form(ation) of the words itself. In a similar way, the present grammar of global law can be portrayed as a mutual interference by many constitutionalisms, drawn together by principled legal pluralism.”<sup>44</sup> Günther, Kadelbach and Avbelj share their optimism as to the mutual

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<sup>38</sup> Fassbender, *The United Nations Charter as the Constitution of the International Community*, 2009.

<sup>39</sup> Günther (note 18), 18.

<sup>40</sup> Günther (note 18), 19.

<sup>41</sup> Kadelbach, *The Territoriality and Migration of Fundamental Rights*, in: Handl et al. (eds.), *Beyond Territoriality – Transnational Legal Authority in an Age of Globalization*, 2012, 295, 316.

<sup>42</sup> Kadelbach (note 41), 323.

<sup>43</sup> Avbelj (note 20), 64.

<sup>44</sup> Avbelj (note 20), 66.

compatibility of grammars. The advantage of arguments framed from the perspective of rights might be that they inhabit both, a constitutionalist and a pluralist perspective. The language of rights is of central importance for today's legal grammar.<sup>45</sup>

Rights-based pluralism is a qualified concept, a *pluralisme ordonné*.<sup>46</sup> In contrast to this meaning of pluralism, there is a perspective highlighting the virtues of fragmentation in order to break up the ideological frame that the traditional grammar comes with. Scholars sharing this perspective aim at a pluralization of political spaces for contestation. While there is a pressing need to include individual articulations, in the formation of global order, the danger of such an unqualified plurality is that in the multitude of voices only the loudest make themselves heard. It would then give undue preference to the articulations of private economic actors, while failing to safeguard the common interest. A grammar is a stabilizing factor in a legal system, even though this might, in some cases, uphold historical injustices.

A qualified version of right-based pluralism as a sketch for a future grammar of global law is confronted with considerable problems, too. While the rights-based constitutions of the national state have succeeded in solving many of society's collective action problems, a convincing reconstruction of public interest beyond the state is missing. Additional problems result from the fragmented structures of the legal architecture concerned with the protection of individuals. As the contribution by Dana Schmalz highlights, it is difficult to entirely reconcile the demands of Human Rights Law and Humanitarian Law. "IHL and IHRL evolved in different historical phases and have a different focus: While IHL introduces some rules to the situation of war and aims to limit suffering under those conditions, IHRL generally proceeds from the perspective of peace and contains much more far-reaching requirements for the protection of individual rights."<sup>47</sup> The overlap between both regimes leads to complex problems that frequently involve a decision for one of the underlying grammars rather than a mediation between them.

The stabilizing function of the legal grammar is particularly visible in global security law. The contributions by Julia Otten and Thomas Kleinlein shed a differentiated light on their essentially reflexive dimension. Kleinlein argues that the Security Council can crucially influence the interpretive practice of its own resolutions. On the one hand, it is bound to the universal grammatical rules that determine the admissibility of arguments in

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<sup>45</sup> *Bhuta*, The Frontiers of Extraterritoriality: Human Rights as Global Law, in: *Bhuta* (Ed.), The Frontiers of Human Rights, 2016, 1, 4. *Domingo*, The New Global Law, 2010.

<sup>46</sup> *Delmas-Marty*, Le Pluralisme ordonné, 2006.

<sup>47</sup> *Schmalz* (note 15), 73.

international law. On the other hand, it can preconfigure through specific formulations how its resolutions will be received in the professional community.<sup>48</sup> This reflexive element, as Otten argues, perpetuates the *status quo*. The narrative of collective security fixes a particular historical situation and relies on certain legal concepts: “State sovereignty is part of the hidden cargo of the script of the collective security narrative and it cannot be easily redefined, which is why it leads to many of the troubles that the narrative encounters.”<sup>49</sup> This leads to a weak form of *autopoiesis*: The narrative can treat, to some extent, the changes in the factual order as external events.

Whether this self-stabilizing, reflexive element of the grammar of global security law can be upheld even if the role of statehood fundamentally changes remains difficult to say. The United Nations might be the result of a historically asymmetric consensus, but the state-based system of collective security and dispute resolution arguably is one of the most central achievements of the 20<sup>th</sup> century.<sup>50</sup> If the basic grammar of global law changes towards other forms of authority, it might cease to carry the *particular* historical experiences in the background of the traditional form of the international legal system and its aims, “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>51</sup> Grammatical change influences the basic mode, in which a legal system operates – it overwrites historical with actual experiences. If the traditional state-focused grammar does not resist the centrifugal forces of globalizing private interest, it will need a replacement that keeps private and public, right and duty, in balance.

## 5. CONCLUSION

The approaches of this volume highlight a wide spectrum of aspects and challenges that the grammar(s) of global law, depending on the perspective in singular or in plural, is confronted with. The debate on the grammar of global law is one place where future political order is negotiated and contended. The outcome of this process is largely open. Will global law find *one* language? Will it be many languages that coexist and interact? Will these many languages still refer to the same basic grammar? Or will even the grammar of global law be fragmented? With the concept of legal grammar, it is possible to illustrate

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<sup>48</sup> Kleinlein (note 11), 116.

<sup>49</sup> Otten (note 32), 40.

<sup>50</sup> Dupuy, Some Conclusions, in: Kadelbach et. al. (eds.), System, Order and International Law – The Early History of International Legal Thought (forthcoming).

<sup>51</sup> Preamble of the Charter of the United Nations.

many theoretical variations beyond unity and particularity. The contributions of this volume demonstrate that it can serve as a helpful tool for the analysis of global order.

# Narratives in International Law

Julia Otten\*

**Abstract:** This contribution sets out to trace an unacknowledged narrativity of international law. It argues that narratives are cognitive instruments that organize the experienced knowledge in the form of a story. Within these stories, narrators can invent characters and concepts. In international law, a plurality of narratives exists and they can have a strong influence on the understanding and the development of international law. Against the background of a constant struggle over the authority of interpretations, narratives are used as tools for argumentation and persuasion. In a final part, this paper locates the narrative of collective security in international law to illustrate how narratives can function in the international legal system.

## 1. THE SPACE BETWEEN

In international law, the possibility that there could be a story behind an interpretation or behind law-making processes is oftentimes rejected. As it was famously argued by Richard Weisberg, “law, proud law, dressed in a little brief authority, stubbornly resists full recognition of its basically narrative nature.”<sup>1</sup> The concept of narrative was only cautiously taken into consideration by scholars who analysed judgements, and until today the vast majority of the work on narratives in law is concerned with the analysis of legal decisions in domestic law. In international law, there are only very few instances in which scholars hint at the existence of stories or even set out to analyse them.<sup>2</sup> Commonly, narratives are seen as a part of literature, as an art and as such cannot possibly have anything to do with law. I was intrigued by narratives because I felt they could be crucial for the understanding of how international law works nowadays. As Tracy Chapman phrased it, “there is fiction in the space between – the lines on your page of memories – write it down but it doesn’t mean – you’re not just telling stories.”<sup>3</sup>

In this contribution, I set out to trace the unacknowledged narrativity in the field of international law. The project is structured in two parts: The first part is characterized by a predominantly conceptual approach to narratives, to what they are and how they function.

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\* This article is based on the author’s M.A. dissertation in International Law at the Graduate Institute, Geneva, which was awarded the Arditi Prize of 2013.

<sup>1</sup> *Weisberg*, Three Lessons from Law and Literature, *Loyola of Los Angeles Law Review* Vol. 27, 1993, 285 (285).

<sup>2</sup> For one of these hints, see, for example: *Clapham*, Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups, *Journal of International Criminal Justice*, 6/2008, 900. For comprehensive work on narratives in international law, compare, for example: *Orford*, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law, 2007; and: *Slaughter*, Human Rights, Inc.: The World Novel, Narrative Form, and International Law, 2007.

<sup>3</sup> *Chapman*, Telling Stories, *SongLyrics.com*, 2000, available at: <http://www.songlyrics.com/tracy-chapman/telling-stories-lyrics/>.



Since narrative analysis originates from literature studies, I first approach the liaison between the disciplines of international law and literature. I develop a broader framing to locate the discussion of narratives in the context of language and interpretation. Narratives form a meaningful totality and I therefore suggest that narratives effectively function as mental tools that shape, influence and manipulate the understanding of international law. Furthermore, I ask how narratives establish themselves as authoritative readings of international law.

In a second step, I localize an example of narratives in international law: the narrative of collective security. In this part, I trace the prevailing narrative, analyse how and why it was created and examine the authority it establishes over time. I base my project on the assumption that international law can be understood as a rhetorical system, in which there is a struggle over the authority of interpretations, and in which argumentation and rhetoric are used to establish, or to undermine this authority.

## 2. APPROACHING LAW AND LITERATURE

The use of literary criticism<sup>4</sup>, applying an analysis from rhetoric, narratology, mythology<sup>5</sup> or other fields, was prominently introduced to the discipline of law (and later international law) by scholars of a movement often referred to as 'Law and Literature'. Both of these disciplines are concerned with texts at the basis of their fields of study. In 1925, Benjamin Cardozo, an American jurist and judge, published an essay called "Law and Literature". Cardozo begins by stating that oftentimes the significance of literary techniques is mistaken by lawyers and he describes the lawyer's attitude as one that is "not of active opposition, but of amused and cynical indifference".<sup>6</sup> What he finds problematic about this points to the core of the liaison between literature and law:

*"We are merely wasting our time, so many will inform us, if we bother about form when only substance is important. I suppose this might be true if anyone could tell us where substance ends and form begins. [...] Form is not something added to substance as a mere protuberant adornment. The two are fused into unity."<sup>7</sup>*

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<sup>4</sup> For further details see: *Binder/Weisberg, Literary Criticisms of Law*, 2000, 112-200.

<sup>5</sup> For example of how myths may influence international law, see: *Wylter, La Paix Par Le Droit: Entre Réalité, Mythe Et Utopie*, in: Boisson de Chazournes/Kohen (eds.), *International Law and the Quest for its Implementation. Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowlland-Debbas*, 2010, 467–488.

<sup>6</sup> Compare: *Cardozo, Law and Literature: And Other Essays and Addresses*, first published in *Yale Review*, July, 1925, reprinted 1986, 3-4.

<sup>7</sup> *Ibid.*, 4-5.

Cardozo suggests that it is the form itself that safeguards the legal substance. He, who himself served as a judge at the New York Court of Appeals, even went further and characterized the activity of judges as “practicing an art”<sup>8</sup>.

This far reaching statement only attracted closer attention again in the 1970s. The beginning of the ‘Law and Literature’ movement is often situated in the 1970s and linked to the publication of James Boyd White’s *Legal Imagination*.<sup>9</sup> It was, at the same, time a reaction against the rationality of the ‘Law and Economics’ movement.<sup>10</sup> At the heart of the law and literature project lies the assumption that law, its principles and institutions cannot be understood from within the discipline of law itself, but that cultural processes – “the cultural sphere without which no meaningful social change can occur”<sup>11</sup> – have to be taken into consideration.

Instead of turning to literature for its humanizing effects, literary criticism can offer a device to challenge international law’s theories of interpretation and its perceptions of authority. Literature can allow for a questioning of the objectivity of international law, its self-conception as a science, and in turn law can challenge the perception of literature as an art that is exempted from political or ideological criticism.

#### **A. ON LANGUAGE**

*“The world is out there, but descriptions of the world are not. [...] The world on its own – unaided by the describing activities of human beings – cannot.”<sup>12</sup>*

Language is part of the parcel of international law. It is a lawyer’s most sensible nerve (if not to say her Achilles tendon). It constitutes the default settings she almost inevitable has to go back to. At the same time, language provides the biggest playground in law. It is existential for law.

In order to provide for legal certainty and predictability, “legal language aims to conceal its artificial origins”<sup>13</sup>. Language is therefore intrinsically linked to law’s authority. Artists and

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<sup>8</sup> *Ibid.*, 40: “He [the judge] is expounding a science, or a body of truth which he seeks to assimilate to a science, but in the process of exposition he is practicing an art.”

<sup>9</sup> *Fludernik/Olson*, Introduction: Law and Literature Versus Law as Literature: Dissenting Opinions, in: *Fludernik/Olson* (eds.), *In The Grip Of The Law: Trials, Prisons, And The Space Between*, 2004, xxx.

<sup>10</sup> *Binder/Weisberg* (note 4), 3. For an example of the ‘law and economics’ method, see: *Dunoff/Trachtman*, *Economic Analysis of International Law*, *Yale Journal of International Law* Vol. 24, 1/1999, 1-59, especially the appended bibliography.

<sup>11</sup> *Aristodemou*, *Law and Literature: Journeys from Her to Eternity*, 2000, 10.

<sup>12</sup> *Rorty*, *Contingency, Irony, and Solidarity*, 1989, 5.

<sup>13</sup> *Aristodemou* (note 11), 2.

writers, on the other hand, confess that their creation on the basis of words is arbitrary, incomplete, personal and provisional.

The participation of law in the making of cultural meaning, more broadly of cultural life is essential for the functioning of the legal system. The word does not exist on its own, it “carries with it a semantic field of potential meanings which is partly governed by a social code and partly individualized by the unique features of whoever utters or interprets the word”<sup>14</sup>. Thus, there is a collective and an individual element in language – a collective and an individual context. The meaning of language can never be fixed; it is instead shared by a certain community. The meaning of *jus cogens* in international law, for example, is not fixed by Article 53 of the Vienna Convention on the Law of Treaties, but is constantly reinterpreted over the years. Norms with a character of *jus cogens* develop and change, and it is a community of international lawyers that shares a certain meaning of *jus cogens* at a certain moment in time.

The process of encoding a collective meaning in language is another way of describing how words gain their meaning and it is applicable to all forms of communication, such as writing, reading, speaking, listening, acting etc. On the individual level, “[I]aw and legal language are always bound up in ethical choices”<sup>15</sup> and these choices are limited by the collective social code. Since ethical choices vary depending on their collective coding around the world, the search for a common language in international law becomes a virtually impossible project.<sup>16</sup> In addition, limiting language to its verbal nature is restrictive as it “engages parts of the self that do not function in explicitly verbal ways, and behind all of our attempts to describe or direct them remains an experience that is by its nature inexpressible”<sup>17</sup>. For the understanding of narratives, this non-verbal aspect of language, which relies on experience, is quintessential. A word derives meaning from the context in which it is used, yet context is made up of the elements to which it gives meaning. This has been described as the “hermeneutic circle”. Hence, there is an unspoken

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<sup>14</sup> Scholes, ‘Language, Narrative, and Anti-Narrative’, *Critical Inquiry* Vol. 7, 1/1980, 204 (206-7). Scholes also refers to Jacques Derrida: “In this view, the medium of language – the material out of which linguistic signs are constructed, whether conceived as ‘writing’ (Derrida’s ‘écriture’) or as ‘speaking’ (Saussure’s ‘sound-image’) is based on ‘difference’. Whether one conceives of language grammatologically or phonologically, the linguistic medium is generated by a series of differentiations or displacements. For spoken language to exist, human sounds must be organized into a system of phonemic differences. If we assume that these differences have priority over perception, then we must accept that we are indeed in a prison house of language. This is why Derrida says, ‘I don’t know what perception is and I don’t believe that anything like perception exists.’”

<sup>15</sup> Weisberg (note 1), 286.

<sup>16</sup> For further reading, compare: White, ‘Our Meanings Can Never Be the Same’: Reflections on Language and Law, *Rhetoric Society Quarterly* Vol. 21, 3/1991, 68-77.

<sup>17</sup> White, *Law as Language: Reading Law and Reading Literature*, *Texas Law Review* Vol. 60, 1981, 420.

foreknowledge – some shared knowledge that is already there, formed by experience and by the collective social coding described above.<sup>18</sup>

*“Context [...]also includes what could be termed as the interpreter’s internal context – namely, her past experience, the knowledge she has of the domain to which the text belongs, her presuppositions and so on and so forth.”*<sup>19</sup>

Context is fundamentally connected to the experienced knowledge. Without going into much detail, it is to be stressed that knowledge is based on individual, social and cultural perception and it is never ‘point-of-viewless’.

Consider, for example, the concept of an ‘international community’: The narrative of collective security creates and heavily relies on an ‘international community’, but the meaning of this concept cannot merely be explained verbally. Instead, the experiences of belonging to this community, and of being excluded from it, also generate meanings.

Language can accommodate fiction and imagination. Commonly, the legal discourse “differentiates itself from literary discourse by virtue of its subject-matter (‘real’ rather than ‘imaginary’ events), rather than by its form”.<sup>20</sup> The processes of creating fiction and imagination are non-issues in the legal world. This is all the more striking, since many fundamental tenets and concepts of the legal discourse are fictions: the State, nationality, responsibility and sovereignty, to name some examples. However, what is interesting in respect to narratives is the process of creation of these fictions, how they come into play.<sup>21</sup>

The original meaning of fiction, *fictio*, is “something made” and this implies “not that they are false, un-factual, or merely ‘as if’ thought experiments”<sup>22</sup>, but that they are formed. In

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<sup>18</sup> Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, 1972.

<sup>19</sup> Bianchi, *Textual Interpretation and (international) Law Reading: The Myth of (in)determinacy and the Genealogy of Meaning*, in: Bekker/Dolzer/Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, 2010, 41.

<sup>20</sup> See: White, *The Question of Narrative in Contemporary Historical Theory, History and Theory* Vol. 23, 1/1984, 21. For the relationship between discourse and narrative, compare: White, *The Value of Narrativity in the Representation of Reality*, *Critical Inquiry* Vol. 7, 1/1980, 7: “The idea that narrative should be considered less as a form of representation than as a manner of speaking about events, whether real or imaginary, has been recently elaborated within a discussion of the relationship between ‘discourse’ and ‘narrative’ that has arisen in the wake of structuralism and is associated with the work of Jakobson, Benveniste, Genette, Todorov, and Barthes.” See also: Foucault, *L’ordre Du Discours: Leçon Inaugurale Au Collège De France Prononcée Le 2 Décembre 1970*, reprinted 2007.

<sup>21</sup> As a note on the side, I would like to point to work on science fiction and law, see: Travis, *Making Space: Law and Science Fiction*, *Law and Literature* Vol. 23, 2/2011, 241–263. Orna Ben-Naftali and Francesco Francioni taught a seminar at the European University Institute on ‘Science, Science Fiction and International Law’, information available at: <http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/Seminars/2011-2012/Science,ScienceFictionandInternationalLaw.aspx>.

<sup>22</sup> Geertz, *Thick Description: Towards an Interpretive Theory of Culture*, in: Clifford Geertz (Ed.), *The Interpretation of Cultures: Selected Essays*, 1973, 15.

this case the German word ‘Gestaltung’ is very suitable to describe the process. Nationality<sup>23</sup>, to pick up the example, is constantly formed in the discourse, and as such it is not just an ‘as-if thought experiment’. This also means that fictions are in a constant process of revision. Considering another example of fiction in international law, the dualist approach defining customary law (*opinio juris* and practice) has become part of the vocabulary. Its use is deeply controversial at times, precisely when the process of forming this fiction becomes visible, when it is apparent that custom is a fiction.<sup>24</sup>

As this paper argues below, powerful narratives follow a strategy of concealing their fictitious and imagined components in order to convince the audience that they are telling the real story. Language is Janus-faced, as it is at the same time promising “closure, fullness, and resolution [and] is the vehicle through which new stories, new interpretations, and new resolutions will be negotiated and contested”<sup>25</sup>.

## B. ON INTERPRETATION

Interpretation is the warp and the woof in international law. Since there is no legislator (in the constitutionalist sense) in the international system, international law relies more than other branches of law on interpretation.. In 1969, some basic rules on interpretation were codified in Article 31, Article 32 and Article 33 of the Vienna Convention on the Law of Treaties.<sup>26</sup> However, the rules on interpretation were largely contested and were subjects of a fierce debate before and during the conference.<sup>27</sup> A report of the International Law Commission to the General Assembly a couple of years before the Vienna Conference acknowledges this: James Leslie Brierly and Sir Hersch Lauterpacht, “[t]he first two of the Commission’s Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any technical rules for the interpretation of treaties.”<sup>28</sup> The report goes on by stating that “recourse to many of these principles [of interpretation] is discretionary rather than obligatory and the interpretation of

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<sup>23</sup> Compare: *Anderson*, *Imagined Communities. Reflections on the origin and spread of nationalism*, rev. ed., 1991.

<sup>24</sup> See the discussion of practice of the International Criminal Tribunal for the Former Yugoslavia: ICTY, *Prosecutor v. Tadić*, Appeals Chamber, the Decision of 2 October 1995, para. 99; ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgement of 10 December 1998, paras. 162 and 185; and: ICTY, *Prosecutor v. Kupreskić*, Trial Chamber II, Judgement of 14 January 2000, para. 527.

<sup>25</sup> *Aristodemou* (note 11), 228.

<sup>26</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969 (entered into force on 27 January 1980), 1155 U.N.T.S. 331. Article 31 is devoted to the general rule of interpretation, Article 32 to supplementary means of interpretation, and Article 33 to interpretation of treaties authenticated in two or more languages.

<sup>27</sup> Compare also: *McTaggart Sinclair*, *The Vienna Convention on the Law of Treaties*, 1984, 114-119.

<sup>28</sup> Report of the International Law Commission on the work of its Sixteenth Session, 11 July 1964, Official Records of the General Assembly, Nineteenth Session, Supplement (A/5809), A/CN.4/173 (Extract from the Yearbook of the International Law Commission: 1964, vol. II), 199.

documents is to some extent an art, not an exact science.”<sup>29</sup> In 1968, at the Vienna Conference of the Law of Treaties, it was the delegation of the United States who prominently raised these concerns.<sup>30</sup> Ultimately, however, the conference outcome followed a textual approach to interpretation and the adopted articles on interpretation are considered to be part of customary international law today.<sup>31</sup>

Since 1969, a textual approach to interpretation has become widely accepted in international law.<sup>32</sup> Underlying the assumption that there is an ‘ordinary meaning’ of words and phrases is the understanding that the meaning of a text is determinate. Textual determinacy is still the “prevailing paradigm”<sup>33</sup> that is taught in law schools and practiced by international courts and tribunals. Consequentially, there is little room for the ambivalences of language discussed above. Textual determinacy has been critiqued by scholars of the critical legal studies movement, such as Duncan Kennedy, David Kennedy, or Martti Koskenniemi.<sup>34</sup> For CLS scholars, form and substance, and the objective and subjective dimension cannot be separated. They even suggest that “[t]he interminability of legal argument is the subtle secret of its success”<sup>35</sup>.

Interpretation is thus not a matter of right or wrong; it is about persuading the others, consolidating opinions and about controlling these interpretations. In fact, interpretation can provide the tools to construct narratives. Inherently, law is a “culture of argument and interpretation through the operations of which the rules acquire their life and ultimate

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<sup>29</sup> Ibid., 200.

<sup>30</sup> Compare: ‘Official Documents -Vienna Conference on the Law of Treaties (Statement of Professor Myres S. McDougal, United States Delegation, to Committee of the Whole, April 19, 1968)’, reprinted in: American Journal of International Law Vol. 62, 1968, 1021-1027. The US delegation was especially concerned with the hierarchy between general and supplementary rules of interpretation. Moreover, McDougal argued that “principles of interpretation, taken as a whole, have seldom in the past been considered as mandatory rules of law, precluding examination of relevant circumstances.”, Ibid., 1022. Other States were also expressing their scepticism at the conference, compare: UN, Report of the 32nd meeting of the Committee of the Whole (United Nations Conference on the Law of Treaties, 26 March – 24 May 1968), A/CONF.39/C.1/SR.32 (Extract from the Official Records of the United Nations Conference on the Law of Treaties, First Session).

<sup>31</sup> Compare: *Dörr* (Ed.), Vienna Convention on the Law of Treaties: a Commentary, 2012, 523, para. 6.

<sup>32</sup> Compare: Ibid., 541. For the argument of interpretation as technique, see: *Bianchi* (note 19), 37. And in this context I would also like to refer to a related argument of international law as a technology, compare further: *Anghie*, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, Harvard International Law Journal 40, 1/1999, 64.

<sup>33</sup> *Bianchi* (note 19) 35.

<sup>34</sup> See: *Kennedy*, Theses about International Law Discourse, German Yearbook of International Law Vol. 23, 1980, 353-391; compare also: *Kennedy*, International Legal Structures, 1987; *Kennedy*, Legal Reasoning: Collected Essays, Contemporary European Cultural Studies, 2008; and: *Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, Reissue with a new epilogue, 2005. For a summary of the argument, see also *de Schutter*, Les Mots Du Droit: Une Grammatologie Critique Du Droit International Public, Revue quebecoise de droit international Vol. 6, 1989, 120–132.

<sup>35</sup> *Kennedy*, A New Stream of International Law Scholarship, Wisconsin International Law Journal Vol. 7, 1/1988, 1 (39).

meaning”<sup>36</sup>. That is why international law can be understood as a rhetorical system. This rhetorical system is in turn restricted by certain rules:

*“Il se peut toujours qu’on dise le vrai dans l’espace d’une extériorité sauvage ; mais on n’est dans le vrai qu’en obéissant aux règles d’une « police » discursive qu’on doit réactiver en chacun de ses discours.”*<sup>37</sup>

Interpretation takes place within a “structure of constraints”<sup>38</sup>. Michel Foucault has linked this to the nature of disciplines itself: “La discipline est un principe de contrôle de la production du discours.”<sup>39</sup> Along these lines, the discipline of international law has detected and begun to anxiously discuss the phenomenon of growing fragmentation. However, this fragmentation can also be seen as “consubstantiel au système [juridique] lui-même”<sup>40</sup>, as part of the rhetorical system of international law.

Stanley Fish once made a comment that is interesting to read against this background: “It has been my strategy in these lectures to demonstrate how little we lose by acknowledging that it is persuasion and not demonstration that we practice.”<sup>41</sup> Acknowledging persuasion, we arrive at the question of how narratives come into play in the process of interpretation. One way to describe narratives is that they provide a framing for and thus constrain interpretations.<sup>42</sup> The narrative of irregular migration in international law, for instance, upholds a distinction between so-called ‘regular’ migration and ‘irregular’ migration. This narrative can constrain the interpretation of human rights of migrants. Concerning access to health care, for example, ‘irregular’ migrants are facing lower standards of protection within many legal frameworks.<sup>43</sup>

The role of narratives in interpretation has also been captured by the “parol evidence rule: in the first [stage] its presence on the ‘interpretive scene’ works to constrain the path interpreters must take on their way to telling a persuasive story [...] then, the rule is

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<sup>36</sup> White (note 17) 436.

<sup>37</sup> Foucault (note 20), 37.

<sup>38</sup> Fish, *Is There A Text In This Class?: The Authority of Interpretive Communities*, 1980, 356.

<sup>39</sup> Foucault (note 20), 37.

<sup>40</sup> Zarbiev, *Les politiques des vérités juridiques en droit international: Propos autour d’une controverse interjuridictionnelle*, *Finnish Yearbook of International Law* Vol. 18, 2007, 343 (365), with reference to: UN, International Law Commission, ‘Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi), A/CN.4/L.682, 13 April 2006.

<sup>41</sup> Fish (note 38), 367.

<sup>42</sup> See also: Jackson, *Law, Fact and Narrative Coherence*, 1988, 171.

<sup>43</sup> Compare: Council of Europe, European Social Charter, Collective Complaint No. 14/2003 from the International Federation of Human Rights Leagues (FIDH) v. France, available at: <http://hudoc.esc.coe.int/eng/?i=cc-14-2003-dmerits-en>.

invoked to protect the meanings that flow from the story.”<sup>44</sup> In this sense, narratives locate meanings in a particular setting.<sup>45</sup> The narrative of collective security in international law, for example, has located and appropriated many other stories within its script exercising its authority to define what constitutes a ‘threat to international peace and security’.<sup>46</sup>

Interpretation becomes a “creative process [that] is collective and social”<sup>47</sup>. Understanding international law as a rhetorical system allows us to trace the crucial role narratives play in interpretation. Stories are essentially created to support, confirm, safeguard or to undermine the authority of an interpretation in international law.

### **3. NARRATIVE NATURE OF INTERNATIONAL LAW**

In international law, treaties are written, customary international law is developed (and constantly developing), interpreted by courts, discussed in articles by scholars, summarized in textbooks, commented on in commentaries and essentially passed on in teaching to law students. International law functions as a rhetorical system. Argumentation and interpretation are essential for its development. Nonetheless, the meaning and the role of narratives has not yet been well explored in international law. Initially, narrative criticism arose in relation to domestic case law in the Anglo-Saxon countries belonging to common-law systems. Until today, the vast majority of the work on narratives in international law is concerned with the analysis of judgements, there being only few exceptions.<sup>48</sup> The fact that narratives were first analysed in case law can also highlight a different insight. Norms are generally created by States and other actors involved in law-making; judges can then be called upon to interpret these norms, and critics comment on the judgements. This leads to a constant telling and retelling in order to generate the meaning of rules and concepts. These stories seem to be necessary for the functioning of international law.

#### **A. TO TELL IS TO KNOW – ON NARRATION**

The origins of the word ‘narrative’ go back to the Latin verb *narrare*, ‘to tell’, and this is derived from the adjective *gnarus*, which means to have knowledge of something – skilful

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<sup>44</sup> *Fish*, *The Law Wishes To Have a Formal Existence*, in: Stanley Fish (Ed.), *There’s No Such Thing As Free Speech. And It’s A Good Thing, Too*, 1994, 153.

<sup>45</sup> *Cover*, *Foreword: Nomos and Narrative*, *Harvard Law Review* Vol. 97, 4/1983, 4: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.”

<sup>46</sup> Compare, for example, the reaction to terrorism in 2001: UN, Security Council, Resolution 1373, S/RES/1373, 28 September 2001.

<sup>47</sup> *Cover* (note 45), 11.

<sup>48</sup> See, for example: *Orford* (note 2); *Slaughter* (note 2); *Nesteruk*, *Corporate Theory and the Role of Narrative*, *Michigan State Law Review* Vol. 2009, 4/2009, 933-945.



or practiced.<sup>49</sup> The history of the genre ‘narrative’ in literature is very rich and cannot be fully explored within the constraints of this paper.<sup>50</sup> characterize

Moreover, various theories about the origins of narratives exist. There are endogenous theories that characterize storytelling as natural, inherent and universal. The activity itself is described as constructing a world through mental activity.<sup>51</sup> In addition, there are also theories in which “narratives serve to *model* characteristic plights of culture-sharing human groups”<sup>52</sup> in a rather exogenous conceptualization. With regard to international law, both of these approaches are relevant.

Almost all stories in international law develop a storyline. Narratives commonly do this by defining a steady state – the ordinary way of how things are set out to be. This ordinary state can be taken as the starting point of a story. Stories can also be created with the intention to explain or solve a certain trouble or conflict. This conflict can take the form of a breach, or any other form of disruption. Oftentimes, troubles and finding solutions are what drives a narrative and provides it’s dynamic. In case the story encounters a conflict, the plot usually moves to a state of redress or transformation, which leads to a situation where either the steady state is restored or where is it transformed. Out of this evaluation of the conflict, either restoring the steady state or transforming it, a narrative can develop its moral.<sup>53</sup>

Furthermore, Anthony G. Amsterdam and Jerome Seymour Bruner argue that narratives “get a good measure of the hidden cargo that is its underlying script”<sup>54</sup>. This distinction between script and narrative can be helpful for the understanding of possible troubles that stories integrate in their storyline. Oftentimes, the conflict that narratives address is taking place between some form of hidden cargo, originating from the steady state, and a new reality. The hidden cargo adds a further level in explaining how meaning is constructed.

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<sup>49</sup> *Mitchell*, Editor’s Note: On Narrative, *Critical Inquiry* Vol. 7, 1/1980, 3.

<sup>50</sup> For an introductory overview, see: *Vogt*, *Aspekte Erzählender Prosa: Eine Einführung in Erzähltechnik und Romantheorie*, 2008. And: *Binder/Weisberg* (note 4), 215. Compare also: Northrop Frye’s models: He identifies four myths of narrative literature: romance – irony, and comedy – tragedy; and regroups jurisprudential traditions according to that scheme. For more details, see: *West*, *Narrative, Authority, and Law*, 2001, 347 and 358.

<sup>51</sup> Compare: *Amsterdam/Bruner*, *Minding the Law*, 2000, 115. Bernard S. Jackson addressed a call for caution to this approach: “I do not believe [...] that the content of such narrative frameworks derive from some universal, perhaps genetically-endowed competence, even if our narrative structures of understanding so derive. Nor do I consider it sufficient to ascribe such narrative frameworks simply to ‘social construction’.”, see: *Jackson* (note 42), 172.

<sup>52</sup> *Amsterdam/Bruner* (note 51), 117.

<sup>53</sup> These characteristics are inspired by the definition of narrative given by *Amsterdam/Bruner* (note 51), 113-114. The moral of a story is not a necessary characteristic for all narratives. Unfinished stories, for instance, do not have one.

<sup>54</sup> *Ibid.*, 121-122.

Bernard Jackson referring to Algirdas Julien Greimas' influential work *Sémantique structurale*, distinguishes between a "‘deep level’ of signification and the ‘surface level’ or ‘level of manifestation’"<sup>55</sup>. The narrative links every meaning to "what [...] culture designates as mattering. And what does or doesn't matter to a culture can be traced back through the culture's stories, its genres, to its enduring myths."<sup>56</sup> Narratives can be the carriers of these myths.<sup>57</sup> State sovereignty provides a powerful example of such a hidden cargo in a script. It can also be part of the underlying script of other narratives, such as collective security. As such, State sovereignty dates back to the original conceptualizations of international law.<sup>58</sup> Oftentimes the Westphalian peace treaty from 1648 is cited as the beginning of this narrative. The script of State sovereignty was further established during the colonial period and nowadays faces a different reality in which, non-state actors, such as corporations gain increasing influence on the processes of international law. Taking into consideration this hidden cargo script of State sovereignty in other stories is helpful for the understanding of conflicts those stories encounter: Consider, for example, the tension State sovereignty creates for the narrative of the *Responsibility to Protect*. The conflicts that narratives encounter can appear in the form of ambiguities or doubts over interpretations of different epistemic communities.<sup>59</sup> Instead of concealing the origins of those interpretations, "[n]arratives serve to warn us of the ever-present dangers that beset our scripts, of the fragility of the ordinary. [...] [They] also work to reinforce the scripts."<sup>60</sup>

An additional aspect that is interesting to discuss in relation to narratives in international law is narrative time. The narrative carries with it a sense of a beginning, middle and an end.<sup>61</sup> The sense of time is often concealed or imagined: "Where one chooses to begin one's story is a part of the hidden-cargo script that defines what's to be taken as ordinary or as mattering in the narrative."<sup>62</sup> Considering the concept of collective security, for instance, most analyses of this concept go back to 1945.<sup>63</sup> However, there are continuities

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<sup>55</sup> Jackson (note 42), 27.

<sup>56</sup> Amsterdam/Bruner (note 51), 111.

<sup>57</sup> Ibid., 112.

<sup>58</sup> Arguably, this narrative of sovereignty begins with the Machiavellian *mantenere lo stato*. See, e.g. Roth-Isigkeit, Niccolò Machiavelli's International Legal Thought – Culture, Contingency and Construction, in: Kadelbach/Kleinlein/Roth-Isigkeit (eds.), System, Order and International Law – The Early History of International Legal Thought (forthcoming).

<sup>59</sup> Reading narratives against the background of the debate on fragmentation becomes an interesting exercise in this sense.

<sup>60</sup> Amsterdam/Bruner (note 51), 122.

<sup>61</sup> This is an allusion to Frank Kermode famous lecture series held in 1965 at Bryn Mawr College and published as: *Kermode, The Sense of an Ending: Studies in the Theory of Fiction*, 2000.

<sup>62</sup> Amsterdam/Bruner (note 51), 124.

<sup>63</sup> See for example: Gowlland-Debbas, Re-Interpreting the Charter's Collective Security System, in: Cardona Llorens (Ed.), *La ONU y El Mantenimiento De La Paz En El Siglo XXI: Entre La Adaptación y La Reforma De La Carta*, 2008, 273-287; Franck, Is Collective Security Through the U.N. Still Feasible?, *Finnish Yearbook*

with the mandate system of the League of Nations that could be traced moving beyond 1945.<sup>64</sup> The authority of the narrator, the one knowing something – as the origins of the word narrative suggest – can be so powerful that it “leav[es] the hearer or reader uncertain about whether a story reaches, as it were, a timeless *logical* conclusion, or a time-bound *narrative* one.”<sup>65</sup> Particularly regarding the exercise of reading narratives in international law, the time frame is often unclear or a story is presented to be timeless. The question of revealing hidden timeframes is highly dependent on the reader’s sensitivity, her education and cultural background.

Generally, “any narrative [...] demands a progression from one point to the next, or at any rate, a change that may be in accordance with the time sequence or counter to it”<sup>66</sup>. This does not imply that there always has to be progress. In contrast, the direction of this progression is not defined. As this paper argued above, plots are characterized by tensions and their resolutions. Therefore, “[s]tories go somewhere”<sup>67</sup>. They commonly use an obstacle, a breach, or any disruption of the steady state, to develop upon. By addressing or resolving conflicts, narratives establish an order and localize and incorporate these conflicts in their storyline.

*“The desire for narrative, for a beginning, a middle, and an end, is a desire for self-recognition and confirmation of our fragile sense of identity. [...] The desire for narrative as a means of understanding ourselves and our world is central, however, not just to tragedy but to all narrative.”*<sup>68</sup>

The narrative does not necessarily have to resolve the trouble or lead to a happy ending, but it has to find a solution that is “made interpretable [and] becomes bearable”<sup>69</sup>.

As a matter of fact, no narrative is complete, “there are always gaps, silences, ignorances”<sup>70</sup>, but it appears to resolve these contradictions, or to fill these gaps “by appealing to our unconscious prejudices, superstitions, sentiment, and weakness”<sup>71</sup>. Essentially, narration is not a chronological arrangement of events, but it is a process by

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of International Law Vol. 9, 1998, 29-54; *Danchin/Fischer*, Introduction: The New Collective Security, in: *Danchin/Fischer* (eds.), *United Nations Reform and the New Collective Security*, 2010, 1-31.

<sup>64</sup> Compare: *Kolb*, The Eternal Problem of Collective Security: From the League of Nations to the United Nations, *Refugee Survey Quarterly* Vol. 26, 4/2007, 220-225.

<sup>65</sup> *Amsterdam/Bruner* (note 51), 127 (emphasis in the original).

<sup>66</sup> *Riffaterre*, The Intertextual Unconscious, *Critical Inquiry* Vol. 13, 2/1987, 371 (381).

<sup>67</sup> *Amsterdam/Bruner* (note 51), 127.

<sup>68</sup> *Aristodemou* (note 11), 2.

<sup>69</sup> *Bruner*, The Narrative Construction of Reality, *Critical Inquiry* Vol. 18, 1/1991, 1 (16).

<sup>70</sup> *Aristodemou* (note 11), 2.

<sup>71</sup> *West* (note 50), 423.

which these events are given “an order of meaning, which they do not possess as mere sequence”<sup>72</sup>. The sense of an order that a narrative presents in terms of sequences can create a false impression of coherence, an “illusion of sequence”<sup>73</sup>. Narratives can “give comfort, inspire, provide insight; they forewarn, betray, reveal, legitimize, [and] convince”<sup>74</sup>. Because of this manipulative power, narratives can never be exempted from critique. It is crucial to recall the critique of narrativity at the end of this section:

*“And as for that family law professor, what was this business of stories as somehow truer than law, as if once you called something a story, it was exempt from ideology critique, as if narrative was ever free from the coercions of generic convention, the feints of rhetoric, its own multiplicity and contradictoriness?”<sup>75</sup>*

## **B. FORMING A MEANINGFUL TOTALITY – NARRATIVES AS MENTAL TOOLS**

In a more abstract way, narratives are used to form of a totality that is meaningful. By narratives we order and make sense of reality.<sup>76</sup> Boaventura de Sousa Santos has argued that “laws are maps; written laws are cartographic maps; customary informal laws are mental maps”<sup>77</sup>. In a similar way, narratives could be seen as the bigger mental maps on which laws are located. In narration, “we organize our experience and our memory of human happenings”<sup>78</sup>. Every narrator sorts the facts to be included in the story by relevance, makes choices and expands the fiction. The decision which facts are relevant is “learned largely through experience”<sup>79</sup>. As a consequence, “the methodological component of legal theory, read as narrative, reveals a moral choice that a purely analytical reading will often obscure”<sup>80</sup>.

For instance, even empirical data cannot escape narratives: “Numbers have become the bedrock of systematic knowledge because they seem free of interpretation, as neutral and descriptive. They are presented as objective, with an interpretive narrative attached to

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<sup>72</sup> White (note 20), 9.

<sup>73</sup> Mitchell (note 49), 2: “Robert Scholes observes, to say of narrative what Marx said of religion, that it is an ‘opiate’ which mystifies our understanding.”

<sup>74</sup> Amsterdam/Bruner (note 51), 115. They add: “You can declare your love by telling just the right story.”

<sup>75</sup> Peters, Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion, PMLA Vol. 120, 2/2005, 442 (443).

<sup>76</sup> Mitchell (note 49), 2.

<sup>77</sup> de Sousa Santos, Law: A Map of Misreading. Toward a Postmodern Conception of Law, Journal of Law and Society Vol. 14, 3/1987, 279 (282).

<sup>78</sup> Bruner (note 68), 4.

<sup>79</sup> Binder/Weisberg (note 4) 233.

<sup>80</sup> West (note 50), 417.

them by which they are given meaning.”<sup>81</sup> Without these narratives, empirical data would be meaningless and models would be impossible to interpret. For example, indicators have become a popular tool in the evaluation of the States’ human rights policies, especially with regard to social, economic and cultural rights. States can use these various indicators (data on school enrolment, State expenditure on education, etc.) to tell the story of how committed they are to the realization of the right to education, for example. However, this data cannot provide the full picture of how a State makes choices with regard to other areas of public expenditure (or even uses money for bribery) and moreover, there are strategies behind the collection of certain data.<sup>82</sup> Literary critics therefore argue that “[n]arrative vision, more autonomous than philosophical and political vision, poses choices not open to the empiricist”<sup>83</sup>.

Narratives do not just provide a structure for interpretation. They merge form and content and eventually become a mental tool for controlling knowledge. Peter Brooks has highlighted the “cognitive dimension to our sense of narrative, to show how it is a ‘specific mode of human understanding’.”<sup>84</sup> This can be linked to the origins of the word ‘narrative’ itself, as stated above (to tell means to know). While reading or tracing narratives in international law, the concern should not only be how the narrative was created, but also “how it operates as an instrument of mind in the construction of reality”<sup>85</sup>. In turn, the processes that relate to the construction of reality are highly internalized.

*“What lawyers internalise is a set of narrative frameworks regarding the legal ‘recognition’ of typical behaviour patterns – the narrative form of legal rules [...], [laden] with those forms of approval and disapproval which legal institutions use in order to confer ‘recognition’.”*<sup>86</sup>

Without drifting too far to psychological explanations, the understanding of narratives as a mental tool has an impact on how and where interpretation takes place in the legal

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<sup>81</sup> Merry, Measuring the World: Indicators, Human Rights, and Global Governance, *Current Anthropology* Vol. 52, S3/2011, S89.

<sup>82</sup> Compare: United Nations, Economic and Social Council, Report of the United Nations High Commissioner for Human Rights on the Use of Indicators in the Realization of Economic, Social and Cultural Rights, UN Doc: E/2011/90 (26 April 2011); and: *Davis/Kingsbury/Merry*, Indicators as a Technology of Global Governance, NYU School of Law, Global Administrative Law Series, IILJ Working Paper 2010/2, Rev. August 2011. For case studies, see also: *Verstappen*, Report of the HURIDOS workshop: Bridging the gap between human rights advocates and scientists: improved measurement of the realisation of ESC rights, Geneva, August 2010, available at:

<http://www.huridocs.org/wp-content/uploads/2010/09/reportESCRworkshop-short.pdf>.

<sup>83</sup> West (note 50), 416.

<sup>84</sup> Clayton, Narrative and Theories of Desire, *Critical Inquiry* Vol. 16, 1/1989, 33 (36). Compare also: Brooks, Narrativity of the Law, *Law and Literature* Vol. 14, 1/2002, 1 (2).

<sup>85</sup> Bruner (note 68), 5-6.

<sup>86</sup> Jackson (note 42), 116.

discourse. Narratives – operating in everyone’s mind – become necessary to make sense of a reality. It can be said that there is a necessity for narration – not to be understood as an equivalent to logical necessity.<sup>87</sup> Since stories are not easily (or even not at all) palpable in logical terms, they are often exempt from interpretation. The “route to making a story seem self-evident and not in need of interpretation is via ‘narrative banalization’. That is, we can take a narrative as so socially conventional, so well known, so in keeping with the canon”<sup>88</sup> that it escapes the means of interpretation. It appears to be an inevitable, necessary and natural impulse to narrate, so that those narratives that correspond to the dominant cultural expectations are not problematized.<sup>89</sup>

*“It seems almost as if humankind is unable to get on without stories. Knowing how to tell them and to comprehend them may be part of the human survival kit. And there appears to be something surreptitiously value-laden or value-promising about storytelling.”<sup>90</sup>*

This leads to a situation where narratives become “an aspect of everyday speech and ordinary discourse”<sup>91</sup>. In many ways, this is not surprising; however, in relation to interpretation and especially thinking about interpretation in international law, “automatized interpretations of narratives are comparable to the default settings of a computer: an economical, time- and effort-saving way of dealing with knowledge – or, as it has been called, a form of ‘mindlessness’”<sup>92</sup>. This automatized interpretation or even more so the fact that narratives escape interpretation bears obvious risks. However, it is part of the way in which narratives function as mental tools. When narratives operate as mental tools, this means that stories become real and receive unquestioned acceptance from their audiences – independent of “whether they are offered as fact or fantasy, myth or matter of fact.”<sup>93</sup> This is essentially why narratives have such manipulative power.

### C. CODES

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<sup>87</sup> Compare: *Bruner* (note 68), 9.

<sup>88</sup> *Ibid.*, 9.

<sup>89</sup> Compare: *White* (note 20), 5.

<sup>90</sup> *Amsterdam/Bruner* (note 51), 114-115.

<sup>91</sup> *White* (note 20), 1.

<sup>92</sup> *Bruner* (note 68), 10.

<sup>93</sup> *Hayman/Levit*, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, *California Law Review* Vol. 84, 2/1996, 377 (399).

Literary approaches to narratives demonstrate that a story carries much more information than international law is able to conceptualize in strict terms of interpretation.<sup>94</sup> Interpretation is not about emotions, identification and imagination; narrative is.

*“In the kind of symbolization embodied in [...] narrative, human beings have a discursive instrument by which to assert (meaningfully) that the world of human actions is both real and mysterious, that is to say, is mysteriously real (which is not the same thing as saying that it is a real mystery); that what cannot be explained is in principle capable of being understood;”<sup>95</sup>*

Narratives make sense of a problem or a reality; they locate troubles by incorporating them into their storyline and, most importantly, they engage with their readers and convince them of the story they present. In this sense, they can become “a collective sign [...] (the icon of a series of events).”<sup>96</sup> The extra information that a narrative carries with it, and that not every text is capable of carrying, is not just a chronological or causal series of connections, but it is the “mediat[ion] between different universes of meaning ‘configuring’ the dialectic of their relationship in an image”<sup>97</sup>.

According to Yuri Lotman, a Russian semiotician, a text can have a memory function.<sup>98</sup> The memory function implies that a text, or broadly speaking a story, cannot only generate new meanings and develop moral codes, but it can also store memories of earlier contexts. The peace treaty of Westphalia concluded in 1648, for example, is a memory that many different narratives in international law have stored. Together with the event, stories store the perception that this was a decisive moment in the history of international law. The narrative of State sovereignty has integrated the peace treaty of Westphalia as a founding event, for example. Stories can thus encode memories and these memories of earlier contexts become part of the storyline.

Narratives act as symbols making sense of a particular reality and they can become a code for understanding this reality. The concept of humanitarian interventions, for example, carries a strong, controversial and appealing moral code: States, and even a

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<sup>94</sup> This section draws on: *Lotman*, *Die Struktur Literarischer Texte*, 4th edition 1993, 43.

<sup>95</sup> *White* (note 20), 30.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, 28.

<sup>98</sup> For Lotman the memory function is the third function of a text – in addition to a creative function, which generates new meaning, and an encoding function that merges meaning and language. For a detailed discussion, see: *Lotman*, *Die Innenwelt Des Denkens: Eine Semiotische Theorie Der Kultur*, 2010, 28: „Die dritte Funktion des Textes ist die Gedächtnisfunktion. Der Text generiert nicht nur neue Bedeutungen, er kondensiert auch das kulturelle Gedächtnis. Texte sind in der Lage, die Erinnerungen an ihre früheren Kontexte zu bewahren.“

wider community of States, have a responsibility to protect populations when their own State is not willing or able to do so anymore.<sup>99</sup>

Narrative authority is not only based on subconscious mechanisms of identification. They convey the moral of a story, such as the following (famous) example does:

*“Two households, both alike in dignity,  
In fair Verona, where we lay our scene,  
From ancient grudge break to new mutiny,  
Where civil blood makes civil hands unclean.  
From forth the fatal loins of these two foes  
A pair of star-crossed lovers take their life;  
Whose misadventured piteous overthrows  
Do with their death bury their parents’ strife.  
The fearful passage of their death-marked love,  
And the continuance of their parents’ rage,  
Which, but their children’s end, nought could remove,  
Is now the two hours’ traffic of our stage;  
The which if you with patient ears attend,  
What here shall miss, our toil shall strive to mend. (Exit.)”*

William Shakespeare announced the moral of his famous play *Romeo and Juliet* in the prologue, presented by the chorus – a more abstract murmur of narrator voices. He passes on a lesson to be learned, a message to be taken into consideration. A moral usually relates to an approval or disapproval of a certain behaviour. Generally speaking, all texts are part of society’s ideological practices, whether it is poems, songs, novels, plays or laws. Narratives capture the practices of a society. They mirror or comment on the way a society lives its reality.

Codes, as they are commonly understood, convert information into some other form. In the case of narrative, they are the “place where sequence and language, among other things, intersect to form a discursive code”<sup>100</sup>. The coding is done by the narrators and within a cultural context, or discipline, out of which narratives arise. Therefore, codes are to a large extent cultural, they are shared amongst narrator and audience.<sup>101</sup>

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<sup>99</sup> For a detailed discussion of this narrative see: *Orford* (note 2).

<sup>100</sup> *Scholes* (note 14), 204.

<sup>101</sup> *Ibid.*, 211.



Depending on which story, or more specifically whose story, is adapted, a different vision of reality and of the future becomes evident. A new inside (the story) and outside (in the world) is created and fixed. As a consequence, the narrative nature of international law creates inclusions and exclusions of certain points of view, of certain meanings. This is part of the authority of narratives and of the power they exercise. Hence, “the experiences of law had by this society’s traditional outsiders are in fact not well represented in either the literary or the legal canon”. Migrants, for example, are classified as regular or irregular migrants in international law and the narrative of the so-called ‘irregular’ migration is exercising its authority over the interpretation of treaties. It is contributing to the establishment of those subjects in law and their exclusion from the enjoyment of certain rights.

Narratives are essentially cognitive instruments that organize the experienced knowledge in the form of a story. They are an attempt to make sense of a reality and they function as mental tools organizing and controlling knowledge. Stories rely on cognitive processes and are driven by a desire of the narrators and the audience to understand the reality. Because of this, narratives can have a strong manipulative power. They become so natural, convincing and self-evident, that they are internalized by their readers and the control they exercise is not noticed anymore.

#### **4. AUTHORITY IN NARRATION**

Having discussed how narratives are created and formed, one question remains: How do they generally operate and enter the discourse of international law? This paper suggests that narratives are inherent in international law and as such they also engage in the struggle over authority in legal interpretations.

Narratives in international law often try to hide their authors or pretend to have none. Discourse analysis has addressed this question particularly in post-structuralist scholarship. Michel Foucault’s lecture on the question “Qu’est-ce qu’un auteur?” bears a number of insights. Foucault sets the discussion of the author into the context of the author’s function in a discipline: The author “assure une fonction classificatoire”<sup>102</sup>. He reminds us that there has been a time in which texts circulated and were cited and retold without asking the question of an author, without knowing the author, but that this has changed: “[À] tout texte de poésie ou de fiction on demandera d’où il vient, qui l’a écrit, à

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<sup>102</sup> *Foucault, Qu’est-ce qu’un auteur?*, in: Foucault (Ed.), *Dits Et Écrits: 1954-1988*, 2001, 826.

quelle date, en quelles circonstances ou à partir de quel projet.”<sup>103</sup> Most importantly, for Foucault, it is not the voice of an individual author that is fulfilling the function of the author, but instead what he calls the “murmur” of a discourse: “Tous les discours, quel que soit leur statut, leur forme, leur valeur, et quel que soit le traitement qu’on leur fait subir, se dérouleraient dans l’anonymat du murmure.”<sup>104</sup>

This consideration provides valuable insights for narratives in international law. The voice of the author is not always singular; voices amount to a “murmur” – a collective process takes place. It also leads to another theory that has addressed this question: the concept of interpretive communities.

The concept of interpretive communities is similar to what political scientists would call epistemic communities. ‘Epistemic’ originates from the Greek word *episteme* meaning (scientific or technical as opposed to experienced) knowledge.<sup>105</sup> These communities are engaged in the processes of shaping knowledge. The concept of interpretive communities was developed by Stanley Fish in relation to the question of authority in interpretation.<sup>106</sup> Fish assigns several characteristics to these communities:

*“Interpretive communities are made up of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions. In other words, these strategies exist prior to the act of reading and therefore determine the shape of what is read.”*<sup>107</sup>

With respect to narratives, this suggests that their creation requires some shared experience or common interpretive strategy. Once stories are ‘written’, they predetermine what the readers read. The creation of narratives can take place in interpretive communities. Meaning is therefore always shared by a community. The plain meaning of the sources of international law stated in Article 38 of the Statute of the International Court of Justice, for example, is a shared meaning of an interpretive community. Taking Fish’s argument away from the emphasis on the concrete text, these considerations can apply to the formation of narratives. The “consciousness of community members” – as he calls it – is shaped by emotional and subjective experiences that are later reproduced in narratives. Narratives reproduce the common beliefs of a community “about the meaning or ultimate

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<sup>103</sup> Ibid., 828.

<sup>104</sup> Ibid., 840.

<sup>105</sup> Kay (et al., eds.), *Historical Thesaurus of the Oxford English Dictionary*, 2009, 949.

<sup>106</sup> Compare: *Fish*, *Interpreting the Variorum*, in: Fish (Ed.), *Is There A Text In This Class?: The Authority of Interpretive Communities*, 1980, 147-173.

<sup>107</sup> Ibid., 171.

nature of reality, shared by the average members of any given culture – what we call common sense”<sup>108</sup>. These collective forces can explain why interpretive communities are important for the creation and transmission of narratives: In essence, “[i]t is a sense of belonging to this canonical past that permits us to form our own narratives of deviation while maintaining complicity with the canon”<sup>109</sup>. This anchoring in the complicity with the canon hints at the authority of interpretive communities in processes of interpretation, of telling and retelling stories. It is no longer the text (in Fish’s analysis) that is at the source of authority, but the complicity with the canon of an interpretive community.<sup>110</sup> This complicity is also based on “a pre-existing body of knowledge (a ‘legal education’, in the wider sense here used)”<sup>111</sup>. Legal education (the determination of which texts are read and which courses are taught) is influenced and shaped by interpretive communities. Legal education is thus an important place of narrative transmission and transaction.

Perceived objectivity is a key factor in the “knowledge-driven, technological society”<sup>112</sup> that can be encountered in many different areas nowadays, including the field of international law.

International law also conceals “narrative mental ‘powers’ and the symbolic systems of narrative discourse that make the expression of these powers possible”<sup>113</sup>. The reasons for this are linked to the self-perception of the discipline:

*“The narrative of law cannot afford to admit to its own constructedness or arbitrariness: it cannot afford to confess that it is only one amongst many narratives created to impose order on chaos. For the legal narrative to attract both moral and political power, no allowance can be made for its human origins, or for the possibility of mistakes.”<sup>114</sup>*

As a result, this creates a tension between what Foucault would call “une ‘police’ discursive”<sup>115</sup> of the discipline and the dynamics of legal storytelling that are part of the nature of international law. Thus, international law suppresses and ignores its narrative nature – presumably to appear more objective and scientific when exercising its moral and political power.

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<sup>108</sup> White, The Narrativization of Real Events, *Critical Inquiry* Vol. 7, 4/1981, 793 (797).

<sup>109</sup> Bruner (note 68), 20.

<sup>110</sup> Compare also: Bianchi (note 19), 52.

<sup>111</sup> Jackson (note 42), 129.

<sup>112</sup> Ibid., 139.

<sup>113</sup> Bruner (note 68), 21.

<sup>114</sup> Aristodemou (note 11), 140.

<sup>115</sup> Foucault (note 20), 37.

Critics were amongst the first to recognize the value of analysing narratives in law (initially in domestic law). Julie Stone Peters, for instance, refers to the story behind the first conference on narratives in law held at University of Michigan Law School in 1989:

*“In a 1988 letter that became the inspiration for one of the first major conferences on legal storytelling, Richard Delgado, one of its leading proponents, proclaimed: ‘The main cause of Black and brown subordination is not so much poorly crafted or enforced laws or judicial decisions. Rather, it is the prevailing mindset through which members of the majority race justify the world as it is [...]. The cure is storytelling, [...] counter hegemonic [storytelling to] quicken and engage conscience.’”*

Delgado describes narratives as the ‘cure’ to racial discrimination in law. He believes in the power of narratives to change mind-sets. The ‘cure’ that is hoped for in this particular context implies a radical change of destroying the mind-sets, but ‘cure’ can also be understood in a lighter version implying enhanced understanding and openness towards other perspectives.

Feminist, post-colonial or critical race scholars drew attention to oppositional narratives as they emerged or existed in international law and engaged in ‘counterhegemonic storytelling’. Especially from the perspective of groups that have been ignored or oppressed by international law, narratives became a possibility to relate to a wider audience – beyond the group affected. Post-colonial critics have analysed narratives in international law and made use of ‘counterhegemonic storytelling’. Narratives can draw attention to the perspective of the subaltern, of the colonized State, or to colonialized relationships. Post-colonial scholarship has contributed a particular work on stories that deal with victimization.<sup>116</sup> They have analysed, for example, how certain discourses, such as the one of the international women’s human rights movement, have created and reinforced women as victim subjects. Narratives engage in the struggle over authority in the rhetorical system of international law. They are one playground on which the authority of international law is constantly challenged, because stories can be like chameleons<sup>117</sup> – conserving, consensus restoring, but also disrupting and overthrowing.

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<sup>116</sup> See, for example: *Kapur*, The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/Post-Colonial Feminist Legal Politics, *Harvard Human Rights Law Journal* Vol. 15, 1/2002, 1-38.

<sup>117</sup> Compare: *Brooks* (note 83), 2.

## 5. LOCALIZING THE NARRATIVE OF COLLECTIVE SECURITY IN INTERNATIONAL LAW

This last part sets out to localize an example of narratives in international law, to trace its creation and to offer one reading of the story. Reading the narrative “reveals a moral choice that a purely analytical reading will often obscure”.<sup>118</sup> In tracing the narrative, I deliberately rely on standard materials, including textbooks, commentaries, cases and UN documents. The following will be my reading of the narrative, as I detect it in mainstream legal discourse. This reading of the story is the most easily accessible one and generally accepted by a larger audience. Needless to say that alternative versions exist which are not as widely accepted in the discipline as the version I focus on. The narrative of collective security is a very complex story, as there are two main storylines this narrative is built upon: an idea of collectivism and one of security. It is a very well-known story and some authors have already hinted at the possibility of there being a narrative behind what international lawyers understand as the legal concept of collective security.<sup>119</sup>

### A. THE CREATION OF THE NARRATIVE

The term ‘collective security’ is not used in the UN Charter. The Charter only speaks of “collective measures”<sup>120</sup>, which are specified in Chapter VII as measures “not involving the use of armed force”<sup>121</sup> and measures involving the use of force<sup>122</sup>, and of “collective self-defense”<sup>123</sup>. The idea of ‘collective security’ is created in the narrative. Only with the narrative does ‘collective security’ obtain its meaning.

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<sup>118</sup> West (note 50), 416-7.

<sup>119</sup> See: Vera Gowlland-Debbas calls for a “re-reading of the Charter goal of collective security”, see: *Gowlland-Debbas* (note 62), 275; compare also: ‘A Symposium on Reenvisioning The Security Council’ Special Issue, *Michigan Journal of International Law* Vol. 17, 2/1996, 221-566; and: *Kolb* (note 63), 221. Kolb compares the collective security systems of the League and the UN Charter to the myth of Castor and Pollux.

<sup>120</sup> See: Article 1 (1) of the Charter of the United Nations, adopted 26 June 1945 (entered into force on 24 October 1945), 1 U.N.T.S. XVI: “To maintain international peace and security, and to that end: to take effective **collective measures** for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;” (emphasis added).

<sup>121</sup> Article 41, UN Charter.

<sup>122</sup> Article 42, UN Charter.

<sup>123</sup> Article 51, UN Charter.

The story goes that collective security was created to “underpin [...] the UN Charter’s regime for dispute resolution”<sup>124</sup>. The main objective of this system is said to be “the keeping of the peace and the avoidance of war”<sup>125</sup>. Chapter VII of the UN Charter is drafted to provide some guidance on how the plot of the narrative is restrained. Generally speaking, collective security is said to mean that an attack on one State is an attack on the collective, and, hence, justifies collective action.<sup>126</sup> The story of collective security begins in 1945. This year has frequently been referred to as the decisive moment.<sup>127</sup> Even narratives that build on the story of collective security (for example, the narrative of humanitarian intervention) reinforce this point of beginning of the story.<sup>128</sup> The power structures of that time have influenced the creation of the story of collective security: “As *Time* noted, the UN Charter was basically designed to ratify a division of the world into ‘power spheres’”<sup>129</sup>.

The narrators have included a reflection of this initial power structure in their story: It is expressed, first of all, in Article 27 (III) of the UN Charter – the possibility of a veto of the permanent members of the Council.<sup>130</sup> Some commentators have observed that the “veto went well beyond what was expected by most. It indeed resulted in freezing the system of collective security”<sup>131</sup> – a freezing of the ordinary state of the story. The veto is subject to continuous debates, in the context of reforming the character of the Security Council, and in broader considerations of how collective decision-making takes place with respect to questions of peace and war. To illustrate how the initial idea of veto powers is still very

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<sup>124</sup> Charlesworth/ Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Melland Schill Studies in International Law, 2000, 280.

<sup>125</sup> Kolb (note 63), 220.

<sup>126</sup> Compare also: UN, High-level Panel on Threats, Challenges and Change, Report: A more secure world: our shared responsibility, in: General Assembly Resolution A/59/565, 2 December 2004, 11: Collective security initially derived from the “traditional military sense: a system in which States join together and pledge that aggression against one is aggression against all, and commit themselves in that event to react collectively”. The report *A more secure world* very nicely tells the story of collective security as it happened until 2004.

<sup>127</sup> UN Secretary-General, The Secretary-General Address to the General Assembly, New York, 23 September 2003, available at: <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

<sup>128</sup> Compare: Orford, Muscular Humanitarianism: Reading the Narratives of the New Interventionism, *European Journal of International Law* Vol. 10, 4/1999, 679 (694): “Intervention by the international community is justified by reference to a history beginning with the framers of the UN Charter of 1945, who ‘understood the linkage between the protection of basic human dignity and the preservation of peace and security’”.

<sup>129</sup> Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*, 2009, 62. He adds that “the UN, even more than the League, was to be run by the great powers and far less confidence was reposed in international law as a set of norms independent from, and standing above, power politics.”

<sup>130</sup> Article 27 (3) of the UN Charter reads as follows: “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”

<sup>131</sup> Kolb (note 63), 224.

present in the narrative until today, it suffices to point to the example of the debates at the beginning of 2012 when Russia used its veto on resolutions concerning Syria .

The ordinary meaning of collective security is further challenged during the development of the story. Questions that arise in relation to the ordinary state of the story are phrased like this: “[W]as the structure of the Charter itself, and the body of international law on which it depends, still the correct framework by which to view and assess new and emerging threats in a post-September 11 world? [Or:] [...] how could the 1945 UN peace and security architecture be made to work more effectively to respond to new threats and lessen the impetus for powerful states to ‘go it alone’?”<sup>132</sup>

Sometimes the narrative of collective security allows its audience to see some continuances between its earlier times during the League of Nations and the present.<sup>133</sup> These flashbacks raise the question of how some of the actors, such as the international community, were imagined at that time: Who was the collectivity envisioned in the first half of the 20<sup>th</sup> century? In an attempt to answer these questions, some observers have argued that “collective security is nothing but a particular peace alliance”<sup>134</sup>. In order to allow for some flexibility in the story, the narrators have created a character called the ‘international community’ and they have been able to adapt the story to changing circumstances over time.

## B. THE HIDDEN CARGO OF THE SCRIPT

The storyline does not merely deal with the content of the story, but rather looks at what drives the story of collective security. The narrative of collective security is driven by two main troubles: first, the conflicts over who represents the collective, and second, the struggle in relation to security in the inter-state system versus security of the people. As this paper argued above conflicts often relate to the hidden cargo in the scripts stories are built upon. The narrative of collective security relies on these hidden scripts, in particular on the concept of State sovereignty, or sovereign equality of States. The concept of State sovereignty functions like a fall-back clause.<sup>135</sup> This can be observed in many cases, for

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<sup>132</sup> *Danchin/Fischer* (note 62), 5.

<sup>133</sup> See, for example: *Anghie*, Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations, N.Y.U. Journal of International Law and Politics 34, 3/2002, 513-633; see also: *Kolb* (note 63), 221.

<sup>134</sup> *Kolb* (note 63), 220.

<sup>135</sup> In this context it is interesting to refer to the critique of post-colonial approaches to international law. Anthony Anghie, for example, argued: “It was principally through colonial expansion in the nineteenth century that international law became universal in this sense.” See: *Anghie* (note 133), 516. How was the fiction of state sovereignty created? This could itself be analysed in terms of narrative and would go beyond the scope of the current example. Certainly, it does have strong implications for collective security.

example, in a Security Council Resolution on Syria, in which the Council “[r]eaffirm[ed] its strong commitment to the sovereignty, independence, unity and territorial integrity of Syria, and to the purposes and principles of the Charter”<sup>136</sup>. State sovereignty can have a preserving effect, in the sense that “[s]tability’ is typically associated with the restoration of the status quo, without reference to the hierarchies of power sustained in the old order”<sup>137</sup>. In a similar way, “Third-World countries attempting to assert their newly won sovereignty by seeking to change international law were seen to be threatening the universality of international law”<sup>138</sup>. State sovereignty is part of the hidden cargo of the script of the collective security narrative and it cannot be easily redefined, which is why it leads to many of the troubles that the narrative encounters.

Another example where the hidden cargo provokes trouble for the collective security narrative becomes visible in Article 43 (1) of the UN Charter. Article 43 deals with the armed forces that Member States of the United Nation make available to the Security Council.<sup>139</sup> Again, considerations of national sovereignty come into play and lead to disagreement about who can and who actually does make available its armed forces for these purposes. It therefore might not come as a “surprise that the members States did not honor such an undertaking”<sup>140</sup>. The lack of willingness of States to support UN missions by providing armed forces has led to frustrations over the way collective security was envisioned. In addition, unilateral actions, such as the action of the United States taken against Iraq in March 2003, circumventing the Charter system, have caused disturbances and frustrations.

Moreover, the hidden script has an influence on the concept of security. The intention of the narrators is to preserve the security of the inter-state system and to guarantee security of the people, or human security.<sup>141</sup> The security of the inter-state system relies on the ‘cargo script’ of sovereign equality, on the integrity of the States. In this regard, boundaries, a military force and right to self-defence are essential for the story of State

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<sup>136</sup> UN, Security Council, Resolution 2043, S/RES/2043, 21 April 2012, introductory paragraph three.

<sup>137</sup> *Charlesworth*, The Inadequacy of “Collective Security”, *Finnish Yearbook of International Law* Vol. 9, 1998, 43. For a detailed discussion of the preservation of authority, see: *Orford*, *International Authority and the Responsibility to Protect*, 2011.

<sup>138</sup> *Anghie* (note 133), 518.

<sup>139</sup> Article 43 (1) of the UN Charter states: “All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”

<sup>140</sup> *Kolb* (note 63), 224.

<sup>141</sup> See also: *Gowlland-Debbas* (note 62), 277.



security.<sup>142</sup> The trouble that arises from these premises has been highlighted by alternative narratives: “They do not investigate the way that power relations work within states and how these power relations affect a state’s ‘external’ activities”<sup>143</sup>. Others in the audience following the story of collective security have argued:

*“The fact that older geopolitics of security, for instance, focused on territory and sovereign power, while now the biopolitics of security have received new and more complex formations and practices neither means that territorial conflicts have entirely eclipsed (though no longer fought necessarily in the name of the State) and that the ‘new’ space of ‘one species’ or ‘global population’ or ‘humanity’ are unrelated to disciplinary technologies of domination, nor that there has been progress from the old to the new.”<sup>144</sup>*

Zartaloudis points to the continuities in the story, albeit the differences that are noticeable at first sight between the way insecurity was generated in earlier times and the way it is generated nowadays. The narrators of collective security have adapted and slowly incorporated a broader understanding of security – moving beyond State security.<sup>145</sup> This adapted conceptualization acknowledges that peace relates to social and economic justice, and to human rights. Consequently, social and economic injustices are seen as capable of generating insecurity. This also opens the space for new discussions on security and development assistance, for example.<sup>146</sup> Lastly, a broadening of the notion of security raises another trouble for the story to resolve: Should the decisions on these broad issues rest on the shoulders of the Security Council? The narrators seem undecided whether this character can and should evolve in that respect.<sup>147</sup>

All these troubles and conflicts resulting from the hidden cargo in the script essentially amount to what drives the narrative of collective security. They create moments of tension, suspension and relief. Each particular event in a narrative is sequenced and creates phases of regress or of transformation. The sequencing in the story of collective security is brought about through a constant redefining of what constitutes a ‘threat to peace’.

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<sup>142</sup> Compare, for example: *Charlesworth/Chinkin* (note 123), 282.

<sup>143</sup> Compare: *Ibid.*, 283.

<sup>144</sup> See: Zartaloudis, Giorgio Agamben: *Power, Law and the Uses of Criticism*, 2010, 168.

<sup>145</sup> This broader understanding is formulated in the Agenda 21 and in the report “In Larger Freedom”, compare: Agenda 21, 1992; and: UN, General Assembly, In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, A/59/2005, 21 March 2005.

<sup>146</sup> The discussions on the 0.7 percent goal (percentage of gross national income that should go into official development assistance) are nonetheless wearisome. Compare: *Danchin/Fischer* (note 62), 10.

<sup>147</sup> For a more detailed discussion of this point, see: *Wolf*, Responses to non-military threats: environment, disease, and technology, in: *Danchin/Fischer* (note 63), 173-192.

Whether something amounts to such a threat is said to be the threshold for events to enter the story of collective security.<sup>148</sup> Threats to peace can range from internal conflicts, interstate conflicts, economic and social threats, gross human rights violation, to terrorism, and weapons of mass destruction. The narrative intertwines all these different crises not only chronologically, but also by classifying them as successes or failures. This has led to the perception that “the history of the UN has been one of constant crisis ever since 1946”<sup>149</sup>. However, these crises keep the story of collective security moving. From the perspective of the narrators they provide an important impetus for the story. Amongst the failures, the narrators of collective security include the conflicts in Somalia in 1992, Rwanda in 1994,<sup>150</sup> Iraq in 1990-91 in relation to the effects of economic sanctions, the Balkans (especially with reference to Srebrenica in 1995), Kosovo in 1999, Iraq in 2003 because the Security Council did not authorize the use of force in these conflicts. This list is illustrative<sup>151</sup> and moreover, the emotions the narrative tried to evoke in relation to each situation vary to large extent. For instance, the emotions attached to the failure to act in Rwanda are very strong and the story goes that “the death of hundreds of thousands of Rwandans in a slaughter that could have been avoided had there been a timely deployment of a preventive force”<sup>152</sup>. It is not easy for the narrators to tell collective security’s successes, because after all they remain bloody, forced, and destabilizing – at least those that involve the use of force. Similarly, the crisis interventions in Libya in 2011 were said to have been rather successful, at least from the first perspectives of the prevailing story.<sup>153</sup> For many crises it is difficult to tell whether they were perceived as failures or as successes in the storyline. The narrators then broadly referred to “witness[ing] major shifts”<sup>154</sup> in maintaining peace and security. Terrorism, particularly after September 11<sup>th</sup>, 2001, has been told to have been one of these major shifts that put

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<sup>148</sup> Compare: *Charlesworth/Chinkin* (note 123), 281. See also: *Danchin/Fischer* (note 63), 2.

<sup>149</sup> *Gowlland-Debbas* (note 62), 273.

<sup>150</sup> See also the comparison between the SC reaction to the attacks of September 11<sup>th</sup>, 2001, and its reaction to the genocide in Rwanda: UN Panel Report (note 125), para. 41.

<sup>151</sup> It also does not include many peace-keeping or peace-building missions. The same holds true for the successes mentioned.

<sup>152</sup> *Franck* (note 62), 30.

<sup>153</sup> Compare: *Powell*, *Libya: A Multilateral Constitutional Moment?*, *The American Journal of International Law* Vol. 106, 2/2012, 298–316; *Schmitt*, *Wings Over Libya: The No-Fly Zone in Legal Perspective*, *The Yale Journal of International Law Online* Vol. 36, 2011, 45-58; and: *Peters*, *The Security Council’s Responsibility to Protect*, *International Organizations Law Review* Vol. 8, 1/2011, 1-40. For an alternative story of the Libyan intervention see: *Orford*, *From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept*, *Global Responsibility to Protect* 3, 2011, 400-424.

<sup>154</sup> *Danchin/Fischer* (note 62), 2.

pressure on the system.<sup>155</sup> The language used in Security Council resolution 1373 is illustrative in this respect.<sup>156</sup>

These sequences and earlier contexts can be stored by stories because, as argued above, narratives have a memory function. This memory of a continuing evaluation of the events is especially important for the development of the moral of the story. The assumption set out at the beginning of the story of collective security “that there will be an active, finite, episode of ‘collective’ intervention (by sanctions or by military force)”<sup>157</sup> clearly cannot be upheld after the various crises and conflicts it has gone through.

### C. NARRATIVE IMAGINATION AND STRATEGIES OF TRANSMISSION

In the development of the storyline of collective security, fiction and reality are merged. As this paper argued above, the processes of creating fiction and imagination are non-issues in the legal world. However, certain elements in the narrative of collective security are clearly fictions created by narrators. First, there is the ‘international community’: The ‘international community’ stimulates a common identification, so that “[t]hose [...] who wage war in the name of the common good, those who kill in the name of democracy or security [...] – all consider themselves to be ‘acting globally’ and even to be executing a certain ‘global responsibility’”<sup>158</sup>. Identification is a cognitive process that is encouraged, in this case, by the existence of the fictitious character of the ‘international community’.

Stories, moreover, develop visions with regard to the future. It has been argued that “a system of perfect collective security has never been realized in history, and may never be realized”<sup>159</sup>. The creativity that lies in imagination and the possibility to envision a future is central for the story of collective security. In 1950, Judge Alvarez argued in a dissenting opinion that “[i]t is therefore necessary, when interpreting treaties – in particular, the Charter of the United Nations – to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to *travaux préparatoires*”<sup>160</sup>. This looking ahead inevitably requires the development of a vision by the narrators. In order to develop

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<sup>155</sup> *Gowlland-Debbas* (note 62), 283.

<sup>156</sup> UN, Security Council, Resolution 1373, S/RES/1373, 28 September 2001. The resolution affirms the “unequivocal condemnation of the terrorist attacks” and expresses that the Council is “[d]eeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism”. Especially the measures adopted in paragraph 1 and 2 of resolution 1373 reflect the desire of the narrators to react strongly – those paragraphs are said to have law-making character.

<sup>157</sup> *Charlesworth/Chinkin* (note 123), 284.

<sup>158</sup> *Judith Butler*, *Frames of War: When Is Life Grievable?*, 2010, 36.

<sup>159</sup> *Kolb* (note 63), 220.

<sup>160</sup> ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports 1950, Advisory Opinion of 3 March 1950, Dissenting Opinion of Judge Alvarez, 18.

narrative solutions with future perspectives, collective security relies on imaginary characters, such as the international community, and visions.

The narrative of collective security is never fully completed, but it is constantly adapted and passed on to new audiences. This transmission is taking place via various routes: in judgements and legal opinions, in UN resolutions, in textbooks and classrooms, and in articles and commentaries. Essentially, the narrative transmits its messages in codes and in evaluations of the crises it has encountered. For instance, the conflict it had to face in Rwanda in 1994 is evaluated as a failure, because the behaviour of the States, of the 'international community' and of the Security Council is disapproved of. By means of evaluating the situation as a failure, the story transmits a message saying that 'this was not normal', 'collective security normally functions differently' and so on and so forth.

The story of collective security heavily relies on the construction of an inside and an outside of the system. It attempts to keep everything inside its story, as part of the storyline, in order to avoid "assertions of unilateralism exercised outside the United Nations"<sup>161</sup>. The language that is used to support this is very strong and emotional: "Self-help will rule, mistrust will predominate and cooperation for long-term mutual gain will elude us."<sup>162</sup> It is a language of responsibility and commitment. Problems and conflicts are internalized, so that they become manageable and controllable. The inside is held up by such persuasive arguments that the audience almost never asks the question why certain problems are framed in terms of collective security. The example of counterterrorism is illustrative in this respect. Alternative stories have drawn attention to "how a phenomenon like 'terrorism' is defined in ways that are vague and overly inclusive"<sup>163</sup>. As a consequence, it can be addressed and incorporated in the story of collective security. The technique behind this is very simple: "We define the phenomenon so that we know what we are talking about, and then we submit the phenomenon to judgement. Conventionally, the first task is descriptive, and the second is normative."<sup>164</sup> Counterterrorism could also be addressed in terms of economic and social policy and in fact, it sometimes is. However, the story of collective security has established itself as a dominant discourse in which counterterrorism is addressed and it claims the power of defining the phenomenon and react by means of security policy. Moreover, "this technical security discourse has become

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<sup>161</sup> *Gowlland-Debbas* (note 62), 287.

<sup>162</sup> See: UN Panel Report (note 125), 12.

<sup>163</sup> *Butler* (note 158), 156.

<sup>164</sup> *Ibid.*, 155.

increasingly naturalized”<sup>165</sup>. Narratives result from the desire to make sense of a complex and at times confusing reality and a rather technical language may help achieving this, also reinforcing the perceived objectivity of its narrators.

The transmission of knowledge is further facilitated by certain codes and symbols that are used in the language in which the narrators tell the story. These discursive codes are shared, in a culture, or a discipline, and they carry a certain meaning within an interpretive community. Alternative stories (particularly from a feminist perspective) have criticized how the prevailing narrative of collective security is using and reinforcing different dichotomies, such as public/private, for example.<sup>166</sup> These dichotomies characterize the language in which the story is told and this language of the narrators is not neutral, but value-laden. There are other dichotomies, such as the distinction between “‘hard’ threats” to security (for example, armed conflict and terrorism) and “‘soft’ threats”,<sup>167</sup> such as poverty or environmental degradation. These dichotomies can then be attached to other categories, for instance, ‘hard’ threats are a concern of Northern countries and ‘soft’ threats are a concern of Southern countries. The story of collective security produces some of these generalizations, also because they are easier to be transmitted than complex argumentations. One aspect that seems to be rather easy for the narrative of collective security to transmit relates to its underlying script: State sovereignty. State sovereignty is part of the agreements that exist prior to the story between the narrators and its rather specialized audience in international law.

As argued above, narratives transmit their messages and morals in codes. They achieve this by defining what is (new) common sense. In the case of the collective security narrative, one example of a common sense that is firmly established goes as follows: Because of the “interconnectedness of today’s threats”<sup>168</sup>, it makes no sense for each State to face security problems on its own. Collective solutions become indispensable – even more so, because some States might not be willing or able to protect their own people. Consequently, the discourse puts “pressure on states to cooperate in security”<sup>169</sup>,

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<sup>165</sup> Orford (note 123), 709.

<sup>166</sup> Compare: *Charlesworth/Chinkin* (note 123), 286: The author criticize the reliance of the discourse on several examples: “logic/emotion, order/anarchy, mind/body, culture/nature, aggression/passivity, external/internal, public/private, protector/protected, independence/dependence”.

<sup>167</sup> See: *Danchin/Fischer* (note 62), 17.

<sup>168</sup> Compare: UN Panel Report (note 125), 11: “The case for collective security today rests on three basic pillars. Today’s threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours.”

<sup>169</sup> *Braveboy-Wagner*, *Institutions of the Global South*, 2009, 216.

especially on States from the so-called 'Global South'. Overall, the story of collective security has transmitted a common sense that is effectively working as a mental tool controlling the language in which the story is passed on and including whatever new events, actions or phenomena take place as part of the story of collective security.

However, what is transmitted as the narrative of collective security also silences other aspects and perspectives on the story. Generally speaking, in the narrative described above, solving problems of collective security, the "action remains state-centered"<sup>170</sup>. Instead, other community-based approaches could be envisioned and developed, and consequentially, the prevailing narrative "does not describe the experience of many groups"<sup>171</sup>. This is also due to the fact that the characters in the story of collective security reflect a "dependence on a particular gendered world view"<sup>172</sup> and almost never acknowledge "the emotional, the concrete, the particular, the human bodies and their vulnerability, human lives and their subjectivity"<sup>173</sup>. The technical language of collective security has been powerfully adopted by the narrators and transmitted to the audience of the story, but the narrators also use very emotional language to persuade their audience. The audience is thus "invited to participate in imagining the world in those terms"<sup>174</sup>.

In conclusion, the narrative of collective security in international law can be characterized as a meta-narrative, because its storyline provides the anchor and starting point for other related stories, such as the narrative of humanitarian intervention,<sup>175</sup> the story of peacekeeping, or the narrative of counterterrorism. It has also been described as a "deeper narrative"<sup>176</sup> that embeds and functions as a carrier for those other stories. For example, the broadening of the understanding of security in the 1990s (towards including gross human rights violations) provides the link for the narrative of 'responsibility to protect', a story that is embedded in the narrative of collective security, to argue that gross human rights violations can constitute a threat to the peace and allow for measure under Chapter VII of the UN Charter.

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<sup>170</sup> Charlesworth (note 137), 43.

<sup>171</sup> Orford, *The Politics of Collective Security*, Michigan Journal of International Law Vol. 17, 1995, 373 (400). Compare also: Charlesworth/Chinkin (note 123), 286.

<sup>172</sup> See: Charlesworth (note 137), 43.

<sup>173</sup> Cohn, *War, Wimps and Women: Talking Gender and Thinking War*, in: Cooke/Woollacott (eds.), *Gendering War Talk*, 1993, 232.

<sup>174</sup> Orford (note 123) 710.

<sup>175</sup> For a detailed discussion of this narrative see: Orford (note 2).

<sup>176</sup> See: Orford (note 123) 682.

## 6. CONCLUSION

This contribution has argued that the international legal system can be understood as a rhetorical system. International law is essentially built on the exchange of arguments, on writing judgements, legal opinions, articles, commentaries, on passing on its interpretations in courtrooms, classrooms, at conferences, on websites or in other networks. The discussion of narratives in international law reaffirms this argument.

The paper has investigated and traced the meaning of narrative in the rhetorical system of international law. In essence, narratives operate as mental tools that order, shape, control and manipulate their audience's understanding of international law. Narratives are deliberately created to persuade audiences with a particular reading of international law. At the same time, they can have such an effect because they meet the need of their audiences to make sense of the reality of international law.

This has consequences for the international lawyer's understanding of interpretation: Narratives are used to establish the authority of a certain reading, or interpretation. Therefore, persuasion and rhetoric, in general, are existential for international law.

Narrators can use several tools to persuade their audiences. First, within narratives they can merge fiction, which is generally considered a non-issue in international law, and reality in a way that becomes unnoticeable to the reader. The fictitious aspects of a story, whether those are characters or events (for example, the international community or State sovereignty) are intertwined with the storyline and become a real and, most important, a necessary part of the development of the story. Narratives can transmit a common sense, or a moral of the story by means of encoding messages. These messages often emanate from the evaluation of conflicts and solutions the narrative has encountered. Stories also impose their evaluations on the future perspectives they envision and they can rearrange the past. Consequently, they can establish a different sense of time. It is evident that when narratives transmit a common sense and maybe even a sense of time, they leave no room for alternative stories. They begin operating like mental tools of knowledge: In this sense 'to tell' is 'to know'. Later, once a story has been accepted by the audience, the mind sorts new experiences and events according to the storyline.

Since there is a plurality of narratives, rhetorical techniques of persuasion are needed in the struggle over authority of interpretations and readings of international law. Rhetoric should not be dismissed as a negative instrument; instead it is existential for international

law.<sup>177</sup> Narratives are a powerful tool to establish, overthrow or reinforce this authority in international law. They are inherently part of legal argumentation and they become necessary for the functioning of international law. Narratives are part of international law's nature.

International law cannot afford to ignore the plurality of narratives that exists in various areas. This contribution has illustrated the example of the narrative of collective security. An understanding of narratives in the international legal system can, moreover, shed light on how certain interpretations establish their authority, how they maintain it, what they silence, and generally, that they are not objective, but represent the interests of a certain community.

Besides, this can offer new inspirations in legal theory: "In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."<sup>178</sup> It is a challenge for legal scholarship not just to wait for new developments in international law and to use the familiar lenses of analysis, but to re-narrate and trace different stories of a known legal problem or concept. In the end, I am convinced that such narrative analysis will enrich the understanding of international law, its methods, translations and practical implications. Tracing the narratives in international law is essentially a task of asking and analysing how the ordinary might be strange.

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<sup>177</sup> For a defence of the positive characteristics of rhetoric, or rather a challenge of the "anti-rhetorical stance", compare: *Fish*, Rhetoric, in: Fish (Ed.), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, 1989, 478-485.

<sup>178</sup> *Harris*, Race and Essentialism in Feminist Legal Theory, *Stanford Law Review* 42, 3/1990, 615.



# Global Constitutionalism as a Grammar of Global Law?

Matej Avbelj

**Abstract:** The article examines the viability and the desirability of the use of constitutional grammar on the global plane. It asks whether global constitutionalism is a viable and/or desirable concept that should be theoretically (and later practically) invested in to know and to understand better the phenomenon of global law as well as, potentially, to come up with normatively advantageous outcomes. The argument is broken down into three parts. The first conceptual part contains a study of the conventional meaning of constitutionalism and global law. This is followed by an examination of the descriptive, explanatory and normative fit between the two phenomena. The final part passes a verdict on the viability and desirability question. It is argued that constitutionalism is only a part of the grammar of global law, its morphology, while principled legal pluralism acts as its syntax.

## 1. THE TRANSFORMATION OF LEGAL DISCOURSE AND THE QUEST FOR A GRAMMAR OF GLOBAL LAW

After WWII, but especially over the last three decades, legal discourse has undergone a profound transformation. Law is being thought differently about. It is practiced differently. Hence, it has also acquired a different meaning. It has become a different social phenomenon, which, as a result, calls for a new meta-theory, a grammar to ensure the law's viability in epistemic, analytic and normative terms. The trajectory, the legal discourse has travelled, has by no means been linear and unidirectional. Initially, its focus was almost exclusively domestic. Legal scholarship was concentrated on the normative developments inside a nation state. This focus was gradually extended to the relationship between the nation states, which marked the rise of comparative law. Simultaneously, with the growth of international institutions and increasing engagement of the states on the international plane, international law scholarship took off and was becoming ever more extensive. The legal discourse was incrementally becoming more international, but its main preoccupation was still the state.<sup>1</sup>

In the late 1980s and the early 1990s, we witnessed the decline of classical comparative law.<sup>2</sup> After its death was declared,<sup>3</sup> the focus shifted to comparative constitutional law.

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<sup>1</sup> For an overview, see *Fassbender/Peters* (eds.), *The Oxford Handbook of the History of International Law*, 2012.

<sup>2</sup> For an overview, see *Bermann/Glenn/Scheppele/Shalakany/Snyder/Zoller*, *Comparative Law: Problems and Prospects*, *American University International Law Review* 26(4), 2011, 935-968.

<sup>3</sup> *Siems*, *The end of comparative law*, *Journal of Comparative Law* Vol.2, 2007, 133-150; see already *Reimann*, *The end of comparative law as an autonomous subject*, *The Tulane European and Civil Law Forum* Vol.11, 1996, 49. For a critique, see, *Michaels*, *Transnationalizing Comparative Law*, *Maastricht Journal of European and Comparative Law* 2/2016.

This was directly connected to political developments in the late 1980s and the early 1990s, when the end of the *Cold War*, the fall of the *Berlin* wall and the emergence of newly independent states, set into motion a so-called new constitutionalism.<sup>4</sup> This movement resulted in the migration of ideas and concepts of liberal democratic constitutionalism, based on the rule of law, from the *West* to the *East*. Legal discourse in the 1990s was thus concerned with the analyses of what new constitutionalism resulted in and which directions and why the constitutional ideas travelled. As the constitutional courts, at least initially, played a major role in the constitutionalization of the newly emerged countries in the *East*, legal scholarship focused mainly on them.<sup>5</sup> This court-based focus also prevailed in another, new and therefore at first relatively discrete field of study of supranational law of the *European Communities*, and later the *European Union*. Since the early 1970s new forms of legal scholarship have been consciously developed in order to construct an autonomous body of supranational law, which would be neither statist nor international.<sup>6</sup> As such, it was in need of its own theoretical backing, which was developed around the jurisprudence of the *European Court of Justice*, both by the academics as well as the actual EU institutional stake-holders acting as academics.<sup>7</sup>

This legal scholarship at first built on the idea and narrative of supranationalism, but as the concept turned out not to be strong enough, to be too amorphous,<sup>8</sup> the switch was made to the grammar of constitutionalism. As I have described in great detail elsewhere,<sup>9</sup> constitutionalism soon became the dominant narrative of the *European Union*. It was used for all sorts of purposes: descriptive, explanatory as well as normative, sometimes already bordering on the almost political use intended to strengthen the increasingly deeper, wider and therefore also more complex European integration whose viability needed to be ensured. This fairly indiscriminate use of constitutionalism soon spilt over from EU law into other regulatory domains beyond the state. With the progress of the process of globalization, it has become increasingly clear that the state no longer holds a monopoly over the jurisgenerative activities. The attention was hence drawn to the law-making sites and bodies beyond the state.

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<sup>4</sup> See, for example *Hirschl*, *The Political Origins of the New Constitutionalism*, *Indiana Journal of Global Legal Studies* Vol. 11(1), 2004. Available at: <http://www.repository.law.indiana.edu/ijgls/vol11/iss1/4>.

<sup>5</sup> *Slaughter*, *A New World Order*, 2004.

<sup>6</sup> *Vaucher*, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, 2015.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Weiler*, *The Dual Character of Supranationalism*, *Yearbook of European Law* Vol. 1, 1981, 268.

<sup>9</sup> *Avbelj*, *Questioning EU Constitutionalisms*, *German Law Journal*, Vol. 9(1), 2008, 1-26.

The first thing that was noticed was that the EU is not the only semi-autonomous and therefore not really typical international organization. There have emerged many, several, if not the majority of them, outside the umbrella framework of the *United Nations*, being especially strong and present on the regional scale. This has, not unlike in the process of European integration, caused concerns for the viability of international law that seemed to be on the way of irreversible fragmentation.<sup>10</sup> While some spoke already of international law being in its death throes,<sup>11</sup> other rushed for a remedy in the form of constitutionalization of international law.<sup>12</sup> However, the growth of jurisgenerative sources beyond the state has not been limited only to public actors.

To the contrary, public legal entities started to share regulatory functions with private actors in the hybrid legal organizational structures and not infrequently private actors alone have taken up the regulatory tasks (or invented new ones) that previously belonged to the dominion of states. This process has led to the emergence of the so-called transnational law and its legal regimes, orders and orderings.<sup>13</sup> Here too, the grammar of constitutionalism started to be employed.<sup>14</sup> However, as these were non-statist, and even non-territorial regimes, a different type of constitutionalism, known as societal constitutionalism has been employed in the transnational domain.<sup>15</sup> Finally, and as the process of globalization cut even deeper and wider, the legal scholarly attention has been extended to the globe as a whole. A new discipline of global law started to emerge,<sup>16</sup> but this too has been suggested to be couched in the constitutional grammar.

The purpose of this contribution is to examine both the viability and the desirability of the use of constitutional grammar on the global plane. In other words, is global constitutionalism a viable and/or desirable concept that should be theoretically (and later practically) invested in to know and to understand better the phenomenon of global law as well as, potentially, to come up with normatively advantageous outcomes. The argument will be developed in the following way. In the first conceptual part, we will study the

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<sup>10</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, available at: [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).

<sup>11</sup> *Domingo*, *The New Global Law*, 2010, 53.

<sup>12</sup> *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 2009; see also *Kleinlein*, *Konstitutionalisierung im Völkerrecht*, 2012.

<sup>13</sup> *Shaffer*, *Transnational Legal Ordering and State Change*, in *Shaffer* (ed.), *Transnational Legal Ordering and State Change*, 2013, 1.

<sup>14</sup> See also, *Roth-Isigkeit*, *Der Kampf des Rechts um seine Form: Drei Krisen des Globalen Verfassungsprojekts*, 2015, in *Bauerschmidt et al. (eds.)*, *Konstitutionalisierung in Zeiten globaler Krisen*, 2015, 45-70.

<sup>15</sup> *Teubner*, *Constitutional Fragments: Societal Constitutionalism and Globalization*, 2012.

<sup>16</sup> See, initially, *Twining*, *Globalisation and Legal Theory*, 2000.

conventional meaning both of constitutionalism as well as of global law. This will be followed in the second part by studying a descriptive, explanatory and normative fit between the two phenomena. This shall enable us to pass a verdict on the viability and/or desirability of constitutionalism as a grammar of global law.

## 2. THE CONCEPT OF CONSTITUTIONALISM IN AND BEYOND THE STATE

It follows from our introductory discussion that especially in the past 20 years constitutionalism has been an increasingly appealing grammar used to conceptualize the new and transforming legal realities in and beyond the state. What are the reasons for that and what difficulties, if any, does this spur? The most obvious reason to begin with is the fact that constitutionalism has been the dominant legal grammar in the statist realm.<sup>17</sup> As the state was for decades a synonym for the law, in the 20<sup>th</sup> century with the emergence of the constitutional state the modern constitutionalism was closely bound to the state too. It carried its imprint.<sup>18</sup> This was hence a paradigmatic grammar in which the exercise of any public authority and its relationship with private actors, their autonomy and freedom, was embedded; from the perspective of which it has been guided and against which it has been normatively measured for its propriety. Statist constitutionalism was not an exclusive grammar, but it was a prevailing one and the one that worked in practice. This explains the first of the reasons for the continuing currency of constitutional grammar even beyond the state: its well established character and the absence of a meaningful alternative.

The second reason can be explained by the fact that constitutionalism as a leading statist legal paradigm simply worked. Especially a post-WWII Western constitutional state was a success. It was copied after the fall of the *Berlin* wall not just in the *Central* and *Eastern Europe*, but indeed worldwide. This prompted *Fukuyama* to declare the end of the history on the basis of the overwhelming ideological prevalence of liberal democracy, based on the rule of law.<sup>19</sup> As the leading constitutional paradigm was marked by success, this also explains the lack of a meaningful alternative. There was simply no reason to look for one. But why was constitutionalism such a success? For a simple reason: it was a civilizing achievement of modernity,<sup>20</sup> pregnant with promises:<sup>21</sup> of a responsible self-rule, political

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<sup>17</sup> For a classic perspective, see, *Peters*, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, *Leiden Journal of International Law*, 19(3), 2006.

<sup>18</sup> *Walker*, EU Constitutionalism in the State Constitutional Tradition, European University Institute Law Working Paper No. 21, 2006.

<sup>19</sup> *Fukuyama*, *The End of History and the Last Man*, 1992.

<sup>20</sup> *Grimm*, The Constitution in the Process of Denationalization, *Constellations*, Vol. 12(4), 2005, 447, relying on *Luhmann*, *Verfassung als evolutionäre Errungenschaft*, *Rechtshistorisches Journal*, Vol. 9, 1990, 176.

<sup>21</sup> See, *Tsagourias*, Introduction-Constitutionalism: A Theoretical Roadmap, in *Tsagourias* (ed.), *Transnational Constitutionalism*, 2007, 1.

emancipation, individual's freedom and well-being that not only reflected, but also strengthened the moral side of the human kind.<sup>22</sup>

However, as constitutionalism appeared to be at its peak and the *Weltstunde des Verfassungsstaates*<sup>23</sup> was declared, this simultaneously signalled the beginning of its decline. *Neil Walker* has identified five fatal critiques of the conventional account of constitutionalism: statism, fetishism, partiality, instrumentalism and conceptual debasement.<sup>24</sup> In short, as a statist concept, conventional constitutionalism was seen unfit to apply beyond the state. Its agency has been overstated and to the extent it has been merited, it was used as a proxy for strengthening, rather than constraining, the anyhow powerful social interests. All this taken together resulted in constitutionalism's conceptual disqualification as a universal legal grammar not just beyond the state, but increasingly also within the state itself. What was at first an exclusively theoretical problem, soon became a very material one, as the traditional nation state has come under a strong transformative impact of globalization.

Nevertheless, some still have not paid any attention, neither to the actual transformation of the state, nor to the critique of constitutionalism, and continued to dwell on it relatively simplistically and uncritically. They may have done so because they have striven for the re-emergence of the declining nation state on a higher echelon: either on the supranational, international or even global level.<sup>25</sup> These authors have been, however, in the minority. The proponents of constitutionalism beyond the state, and especially in the international realm, relied on the old constitutionalism as a means of re-creating unity out of the fragmenting international law.<sup>26</sup>

Others, on the other hand, recognized the need to reform, to redefine or at least refine constitutionalism to preserve its ongoing currency in the state and beyond it, not to recreate the old, but to guide the emerging new. This refinement of the conventional constitutionalism was deemed necessary precisely since there had been no other alternative<sup>27</sup> and dropping constitutionalism meant giving up on political modernity and on

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<sup>22</sup> See, *Preuss*, *Constitutional Revolution, The Link Between Constitutionalism and Progress*, 1995, 126.

<sup>23</sup> *Häberle* cited in *Walker*, *The Idea of Constitutional Pluralism*, *Modern Law Review* Vol. 65, 2002, 317, fn. 1.

<sup>24</sup> *Ibid.*, 319.

<sup>25</sup> See, for example, *Shaw*, *Theory of the Global State*, 2000.

<sup>26</sup> See, for example, *Peters*, *Constitutional Fragments – On the Interaction of Constitutionalization and Fragmentation in International Law*, Centre for Global Constitutionalism, Working Paper No. 2, 2015.

<sup>27</sup> In this vein, *Walker*, *Not the European Constitution*, *Maastricht Journal of European and Comparative Law* Vol.15, 2008, 140, who observes that constitutional skeptics are unable to correct or compensate for the absence of any adequate alternative 'public' narrative; also *Dani*, *Constitutionalism and Dissonances - Has Europe Paid Off Its Debt to Functionalism?*, *Jean Monnet Working Paper* 7, 2006, 5.

all of its achievements.<sup>28</sup> There was something in the conventional constitutionalism, even if statist and even if it has historically been used for many ill purposes,<sup>29</sup> that ought to be preserved. This was an idea(l) of responsible self-government in the community of equals. Constitutionalism, now stripped of its statist character, has thus been advanced as a trans-contextual grammar for polity building, for equal respect of individuals, serving as the legitimating source of power-wielding institutions that ought to be procedurally and substantively constrained in their pursuit of the common good.<sup>30</sup>

This revised and cut-down concept of constitutionalism has, of course, departed heavily from the conventional statist constitutionalism. The latter has traditionally stood on three pillars: the legal institutional, the socio-political and the philosophical. These have, in a nutshell,<sup>31</sup> set up constitutionalism as a hierarchical legal framework, underpinned by a (more or less) socially homogeneous demos, being part and parcel of a constitutional unity devoted to uniformity. In the EU context I have voiced my reservations against the described transformation of constitutionalism in the process of its translation beyond the state.<sup>32</sup>

I warned then that, as any social concept, constitutionalism too can be redefined, but changing it substantively beyond recognition, so that essentially just the etiquette is preserved, better requires creating a new concept.<sup>33</sup> In the opposite case, the redefinition might backfire in practice. This is so since the conventional, established meaning of social concepts, and that of constitutionalism *par excellence*, is sticky. Even if the language is changed, the normative baggage of the original understanding of a concept remains and influences, often in a negative way, the practices that the revised concept was anticipated to make more viable. The unfortunate episode with the EU *Constitutional Treaty* proved this point. The drafted EU *Constitution* was, despite its framers' best intentions and assurances that its object and purpose is not the pre-emption of the existing Member States' constitutions, perceived precisely in that way and consequently also rejected.

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<sup>28</sup> See, *Baquero Cruz*, The Legacy of the Maastricht-Urteil and the Pluralist Movement, *European Law Journal* Vol. 14, 2008, 389-422; *Allot*, Epilogue: Europe and the Dream of Reason, in Weiler/Wind (eds.), *European Constitutionalism Beyond the State*, 2003.

<sup>29</sup> *Tully*, *Strange Multiplicity – Constitutionalism in an Age of Diversity*, 1995.

<sup>30</sup> *Kumm*, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in Dunoff/Trachtman (eds.), *Ruling the World, Constitutionalism, International Law and Global Governance*, 2009.

<sup>31</sup> For a more extensive discussion see *Avbelj*, Can European Integration be Constitutional and Pluralist – both at the Same Time?, in *Avbelj/Komárek* (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012, 381-410.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

Notwithstanding the fact that the EU carries several similarities with the state, the extension of constitutionalism to the EU has so far proven very difficult. This suggests that the challenge of constitutionalism's extension to global law might be even bigger. Not only is global law much less statist than EU law – and therefore, presumably, much less constitutional; it is also, much more than EU law, a concept in the making. Can constitutionalism be made a grammar of global law, given the negative experiences in constitutionalizing the *European Union*? This is the question that this article shall ultimately respond to. Before doing so, however, we must turn to the conceptual analysis of global law first.

### 3. THE CONCEPT OF GLOBAL LAW

There is no established meaning of global law. To begin with, for many, especially those who stick to the old *Westphalian* paradigm, there is simply no such thing as global law. There is statist law and law between states: international law, *tertium non datur*. However, such views, while probably still in the majority, are in a persistent and steep decline. As a matter of an accurate description of the world, the state is no longer an exclusive source of the law, be it at home or abroad. There are other jurisgenerative entities, which are either a competitive or a complementary source of legal regulation to that of the state. These entities, which are not just public, but increasingly hybrid and private, are located on the subnational, international, supranational, transnational and global level.<sup>34</sup> They make up a plurality of legal orders and orderings,<sup>35</sup> which has been described as legal polycentricity.<sup>36</sup>

This legal polycentricity has been coming about since the end of the cold war, but it got into full swing in particular since 2000 with the acceleration of the process of globalization. The latter has transformed our spatial experience. The space has simultaneously shrunk and widened. Global has become local and local has become global. The immediate consequence of this was a declining functional importance of national frontiers and hence of the nation states as their guardians. The states have been, more and more,

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<sup>34</sup> The literature explaining the process of transformation of the state under the impact of globalization is burgeoning and there is no intent to do it justice here. For an overview, see, Glenn, *The Cosmopolitan State*, 2013, 181-186.

<sup>35</sup> The distinction is Shaffer (note 13), fn. 4-7. “*The concept of legal ordering is used to assess the construction, flow, and impact of transnational legal norms. The term transnational legal order is conceptualized as a collection of legal norms and associated institutions within a given domain that order behavior across national jurisdictions.*”

<sup>36</sup> See Tuori, *Transnational Law: On Legal Hybrids and Legal Perspectivism*, in Maduro/Tuori/Sankari (eds.), *Transnational Law, Rethinking European Law and Legal Thinking*, 2014, 24: “*‘Polycentricity’ connotes a multiplication of sources of law; the fact that new participants have been granted access to legal discourse, where the ever-changing content of the legal order is determined.*”

economically and politically driven to form regional integrations. They have gradually lost the monopoly over their territories, but at the same time the role of territory has changed as well as, perhaps, its importance diminished.<sup>37</sup>

As it has been stressed before, a number of non-territorial, functional entities has emerged with powers and competencies matching and sometimes surpassing those of states. We have witnessed, in short, regionalization, growing into de-nationalization and ultimately into de-territorialization. Others have sensed an even deeper change and have speculated about a paradigm shift from modernity to post-modernity.<sup>38</sup> In any case the old *Westphalian* statist order seems to be lost, and the perception of dis-order or even chaos has been on the rise.

It is in this context that global law has entered our conceptual map. In a response to a perceived chaos, *Larry Cata Baker* has defined global law as the systematization of anarchy.<sup>39</sup> According to him global law is the law of a non-state governance system.<sup>40</sup> It has four fundamental characteristics: fracture, fluidity, permeability and poly-centricity.<sup>41</sup> Fracture is about the re-ordering of the pre-existing statist legal ordering, by taking on board a plethora of emerging non-statist self-constituting sites,<sup>42</sup> making up the global law's poly-centricity.<sup>43</sup> In contrast with the (portrayed) *Westphalian* order, these sites are temporal, contingent, unstable and dynamic. As such, they make global law fluid as a concept, as a practice,<sup>44</sup> as well as a space of flows.<sup>45</sup> Thanks to its fluid character, global law is also the source of and a legitimating framework for permeability.<sup>46</sup>

However, while *Baker's* definition fits well the anarchical legal context beyond and/or after the state, it is hardly distinguishable from the concept of transnational law. Already in 1956 Philip Jessup characterized transnational law as including:

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<sup>37</sup> See, for example, *Sassen*, *Neither Global nor National: Novel Assemblages of Territory, Authority and Rights, Ethics and Global Politics* Vol.1 (1-2), 2008, 61-79; *Glenn*, *Transnational Legal Thought: Plato, Europe and beyond*, in *Maduro/Tuori/Sankari* (eds.), (note 36), 66 refers to the debate on 'despatialization', 'deterritorialising', 'a-territoriality'.

<sup>38</sup> See, for example, *Avbelj*, *Modernity, Post-Modernity and Transnational Law*, *Transnational Legal Theory* Vol. 7(3), 2016 (forthcoming).

<sup>39</sup> *Baker*, *The Structure of Global Law: Future, Fluidity, Permeability and Polycentricity*, Consortium for Peace and Ethics, Working Paper No. 2, 7/1, 2012, 105.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 106.

<sup>42</sup> *Ibid.*, 109.

<sup>43</sup> *Ibid.*, 117.

<sup>44</sup> *Ibid.*, 113.

<sup>45</sup> *Ibid.*, 114.

<sup>46</sup> *Ibid.*, 117.



*“all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as well as other rules which do not wholly fit into such standard categories.”*<sup>47</sup>

As I have argued elsewhere,<sup>48</sup> this definition of transnational law is over-inclusive. It encompasses any, not necessarily legal, rules beyond state. As such a broad concept transnational law is deprived of its distinctiveness as well as of its utility. In order to avoid this result, it has been common to divorce *Jessup’s* definition of transnational law *lato sensu* from transnational law *stricto sensu*. Pursuant to this narrower conception, transnational law has been identified as the law without a state,<sup>49</sup> which is indistinguishable from *Baker’s* understanding of global law. Since *Baker’s* approach to global law is, apparently, not really satisfactory, as it fails to distinguish itself from the older notion of transnational law, it merits looking at other approaches too.

One that deserves our attention, is the approach of *Neil Walker*. In his recent treatise,<sup>50</sup> he has tried to move beyond a mere rhetorical as well as a very thin usage of global law. In his view, global law is not just a label for one’s (corporate) self-promotion across the globe. It is also more than a description of the activities of the institutions with a global span.<sup>51</sup> Accordingly, for Walker law qualifies as global law due to its

*“practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law.”*<sup>52</sup>

It is thus essential to global law to at least purport to cover all actors and activities relevant to its remit across the globe.<sup>53</sup>

As such, global law is an adjectival rather than a nominal category. It does not specify any source or pedigree.<sup>54</sup> Following this criterion, *Walker* has mapped out seven species of global law, dividing them into two groups. One group makes claims towards convergence. These convergence-promoting types of global law endorse hierarchy and normative singularity,<sup>55</sup> and involve structural, formal and abstract-normative approaches. The other

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<sup>47</sup> *Jessup*, *Transnational Law*, 1956, 3.

<sup>48</sup> See, *Avbelj*, (note 38).

<sup>49</sup> To paraphrase Teubner’s global law without a state, see *Teubner*, *Global Bukowina’: Legal Pluralism in the World Society*, in *Teubner* (ed.), *Global Law Without a State*, 1997.

<sup>50</sup> *Walker*, *Intimations of Global Law*, 2015.

<sup>51</sup> See *Walker* cited in *Avbelj*, *The Concept and Conceptions of Transnational and Global Law*, WZB Discussion Paper SP IV, 2016, 9.

<sup>52</sup> *Walker*, (note 50), 19.

<sup>53</sup> *Ibid*, 21.

<sup>54</sup> *Ibid*, 21.

<sup>55</sup> *Ibid*, 56.

group contains examples of global law that make claim towards divergence and hence stress difference, heterarchy and plurality. These divergent approaches include laterally co-ordinate, functionally specific and hybrid forms of global law.<sup>56</sup> The historical-discursive approach to global law connects the two groups, which are anyhow not sealed categories, but often overlap, complement and even conflict with each other.<sup>57</sup>

*Walker's* concept of global law is thus narrower in scope than *Baker's*. Global law is the law with a (claim to) global, universal reach and not any law with transboundary application, which makes it different from transnational law. This means that, unlike *Baker*, *Walker* has succeeded at carving out an autonomous conceptual space for global law. The difficulty that his concept, however, faces is a highly abstract orientation, which makes one wonder whether global law is indeed positive law or just a discourse about global law or, eventually, both.

A relatively high level of abstraction also defines a take on global law adopted by *Rafael Domingo*. He has conceptualized global law as a legal order of seven primary principles.<sup>58</sup> The principles of justice, reasonableness and coercion define the global law's essence.<sup>59</sup> The remaining principles of universality, solidarity, subsidiarity and horizontality specify its nature.<sup>60</sup> These principles make global law a distinct concept, in particular by setting it apart from international law, which is, in *Domingo's* eyes, built on the principles of totality, individuality, centralism and verticality.<sup>61</sup>

According to these thinkers of global law, the apparent vagueness and abstractness of global law is nothing to lament. For *Walker*, global law is and is bound to remain something deeply unrealised, in the process of becoming.<sup>62</sup> *Baker* too, as we have seen above, has emphasised global law's permeability as part and parcel of its identity. What matters, is that global law finally makes a rupture with the old compartmentalized world, to reveal a fundamental interconnectedness<sup>63</sup> of the legal (as well as social, economic and political) sites across the world, on all levels of jurisgenerative activity. The challenge that emerges then for global law is what to make of and how to structure this interconnectedness.

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<sup>56</sup> *Ibid*, 58.

<sup>57</sup> *Ibid*, 57.

<sup>58</sup> *Domingo*, (note 11), 154.

<sup>59</sup> *Ibid*, 157.

<sup>60</sup> *Ibid*, 158.

<sup>61</sup> *Ibid*, 182 ff.

<sup>62</sup> *Walker* in *Musa/de Welder* (eds.), *Reflections on Global Law*, 2013, 9.

<sup>63</sup> *Walker*, *ibid*.

Broadly two contrasting answers have been developed in a response to this challenge. One favours exclusivity, while the other stresses complementarity of global law. The former is championed by *Domingo*, who posits global law in a zero-sum relationship with pre-existing legal regimes, in particular that of the state and international law. He celebrates their withering away and presents global law as something that will not only complement, but replace and supplant them. The state and international community will be replaced by a global community and global legal order. This process has already been set in an irreversible motion.<sup>64</sup>

Others have disagreed with this view and have stressed that the legal world consists of a multiplicity of normative orders, which interact through network-based governance structures in which law plays a prominent role as a medium of structuring expectations and norms.<sup>65</sup> The taking of sides in this disagreement is important because it bears directly on the question of the viability and desirability of constitutionalizing the globe, eg of making constitutionalism a grammar for global law. It is to this intricate point that we turn next.

#### 4. CONSTITUTIONALIZING THE GLOBE

It has been suggested that constitutionalism in a global realm could come in one of the three forms: as singularity, as commonality and as plurality.<sup>66</sup> As mapped out by *Walker*, global constitutionalism as singularity is about constitutionalizing international law, by translating and adapting the hierarchical state-centred constitutional law in form of the top-down governing structure of the *United Nations* to rule the globe.<sup>67</sup> Global constitutionalism as commonality is, in contrast, about internationalizing constitutionalism by elevating bottom-up the national constitutional theories and practices in horizontal and vertical networks of co-operation across the globe.<sup>68</sup> To a certain extent, global constitutionalism as commonality could be thus seen as an advanced version of the new constitutionalism, combined with comparative (constitutional) law and multilevel governance.<sup>69</sup>

In both of these cases the conventional constitutionalism, described above, remains intact. It is either applied top down from the premises of the *United Nations* across the globe; or it is spread over the globe mostly horizontally through the influential western networks. In either case, however, it is clear that this type of top-down or bottom-up global, but

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<sup>64</sup> *Domingo*, (note 11), 55, 102, 122.

<sup>65</sup> *Kjaer*, *Constitutionalism in the Global Realm: A Sociological Approach*, 2014, 153.

<sup>66</sup> *Walker*, above (note 50), 91-100.

<sup>67</sup> *Ibid*, 91-94.

<sup>68</sup> *Ibid*, 94-97.

<sup>69</sup> *Hooghe/Marks*, *Multi-level Governance and European Integration*, 2001.

essentially conventional statist constitutionalism, cannot be squared with global law that is fractured, fluid, permeable and poly-centric. It is, on the other hand, compatible with *Walker's* convergence-promoting account of global law, which global constitutionalism as plurality fails to capture. The latter comes (at least) in two distinct versions: the legal and the sociological.

The sociological form of global constitutionalism has been defended by *Teubner* under the label of societal constitutionalism.<sup>70</sup> It starts off from the premise that

*“contemporary societies have an informal constitutionality that is neither normatively nor directly centred on states.”*<sup>71</sup>

This enables the defenders of societal constitutionalism not only to move beyond the state, but also to capture the widespread plurality of the entire range of functional sectors of the global society as well as to cast their autonomous forms and activities into a constitutional grammar.<sup>72</sup> These autonomous, self-referential functional systems with their informal constitutions represent the constitutional fragments. They make up a thoroughly non-unitary global constitutionalism, which is subject to a double fragmentation and marked by constitutional conflicts that are an inherent feature of the sociological global constitutionalism.<sup>73</sup> As a result, the latter's main quest is to concentrate on the mediation of these constitutional conflicts through a global constitutional conflict of laws.<sup>74</sup>

Societal constitutionalism fits rather well the global law as described by *Cata Baker* as well as *Walker's* divergence-accommodating leg of global law. Nevertheless, and not unlike the conventional global constitutional take presented above, its remit appears to be partial. As already indicated, it leaves out the convergence-fostering leg of global law and privileges private constitutional fragments over the public authorities. The sociological emancipation of the many functional partial constitutions,<sup>75</sup> divorced from the state, is thus both a strength and a weakness of societal constitutionalism. The same is true of its focus on the informal constitutionalism. By taking constitutionalism so far from the conventional meaning, it raises the question of the appropriateness of the continuous use of the constitutional tag. Societal constitutionalism is so categorically different from the conventional constitutionalism that it effectively represents a different, indeed a new

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<sup>70</sup> *Teubner*, (note 15).

<sup>71</sup> *Thornhill*, *Constitutional Law from the Perspective of Power*, 2011, 244, cited in *Teubner*, (note 15), 4.

<sup>72</sup> *Ibid*, *Teubner*, (note 15), 4.

<sup>73</sup> *Ibid*, 13.

<sup>74</sup> *Ibid*, 13.

<sup>75</sup> *Ibid*, 171.

concept, which also deserves a different name. In short, societal constitutionalism can serve as a grammar of several sectors or fragments of global law, but this grammar is neither holistic nor constitutional in the ordinary meaning of the term. Last but not least, that might not even be its purpose.

The case is, however, different with the legal version of constitutionalism as plurality. Promoted as cosmopolitan constitutionalism by *Mattias Kumm*, this version of constitutionalism provides a cognitive frame for the holistic construction of legitimate public authority.<sup>76</sup> It acts as

*“a universally applicable conceptual framework for the analyses and assessment of the institutions, procedures, and decisions of public authorities.”<sup>77</sup>*

To do so, however, constitutionalism needs a more correct conceptualization,<sup>78</sup> falling nothing short of the *Copernican* turn.<sup>79</sup> The order of things has to be inversed. Now, contrary to what we have long believed, constitutionalism is no longer dependent on the statist framework, rather it is the latter – as so many other spaces of the political - that is contingent on constitutionalism.<sup>80</sup> What constitutionalism thus actually stands for is not a statist or any other particular institutional solution. It is the transcontextual principles: formal, jurisdictional, procedural and substantive,<sup>81</sup> which encompass legality, subsidiarity, due process, democracy and human rights protection. They are considered universal, embedded and derived from public reason.<sup>82</sup> While they refurnish constitutionalism with the universalist perspective,<sup>83</sup> they do not turn it into a hierarchical - monist paradigm. Cosmopolitan constitutionalism does not impose hierarchy between different spheres of legality, rather it allows them to coexist in a coherent way by providing the means for a principled resolution of conflicts that might arise between them.<sup>84</sup>

Societal constitutionalism and cosmopolitan constitutionalism share the departure from the exclusively statist constitutional framework. They also both focus on the plurality, rather than unity or commonality,<sup>85</sup> but this pluralist orientation is much more pronounced in societal constitutionalism than in its cosmopolitan counterpart. Cosmopolitan

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<sup>76</sup> *Ibid*, 322.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Kumm*, (note 30), 261-262.

<sup>79</sup> *Ibid*, 263.

<sup>80</sup> *Ibid*, 263-264.

<sup>81</sup> *Ibid*, 268.

<sup>82</sup> *Ibid*, 310, 315.

<sup>83</sup> *Ibid*, 322.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Walker*, (note 50), 97-100.

constitutionalism preserves many traits of the conventional constitutionalism, but divorces them from the state, so to make them fit the environment and realities beyond the state. Unlike the societal constitutionalism, which focuses on the private exercise of informal, functional authority, cosmopolitan constitutionalism is concerned with framing the public authorities to ensure their legitimate functioning and operation. This legitimacy is not, as in the state, exclusively based on the fit with the in-put legitimacy of the “we the people”, but stems from the right balance of the underlying constitutional principles. These serve the resolution of constitutional conflicts, which, interestingly, the legal and sociological constitutional approaches alike try to resolve in a principled manner.<sup>86</sup>

Despite several similarities, the two pluralist constitutional approaches differ fundamentally in terms of their focus and ambition. Cosmopolitan constitutionalism is explicitly holistic, paradigm-building and all-encompassing, even exclusionary. *Kumm* has made this clear in his discussion of the relationship between constitutionalism and international law, as he argued that once constitutionalism and international law are properly understood, they remain two discourses, because they are employed on different planes, but ultimately they are of one and the same kind.

*“There is only constitutionalism [but] in different institutional contexts”.*<sup>87</sup>

Societal constitutionalism makes no such claim. The latter is after all about constitutional fragments, whereas cosmopolitan constitutionalism is regarded as a principled framework for legal pluralism.<sup>88</sup> This, again, makes it despite its proclaimed principled orientation more compatible with *Walker’s* convergence-promoting global law as well as, perhaps, also with *Domingo’s* principled global law. The compatibility between cosmopolitan constitutionalism and *Domingo’s* approach to global law is, however, questionable because of the latter’s explicit rejection of individuality that is a part and parcel of the liberal credo on which cosmopolitan constitutionalism builds.

Finally, not unlike the societal constitutionalism, the cosmopolitan constitutionalism too raises questions about the propriety of a continuous use of the constitutional title, about its relationship with the conventional statist constitutionalism and about the merits of the alleged *Copernican* turn. Cosmopolitan constitutionalism turns the conventional constitutionalism inside out. Essentially, it too creates a new concept, but keeps the old

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<sup>86</sup> *Teubner*, (note 15), 172, stressing the justice principled in the form of »sustainability« as a leading principle of conflicts resolutions between the regimes.

<sup>87</sup> *Kumm*, (note 30), 263.

<sup>88</sup> *Ibid*, 274.

label. Especially, it does away with the popular dimension of the constitution, which has been a landmark of the constitutionalism inside the state. Through this conceptual transformation, the cosmopolitan constitutionalism can be extended beyond the state to the supranational and international plane, including the globe, but again it runs short of turning itself into a grammar of global law *in toto*.

In a nutshell, our study of constitutional attempts to frame the globe reveals that no single version of global constitutionalism matches the global law in its entirety or in all of its versions. There is a partial fit. Certain types of global constitutionalism match convergence-promoting others again divergence-accommodating types of global law. In these attempts at constitutionalizing the globe, the concept of constitutionalism itself has been transformed. Sometimes only marginally, especially when the statist constitutionalism has simply been imposed top down or exported bottom-up to the globe. In other cases, again, the transformation has been radical, so that nothing, other than the name, has been left of the conventional concept.

In the attempts of turning constitutionalism into a grammar of global law, there have apparently emerged many conceptions of constitutionalism that, as such, do not, for they cannot, provide for a single grammar of global law. We can observe many types of global law, several conceptions of global constitutionalism that make up many partial grammars of global law. In approaching global law, which aims towards or indeed is about universality, we have to be cognizant of the fragmentation of the theoretical or epistemic lenses through which global law is perceived, conceived and normatively influenced. This fact of epistemic fragmentation, *a priori*, disqualifies any attempts at turning any single constitutional account of global law in its allegedly exclusive and comprehensive theoretical container. What is needed instead, if you are a proponent of constitutionalization of the globe, is a great degree of modesty and complementarity.

## **5. A CALL FOR MODESTY AND COMPLEMENTARITY**

Despite the fact that the preceding discussion has demonstrated an imperfect fit between global constitutionalism(s) and global law(s), this article concludes on a positive, but simultaneously cautionary note. To do so, I would like to call, by way of answering the question of the constitutionalism's conceptual capacity and normative desirability to frame the globe, for modesty and complementarity. There is, of course, nothing in the nature of constitutionalism itself, after all it is an amenable social concept, that would *ab initio* disqualify it as a grammar of global law. Attempts at constitutionalizing the globe are

therefore not futile and can be, if persuasively argued for, not just compelling but also legitimate. Nevertheless, and simultaneously, in the process of translation of constitutionalism to the globe one must also be aware of several pitfalls, which call for an aforementioned modesty.

This is necessary since constitutionalism is an extremely ambitious and, above all, normatively overloaded concept. It is not just any social concept. It is a *political* social concept *par excellence*, which has been shaped by and has emerged out of very tangible historical struggles. Most of these struggles are closely connected to the idea and practice of statehood. It is thus a truism to repeat once more that constitutionalism conventionally understood is a statist concept. Irrespectively whether one likes this or not, this fact needs to be repeated, acknowledged and factored in before starting any debate on global constitutionalism. In the opposite case, we risk pre-empting the very debate which was yet to begin.

A modest approach to global constitutionalism, however, should not lead us to excessively thin conceptual choices. In our desire to strip constitutionalism of its statist characteristics to make it fit the globe – assuming that we are not creating some sort of a global state, which is as utopian as it is normatively harmful – we cannot go as far as changing the concept beyond recognition or to detract from its substance so much that what is left is just a label – a formal shell of constitutionalism. That would take us to an extreme reduction *ad absurdum*, which ought to be avoided. Again, as in all things, we shall be pursuing the right balance between the positive normative values traditionally associated with constitutionalism, which ought to be preserved or extended to the globe, and those conceptual, institutional, normative features of the concept that simply cannot or should not be translated to the global realm.

The pursuit of this right balance, which is anything but an easy task, could be facilitated by resorting to complementarity. That is: (very) different forms of constitutionalism could be preserved (or developed) for different ‘environments’, taking into account their disparate historical, social and overall political characters. Rather than looking for a special universal all-contexts-embracing theory of constitutionalism: a kind of minimum global constitutionalism fitting the globe as well as all the other more particular environments, we should be, as in a mosaic of concentric circles, collecting different conceptual and practical expressions of constitutionalism to build a complementary framework.



This should consist of constitutionalism in the state, beyond the state, in transnational realm and on the globe. These different environments have or call for different forms of constitutionalism, whereby the emergence of one form does not detract or even negate the former. In other words, constitutionalism beyond the state, does not (and should not) mean the demise of the statist constitutionalism; transnational “constitutionalism” does not take away from constitutionalism beyond the state, etc. Simultaneously, these different forms of constitutionalism do not exist in a mutual isolation. Instead, they form highly dynamic and self-transforming relationships, marked by a constant interaction between different environments: national, supranational, international, transnational and global.

Of course, such a theoretical construction needs a meta-theory to connect the different expressions of constitutionalism across the plurality of legal environments. As it is already dubious whether all environments deserve and/or even require the constitutional title, it is even more questionable whether the required meta-theory should be itself constitutional in character. The many constitutional approaches surveyed in this article are, of course, of this opinion. However, I remain skeptical. As I have argued in greater detail elsewhere, all these emanations of legal regulations across different regimes might be better described and explained if embedded in the language of principled legal pluralism.<sup>89</sup>

This is a version of legal pluralism, which is not only descriptive and explanatory, as most of the legally pluralist approaches have been, but it is also normative in a thick way. Principled legal pluralism begins with legal plurality. That is with the recognition of many, not just statist, jurisgenerative sites which have succeeded at making plausible claims to their own legal autonomy. In this manner, principled legal pluralism captures global law in all of its fragmentation, fluidity and polycentricity. In so doing, it comes close to the societal constitutionalism, which allows for and recognizes many sociological jurisgenerative sites. However, legal pluralism insists on their legal quality, which is achieved by passing a certain threshold of mutual-intelligibility between the sites that have been (plausibly) recognized as legal sites.<sup>90</sup>

Once this legal plurality is recognized, it must get connected to form legal pluralism. This connection ought to take place in a principled way, so that different legal orders, first, mutually recognize each other and then, secondly, commit to the non-unitary common whole. The prerequisite of meeting such a principled legal solution is the development of a normative spirit of pluralism, based on a high degree of reflexivity, which is, of course, not

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<sup>89</sup> See, *Avbelj*, European Union under Transnational Law: A Pluralist Appraisal, forthcoming 2017.

<sup>90</sup> *Muniz-Fraticelli*, The Structure of Pluralism – On the Authority of Associations, 2014, 50.

unlimited. Its limit is the episteme of any single legal order involved. In this way, we get a grammar for global law, which has an ambition, a commitment to the universal whole, while simultaneously recognizing the inherent limits of this universality posed by the many fragmented, more or less encompassing, pieces of the global whole.

The just sketched principled legally pluralist approach to global law is thus obviously the reverse side of cosmopolitan constitutionalism. Rather than advancing constitutionalism as a principled framework for legal pluralism, what is promoted here is legal pluralism as a principled framework for different types of constitutionalisms: statist and non-statist; formal and informal; national, transnational or global etc. Principled legal pluralism, hence conceived of, can meet the same normative objectives as the variety of constitutional attempts to frame the globe. However, its chief advantage is that it does so in a way that eschews the conceptual, normative and political controversies that the invocation of the c-word has too often produced. In other words, principled legal pluralism appears to be a more appropriate, more suitable means for the development of the grammar of global law as constitutionalism has been.

Nevertheless, this does not mean that principled legal pluralism now becomes an exclusive epistemic resource to legally frame the globe. Not only is this conceptually impossible, it is even more normatively undesirable and incompatible with the modest and complementary approach advocated for here. Global law, to reiterate the point made by *Walker*, is something deeply unrealized and in the process of becoming.<sup>91</sup> As such, it necessarily prompts and invites divergent points of view and theories, which try to make sense of many of its fragments, layers as well as of the whole. All of these theories, including the constitutional ones, as this article has tried to demonstrate, do justice to the phenomenon of global law at least in a limited way.

Eventually, however, global law is more than a sum of many constitutionalisms. This can be illustrated by pushing the grammar metaphor a little bit further. Accordingly, constitutionalism could be viewed as a morphology of global law, while principled legal pluralism is its syntax. Many constitutionalisms frame the many sites of global law, while principled legal pluralism provides the glue and the matrix for the expression of the whole. The same as in linguistics, in legal grammar too, morphology and syntax are not sealed categories, but often form a morphosyntax.<sup>92</sup> The meaning of the words is formed not only through syntax, by way the words are combined into sentences, but also by the form(ation)

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<sup>91</sup> *Walker*, (note 62).

<sup>92</sup> *Payne*, *Exploring Language Structure*, 2012, 9.

of the words itself. In a similar way, the present grammar of global law can be portrayed as a mutual interference by many constitutionalisms, drawn together by principled legal pluralism, whose structure is equally under a strong constitutional impact, avoiding, however, the legacy of the statist big C constitutionalism.<sup>93</sup>

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<sup>93</sup> Walker, Big »C« or small »c«?, *European Law Journal* Vol. 12, 2006, 12.

# Normative demarcations of the right to life in a globalized world: Conflicts between Humanitarian Law and Human Rights Law as markers

Dana Schmalz

**Abstract:** The relationship between international humanitarian law (IHL) and international human rights law (IHRL) has occupied legal scholarship extensively over the last decades. It is undisputed today that IHRL also applies in situations of armed conflict, and that norms of the two regimes are regularly intertwined. At the same time, the regimes are characterized by different logics, which become most apparent with regard to the protection of the right to life, or the permissibility to kill a person. In this paper, I will argue that the concrete lines of conflict between IHL and IHRL in that regard can be viewed as markers for fundamental normative questions arising in a changing global political framework. IHL draws on the order of states as decisive entities of rights and liabilities, whereas IHRL takes humanity as reference point. On that basis, their relationship does not appear as straightforward convergence but rather as a dialectical process that highlights their respective limitations. The conflicts regarding the protection of a right to life in that sense are indicative of a more general uncertainty about the appropriate normative grammar today: They point to instances, in which the state-centric framework has become inadequate. But they equally underline dangers of the language of universal human rights, the scope and content of which will depend on particular conceptions about the boundaries of political community.

*Prince Andrei merely shrugged his shoulders at Pierre`s childish talk. [...] "If everyone made war only to his own convictions, there would be no war," he said. "And that would be excellent," said Pierre. Prince Andrei smiled. "It might very well be excellent, but it will never happen..." "Well, what makes you go to war?" asked Pierre.*

*(Leo Tolstoy, War and Peace<sup>1</sup>)*

## 1. INTRODUCTION

In Tolstoy's novel "War and Peace", the reader is taken through contrasting sequences of domestic and urban life on the one hand, and the waiting and fighting of soldiers in battlegrounds on the other. In a paradigmatic manner, these alternating scenes convey the picture of war and peace as separate realms of human interaction. Widely different concerns guide persons in the respective surroundings: Soldiers at the front lines are coping with deprivations and their anxiety, struggling to appear brave in face of death. Storylines in Saint Petersburg and Moscow, by contrast, deal with love affairs, jealousy and family life. As dissimilar as the atmosphere in those contrasting sequences of the book

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<sup>1</sup> *Tolstoy, War and Peace*, 1869 (here English edition from 2007, translation by Richard Pevear and Larissa Volokhonsky), 25.

is our general perception of war and peace, and of the respective rules governing these spheres. Most importantly, this involves a contrasting judgment on the permissibility to kill a person.

Generally, the perception of war and peace as opposite conditions of life persists although it has long been conceded that a clear line can hardly be drawn, and that boundaries are becoming ever more blurred in the so-called “new types of armed conflicts”.<sup>2</sup> The main theoretical site for discussing the relationship between the different legal paradigms of war and peace is the respective applicability of (norms of) international humanitarian law (IHL) and international human rights law (IHRL). Humanitarian law has a long history with certain rules of war dating back to ancient times, and with modern IHL being considered to have its starting point with the initial 1864 Geneva Convention.<sup>3</sup> IHRL, by contrast, is a much younger body of law, generally conceived to begin with the 1948 Universal Declaration of Human Rights (UDHR).<sup>4</sup> With seminal court decisions such as the International Court of Justice’s (ICJ) Wall Opinion,<sup>5</sup> it is now undisputed that IHRL also applies in situations of armed conflict, and it has been explored extensively how IHL is today complemented and influenced by IHRL.<sup>6</sup>

The concrete applicability and interrelation of the two regimes comes, however, with complex questions. As a general tendency, analyses have focused on their common features and their converging development.<sup>7</sup> At the same time, the regimes are characterized not only by singular divergence in rules but by fundamentally different logics: IHL starts out from the situation of armed conflict, setting up rules for that situation of hostilities and thereby aiming to mitigate the negative consequences. IHRL, by contrast,

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<sup>2</sup> *Sassòli*, The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in: Ben-Naftali (Ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, 2011, 34; *Wippman*, Introduction: Do New Wars Call for New Laws?, in *Wippmann/ Evangelista (Eds.), New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, 2005, 1.

<sup>3</sup> *Sassòli et al.*, How does law protect in war? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume I, Third Edition 2011, Chapter 3, 1.

<sup>4</sup> Universal Declaration of Human Rights (UDHR), as proclaimed by the UN General Assembly in Resolution 217 A on 10 December 1948.

<sup>5</sup> International Court of Justice, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 9 July 2004, I.C.J. Advisory Opinion, 2004 I.C.J. 136.

<sup>6</sup> E.g. *Provost*, *International Human Rights and Humanitarian Law*, 2002; *Droege*, The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, *Israel Law Review* Vol. 40, 2/2007, 310; Ben-Naftali (Ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, 2011; *Quenivet/ Arnold (Eds.), International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law*, 2008.

<sup>7</sup> *Ben-Naftali*, Introduction: International Humanitarian Law and International Human Rights Law - Pas de Deux, in: Ben-Naftali (note 6), 5.

proceeds from a perspective of peace, envisaging a number of rights to be safeguarded for all persons, including civil and political rights on the one hand,<sup>8</sup> and economic, social, and cultural rights on the other.<sup>9</sup>

In this paper, I will examine how international law deals with the distinction between and the distinguishability of war and peace with a focus on the position of a right to life. In particular, the notion of a “right to life” calls for interpretation: What such right can mean, for mortal human beings whose survival is always dependent on others,<sup>10</sup> must be sought in the relationship between the individual and the community. It encompasses the prohibition to be arbitrarily deprived of one’s life, but also relates to social and economic rights as life’s structural preconditions.<sup>11</sup> With respect to conflicting rules of IHL and IHRL, the protection of a right to life represents foremost the normative protection of the individual physical integrity vis-à-vis security concerns of states. To which extent this individual inviolability prevails over collective concerns will depend on the qualifications, both in a rhetorical and a technical sense, of situations as war or armed conflict, of persons as enemies or combatants, and of acts as falling within the jurisdiction of a state.

The proposition of this paper is that we can read the concrete lines of conflict between IHL and IHRL as markers of fundamental normative questions of a changing global political framework. The respective normative principles do not only relate to different paradigmatic situations of war and peace, but also embody different perspectives on the foundation of rights. IHL builds on the order of states as decisive entities of rights and liabilities. The assumptions thereby made are challenged by the increasing role of non-state actors, but more generally by the fact that the nation state no longer appears as the only framework of law and legitimacy. It is the aim of this paper to link the debate about the relationship of IHL and IHRL to reflections about the changing landscape of political order, in the sense of a demise of the Westphalian framework as exclusive or self-evident.<sup>12</sup>

The critique that can be drawn from that linkage is not one-sidedly one of the laws of armed conflict, but equally points to the limitations in the assumptions of IHRL. Over the last decades, the universalism of human rights has been subjected to a rigorous critique,

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<sup>8</sup> International Covenant on Civil and Political Rights (ICCPR), as adopted by UN GA Res 2200A (XXI) on 16 December 1966.

<sup>9</sup> International Covenant on Economic, Social, and Cultural Rights (ICESCR), as adopted by UN GA Res 2200A (XXI) on 16 December 1966.

<sup>10</sup> *Butler*, Notes Toward a Performative Theory of Assembly, 2015, 23, 196.

<sup>11</sup> *Wicks*, The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties, *Human Rights Law Review* Vol. 12, 1/2012, 199 (2012). Cf. also *Butler* (note 10), 199.

<sup>12</sup> Cf. *Fraser*, Scales of Justice, 2009, 14.

which demonstrates how exclusions are present in every account of the universal.<sup>13</sup> At the same time, propositions of a “critical universalism” have defended the importance of human rights and reformulated an understanding in awareness of those pitfalls.<sup>14</sup> I will argue that the limits of IHRL regarding the effective protection of a right to life and its relationship with IHL reflect the importance of a critical theoretical conception of human rights. In that sense, the lines of conflict between the two regimes can be read as illustrating the dialectical relationship of both perspectives, in which their contradictions as well as their merits become visible.

## **2. THE RELATIONSHIP BETWEEN IHL AND IHRL: CONVERGENCE OR CONTRADICTION?**

Thinking about the relationship between IHL and IHRL, we might first of all look at the respective intellectual roots and histories of codification. Historical roots and developments of IHL are in themselves object of opposing narratives.<sup>15</sup> Traditionally, it is held that laws of war have for a long time and throughout all cultures existed to limit the destructive effects of hostilities.<sup>16</sup> In a different narrative, however, laws of war have often failed to actually improve the situation of the populations affected by war, or even went hand in hand with domination.<sup>17</sup> As Amanda Alexander points out, both these descriptions adopt the view of a certain continuity between rules in previous centuries and the current framework of IHL. Advancing a description distinct from both, Alexander starts out from the observation that the term “international humanitarian law” as synonymous to “laws of armed conflict” only emerged in the 1960s.<sup>18</sup> She suggests, the interpretation of rules of law took a genuinely new emphasis in those decades, increasingly including counter-hegemonic concerns, and shifting the balance between the principle of military necessity and the principle of humanity.<sup>19</sup>

This perspective on international humanitarian law replacing earlier traditions of laws of war goes hand in hand with the perspective of an increasing convergence between IHL

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<sup>13</sup> E.g. *Butler*, Sovereign Performatives in the Contemporary Scene of Utterance, *Critical Inquiry* Vol. 23, 2/1997, 350 (367); *Mouffe*, On the political, 2005, 11.

<sup>14</sup> E.g. *Ingram*, Cosmopolitanism from Below: Universalism as Contestation, *Critical Horizons* Vol. 17, 1/2016, 66; *Benhabib*, Another Cosmopolitanism, 2006.

<sup>15</sup> *Alexander*, A Short History of International Humanitarian Law, *European Journal of International Law* Vol. 26, 1/2015, 109 (111).

<sup>16</sup> *Ibid.*, 111, 112.

<sup>17</sup> *Ibid.*, 113.

<sup>18</sup> *Ibid.*, 114.

<sup>19</sup> *Ibid.*, 125.

and IHRL. Human rights, in turn, have two main historical points of anchorage: Firstly, the idea of inalienable rights as product of Enlightenment philosophy was legally codified in the French and the American Constitution.<sup>20</sup> In 1948, more than 150 years later and following the experiences of two World Wars and the Holocaust, the international community then aimed to “reaffirm[...] their faith in fundamental human rights”,<sup>21</sup> which marks the beginning of the current regime of IHRL.<sup>22</sup> Since then, it has differentiated beyond the 1948 Universal Declaration and the subsequent two international covenants,<sup>23</sup> encompassing various specific human rights treaties,<sup>24</sup> regional conventions,<sup>25</sup> and involving judicial bodies that interpret and develop human rights provisions.<sup>26</sup> This differentiation of IHRL went hand in hand with a growing influence it had for all areas of international law.<sup>27</sup>

Since the beginnings of IHRL, its relationship with IHL has been an important topic in legal scholarship and practice.<sup>28</sup> Classically, it is emphasized how the two regimes are distinct in nature and evolution.<sup>29</sup> Law of armed conflict developed as law between states, and much through customary law. As such, it builds on a view of formal equality between rivaling parties, having roots for instance in the medieval norms of chivalry, which aim to guarantee a minimum of “fair play”.<sup>30</sup> Human rights law, by contrast, evolved first as domestic law and proceeds from the perspective of a hierarchical relationship between states and individuals. The respective demands of the two regimes will often differ considerably, raising the question, which regime or which norms are applicable. On a first level, it has been discussed whether IHRL can be applicable in situations of armed conflict at all. In the

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<sup>20</sup> Notably the 1776 Virginia Declaration of Rights, available at [www.archives.gov/exhibits/charters/virginia\\_declaration\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html); and the 1789 Déclaration des Droits de l'Homme et du Citoyen, available at [www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789](http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789).

<sup>21</sup> Cf. the Preamble to the 1948 Universal Declaration of Human Rights (note 4).

<sup>22</sup> *Alston/Goodman*, International Human Rights, 2013, 139.

<sup>23</sup> Cf. above note 8 and 9.

<sup>24</sup> E.g. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as adopted by the UN General Assembly on 19 December 1979.

<sup>25</sup> E.g. the American Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR), and the African Charter on Human and People's Rights (ACHPR).

<sup>26</sup> On the far-reaching authority and the question of democratic legitimacy *von Bogdandy/Venzke*, In Whose Name? A Public Law Theory of International Adjudication, 2014, in particular 63, 132.

<sup>27</sup> Cf. e.g. for the case of refugee law *Hathaway*, *Reconceiving Refugee Law as Human Rights Protection*, *Journal of Refugee Studies* Vol. 4, 2/1991, 113.

<sup>28</sup> *Provost*, (note 6), 2. Cf. also *Draper*, *Human Rights and the Law of War*, *Virginia Journal of International Law* Vol. 12, 3/1972, 326.

<sup>29</sup> *Quenivet*, Introduction, in: *Quenivet/Arnold* (Eds.) (note 6), 1 (2).

<sup>30</sup> *Meron*, *The Humanization of Humanitarian Law*, *American Journal of International Law* Vol. 94, 2/2000, 239 (240).



late 1960s and early 1970s, the perspective of two distinct legal fields became challenged and the application of human rights norms in situations of armed conflict was intensely debated in the framework of the United Nations.<sup>31</sup> In opposition to the view that both regimes were so fundamentally different that one could not speak about a confluence, it is thereby pointed out how the underlying considerations of IHL relate to the idea of human rights,<sup>32</sup> and that a complementing application of human rights can fill voids arising in the law of armed conflict.

Today, the general applicability of IHRL is widely accepted.<sup>33</sup> It is being viewed as *lex generalis* whereas IHL forms the *lex specialis* for circumstances of armed conflict.<sup>34</sup> The view of a confluence of the two regimes has come to enjoy, as Orna Ben-Naftali formulates pertinently, “the status of the new orthodoxy”.<sup>35</sup> Many questions remain, most importantly as to the qualification of a situation as armed conflict, and as to which extent the applicability of rules of IHL exclude normative demands of IHRL. The *lex specialis* principle can thereby delimitate the direction, but hard cases will always require political choices about the prevailing rules.<sup>36</sup> In this regard, the distinct histories and paradigms of IHL and IHRL become visible again. This holds particularly true for cases involving the protection of a right to life the next section will discuss. While the view of a convergence between IHL and IHRL is thus reflective of the development in practice, it should not conceal that at the same time conflicting logics persist, and that questions of applicability for some bordering cases are not simply questions of gradual adjustment but can involve glaringly opposite results.

### 3. THE RIGHT TO LIFE AS CONFLICT BETWEEN THE TWO REGIMES

IHL and IHRL evolved in different historical phases and have a different focus: While IHL introduces some rules to the situation of war and aims to limit suffering under those conditions, IHRL generally proceeds from the perspective of peace and contains much more far-reaching requirements for the protection of individual rights. But it is also clear that the normative considerations overlap in many instances: The development of IHRL has influenced the interpretation of IHL in various ways, and new types of armed conflict

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<sup>31</sup> *Quenivet* (note 29), 4, 5.

<sup>32</sup> *Draper* (note 28), 327, 328, who speaks of “parentage”. *Provost* (note 6), 26.

<sup>33</sup> See above note 5.

<sup>34</sup> *Provost* (note 6), 277.

<sup>35</sup> *Ben-Naftali* (note 7), 5.

<sup>36</sup> *Sassòli* (note 2), 71; *Shany*, Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror, in: Ben-Naftali (ed.) (note 6), 13.

make the concurrent applicability ever more relevant. Under these conditions, the protection of the right to life can serve as a lens for tracing the underlying assumptions in the two regimes. After describing central principles for the protection of a right to life in IHRL (a) and in IHL (b), I will examine a few contentious aspects (c).

### A) THE RIGHT TO LIFE IN IHRL

The right to life figures as key provision in all major international human rights conventions: The Universal Declaration of Human Rights (UDHR) states that “[e]veryone has the right to life, liberty and security of person”.<sup>37</sup> The International Covenant on Civil and Political Rights (ICCPR) holds that “[e]very human being has the inherent right to life[, which] shall be protected by law.”<sup>38</sup> In a similar way, the American Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR), and the African Charter on Human and Peoples’ Rights (ACHPR) all guarantee the right to life.<sup>39</sup> It counts to the non-derogable provisions of those conventions, meaning that derogation clauses, which allow limiting right guarantees in times of emergency, do not extend to it. The right to life is thus counted among those most fundamental guarantees, which the respective treaties exclude from a possible limitation even in conditions of public emergency. At the same time, the deprivation of life in situations of armed conflict is not considered a violation of the human rights provisions *per se*.

Under the ICCPR, the application of IHL as *lex specialis* is read into the question whether a deprivation of life is “arbitrary”.<sup>40</sup> As the ICJ held in its Advisory Opinion on the use of nuclear weapons, determining whether a deprivation of life was in violation of Article 6 ICCPR can in those cases “only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.<sup>41</sup> Along that vein, the ECHR explicitly excludes “lawful acts of war” from the non-derogability of the right to life.<sup>42</sup> The case lies parallel for the ACHR, for which the Inter-American Commission of Human Rights has held that in lack of specific rules on the situation of armed conflict, whether the respective guarantee of the right to life was violated must be determined by reference to

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<sup>37</sup> Art. 3 UDHR, (note 4).

<sup>38</sup> Art. 6 ICCPR, note 8.

<sup>39</sup> Cf. with detailed references *Doswald-Beck*, The right to life in armed conflict: does international humanitarian law provide all the answers?, *International Review of the Red Cross* Vol. 88, 2006, 864 (883).

<sup>40</sup> *Otto*, Targeted Killings and International Law, 2012, 106.

<sup>41</sup> International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, I.C.J. Advisory Opinion 1996, 225 (240).

<sup>42</sup> Cf. Art. 15 para. 2 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

IHL.<sup>43</sup> For the ACHPR, the non-derogability of the right to life guarantee is as such less explicit,<sup>44</sup> but in parallel to the mentioned conventions deprivation of life in situations of armed conflict is not considered a violation insofar it respects the rules of IHL.<sup>45</sup>

In general, the right to life in IHRL constitutes both, a negative and a positive obligation, for the state towards individuals. Beside the prohibition to arbitrarily deprive a person of her life, the right to life also refers to the obligation of a state to safeguard the lives of persons under its jurisdiction and in that context to investigate the killing of a person.<sup>46</sup> For the killing of a person by state authorities in order not to violate the guarantee, there are very strict requirements as to the necessity and proportionality. The direct killing of a person can only be justified as measure of self-defense. A “collateral damage” as in IHL is not justified under international human rights law;<sup>47</sup> when occurring as side effect of the state’s legitimate use of force, all appropriate measures of precaution must have been taken.<sup>48</sup>

## **B) THE RIGHT TO LIFE IN IHL**

The boundaries for the killing of a person to be legitimate are much wider in the law of armed conflict. In fact, speaking about a right to life in situations of armed conflict might sound like a contradiction in terms: Armed conflict is characterized by the occurrence of violent and often fatal acts of force,<sup>49</sup> and a right to life is certainly hard to maintain in absolute terms.<sup>50</sup> Nonetheless, in order to examine cases of conflict between IHL and IHRL in that respect, it makes sense to describe the rules of IHL with view to the protection of a right to life. Three points thereby appear central: firstly, the rules pertaining to combatancy and the containment of warfare, secondly, those regarding the protection of civilians and the notion of collateral damage, and lastly, the prohibition of human shields.

## **I) RULES OF COMBATANCY AND THE CONTAINMENT OF WARFARE**

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<sup>43</sup> *Otto* (note 40), 128. With reference to the La Tablada Case, IAComHR, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, 1997, para. 158.

<sup>44</sup> *Otto* (note 40), 141, 143.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Wicks* (note 11), 201.

<sup>47</sup> *Otto* (note 40), 103.

<sup>48</sup> *Quenivet*, *The Right to Life in International Humanitarian Law and Human Rights Law*, in: *Quenivet/Arnold* (Eds.) (note 6), 331 (347).

<sup>49</sup> I here and in the following refer to armed conflict both as international and as non-international armed conflict. When speaking about “war”, this equally includes both forms, as suggested in Steven P. Lee’s definition of war as “the use of force for political purposes by one side in a large-scale armed conflict where both (or all) sides are states or other large organized groups”, *Lee*, *Ethics and War: An Introduction*, 2012, 9.

<sup>50</sup> Cf. also *Wicks*, *The Right to Life and Conflicting Interests*, 2010, 79.

It has been called the “basic axiom” of IHL that acts to weaken the military potential of the enemy are in general not punishable under domestic law.<sup>51</sup> This excludes war crimes, thus grave breaches of IHL,<sup>52</sup> which can be adjudicated in every state according to the concept of universal jurisdiction.<sup>53</sup> Apart from those cases of grave breaches, IHL constitutes the *lex specialis* for situations of armed conflict, in which the killing of a person is permissible under wider conditions than under domestic laws and IHRL. This wider permission is framed as “privilege of belligerency”, referring to the exclusion from criminal liability. With this privilege not to be punished for killing in war corresponds the weaker protection of a right to life, in particular for combatants themselves.

Yet, the law of armed conflict is not without limitation regarding the killing of enemy combatants.<sup>54</sup> Already the 1868 St. Petersburg Declaration forbids the “employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable”, expressing that whenever possible, combatants should avoid causing the deaths of adversary combatants.<sup>55</sup> Under the prohibition of perfidy, the treacherous killing of adversary combatants is interdicted.<sup>56</sup> Moreover, persons *hors de combat* cease to be legitimate targets.<sup>57</sup> Central to the privilege of belligerency is thus the delimitation of who counts as a combatant.<sup>58</sup> This concerns the side of being excluded from criminal liability, but also the side of being considered a permissible target in the conduct of hostilities. Regarding the privilege of belligerency, the qualification as combatant works as delimitation towards civilians on the one hand, and towards unlawful fighters on the other.<sup>59</sup> The position of forming a legitimate target of acts of force by contrast extends to all persons who are members of enemy armed forces as well as persons who are not members of enemy armed forces but who directly take part in hostilities. Whereas the

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<sup>51</sup> *Sassòli et al.* (note 3), Chapter 5, 1.

<sup>52</sup> Cf. for a definition Art. 8 para. 2 of the Rome Statute of the International Criminal Court.

<sup>53</sup> *O’Keefe*, Universal Jurisdiction. Clarifying the Basic Concept, *Journal of International Criminal Justice* Vol. 2, 2004, 735.

<sup>54</sup> *Dinstein*, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, 198.

<sup>55</sup> *Shue*, *Laws of war*, in: Besson/Tasioulas (Eds.), *The Philosophy of International Law*, 2010, 551.

<sup>56</sup> Art. 23 lit. b of the 1907 Hague Convention; see also *Otto* (note 40), 255.

<sup>57</sup> Art. 41 para. 1 of the Additional Protocol I (1977).

<sup>58</sup> IHL defines a combatant as any member of the armed forces of a party to the conflict other than medical personnel and chaplains. cf. Art. 43 para. 2 of the Additional Protocol I (1977); the rule is moreover considered part of customary international law, *Otto* (note 40), 221. Armed forces in turn are marked by four criteria: A commander being responsible for his subordinates, a fixed distinctive emblem recognizable at a distance, the carrying of arms openly, and the conduct of operations in accordance with the laws and customs of war, cf. Art. 1 of the 1907 Hague Convention as well as Art. 4 A of the 1949 Geneva Convention III.

<sup>59</sup> Cf. Art. 4 A of the 1949 Geneva Convention III, which relates to the Prisoner of War Status. For further discussion *Otto* (note 40), 22.

proposition that such “unlawful fighters” would not benefit from any protection under IHL is not convincing,<sup>60</sup> they constitute a potential source of attack and, accordingly, their targeting is considered as useful and necessary for military purposes.

## II) THE PROTECTION OF CIVILIANS AND THE NOTION OF COLLATERAL DAMAGE

Since the concession to kill in the conduct of hostilities builds on the aim to weaken the enemy, it is limited by what is useful and necessary for that purpose. This is reflected in all fundamental principles of IHL but finds most far-reaching expression in the principle of distinction *ratione personae*, requiring to distinguish at all times between military personnel and civilian population.<sup>61</sup> The distinction *ratione personae* in IHL proceeds from the presumption that a person is civilian unless she falls under the definition of a combatant.<sup>62</sup> Yet, as outlined in the last section, a person neither benefits from the protection as civilian if and when taking part in hostilities, whether momentarily or as an “unlawful fighter”.

Generally, civilians who do not take part in hostilities are no legitimate targets of violent acts. Yet even with regard to those, the framework of IHL allows a broader discretion of potentially fatal acts. Under the notion of “collateral damage”, the privilege of belligerency extends to the killing of civilians as long as the “incidental loss of civilian life” is not “excessive in relation to the concrete and direct military advantage anticipated”.<sup>63</sup> The death of civilians is thus accepted as “collateral damage” if it occurs as a side effect to permissible acts of war and is within the bounds of proportionality,<sup>64</sup> requiring a balancing of all relevant circumstances in each individual case.

## III) THE PROHIBITION OF HUMAN SHIELDS

As the principle of distinction allows the killing of civilians only under strict considerations of proportionality, the danger arises that a party to a conflict uses this prohibition for its military strategies, by deliberately “shielding” military objectives with civilian population. The Fourth Geneva Convention explicitly prohibits such use of “human shields”.<sup>65</sup> The prohibition is moreover considered a rule of customary IHL,<sup>66</sup> and falls under the war

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<sup>60</sup> *Otto* (note 40), 339.

<sup>61</sup> Art. 48 of the Additional Protocol I (1977). See also *Thürer*, *International Humanitarian Law: Theory, Practice, Context*, 2011, 86.

<sup>62</sup> Art. 50 of the Additional Protocol I (1977).

<sup>63</sup> Cf. Art. 51 para. 5 b of the Additional Protocol I (1977).

<sup>64</sup> For a general outline cf. *Lefkowitz*, *Collateral Damage*, in: Larry May (Ed.), *War. Essays in Political Philosophy*, 2008, 145.

<sup>65</sup> Art. 28 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949).

<sup>66</sup> Rule 97 of the ICRC Study on Customary International Law, see *Henckaerts/Doswald-Beck*, *Customary International Humanitarian Law*, Volume I: Rules, 2005, 337.

crimes enlisted by the Statute of the International Criminal Court (ICC).<sup>67</sup> Moreover, customary international humanitarian law contains a broader general rule that “to the extent feasible, [...] civilian persons and objects [must be removed] from the vicinity of military objectives”.<sup>68</sup> The principle of distinction thus yields effects not only for a party’s conduct towards individuals belonging to the opposing party in hostilities. Important limitations to the conduct of a party towards its own population flow from the general purpose to protect civilians from the hostilities to the largest extent possible.

### **C) LINES OF CONFLICT**

The far-reaching differences between IHL and IHRL regarding the protection of a right to life mean that the decision on which rule is considered applicable will correspond with extremely opposing results as to whether a person’s killing is permissible or justifiable. Rules of interpretation do not conclusively answer this question of applicability: Whereas the principle of *lex specialis* can guide considerations of rule conflict, it does not produce “one right answer” for every case.<sup>69</sup> Rather, the delimitation will by necessity involve political decisions. As Martti Koskenniemi’s suggests, “the most important political conflicts in the international world are often legally articulated as conflicts of jurisdiction and applicable law”.<sup>70</sup> The lines of conflict between IHL and IHRL thereby involve three main points: the boundaries of state jurisdiction, the qualification of a person as taking part in hostilities, and the qualification of a situation as armed conflict.

### **I) BOUNDARIES OF STATE JURISDICTION**

Whether a conflict of rules arises will depend on the applicability of human rights laws. Human rights conventions slightly differ in their wording regarding applicability, with the ICCPR referring to the territory and the jurisdiction of a state,<sup>71</sup> whereas the ECHR and the ACHR only refer to the jurisdiction.<sup>72</sup> Generally, whether IHRL is applicable will depend on whether jurisdiction is established, which is always the case for acts on a state’s own

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<sup>67</sup> Art. 8 para. 2 b (xxiii) of the Rome Statute of the International Criminal Court.

<sup>68</sup> Rule 24 of the ICRC Study on Customary International Law, see *Henckaerts/Doswald-Beck* (note 66), 74.

<sup>69</sup> *Sassòli* (note 2), 85.

<sup>70</sup> *Koskenniemi*, *The Politics of International Law – 20 Years Later*, *European Journal of International Law* Vol. 20, 1/2009, 7 (10).

<sup>71</sup> This has led to the debate whether these two criteria should be read cumulatively or alternatively, with the majority opinion opting for the latter. Cf. *Otto* (note 40), 371.

<sup>72</sup> Cf. e.g. Art. 1 European Convention on Human Rights (ECHR); Art. 1 para. 1 American Convention on Human Rights (ACHR).

territory, but can also be the case extra-territorially.<sup>73</sup> The decisive question is then the “existence of a factual connection”,<sup>74</sup> or the “effective control” of a state over persons. For cases of armed conflict, this threshold of factual connection in the sense of effective control has seminally been discussed in the *Bankovic* case before the European Court of Human Rights (ECtHR).<sup>75</sup> In its decision on admissibility, the ECtHR gave the criterion of “effective control” a narrow interpretation, holding that the applicability of the ECHR explicitly differs from the applicability of IHL under the Geneva Conventions, and that jurisdiction of the respective states had not been established in that case.<sup>76</sup> Foremost, it remains contentious whether the question of applicability of human rights would - for the ECHR and in general - have to be answered categorically for one situation, or whether a sliding scale conception of applicability of human rights provisions is conceivable.<sup>77</sup>

## II) THE QUALIFICATION OF PERSONS AS TAKING PART IN HOSTILITIES

Moreover, we have seen above that the extent of the protection of a right to life within IHL depends on the qualification of a person as civilian or participant in hostilities. Those boundaries of who is effectively engaged in hostilities and may therefore be killed under the privilege of belligerency are difficult to draw,<sup>78</sup> particularly given the “civilianization of armed conflicts”:<sup>79</sup> Most armed conflicts today being of non-international nature, at least one side will often not consist in combatants carrying formal signs of demarcation. Moreover, the asymmetrical nature of conflicts makes also the distinction between acts of taking part in hostilities, and a conduct, which is still considered an everyday activity although directly or indirectly benefitting a party to the armed conflict, increasingly intricate.

## III) THE QUALIFICATION OF A SITUATION AS ARMED CONFLICT

Finally, the delimitation of IHL and IHRL will often depend on the overall qualification of a situation as armed conflict. This is regularly discussed in the context of a state’s response to terrorist acts and the fight against terrorist structures. How acts of killing a person

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<sup>73</sup> *Wilde*, Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties, in: Quenivet/ Arnold (Eds.) (note 6), 133 (137).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Bankovic and Others v. Belgium and Others* European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application No. 52207/99, 12 December 2001. The case concerned the bombing of a Radio Station in Serbia, then Yugoslavia, and the question whether the European member states of the North Atlantic Treaty Organization could be held accountable for the death of persons caused by the bombing.

<sup>76</sup> *Ibid.*, para. 75.

<sup>77</sup> *Wilde* (note 73), 151, 152.

<sup>78</sup> *Doswald-Beck* (note 39), 882.

<sup>79</sup> *Sassòli et al.* (note 3), Chapter 5, 1.

suspected a terrorist or member of a terrorist group should be understood in legal terms has been described as the conflict between a law-and-order-paradigm and an armed-conflict-paradigm.<sup>80</sup> Yuval Shany suggests that, given the huge differences between the two regimes, each appearing imperfectly suited for covering the situation, a mixed paradigm emerged under which IHRL and IHL are co-applied.<sup>81</sup> Under such mixed paradigm, for instance, the IHL-principle of proportionality is interpreted to require opting for the “least harmful measure even in relation to enemy combatants”.<sup>82</sup> It remains that rules of IHL allow targeting a person based on its group affiliation and without any further criminal procedure or requirements of self-defense. If a situation is not qualified as an armed conflict, by contrast, the targeting of a person falls under strict preconditions, either of immediate self-defense or of criminal procedure and punishment.

#### **4. LINES OF CONFLICT BETWEEN IHL AND IHRL IN BROADER PERSPECTIVE**

These lines of conflict between IHL and IHRL with regard to a right to life concern concrete questions of rule applicability. But the two regimes also correspond with different normative grammars – one that grounded in a state-centric framework, and one oriented at a rights universalism. The increasing difficulty to separate their areas of application in that sense appears indicative of a more general uncertainty about the appropriate normative grammar today: We find ourselves in a condition, in which the boundaries of the nation state are no longer accepted as natural or primary boundaries of rights and duties, and where at the same time a disillusion with ideas of boundless universalism has taken place. In that vein, the lines of conflict might serve as markers for where the need for normative demarcations about a right to life in a globalized world arises.

To situate the questions about the applicability of IHL and IHRL in more general analyses, I will first look at how they correspond with conceptions of war and peace in the age of globalization (a). This refers to established considerations about the relationship between war and peace, and their contemporary and possibly changing significance. Most notably, the situation of two states as parties to a conflict that underlies IHL as paradigmatic case no longer constitutes the rule but the exception. Not only do most armed conflicts today involve at least one side that is not a state. More generally, the boundaries of an inside

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<sup>80</sup> Shany (note 36), 14.

<sup>81</sup> Ibid., 24.

<sup>82</sup> Ibid., 26, with reference to the case before the Israeli Supreme Court *Public Committee against Torture in Israel vs. Israel*, HCJ 769/02, ILDC 597 (IL 2006), para. 21.



and outside of political communities have become blurred, as many cases in which the applicability of IHL is debated suggest (b).

The overall evolution appears, however, not simply as one of a vanishing significance of territorial borders, but a more complex process in which territorial delimitations are partly replaced by other axes of separation and exclusion. Several critiques of human rights universalism in the last decades have pointed out in that regard, how the language of universal rights can work to conceal rather than remedy exclusions. Accounts of a critical universalism, in turn, have sought to defend the importance of human rights, and to conceptualize them in a way that recognizes the complex preconditions of rights and their dependence on political membership (c). In that respect, the discussed conflicts also illustrate dangers arising from the exclusion from the language of human rights.

### **A) WAR AND PEACE IN A GLOBALIZED WORLD**

IHL and IHRL represent, as advanced in the beginning of this article, not only two legal regimes but also two normative frameworks corresponding to perceptions of war and peace as conditions of human coexistence. The qualification of situations as “war” or, more technically, “armed conflict” in many cases not only works as a legal qualification, but concurrently as rhetoric justification in a general discourse about the permissibility of limiting individual rights, and of making exceptions from otherwise persisting demands of (human rights) law.<sup>83</sup> In that sense, a general public discourse regarding notions of “war” and “peace” often parallels the legal discourse about the applicability of rules from IHL and from IHRL.<sup>84</sup>

Analyzing the contemporary conditions of armed conflict, authors have suggested in various ways that the basic premises have become challenged and that the distinction between war and peace as such is increasingly difficult. The increasing overlap between IHL and IHRL, and the challenge of deciding between competing normative demands then appears not only as a conflict between legal regimes, but as a disarray in the social conditions they presuppose. One phenomenon that raises questions in several mentioned respects is transnational terrorism: Posing threats on the territory of a state while often not clearly locatable in the same or in another state, it profoundly challenges perceptions of territorial sovereignty. And while respective acts of individuals also fall under criminal law,

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<sup>83</sup> For a critique of the far-reaching employment of the term “war” in the US-American context see *Louis Henkin*, *War and Terrorism: Law or Metaphor*, *Santa Clara Law Review* Vol. 45, 2004/2005, 817 (819).

<sup>84</sup> Cf. the attention that the terminology of “war” received in the context of France after the terrorist attacks in November 2015, e.g. [www.cnn.com/2015/11/16/world/paris-attacks/](http://www.cnn.com/2015/11/16/world/paris-attacks/).

it typically induces the question where to draw the line between criminal acts and hostilities in the sense of armed conflict.<sup>85</sup> At the same time, practices of targeted killing and the use of drones, typically employed as responses to terrorism, equally put into question the distinguishability of spheres of war and peace. Targeted killings are defined as the intentional, premediated, and deliberate use of lethal force against an individual person.<sup>86</sup> They constitute acts that fall under the law of armed conflict (rather than criminal law), yet without a generally perceivable situation of armed conflict.<sup>87</sup> Frequently operated from distance, they especially interrupt presumptions of co-presence of combatants, and more generally a territorially based vision of armed conflict.<sup>88</sup>

Yet, it would be overly simplistic to deduce that the role of territorial sovereignty is diminishing in the course of globalization.<sup>89</sup> The increasing global interdependencies certainly shape the nature and appearance of armed conflict in many ways: Zygmunt Bauman in that regard distinguishes between “globalising wars” and “globalisation-induced wars”.<sup>90</sup> At the same time, globalization itself constitutes a highly complex phenomenon. The ways, in which the framework of the nation state is challenged and complemented, are ambivalent and multi-faceted, including vehement reaffirmations of territorial borders and national belonging, re-emerging racial exclusions, and differentiated openness along criteria of class.<sup>91</sup> These complexities regarding the position of the nation state are central also when analyzing how boundaries between the rules of IHL and IHRL with respect to a right to life are drawn, and whose lives are endangered to which extent.<sup>92</sup>

Nick Mansfield suggests in that vein that we are not so much dealing with a new development of “disappearing difference” between war and peace,<sup>93</sup> but that the two sides always inherently relate to each other.<sup>94</sup> Indeed, the juxtaposition of war and peace can hardly appear as a stable one, since the notions do not refer to empirically definable conditions. We can distinguish two main conceptions of the relationship between war and

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<sup>85</sup> *Shany* (note 36), 13.

<sup>86</sup> *Melzer*, Targeted Killing in International Law, 2008, 3, 4.

<sup>87</sup> For the restrictions in IHL on the practice of targeted killings cf. *Otto* (note 40), 347.

<sup>88</sup> Cf. *Otto* (note 40), 8.

<sup>89</sup> *Elden*, Terror and Territory. The Spatial Extent of Sovereignty, 2009, 177.

<sup>90</sup> Cf. *Mansfield*, Theorizing War. From Hobbes to Badiou, 2008, 142, with reference to *Bauman*, Wars of the Globalisation Era, *European Journal of Social Theory* Vol. 4, 1/2001, 11.

<sup>91</sup> *Balibar*, Equaliberty, 2014, 205, 295.

<sup>92</sup> *Butler*, Frames of War, 2009, 25.

<sup>93</sup> Or as Mansfield frames it, “war and its other“, *Mansfield* (note 90), 39.

<sup>94</sup> *Ibid.*, 6.

peace, or war and “its other”:<sup>95</sup> a view of opposition on the one hand, and one of continuum on the other. Mansfield describes the positions of Thomas Hobbes for the former, and Carl von Clausewitz for the other as the two poles that demarcate the field.<sup>96</sup> Whereas Hobbes regarded war as the state of human interaction that must be overcome and opposes it to “civil society”, Clausewitz viewed war in continuity with politics in general, coining the phrase that “war is merely the continuation of policy by other means”.<sup>97</sup> These perspectives on the relationship between war and its other are central when thinking about the way law can contribute to establishing or securing peace: Viewing war and civil society as strictly opposed, law is traditionally seen as an instrument for installing peace. From a perspective of a more entangled relationship between war and peace, the position of law is equally more ambivalent: As much as an element of opposition forms part of social relations even outside armed conflict, law irreducibly involves an element of violence.<sup>98</sup>

We can relate back these two perspectives to the relationship between IHLR and IHL, taking for instance the description of the influence of IHRL on the law of armed conflict as a “humanization of humanitarian law”.<sup>99</sup> While this proposition points to some undeniably positive effects that human rights law has had on the law of armed conflict, its more far-reaching interpretation will hinge on the respective conception: Viewing war in opposition to peace, the latter being upheld by law, the influence of IHRL on IHL by introducing a higher level of regulation also tends to be seen to automatically work towards a more peaceful condition. Regarding the conditions of war and peace as more entangled, however, the evolving relationship between IHL and IHRL equally appears less straightforward. Human rights law contains, as has been discussed, more far-reaching requirements for the protection of a right to life. At the same time, it finds its limits in the boundaries of state jurisdiction. The concrete contents of human rights are indeterminate as a result of being subject to differing interpretations depending on political interests and opinions. IHL by contrast is more “realistic” in its perspective on the role of political interests and opinions, but has partly lost in adequacy insofar as it relies on the picture of states as only decisive entities of law and politics.

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<sup>95</sup> *Mansfield* (note 90), 39.

<sup>96</sup> *Ibid.*, 9.

<sup>97</sup> Cf. *von Clausewitz*, *On War*, 1832 (transl. Howard and Paret, 1984), 85.

<sup>98</sup> *Derrida*, *Force of Law: The Mystical Foundation of Authority*, *Cardozo Law Review* Vol. 11, 1990, 920. For a reflective discussion together with other authors see *Mansfield* (note 96), 98.

<sup>99</sup> *Meron*, (note 30), 239.

## B) BOUNDARIES OF THE TERRITORIAL NATION STATE

War has generally been conceived as prerogative of states.<sup>100</sup> This again holds true on the level of law, where *inter-national* law essentially builds on the sovereign equality of states.<sup>101</sup> But more generally, the relationship between states constitutes the paradigmatic case of our thinking about war and peace. It were peace treaties that stand at the origin of the common terminology for our contemporary political order of states: The Westphalian Peace in 1648 mark the beginning transition from a religiously ordered world to an order of territorial states in Europe. Whereas religion had been the determining factor of identity but also of opposition in the previous ages, the idea of the nation started to be the ordering principle and the reference point of both membership and conflict.

This relationship of the territorial order of states with normative assumptions about war and peace points to several ensuing reflections: What does the particular origins of the nation state framework mean for the impartiality of international laws of armed conflict regarding different parts of the world?<sup>102</sup> To which extent has the ubiquity of territorial states as reference points of rules of law always been a fiction? And how do the current changes in the framework of legitimacy thinking, whether framed as “the post-national constellation”,<sup>103</sup> as emerging global constitution,<sup>104</sup> as “global polity”,<sup>105</sup> or “global condominium”,<sup>106</sup> impact on the perception of IHL?

Processes of globalization certainly put into question the “Westphalian political imaginary”,<sup>107</sup> and thereby also challenge the role of the state as framework for rights and obligations. The challenging of states as being “the monopolist of war”<sup>108</sup> raises questions about the underlying conception of opposing parties to an armed conflict. This can also be related to the moral justification of the privilege of belligerency: In that vein, it has been suggested understanding the killing of a person in armed conflict as act of self-defense, though in a broader sense with combatants being considered as aggressors for reason of their group affiliation, regardless of any individual moral responsibility.<sup>109</sup> In structure, the

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<sup>100</sup> *Mansfield* (note 96), 1.

<sup>101</sup> Cf. Art. 2 para. 1 of the Charter of the United Nations.

<sup>102</sup> For references to postcolonial critiques of IHL see *Alexander* (note 15), 113.

<sup>103</sup> *Habermas*, *The Postnational Constellation: Political Essays*, 2001.

<sup>104</sup> *Fischer-Lescano*, *Globalverfassung*, 2005.

<sup>105</sup> *Cassese*, *The Global Polity*, 2012.

<sup>106</sup> *Benvenisti*, *Sovereigns as Trustees of Humanity*, *American Journal of International Law* Vol. 107, 2/2013, 295 (298).

<sup>107</sup> *Fraser* (note 12), 4.

<sup>108</sup> *Mansfield*, (note 90), 153, with reference to *Münkler*, *The New Wars*, 2005, 2.

<sup>109</sup> *Lee*, *Ethics and War: An Introduction*, 2012, 169.

moral justification for killing a person in armed conflict is thus build in parallel to the justification outside armed conflict. This construction of forming a legitimate target due to national membership obviously looses in persuasiveness the less states are seen as only or paramount frameworks of rights. In light of these considerations, the exposure to military service itself can be reassessed. This does certainly not mean a simple critique of obligatory conscription.<sup>110</sup> Yet, it might point to the role of a right to life for the issue of conscientious objection to military service,<sup>111</sup> and the obligations that states hold in that respect towards nationals of other states.<sup>112</sup>

### **C) LIMITATIONS OF HUMAN RIGHTS UNIVERSALISM**

We thus see how the state framework as paradigm underlying IHL is no longer taken for granted and how specific rules can be challenged with reference to a more universalist perspective. Human rights claims play a crucial role in contrasting the state-bounded conception. More generally, over the last decades, human rights law forms part of the process in which the individual has gained importance as a subject of international law.<sup>113</sup> At the same time, the idea of human rights and the underlying universalism have also been subject to important criticisms: In the context of stateless persons and refugees, Hannah Arendt has famously maintained that the idea of unalienable rights was part of the problem rather than the solution, and that “[t]he very phrase ‘human rights’” was “the evidence of hopeless idealism or fumbling feeble-minded hypocrisy”.<sup>114</sup> Arendt’s critique of human rights points out that rights by nature relate to their mutual recognition within a community, and are thus necessarily dependent on some form of political membership.<sup>115</sup> Neglecting this dependence of rights on political membership is disposed to contribute to an even greater condition of rightlessness.<sup>116</sup>

In addition to this line of critique, it has been emphasized that the universalist language of human rights tends to conceal the particular nature of any dominant interpretation.<sup>117</sup> The

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<sup>110</sup> Cf. already *Walter Benjamin*, Critique of Violence, 1921, Peter Demetz (Ed.) 1986, 284, linking the question of conscription to the place of violence in the law in general.

<sup>111</sup> *Takemura*, International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders, 2009, 37.

<sup>112</sup> *Takemura* (note 111), 40 with reference to UN GA Res 33/165, 154, UN Doc A/33/45 [1].

<sup>113</sup> *Clapham*, The Role of the Individual in International Law, European Journal of International Law Vol. 21, 1/2010, 25.

<sup>114</sup> *Arendt*, The Origins of Totalitarianism, 1951, 269.

<sup>115</sup> *Arendt* (note 114), 291, 295.

<sup>116</sup> Cf. also for a contemporary account *Gündoğdu*, Rightlessness in an Age of Rights. Hannah Arendt and the Contemporary Struggles of Migrants, 2015.

<sup>117</sup> *Tully*, On Global Citizenship, 2014, 324, 325.

concrete content and demands from human rights norms are indeterminate and subject to conflicting political claims.<sup>118</sup> At the same time, human rights tend to be viewed as universally valid and to be accepted by all,<sup>119</sup> and for that reason are susceptible of becoming part of an imperialist “epistemic violence” through law.<sup>120</sup> In awareness of these dangers, several scholars in recent years have aimed to reconceptualize the understanding of human rights, shifting the focus to the political processes of founding human rights.<sup>121</sup> Rather than rights with a stable, determinate content, human rights are then viewed as positions, the content of which is contested and shaped through every invocation.<sup>122</sup> As such, human rights are not rejected as *per se* object of dominant interpretations, but regarded as an important vocabulary in emancipatory processes.

These lines of critique appear central when considering conflicts between IHL and IHRL in the light of a right to life. Whereas the protection of a right to life is far-reaching in the provision of IHRL, we have seen that its applicability hinges on the conception of state jurisdiction, and that this conception will rely on background assumptions about the boundaries of political community and obligations of solidarity. For whom and under which conditions the protection of a right to life can be limited, also within the territorial boundaries of the state, is vice versa subject to political conceptions of the demarcation of citizens and foreigners, of fellow and enemy.<sup>123</sup> The conflicts with IHL thus mark the limits that, despite the universalist language, legal provisions of human rights will necessarily have, and call for a stronger awareness about the political decisions underlying those delimitations.

## 5. CONCLUSION

The political idea of the nation that has made it possible, as Benedict Anderson writes, “over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings”.<sup>124</sup> How the demise of the order of nation states might impact on our thinking about a right to life in relation to armed conflict has been a central

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<sup>118</sup> Koskenniemi, *The Politics of International Law*, 2011, 131.

<sup>119</sup> Mouffe, *Which world order: cosmopolitan or multipolar?*, *Ethical Perspectives* Vol. 15, 4/2008, 453 (454).

<sup>120</sup> Spivak, “Can the subaltern speak?” revised edition, in: Morris (Ed.), *Can the Subaltern Speak?: Reflections on the History of an Idea*, 2010, 21 (37, 39).

<sup>121</sup> *Gündoğdu* (note 116), 209; Ingram, *Radical Cosmopolitics. The Ethics and Politics of Democratic Universalism*, 2013, 147.

<sup>122</sup> Cf. with the notions of “democratic iterations” and “jurisgenerative politics” Benhabib, *The Rights of Others*, 2004, 179; Benhabib, *The new sovereigntism and transnational law: Legal utopianism, democratic scepticism and statist realism*, *Global Constitutionalism* Vol. 5, 1/2016, 109 (122).

<sup>123</sup> *Balibar* (note 91), 189.

<sup>124</sup> Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 1983, 7.

concern of this article. I have tried to sketch how the legal debate about the relationship between IHL and IHRL parallels considerations in political philosophy about the distinguishability of war and peace under contemporary conditions. The right to life, although in itself a very ambivalent notion,<sup>125</sup> can serve in that regard as a lens for describing conflicting logics of the two legal regimes in a first step, and to understand these logics as engaged in a dialectical process, in which limitations of both become thematized, in a second step.

The territorial order of states has its - at least symbolic - point of origin in the endeavors of installing peace.<sup>126</sup> The Westphalian peace treaties ending the Thirty Years' War embody the creation of an order that worked to appease religious oppositions and became the framework, in which the core values of modernity, equality and freedom,<sup>127</sup> have been concretized in legal institutions. At the same time, this framework of the nation state stood at the basis of the most violent wars and persecutions in 20<sup>th</sup> century.<sup>128</sup> Today, it appears that we have by far not moved beyond the framework of the nation, yet that, to borrow Étienne Balibar's words, the "separation between inside and outside [...], even if necessary to the very definition of the nation, is becoming increasingly virtual".<sup>129</sup> On the one hand, national boundaries are increasingly contested, processes of globalization and internationalization can in some regards be reconstructed as working to move beyond the exclusions inherent in the nation state order. On the other hand, privileges of "global existence" being distributed highly unequally, we find in many cases a "fusion of racial and class exclusions".<sup>130</sup>

This analysis of changing lines of exclusions not only concerns the antinomies present in laws of armed conflict as representative of the state-centric framework. It equally concerns human rights law, which embodies a more individualistic logic with a universalist horizon, but must constantly be reconsidered as to the effect that structures of power have on its dominant interpretation. The medium of law is central in constructing the differential

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<sup>125</sup> Cf. for a "critique of the right to life" and the postulation to retrieve thinking about "life" for the Left *Butler* (note 92), 15.

<sup>126</sup> In the modern understanding, this arguably begins far before the Westphalian treaties. See *Roth-Isigkeit*, Niccolò Machiavelli's International Legal Thought – Culture, Contingency and Construction, in: Kadelbach/Kleinlein/Roth-Isigkeit (eds.), *System, Order and International Law – The Early History of International Legal Thought* (forthcoming).

<sup>127</sup> *Honneth*, *Freedom's Right: The Social Foundations of Democratic Life*, 2014, 15.

<sup>128</sup> *Arendt* (note 114), in particular 161, 267. Cf. also for an analysis of Arendt in that regard *Volk*, *Arendtian Constitutionalism. Law, Politics and the Order of Freedom*, 2015, 17.

<sup>129</sup> *Balibar*, (note 91), 271.

<sup>130</sup> *Ibid.*, 253.

exposure to death and violence,<sup>131</sup> in creating the practical conditions for the “right to kill, to allow to live, or to expose to death”.<sup>132</sup> Thinking about the protection of a right to life between these poles, we are confronted with fundamental normative questions about the place of the individual in the world.

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<sup>131</sup> *Butler* (note 92), 25.

<sup>132</sup> *Mbembe*, *Necropolitics*, *Public Culture* Vol. 15, 1/2003, 11 (12).



# Der UNO-Sicherheitsrat und die Universalgrammatik des Völkerrechts

## Zur Interpretation von Sicherheitsratsresolutionen

Thomas Kleinlein

**Abstract:** The article examines whether the interpretation of resolutions of the UN Security Council follows the universal grammar of public international law with general rules of interpretation or a special grammar. First, interpretation will be presented as a practice of argumentation on the basis of certain rules. Thereafter, the contribution analyses the pronouncements of the international judiciary regarding the method of interpretation applicable to Security Council resolutions. In the next step, the article questions arguments that justify or contest the applicability of the interpretive regime for international treaties on the basis of a comparison of Security Council resolutions with agreements and unilateral acts. Finally, the contribution examines the impact on interpretation of the derivative character of Security Council resolutions as secondary law and of the serial practice of the Security Council. The study concludes that the interpretation of Security Council resolutions follows the universal grammar of public international law. However, its rules of interpretation must be applied in a specific manner adjusted to the object of interpretation. It will also be demonstrated that the practice of interpretation is less stable than the metaphor of a “grammar” might insinuate. The practice of interpretation rather changes over time and is – at least potentially – reflexive because it can have repercussion on the drafting of Security Council resolutions.

### I. EINLEITUNG

Die Interpretation von Sicherheitsratsresolutionen ist eine anspruchsvolle Aufgabe. Die Regeln, denen diese Interpretationsarbeit folgen soll, sind Teil der Grammatik, die die Argumentation im Völkerrecht anleiten. In der völkerrechtlichen Literatur wurde in letzter Zeit verstärkt die Frage behandelt, ob diese Interpretation den auch sonst angewandten Auslegungsregeln als Teil der völkerrechtlichen „Universalgrammatik“<sup>1</sup> folgt oder sich nach einer „Spezialgrammatik“ des auf Sicherheitsratsresolutionen bezogenen Diskurses richtet.<sup>2</sup> Die Frage ist von großer praktischer Tragweite. Völkerrechtler, die sich mit der Interpretation von Sicherheitsratsresolutionen befassen, sind gar davon überzeugt, dass die Frage, wie wir diese Resolutionen auslegen, entscheidend für die künftige Gestalt des

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<sup>1</sup>Zum Konzept *Pulkowski*, Universal International Law's Grammar, in: Fastenrath u.a. (Hrsg.), From Bilateralism to Community Interest. Essays in Honour of Bruno Simma, 2011, S. 138 (143–144) unter Bezug auf *Koskenniemi*, From Apology to Utopia. The Structure of International Legal Argument, 2005, S. 566.

<sup>2</sup>*Wood*, The Interpretation of Security Council Resolutions, Max Planck Yearbook of United Nations Law 2 (1998), S. 73; *Papastavridis*, Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis, The International and Comparative Law Quarterly 56 (2007) 1, S. 83; *Brandl*, Auslegung von Resolutionen des Sicherheitsrats. Einheitliche völkerrechtliche Regelungen oder „pick and choose“ aus möglichen Auslegungsregeln?, Archiv des Völkerrechts 53 (2015) 3, S. 279.

Völkerrechtssystems ist.<sup>3</sup> Und in der Tat: Sicherheitsratsresolutionen betreffen nicht nur wichtige Fragen der Weltpolitik, sondern auch die Lebenssituation von Einzelmenschen – von Sanktionen betroffener Geschäftsleute, mutmaßlicher Kriegsverbrecher oder Opfer humanitärer Katastrophen.<sup>4</sup> Darin spiegelt sich, dass der Sicherheitsrat seine Aktivitäten in bemerkenswerter Weise ausgeweitet hat. Sicherheitsratsresolutionen sind zudem oft sehr umfangreiche und komplexe Dokumente. Gleichwohl hat die methodische Frage der Interpretation von Sicherheitsratsresolutionen, im Gegensatz zu Interpretationsfragen im Völkerrecht im Allgemeinen,<sup>5</sup> vergleichsweise wenig Aufmerksamkeit erfahren.<sup>6</sup>

Zuletzt hat sich die Frage nach der Interpretation von Sicherheitsratsresolutionen vor allem in zwei – ganz unterschiedlichen – Konstellationen als bedeutsam erwiesen: Zum einen berufen sich Staaten auf die Autorisierung des Einsatzes militärischer Gewalt durch Resolutionen des Sicherheitsrats. Zum anderen rechtfertigen Staaten Eingriffe in Menschenrechte mit dem Hinweis auf Verpflichtungen, die sie aus Sicherheitsratsresolutionen u.a. zur Bekämpfung des Terrorismus ableiten. Ein aktuelles Beispiel für die erste Konstellation ist die Berufung auf die Sicherheitsratsresolution 2249 (2015) über durch terroristische Handlungen verursachte Bedrohungen des Weltfriedens und der internationalen Sicherheit.<sup>7</sup> Sie

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<sup>3</sup> Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, *European Journal of International Law* 13 (2002) 1, S. 21 (41): „The future shape of the international legal system will depend, above all, on how we interpret Security Council resolutions and treaties, on how we create and change rules of customary international law, and on how we understand the relationship between customary international law and treaties.“

<sup>4</sup> Vgl. *Wood* (Fn. 2), S. 74.

<sup>5</sup> Vgl. *Waibel*, *Demystifying the Art of Interpretation*, *European Journal of International Law* 22 (2011) 2, S. 571: Review Essay, *Besprechung von sechs neueren Monographien zur (Vertrags-)Interpretation im Völkerrecht*; A. Bianchi/D. Peat/M. Windsor (Hrsg.), *Interpretation in International Law*, Oxford, 2015.

<sup>6</sup> So auch die Einschätzung von *Kolb*, *Interprétation et création du droit international. Esquisses d'une herméneutique juridique moderne pour le droit international public*, 2006, S. 256. S. aber die Beiträge von *Wood* (Fn. 2); *Frowein*, *Unilateral Interpretation of Security Council Resolutions. a Threat to Collective Security?*, in: Götz u.a. (Hrsg.), *Liber amicorum Günther Jaenicke – zum 85. Geburtstag*, 1998, S. 97; *Byers* (Fn. 3); *Papastavridis* (Fn. 2); *Angelini*, *Interpretation and the Security Council. Interpretative Communities in Action*, 2015; *Brandl* (Fn. 2). Allgemein zur Auslegung der Entscheidungen internationaler Organisationen *Bos*, *The Interpretation of Decisions of International Organizations*, *Netherlands International Law Review* 28 (1981) 1, S. 1; *Amerasinghe*, *Interpretation of Texts in Open International Organisations*, *British Yearbook of International Law* 65 (1994), S. 175; *Amerasinghe*, *Principles of the Institutional Law of International Organizations*, 2. Aufl., 2005, S. 61 ff.

<sup>7</sup> S/RES/2249 (2015) v. 20.11.2015: Bedrohungen des Weltfriedens und der internationalen Sicherheit durch terroristische Handlungen (Sicherheitsrat verurteilt unmissverständlich die Terroranschläge des ISIL und stellt fest, dass diese extremistische Gruppe eine beispiellose Bedrohung darstellt). S. zur *Syrien* zuletzt auch S/RES/2254 (2015) v. 18.12.2015: Die Situation in *Syrien* (Sicherheitsrat billigt Fahrplan für den Friedensprozess in *Syrien* und legt Zeitplan für Gespräche fest); S/RES/2258 (2015) v. 21.12.2015: Die Situation in *Syrien* (Sicherheitsrat verlängert Ermächtigung für Durchlass humanitärer Hilfe nach *Syrien*); S/RES/2268 (2016) v. 26.2.2016: Die Situation in *Syrien*

wurde unter anderem auch von der *Bundesregierung* zur Begründung der völkerrechtlichen Zulässigkeit eines Einsatzes bewaffneter deutscher Streitkräfte zur Verhütung und Unterbindung terroristischer Handlungen durch die Terrororganisation *IS* herangezogen.<sup>8</sup> In der Vergangenheit ist die Frage, ob eine Sicherheitsratsresolution dahin interpretiert werden kann, dass sie den Einsatz militärischer Gewalt autorisiert, vor allem im Zusammenhang mit *Irak* von Bedeutung gewesen, so etwa bei der *Operation Desert Fox* 1998 und – besonders kritisch – der *Operation Iraqi Freedom* 2003.<sup>9</sup> Die Frage, wie weit eine Ermächtigung aus einer Sicherheitsratsresolution reichen kann, stellte sich aber etwa auch, als die Libyen-Resolution 1973 (2011) jedenfalls faktisch zur Grundlage eines Regimewechsels wurde.<sup>10</sup> Die Bedeutung von Sicherheitsratsresolutionen als Rechtfertigungsgrundlage für Eingriffe in Menschenrechte ist zuletzt im Juni 2016 im Urteil der Großen Kammer des *Europäischen Gerichtshofs für Menschenrechte* (EGMR) im Fall *Al-Dulimi* deutlich geworden.<sup>11</sup>

Im Folgenden soll daher die Frage geklärt werden, ob die Interpretation von Sicherheitsratsresolutionen anhand der Universalgrammatik des Völkerrechts mit allgemeinen Auslegungsregeln erfolgt oder sich aber nach einer Spezialgrammatik richtet. Zunächst wird Interpretation als eine argumentative Praxis auf der Grundlage bestimmter Regeln vorgestellt (II). Sodann analysiert der Beitrag die Aussagen der internationalen Rechtsprechung zur auf Sicherheitsratsresolutionen anwendbaren Auslegungsmethode (III). Im nächsten Schritt werden Argumente hinterfragt, die die Anwendbarkeit der für völkerrechtliche Verträge geltenden Auslegungsregeln auf der Grundlage eines Vergleichs von Sicherheitsratsresolutionen mit Vereinbarungen und einseitigen Akten begründen oder bestreiten (IV.). Schließlich untersucht der Beitrag

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(Sicherheitsrat billigt einstimmig die Vereinbarung über die Einstellung der Feindseligkeiten in *Syrien*). Zu ISL s. bereits S/RES/2199 (2015) v. 12.3.2015: Bedrohungen des Weltfriedens und der internationalen Sicherheit durch terroristische Handlungen (Sicherheitsrat verurteilt den Handel mit dem ISIL, der ANF und anderen mit Al-Qaida verbundenen Gruppen und droht weitere gezielte Sanktionen an).

<sup>8</sup> Antrag der Bundesregierung, Einsatz bewaffneter deutscher Streitkräfte zur Verhütung und Unterbindung terroristischer Handlungen durch die Terrororganisation IS auf Grundlage von Artikel 51 der Satzung der Vereinten Nationen in Verbindung mit Artikel 42 Absatz 7 des Vertrages über die Europäische Union sowie den Resolutionen 2170 (2014), 2199 (2015), 2249 (2015) des Sicherheitsrates der Vereinten Nationen, BT Drs. 18/6866, 1.12.2015, S. 3.

<sup>9</sup> Zur Begründung legten die USA als S/RES/1441 (2002) vom 8.11.2002 im Zusammenhang mit der Waffenstillstandsresolution S/RES/687 (1991) v. 3.4.1991 aus.

<sup>10</sup> S/RES/1973 (2011) v. 17.3.2011; s. dazu *Payandeh*, *The United Nations, Military Intervention, and Regime Change in Libya*, *Virginia Journal of International Law* 52 (2012) 2, S. 355.

<sup>11</sup> EGMR (GK), *Al-Dulimi and Montana Management Inc. ./.* *Schweiz*, Beschw.Nr. 5809/08, Urt. v. 21.6.2016.

die Bedeutung des derivativen Charakters von Sicherheitsratsresolutionen als Sekundärrecht und der seriellen Praxis des Sicherheitsrats (V.). Die Untersuchung gelangt zu dem Fazit, dass die Interpretation von Sicherheitsratsresolutionen der Universalgrammatik des Völkerrechts folgt, die Auslegungsregeln jedoch in spezifischer Weise gegenstandsbezogen angewandt werden müssen. Es zeigt sich zudem, dass die Auslegungspraxis weniger stabil ist als die Metapher von der „Grammatik“ verheißen mag. Vielmehr verändert sie sich in der Zeit und ist zudem zumindest potentiell reflexiv, weil sie – in stärkerem Maße als dies bei völkerrechtlichen Verträgen der Fall sein könnte – auf die Formulierung von Sicherheitsratsresolutionen selbst zurückwirken kann (VI.).

## II. INTERPRETATION ALS ARGUMENTATIVE PRAXIS

Interpretation ist eine argumentative Praxis: Das ist eine Aussage, die intuitiv einleuchtet. Sie folgt der Einsicht, dass wir einerseits die „richtige Interpretation“ nicht einfach logisch deduzieren können, Interpretation aber andererseits keine beliebige instrumentelle rhetorische Übung ist.<sup>12</sup> Sie steht im Einklang mit einem Verständnis juristischen Argumentierens, das die Gültigkeit von Argumenten anhand der argumentativen Praxis selbst überprüft.<sup>13</sup> Das setzt voraus, dass eine „vorgängig eingespielte[...], originär verständigungsorientierte[...] Sprachverwendung“ besteht,<sup>14</sup> was nicht ohne Weiteres unterstellt werden kann. Unverbindlicher ist in dieser Hinsicht die weitverbreitete Vorstellung von „Interpretationsgemeinschaften“, die auf *Stanley Fish* zurückgeht<sup>15</sup> und gerade auch im Zusammenhang mit dem *UNO-Sicherheitsrat* durch die Arbeiten von *Ian Johnstone* Bedeutung erlangt hat.<sup>16</sup> Ob eine Interpretation „korrekt“ ist, hängt dann davon ab, ob sie dem Verständnis der anderen Mitglieder der Interpretationsgemeinschaft hinreichend „ähnlich“, ob sie

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<sup>12</sup> *Venzke*, What Makes for a Valid Legal Argument?, *Leiden Journal of International Law* 27 (2014) 4, S. 811 (812–814).

<sup>13</sup> *Habermas*, *Theorie des kommunikativen Handelns*, 1995.

<sup>14</sup> *Habermas*, Zur Kritik der Bedeutungstheorie, in: *Nachmetaphysisches Denken. Philosophische Aufsätze*, 1988, S. 105 (135).

<sup>15</sup> *Fish*, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, 1989, S. 141–142.

<sup>16</sup> *Johnstone*, Security Council Deliberations. The Power of the Better Argument, *European Journal of International Law* 14 (2003) 3, S. 437; *Johnstone*, Legislation and adjudication in the UN Security Council: bringing down the deliberative deficit, *American Journal of International Law* 102 (2008) 2, S. 275; *Johnstone*, *The Power of Deliberation. International Law, Politics and Organizations*, 2011. S. auch *Papastavridis* (Fn. 2); *Angelini* (Fn. 6).

tatsächlich „anschlussfähig“ ist. Ziel der Interpretation ist es, das „Publikum“ zu überzeugen.<sup>17</sup>

Sicherheitsratsresolutionen werden von einer ganzen Reihe von Akteuren in diversen Kontexten interpretiert. Zunächst interpretiert der *Sicherheitsrat* selbst – als authentischer Interpret<sup>18</sup> – seine Resolutionen häufig selbst in Folgeresolutionen. Aber auch Nebenorgane des *Sicherheitsrats* sind wichtige, wenn auch nicht authentische Interpreten,<sup>19</sup> so etwa die Ad-hoc-Strafgerichtshöfe, die *United Nations Compensation Commission*,<sup>20</sup> oder Sanktionsausschüsse. Auch andere UNO-Organe wie die *Generalversammlung* interpretieren Sicherheitsratsresolutionen.<sup>21</sup> Internationale Rechtsprechungsinstitutionen mit universeller Reichweite, allen voran der *Internationale Gerichtshof (IGH)* gehören natürlich ebenfalls zum Kreis der Interpreten, aber auch regionale Rechtsprechungsorgane wie der *Europäische Gerichtshof für Menschenrechte (EGMR)*. *EGMR* wie auch innerstaatliche Gerichte sind häufig mit den menschenrechtlichen Implikationen von Sanktionsregimen des *Sicherheitsrats* befasst.<sup>22</sup> Nicht zuletzt sind natürlich die Regierungen wichtige Interpreten, vor allem diejenigen, die selbst am Zustandekommen beteiligt waren, aber auch innerstaatliche Gesetzgebungsorgane und nachgeordnete Behörden.

„Unilaterale“ Interpretationen von Sicherheitsratsresolutionen durch einzelne Staaten sind schon im Ausgangspunkt nicht unproblematisch.<sup>23</sup> Zwar können die Organe der *Vereinten Nationen* nicht letztverbindlich über die Auslegung ihrer Entscheidungen bestimmen: Auch Staaten legen diese Entscheidungen aus, etwa um sie an den Befugnissen zu messen, die dem jeweiligen Organ verliehen sind, oder um sie umzusetzen. Strukturell besteht das Problem der unilateralen Interpretation von Sicherheitsratsresolutionen jedoch darin, dass Staaten durch einseitige Interpretation von Resolutionen versuchen, einen besonderen Legitimationsüberschuss abzugreifen, einen Legitimationsüberschuss, der sich daraus ergibt, dass eben der

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<sup>17</sup> *Bianchi*, The Game of Interpretation in International Law. The Players, the Cards, and Why the Game is Worth the Candle, in: *Bianchi u.a.* (Hrsg.), *Interpretation in International Law*, 2015, S. 34 (36).

<sup>18</sup> *Wood* (Fn. 2), S. 82–84; *Papastavridis* (Fn. 2), S. 91.

<sup>19</sup> *Wood* (Fn. 2), S. 84.

<sup>20</sup> Geschaffen durch SR/RES/687 (1991) v. 3.4.1991.

<sup>21</sup> S. etwa GA, die in einer Resolution das Wort „area“ in einer Resolution über Korea auslegt als „ganz Korea“.

<sup>22</sup> S. *Brandl* (Fn. 2), S. 290–314 zur Auslegung von Sicherheitsratsresolutionen in der Praxis internationaler Gerichte und in der Praxis des Menschenrechtssystems der Vereinten Nationen.

<sup>23</sup> *Frowein* (Fn. 6); *Orakhelashvili*, Unilateral Interpretation of Security Council Resolutions: UK Practice, *Goettingen Journal of International Law* 2 (2010), S. 823.

*Sicherheitsrat* als Organ der *Vereinten Nationen* entschieden oder bestimmte Bewertungen vorgenommen hat. Allerdings gilt eine Auslegung im Sprachgebrauch der Völkerrechtler erst dann als „unilateral“, wenn sie sich mit den „normalen“ Auslegungsmethoden nicht mehr vertreten lässt;<sup>24</sup> wenn ein Interpretation als „unilateral“ bezeichnet wird, impliziert das also eine Beurteilung ihrer Vertretbarkeit oder Anschlussfähigkeit im Diskurs.

Die starke Fragmentierung der „Interpretationsgemeinschaften“,<sup>25</sup> die um Sicherheitsratsresolutionen bestehen, bringt *Johnstones* Vorstellung von „konzentrischen“ Interpretationsgemeinschaften<sup>26</sup> an ihre Grenzen. Sie braucht deshalb jedoch nicht grundsätzlich in Frage gestellt werden, zumal sie vom Standpunkt des externen Betrachters durchaus einigen Beschreibungs- und Erklärungswert hat. Die Interpretationsgemeinschaften definieren auch den Rahmen für eine Interpretationspraxis, obschon sie nicht über die Interpretationsgemeinschaft als „Spezialdiskurs“ abgegrenzt werden kann.

Fragt man nach den Leitlinien dafür, was eine „gültige“, ja sogar dafür, was eine „gute“ Interpretation ist, so sind Auslegungsregeln von zentraler Bedeutung. Im Völkerrecht findet sich ein allgemein, nämlich auch völkergewohnheitsrechtlich, anerkanntes Regime für die Auslegung völkerrechtlicher Verträge in den Artikeln 31 bis 33 der Wiener Vertragsrechtskonvention (WVK).<sup>27</sup> Art. 31 Abs. 1 WVK lautet: „Ein Vertrag ist nach Treu und Glauben in Übereinstimmung mit der gewöhnlichen, seinen Bestimmungen in ihrem Zusammenhang zukommenden Bedeutung und im Lichte seines Zieles und Zweckes auszulegen.“ Nach dieser Grundregel wird – in Übereinstimmung mit der objektiven Theorie – nur auf den Text, auf den authentischen Wortlaut der Vertragsbestimmung, abgestellt und dabei auf die „gewöhnliche Bedeutung“ (*ordinary meaning*) der gebrauchten Worte. Entscheidend ist also der Wortlaut und nicht das, was die Parteien bei Abschluss des Vertrages subjektiv mit den verwendeten Formulierungen meinten. Außerdem sind Anlagen, Protokolle, auch jede spätere Übereinkunft (*accord interprétatif*) oder Übung sowie sonstige anwendbare Völkerrechtssätze für die Auslegung von Bedeutung (Art. 31

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<sup>24</sup> *Orakhelashvili* (Fn. 23), S. 827.

<sup>25</sup> S. *Waibel*, *Interpretive Communities in International Law*, in: Bianchi u.a. (Hrsg.), *Interpretation in International Law*, 2015, S. 154 ff. zur Diversität und Fragmentierung von Interpretationsgemeinschaften im Völkerrecht.

<sup>26</sup> *Johnstone* (Fn. 16), S. 7 f., 41 ff.

<sup>27</sup> Wiener Übereinkommen über das Recht der Verträge vom 23.5.1969, BGBl. 1985 II S. 926, UNTS Bd. 1155 S. 331.

Abs. 2, 3 WVK). Letztlich zielt die Auslegung also auf den jeweils aktuellen Parteikonsens.<sup>28</sup> Die vorbereitenden Arbeiten zu einem Vertrag (*travaux préparatoires*) sind nur als „ergänzendes Auslegungsmittel“ heranzuziehen, wenn die Auslegung nach Art. 31 WVK entweder „die Bedeutung mehrdeutig oder dunkel lässt“ oder „zu einem offensichtlich sinnwidrigen oder unvernünftigen Ergebnis führt“ (Art. 32 WVK). Ein vergleichbares Regime für die Auslegung von Sicherheitsratsresolutionen wurde nicht erarbeitet. Um die Bedeutung der Auslegungsregeln als „Grammatik“ der Interpretationspraxis zu verstehen, muss man sich indes ohnehin vor Augen führen, dass sie der Praxis nicht extern und statisch vorgegeben sind, sondern sich nur aus der Praxis selbst erschließen.<sup>29</sup>

### III. AUSSAGEN INTERNATIONALER RECHTSPRECHUNGSINSTITUTIONEN ZUR INTERPRETATION VON SICHERHEITSRATSRESOLUTIONEN

Sieht man von einem Rechtsgutachten des *Ständigen Internationalen Gerichtshofs* zu einer Resolution des *Völkerbunds* ab,<sup>30</sup> so lassen sich für die Frage der Interpretation von Sicherheitsratsresolutionen relevante Aussagen internationaler Gerichte insbesondere im *Namibia*-Gutachten von 1971 (1.) und im *Kosovo*-Gutachten (2.) des *IGH* sowie im *Tadić*-Urteil der *Berufungskammer des Jugoslawientribunals (International Criminal Tribunal for the former Yugoslavia, ICTY)* (3.) finden.

#### 1. NAMIBIA-GUTACHTEN DES IGH

Im *Namibia*-Gutachten von 1971 war der *Internationale Gerichtshof* mit der Sicherheitsratsresolution 276 (1970) zu *Namibia* befasst.<sup>31</sup> Die dem *IGH* vom *Sicherheitsrat* unterbreitete Gutachtenfrage zielte auf den Inhalt der rechtlichen Konsequenzen, die sich aus der fortbestehenden „Anwesenheit“ *Südafrikas* in *Namibia* trotz dieser Resolution des *Sicherheitsrats* ergaben. Die *UNO*-

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<sup>28</sup> Vitzthum, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: Vitzthum/Proelß (Hrsg.), *Völkerrecht*, 2016, S. 1 (47), Rn. 123.

<sup>29</sup> Instruktiv zur Bedeutung des „Zwei-Welten-Modells“ von grammatischem Regelsystem und seiner Realisierung oder Aktualisierung im jedesmaligen Sprechen und Kommunizieren in den modernen Sprachtheorien Krämer, *Sprache, Sprechakt, Kommunikation. Sprachtheoretische Positionen des 20. Jahrhunderts*, 2001.

<sup>30</sup> StIGH, Gutachten v. 15.5.1931, in *Sachen betreffend den Zutritt zu den deutschen Minderheitenschulen in Oberschlesien, Access to German Minority Schools in Upper Silesia*, PCIJ Series A/B, No. 40, S. 16, 18. S. dazu Bos (Fn. 6), S. 6; Papastavridis (Fn. 2), S. 92.

<sup>31</sup> S/RES/276 (1970) v. 30.1.1970.

*Generalversammlung* hatte in ihrer Resolution 2145 (XXI)<sup>32</sup> das von *Südafrika* ursprünglich auf der Grundlage von Mandatsbestimmungen des *Völkerbunds* ausgeübte Mandat über *Südwestafrika* einseitig beendet, und die Sicherheitsratsresolution 276 (1970) hatte die fortbestehende Anwesenheit *Südafrikas* im bisherigen Mandatsgebiet – nunmehr *Namibia* genannt – für illegal erklärt.

Der Gerichtshof befasste sich mit der rechtlichen Bindungswirkung dieser Sicherheitsratsresolution als Auslegungsfrage und stellte zur Frage der Auslegungsmethode fest, dass der Wortlaut einer Resolution sorgfältig untersucht werden sollte, bevor man Schlüsse auf eine bindende Wirkung zieht. Art. 25 UNO-Charta verleiht dem *Sicherheitsrat* die Befugnis, für die Mitgliedstaaten verbindliche Beschlüsse zu fassen. Danach kommen die Mitglieder der *Vereinten Nationen* überein, „die Beschlüsse des Sicherheitsrats im Einklang mit dieser Charta anzunehmen und durchzuführen“. Angesichts der Natur der durch Art. 25 UNO-Charta verliehenen Befugnisse ist dem *Namibia*-Gutachten zufolge von Fall zu Fall darüber zu entscheiden, ob diese Befugnisse ausgeübt worden sind. Dabei sind der Wortlaut der Resolution, die vorausgegangenen Beratungen, die Charta-Bestimmungen, auf die sich die Resolution beruft, und grundsätzlich alle Umstände zu berücksichtigen, die dazu beitragen können, die Rechtsfolgen der Resolution des *Sicherheitsrats* zu bestimmen.<sup>33</sup>

Diese Aussagen beziehen sich zwar unmittelbar nur auf die Frage nach der Rechtsverbindlichkeit der Resolution auf der Grundlage von Art. 25 UNO-Charta. Sie können aber dennoch von darüber hinausgehender Bedeutung für die Interpretationsfrage sein,<sup>34</sup> ist doch die Frage nach der Bindungswirkung zugleich eine Frage nach der durch Interpretation zu ermittelnden Bedeutung einer Resolution.<sup>35</sup>

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<sup>32</sup> A/RES/2145(XXI) v. 27.10.1966.

<sup>33</sup> IGH, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21.6.1971, I.C.J. Reports 1971, S. 16 (53) Rn. 114: „The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council“.

<sup>34</sup> Wood (Fn. 2), S. 75.

<sup>35</sup> Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 2008, S. 488.



## 2. KOSOVO-GUTACHTEN DES IGH

Im *Kosovo-Gutachten* fasst der *IGH* die für seine Interpretation der Sicherheitsratsresolution 1244 (1999) relevanten Gesichtspunkte zusammen.<sup>36</sup> In der Sache zielte die Auslegung auf die Beantwortung der Frage, ob die einseitige Unabhängigkeitserklärung des *Kosovo* diese Resolution verletzt. Die in Art. 31 und 32 WVK zum Ausdruck kommenden Regeln der Vertragsauslegung können demnach auch die Auslegung von Sicherheitsratsresolutionen anleiten. Die Unterschiede zwischen Sicherheitsratsresolutionen und völkerrechtlichen Verträgen gebieten es für den *IGH* allerdings, dass auch andere Gesichtspunkte in Betracht gezogen werden. Unter Umständen müsse der Gerichtshof zur Interpretation von Sicherheitsratsresolutionen die Stellungnahmen der Vertreter von Sicherheitsratsmitgliedern untersuchen, die diese bei der Annahme der Resolution abgegeben hätten, außerdem andere Resolutionen zur selben Problematik sowie die von diesen Resolutionen beeinflusste spätere Übung der maßgeblichen UNO-Organe und Staaten.<sup>37</sup>

## 3. TADIĆ-FALL DES JUGOSLAWIEN-TRIBUNALS

Außer diesen beiden *IGH-Gutachten* ist eine Entscheidung der Berufungskammer des *Jugoslawien-Tribunals* im Fall *Tadić* von Interesse.<sup>38</sup> Das durch Sicherheitsratsresolution 827 (1993) eingerichtete Tribunal befasste sich mit der Auslegung seines eigenen Statuts, das in der Sicherheitsratsresolution angenommen wurde.<sup>39</sup> Wie der *IGH* im *Namibia-Gutachten* bezog sich die Berufungskammer nicht auf die Auslegungsregeln der Wiener Vertragsrechtskonvention. Später im *Milošević-Fall* folgte eine Kammer des Tribunals dagegen der Vorstellung, dass das Statut als

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<sup>36</sup> Resolution 1244 vom 10. Juni 1999. Die deutschen Übersetzungen sind verfügbar unter: [http://www.un.org/depts/german/sr/sr\\_res.html](http://www.un.org/depts/german/sr/sr_res.html) (geprüft am 30.8.2016).

<sup>37</sup> *IGH, Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, 22.7.2010, Rn. 94: „Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. [...] The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.“

<sup>38</sup> ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Entscheidung v. 2.10.1995, IT-94-1.

<sup>39</sup> S/RES/827 (1993) v. 25.5.1993, § 2.

Vertrag auszulegen sei.<sup>40</sup> Zur Beantwortung der Frage, ob sich die Bestimmungen des Statuts, die der Sicherheitsratsresolution als Annex beigefügt sind, allein auf Straftaten beziehen, die im internationalen bewaffneten Konflikt begangen wurden, geht die Berufungskammer im Fall *Tadić* in drei Schritten vor. Sie unternimmt zunächst eine kurze Wortlautauslegung, dann eine ausführlichere teleologische Interpretation und schließlich eine umfangreiche logische und systematische Interpretation des Statuts.<sup>41</sup> Aber auch Vorarbeiten wie der Bericht des *UNO-Generalsekretärs* über die Einrichtung des Tribunals werden herangezogen.<sup>42</sup>

#### 4. ZWISCHENFAZIT

So spärlich diese Aussagen der Rechtsprechung über ihr eigenes Vorgehen bei der Interpretation von Sicherheitsratsresolutionen auch sind, sie sprechen doch bereits zentrale Probleme an. Erstens wird deutlich, dass die Frage nach der Rechtsverbindlichkeit einer Resolution von zentraler Bedeutung ist. Sie stellt sich bei der Vertragsauslegung in dieser Form nicht, unterscheidet sich jedoch methodisch nicht grundlegend von anderen Interpretationsfragen. Zum Zweiten verweist das *Namibia-Gutachten* von 1971 auf die Existenz eines kompetenzrechtlichen Rahmens für den Resolutionserlass,<sup>43</sup> wenn der *IGH* nämlich formuliert, es seien die Charta-Bestimmungen zu berücksichtigen, auf die sich die Resolution beruft. Sicherheitsratsresolutionen sind, soweit sie rechtsverbindlich sind, Sekundärrecht. Ausdrücklich stellt der *IGH* fest, dass bestimmte Resolutionsbestimmungen in Übereinstimmung mit den Zielen und Grundsätzen der Charta und im Einklang mit ihren Artikeln 24 und 25 verabschiedet worden seien.<sup>44</sup> Die Interpretation seines eigenen Statuts durch das *Jugoslawien-Tribunal* verdeutlicht drittens, dass es unterschiedliche Typen von Resolutionen gibt, die womöglich differenzierte Interpretationsmethoden erfordern. Viertens verhalten sich alle Entscheidungen explizit oder implizit zu der Frage, ob denn die einzige kodifizierte Anleitung zur Interpretation, die Bestimmungen der Wiener Vertragsrechtskonventionen über die

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<sup>40</sup> ICTY, *Prosecutor v. Slobodan Milošević*, Trial Chamber III, *Decision on Preliminary Motions*, 8.11.2001, IT-99-37-PT, § 47: „the Statute of the International Tribunal is interpreted as a treaty“.

<sup>41</sup> Ebd., §§ 71 ff.

<sup>42</sup> Ebd., § 82. Im Fall *Šešelj* bestätigt, s. *Prosecutor v. Vojislav Šešelj*, *Decision on the Interlocutory Appeal Concerning Jurisdiction*, 31.8.2004, IT-03-67-AR72.1, § 12; vgl. *Orakhelashvili*, *The Acts of the Security Council: Meaning and Standards of Review*, *Max Planck Yearbook of United Nations Law* 11 (2007), S. 143 (161).

<sup>43</sup> *Fernández de Casadevante y Romani*, *Sovereignty and Interpretation of International Norms*, 2007, S. 245.

<sup>44</sup> *IGH*, *Namibia-Gutachten* (Fn. 33), S. 53, Rn. 115: „... were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.“

Auslegung von Verträgen, Art. 31 bis 33 WVK, auch für die Interpretation von Sicherheitsratsresolutionen im Sinne einer Universalgrammatik herangezogen werden können.

#### **IV. VERSUCHE EINER KATEGORIALEN EINORDNUNG VON SICHERHEITSRATS-RESOLUTIONEN**

In der bereits zitierten Rechtsprechung und auch in der Literatur werden die Merkmale von Sicherheitsratsresolutionen im Vergleich zu völkerrechtlichen Verträgen als Kriterien dafür herangezogen, ob und gegebenenfalls mit welchen Modifikationen die Auslegungsregeln für völkerrechtliche Verträge auf Sicherheitsratsresolutionen Anwendung finden sollen. Sicherheitsratsresolutionen bewegen sich zwischen Vereinbarung zwischen den Mitgliedern des *Sicherheitsrats* (1.) und einseitigem Akt einer internationalen Organisation (2.). Nicht ganz unproblematisch sind allerdings die Konsequenzen, die aus diesem Vergleich für die Auslegungsmethode gezogen werden (3.).

##### **1. SICHERHEITSRATSRESOLUTIONEN ALS VEREINBARUNGEN**

Wie bei einem völkerrechtlichen Vertrag besteht bei einer Sicherheitsratsresolution eine Willensübereinstimmung, hier zwischen den Mitgliedern des *Sicherheitsrats*, die die Resolution tragen. Es werden die – möglicherweise auch entgegengesetzten – Bestrebungen von Staaten im Resolutionstext vereint. Manche Autoren halten das für den maßgeblichen Gesichtspunkt: Sicherheitsratsresolutionen sind danach im Wesentlichen Vereinbarungen zwischen Staaten.<sup>45</sup> Auch zeigen Staaten verbreitet eine Tendenz, Sicherheitsratsresolutionen wie Verträge auszulegen.<sup>46</sup>

Die Unterschiede zwischen einem völkerrechtlichen Vertrag und einer Sicherheitsratsresolution sind allerdings allzu offenkundig. Der *IGH* hat sie im *Kosovo-Gutachten* zusammengefasst:<sup>47</sup> Sicherheitsratsresolutionen stammen von

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<sup>45</sup> *Orakhelashvili* (Fn. 35), S. 489–490.

<sup>46</sup> *Kolb* (Fn. 6), S. 256.

<sup>47</sup> *IGH, Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, 22.7.2010, I.C.J. Reports 2010, S. 403, Rn. 94: „Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*), Advisory

einem einzigen Kollektivorgan und kommen in einem Verfahren zustande, das sich wesentlich vom Zustandekommen völkerrechtlicher Verträge unterscheidet. Sie sind das Ergebnis einer Abstimmung nach Art. 27 UNO-Charta, und der endgültige Resolutionstext repräsentiert die Sichtweise des *Sicherheitsrats* als Kollektivorgan. Außerdem können Sicherheitsratsresolutionen nach Art. 25 UNO-Charta Bindungswirkung für alle Mitgliedstaaten entfalten, unabhängig davon, ob sie an der Formulierung überhaupt mitgewirkt haben.<sup>48</sup> Diese Bindungswirkung steht im Gegensatz zu dem Grundsatz *pacta tertiis nec nocent nec prosunt* im Vertragsrecht, also der auch Art. 34 WVK formulierten Regel, dass ein Vertrag für einen Drittstaat ohne dessen Zustimmung weder Pflichten noch Rechte begründet.<sup>49</sup> Nicht alle Resolutionstypen entfalten indes diese Bindungswirkung wie rechtsverbindliche Entscheidungen, die an die Mitgliedstaaten gerichtet sind, etwa nach Art. 41–42 UNO-Charta, zu denen Sanktionen oder *Peace Keeping*-Einsätze zählen. Einerseits verabschiedet der Sicherheitsrat in Resolutionsform auch interne Empfehlungen oder Entscheidungen, Empfehlungen an die Generalversammlung, die Einrichtung eines Unterorgans oder eines Nebenorgans nach Art. 29 UNO-Charta. Andererseits ergehen in dieser Form auch bloße Empfehlungen an die Mitgliedstaaten, etwa zu vorläufigen Maßnahmen nach Art. 40 UNO-Charta. Schließlich ist zu berücksichtigen, dass wichtige Inhalte von Sicherheitsratsresolutionen auch schlicht politische Erklärungen wie die Verurteilung eines Terrorakts oder feierliche Erklärungen zu einem bestimmten Thema sind. Ein weiterer Unterschied zu völkerrechtlichen Verträgen besteht häufig darin, dass sich Sicherheitsratsresolution oft auf eine konkrete Situation beziehen und eine Regelung von nur beschränkter Dauer und Reichweite anstreben.

Sicherheitsratsresolutionen sind jedenfalls nicht stets mit einer Vereinbarung der Mitglieder des *Sicherheitsrats* gleichzusetzen. Das folgt aus dem Abstimmungsmodus im *Sicherheitsrat*. Nach Art. 27 Abs. 3 UNO-Charta bedürfen Beschlüsse des *Sicherheitsrats* über alle Fragen, die nicht Verfahrensfragen sind, grundsätzlich der Zustimmung von neun Mitgliedern einschließlich sämtlicher ständigen Mitglieder. Bei der Abstimmung hat jedes Mitglied des *Sicherheitsrats* eine Stimme (Art. 23 Abs. 1 UNO-Charta). Die „Vereinbarung“ besteht also nur unter den

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*Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation.“

<sup>48</sup> *Frowein* (Fn. 6), S. 99; *Papastavridis* (Fn. 2), S. 87.

<sup>49</sup> *Vitzthum* (Fn. 28), S. 45, Rn. 120.

mindestens neun von fünfzehn Mitgliedern (Art. 23 Abs. 1 UNO-Charta), die die betreffende Resolution mittragen und für sie stimmen. Den ständigen Mitgliedern des *Sicherheitsrats* – *China, Frankreich, Russland, Vereinigtes Königreich* und *Vereinigte Staaten* (Art. 23 Abs. 1 UNO-Charta) – nehmen dabei eine Sonderrolle ein: Weil ihnen eine Veto-Position zusteht, müssen sie immer Partei der „Vereinbarung“ sein. Die Sonderrolle der ständigen Mitglieder reicht praktisch noch weiter, weil jedenfalls *Frankreich, das Vereinigte Königreich* und die *Vereinigten Staaten* auch die Entwurfsphase dominieren und Resolutionen oder auch Erklärungen des Präsidenten vorformulieren.<sup>50</sup>

## 2. SICHERHEITSRATSRESOLUTIONEN ALS EINSEITIGE AKTE

Diese Interna blendet man aus, wenn man Sicherheitsratsresolutionen als Akte des Kollektivorgans *Sicherheitsrat* betrachtet, indem man sie – als eine Willensäußerung dieses Organs oder eine Erklärung eines gemeinsamen Standpunkts – mit einseitigen Akten gleichstellt.<sup>51</sup> Tatsächlich haben sie eine gewisse Ähnlichkeit mit Gesetzgebungsakten oder Exekutivakten, sind unilaterale institutionelle Akte mit bindender Wirkung *erga omnes partes*.<sup>52</sup>

Die Ähnlichkeiten mit einseitigen Erklärungen von Staaten sind allerdings auch beschränkt. In der Regel legen Sicherheitsratsresolutionen eben nicht eigene Verpflichtungen der Erklärenden fest, sondern Verpflichtungen für alle Staaten oder Staaten, die nicht Mitglieder des *Sicherheitsrats* sind, oder aber enthalten gerade Ermächtigungen, wenn sie den Einsatz militärischer Gewalt autorisieren und damit in der Regel Sicherheitsratsmitgliedern Handlungsoptionen gegen die betroffenen Staaten eröffnen.

## 3. KONSEQUENZEN DER EINORDNUNG

Könnte man Sicherheitsratsresolutionen Vereinbarungen gleichstellen, so hätte dies zur Folge, dass man die Auslegungsregeln der Wiener Vertragsrechtskonvention jedenfalls analog auf Sicherheitsratsresolutionen anwenden könnte. Danach wäre insbesondere zwischen der allgemeinen Auslegungsregel des Art. 31 WVK und den

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<sup>50</sup> Darauf reagiert u.a. eine Mitteilung des *Präsidenten des Sicherheitsrats* zu diesem *penholder system*, die alle Mitglieder des *Sicherheitsrats* darin bestärkt, daran mitzuwirken UN Dok. S/2014/268 v. 14. April 2014.

<sup>51</sup> *Thirlway*, *The Law and Procedure of the International Court of Justice. 1960–1989*, *British Yearbook of International Law* 66 (1995), S. 1 (29); *Papastavidis* (Fn. 2), S. 105.

<sup>52</sup> *Papastavidis* (Fn. 2), S. 88.

ergänzenden Auslegungsmitteln des Art. 32 WVK abzustufen. Primäre Bedeutung haben danach der Text und seine gewöhnliche Bedeutung, der Zusammenhang und Ziel und Zweck eines Vertrages bzw. der Resolution.<sup>53</sup> Nur ergänzend sind insbesondere die vorbereitenden Arbeiten und die Umstände des Zustandekommens einer Resolution heranzuziehen. Außerdem enthält die allgemeine Regel des Art. 31 WVK weitere Abstufungen, und zwar zwischen den Gesichtspunkten, die die Interpretation unmittelbar anleiten, nämlich der gewöhnlichen Bedeutung, dem Zusammenhang und Ziel und Zweck und weiteren Gesichtspunkten, die nach Art. 31 Abs. 3 WVK „[a]ußer dem Zusammenhang“ „in gleicher Weise zu berücksichtigen“ sind: spätere Übereinkunft, spätere Übung, sonstige anwendbare Völkerrechtssätze. Die gewöhnliche Bedeutung des Wortlauts wäre daher der Ausgangspunkt bei der Ermittlung dessen, worauf sich die Mitglieder geeinigt haben. Der Text hätte insbesondere Vorrang gegenüber den Äußerungen während der Beratungen über die Resolution und auch nach Annahme der Resolution. Mit diesem Ansatz ist auch die Erwartung verknüpft, die Konzentration auf den Wortlaut Sorge für Stabilität und Berechenbarkeit.<sup>54</sup>

Ordnet man Sicherheitsratsresolutionen als unilaterale Akte ein, so wäre die – auch analoge – Anwendung der Art. 31 bis 33 WVK besonders zu begründen.<sup>55</sup> Löst man die Auslegung von den dort vorgesehenen Abstufungen, so könnten der politische Gesamthintergrund und die Entstehungsbedingungen verstärkte Berücksichtigung finden.<sup>56</sup> Herangezogen werden könnten dann auch die Kriterien für einseitige Erklärungen. Für die Auslegung einseitiger Erklärungen von Staaten gibt es einschlägige Leitlinien der *Völkerrechtskommission*.<sup>57</sup> Diese *Guidelines applicable to unilateral declarations of States* betonen, dass sich aus einseitigen Erklärungen von Staaten Verpflichtungen des erklärenden Staates nur ergeben, wenn sie klar und bestimmt formuliert sind. Im Zweifel müssten die Erklärungen restriktiv erklärt werden, mit einem besonderen Gewicht des Wortlauts. Der *IGH* bestand im *Fisheries Jurisdiction*-Fall zwischen *Spanien* und *Kanada* auf den *sui generis*-Charakter von

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<sup>53</sup> Orakhelashvili (Fn. 35), S. 489; Orakhelashvili (Fn. 42), S. 151.

<sup>54</sup> Orakhelashvili (Fn. 42), S. 156.

<sup>55</sup> Gegen eine Anwendung *mutatis mutandis Papastavridis* (Fn. 2), S. 88.

<sup>56</sup> Wood (Fn. 2), S. 74.

<sup>57</sup> ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, 2006, UN Dok. A/61/10.

Erklärungen nach der Fakultativklausel des IGH-Statuts,<sup>58</sup> einem Sonderfall einer einseitigen Erklärung.<sup>59</sup>

Lassen sich nun aus den Ähnlichkeiten und Unterschieden zu völkerrechtlichen Verträgen und einseitigen Akten Schlussfolgerungen für die Fragestellung ziehen, ob die Interpretationsregeln der Art. 31 bis 33 WVK angemessen sind? Zunächst sollten nicht einfach pauschal Sicherheitsratsresolutionen mit Verträgen verglichen werden. Vielmehr sind unterschiedliche Resolutionstypen zu unterscheiden, bei denen das Spannungsverhältnis zwischen der Orientierung an der Auslegung von Verträgen und einseitigen Akten jeweils anders aufzulösen ist. Einen besonderen Typus bilden Resolutionen mit Legislativcharakter, die den Mitgliedstaaten generell-abstrakte Verpflichtungen auferlegen, etwa die Terrorismusresolutionen 1373 (2001) oder die Resolution zu Massenvernichtungswaffen 1540 (2004).<sup>60</sup> Derartige Resolutionen legislativen Charakters sind rechtlich nicht unproblematisch; indes haben *Generalversammlung* und Staatengemeinschaft die Ausdehnung der Tätigkeit des Sicherheitsrats gebilligt.<sup>61</sup> Im gegebenen Zusammenhang genügt es festzuhalten, dass gewisse Parallelen zwischen der Auslegung einer Resolution mit Legislativcharakter und einem *traité-loi* nicht von der Hand zu weisen sind.<sup>62</sup> Die Ähnlichkeit von Resolutionen legislativen Charakters mit völkerrechtlichen Verträge spricht dafür, dass sich auch ihre Auslegung stärker am WVK-Regime orientiert als die Auslegung anderer Resolutionen.<sup>63</sup> Aufgrund ihres eher grundsätzlichen und längerfristig orientierten Inhalts kommt etwa der nachfolgenden Praxis eine größere Bedeutung zu.

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<sup>58</sup> Statut des Internationalen Gerichtshofs, BGBl. 1973 II S. 430, 505.

<sup>59</sup> IGH, *Fisheries Jurisdiction (Spain v Canada)*, Judgment, 4.12.1998, I.C.J. Reports 1998, 432, §§ 61–80.

<sup>60</sup> S/RES/1373 (2001) v. 28.9.2001; S/RES/1540 (2004) v. 28.4.2004; *Papastavridis* (Fn. 2); s. auch *Bailey/Daws*, *The Procedure of the UN Security Council*, 3. Aufl., 1998, S. 18–20; *Talmon*, *The Security Council as World Legislature*, *American Journal of International Law* 99 (2005) 1, S. 175; *Rasand*, *The Security Council as Global Legislator: Ultra Vires or Ultra Innovative*, *Fordham International Law Journal* 28 (2005) 3, S. 542.

<sup>61</sup> *Tomuschat*, *The Security Council and Jus Cogens*, in: Cannizzaro (Hrsg.), *The Present and Future of Jus Cogens*, 2015, S. 7 (81).

<sup>62</sup> Womit aber schon wieder impliziert ist, dass möglicherweise auch die Auslegung völkerrechtlicher Verträge eine Typologisierung erfordert; gegen anderer Regeln, aber für ein angemessenes Verständnis der allgemeinen Regeln *Dörr*, *Article 31*, in: ders. (Hrsg.), *Vienna Convention on the Law of Treaties. A commentary*, 2012, S. 521 (536 ff.), Rn. 29 ff.

<sup>63</sup> *Kolb* (Fn. 6), S. 256. S. zur Interpretation von Sicherheitsratsresolutionen mit Legislativcharakter *Smit Duijzentkunst*, *Interpretation of legislative Security Council resolutions*, *Utrecht Law Review* 4 (2004) 3, S. 188 (205 ff.).

Einen Sonderstatus nimmt zudem die Autorisierung des Einsatzes militärischer Gewalt nach Kapitel VII der Charta ein.<sup>64</sup> Neben dem Recht auf Selbstverteidigung nach Art. 51 UNO-Charta ist diese – ursprünglich gar nicht vorgesehene – Möglichkeit der Autorisierung von Mitgliedstaaten zur Anwendung von militärischer Gewalt eine anerkannte Ausnahme vom Gewaltverbot des Art. 2 Nr. 4 UNO-Charta.<sup>65</sup> Aus diesem Ausnahmecharakter könnte man nun schließen, dass solche Autorisierungen nach dem Grundsatz *exceptiones sunt strictissimae interpretatione* eng auszulegen sind.<sup>66</sup> Auf diese Weise gelangt man mit einem anderem Begründungsansatz zu einem ähnlichen Ergebnis wie seinerzeit *Frowein* in seinem Aufsatz zur „Unilateral Interpretation of Security Council Resolutions“. *Frowein* forderte dort eine souveränitätsschonende Auslegung von Resolutionen, die zu militärischen Zwangsmaßnahmen als stärkster Form der Souveränitätsbeeinträchtigung ermächtigen, entsprechend dem Grundsatz *in dubio mitius*.<sup>67</sup> Allerdings ist durchaus fraglich, ob hier eine eigene Auslegungsregel jenseits des Regimes der WVK anzunehmen ist. Die erforderliche Zurückhaltung lässt sich unter Umständen durchaus im Rahmen der allgemeinen Auslegungsregeln erzielen. Jedenfalls lässt sich kaum sagen, dass Autorisierungen immer restriktiv statt effektiv auszulegen seien.<sup>68</sup> Im Hinblick auf die Argumentation angelsächsischer Staaten zur Rechtfertigung des Irakkrieges 2003, die anhaltenden Verletzungen von Verpflichtungen aus Resolution 687 ließen die Autorisierung des Einsatzes militärischer Gewalt aus Resolution 678 wiederaufleben, kommt es auf diesen Streit indes gar nicht an.<sup>69</sup> Abgesehen davon, dass die Autorisierung nur die Befreiung von *Kuwait* betraf, war der *Sicherheitsrat* Partei des Waffenstillstands, so dass nur er über die Folgen einer Verletzung entscheiden kann.<sup>70</sup>

Festzuhalten ist also zunächst, dass pauschale Argumente, die sich auf einen Vergleich zwischen Sicherheitsratsresolutionen und völkerrechtlichen Verträgen

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<sup>64</sup> *Papastavridis* (Fn. 2), S. 103.

<sup>65</sup> *Papastavridis* (Fn. 2), S. 107.

<sup>66</sup> So i.E. auch *Papastavridis* (Fn. 2), S. 107.

<sup>67</sup> *Frowein* (Fn. 6), S. 112 unter Bezugnahme auf StIGH, Urteil vom 10. September 1929 in Sachen betreffend die räumliche Zuständigkeit der Internationalen Oderkommission (Urteil Nr. 16), *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, Ser. A. No. 23, 26: „Nur wenn trotz aller für die Sache in Betracht kommenden Erwägungen die Bestimmung immer noch zweifelhaft bleibt, muss die Auslegung gewählt werden, die der Freiheit der Staaten am günstigsten ist.“ (S. 252 der dt. Übers.).

<sup>68</sup> Zutreffend *Orakhelashvili* (Fn. 35), S. 258.

<sup>69</sup> S/RES/687 (1991) v. 3.4.1991, §§ 33–34.

<sup>70</sup> *Kolb* (Fn. 6), S. 488–489.



berufen, nicht überzeugen können. Hinzu kommt ein weiterer wichtiger Gesichtspunkt: Wer mit einem solchen Vergleich argumentiert, müsste zumindest jeweils auch fragen, welchem Zweck eine bestimmte Eigenart des WVK-Regimes dient. Die Priorisierung der Auslegungsmethoden in Art. 31, 32 WVK, der zufolge die Bedeutung der Entstehungsgeschichte in der Auslegung zurücktritt, hat jedenfalls einen Grund, der auch – und sogar verstärkt – die Entstehungsgeschichte von Sicherheitsratsresolutionen betrifft: Ausweislich der Erwägungen der *Völkerrechtskommission* war einer der Gründe für die nur nachrangige Bedeutung der Entstehungsgeschichte, dass die Aufzeichnungen über Vertragsverhandlungen in vielen Fällen unvollständig oder missverständlich sind.<sup>71</sup> Demgegenüber vermag es kaum zu überzeugen, wenn auf schmaler empirischer Grundlage eine eigene, vom Vertragsrecht abweichende gewohnheitsrechtliche Auslegungsregel zur Bedeutung der vorbereitenden Arbeiten postuliert wird.<sup>72</sup>

## V. DERIVATIVER CHARAKTER VON SICHERHEITSRATSRESOLUTIONEN

Ist der Vergleich zwischen Sicherheitsratsresolutionen mit völkerrechtlichen Verträgen einerseits und einseitigen Akten von Staaten andererseits demnach nur ein bedingt taugliches Argumentationsmuster, so ist die Berücksichtigung des derivativen Charakters von Sicherheitsratsresolutionen von zentraler Bedeutung. Damit sind drei Gesichtspunkte angesprochen: Sicherheitsratsresolutionen sind, soweit sie rechtsverbindlich sind, Sekundärrecht einer internationalen Organisation. Daraus ergibt sich trotz der großen Reichweite der Befugnisse des *Sicherheitsrats* ein auch für die Auslegung relevanter rechtlicher Rahmen (1.). Zudem bestehen bestimmte tatsächliche Bedingungen des Zustandekommens im Rahmen der *Vereinten Nationen*, die ebenfalls bei der Auslegung zu berücksichtigen sind (2.). Des Weiteren ist die Sprache der Resolutionen in einem gewissen Umfang eine abgeleitete Sprache (3.). Schließlich entwickelt der *Sicherheitsrat* als Organ eine serielle Praxis, die bei der Auslegung zu berücksichtigen ist (4.).

### 1. SICHERHEITSRATSRESOLUTIONEN ALS „SEKUNDÄRRECHT“

Der Rechtsrahmen der Charta, der den möglichen Inhalt und die zulässige Bedeutung von Sicherheitsratsresolutionen beschränkt, ist ein weiterer Unterschied

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<sup>71</sup> ILC, Report of the of the International Law Commission on the work of its Eighteenth Session, 4 May - 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), UN Dok. A/CN.4/191, Article 28, Commentary, YbILC 1966-II, S. 220, § 10.

<sup>72</sup> So allerdings *Brandl* (Fn. 2), S. 288.

zwischen einem völkerrechtlichen Vertrag und einer Sicherheitsratsresolution.<sup>73</sup> Auf die Grenzen der Befugnisse des *Sicherheitsrats* kann hier nicht im Detail eingegangen werden. Das ist aber auch nicht notwendig. Es wird heute allgemein davon ausgegangen, dass der Sicherheitsrat an Menschenrechte gebunden ist; strittig ist nur die Begründung.<sup>74</sup> Nach Art. 24 Abs. 2 UNO-Charta handelt der *Sicherheitsrat* im Einklang mit den Zielen und Grundsätzen der *Vereinten Nationen*. Zu diesen Zielen zählt es jedenfalls auch, „eine internationale Zusammenarbeit herbeizuführen, um [...] die Achtung vor den Menschenrechten und Grundfreiheiten [...] zu fördern und zu festigen“ (Art. 1 Nr. 3 UNO-Charta). Daraus lässt sich die Vermutung ableiten, dass Sicherheitsratsresolutionen den Mitgliedern der *Vereinten Nationen* im Zweifel keine Verpflichtungen auferlegen, die im Widerspruch zu den in Art. 1 und 2 der Charta niedergelegten Zielen und Grundsätzen stehen. Für die UNO-Mitglieder bindende Beschlüsse sind nach Art. 25 UNO-Charta auch „im Einklang mit“ der Charta anzunehmen und durchzuführen.

Der Gedanke findet sich etwa im Sondervotum zum Verfahren *Sayadi und Vinck gegen Belgien* des UNO-Menschenrechtsausschusses aus dem Jahr 2008.<sup>75</sup> Das Sondervotum stammt vom britischen Ausschussmitglied *Sir Nigel Rodley* und stellt eine Vermutung dafür auf, der *Sicherheitsrat* beabsichtige nicht, dass die Befolgung von Resolutionen Menschenrechte verletzen soll. Das soll auch und gerade für solche Menschenrechte gelten, die den Status von zwingendem Völkerrecht (*ius cogens*) haben, und auch für solche Gewährleistungen, die auch im Falle eines öffentlichen Notstands nicht außer Kraft gesetzt werden dürfen. Jedenfalls sind dabei die Grundsätze der Notwendigkeit und Verhältnismäßigkeit streng zu wahren.<sup>76</sup> Solche Vermutungsregeln sind in *common law*-Jurisdiktionen und darüber hinaus allgemein im innerstaatlichen Recht nicht ungewöhnlich.

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<sup>73</sup> So auch *Orakhelashvili* (Fn. 42), S. 158. Insofern verbünden Resolutionen Elemente der Vereinbarung zwischen Staaten mit Elementen von Gesetzgebungsakten oder Regulierungsverwaltungsakten (ebd., S. 160).

<sup>74</sup> *Fassbender*, Sources of Human Rights Obligations Binding the UN Security Council, in: Bekker u.a. (Hrsg.), Making transnational law work in the global economy. Essays in honour of Detlev Vagts, 2010, S. 71; *Janik*, Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards. Eine rechtsquellentheoretische Untersuchung am Beispiel der Vereinten Nationen, der Weltbank und des Internationalen Währungsfonds, 2012.

<sup>75</sup> Human Rights Committee, *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006, 29.12. 2008, Individual opinion of Committee member Sir Nigel Rodley (concurring). S. dazu *Milanović*, The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity, *Goettingen Journal of International Law* 1 (2009) 3, S. 519 (533 ff.).

<sup>76</sup> Ebd., S. 36–37.

Ähnlich argumentierte die Große Kammer des *Europäischen Gerichtshofs für Menschenrechte* im Fall *Al-Jedda* von 2011,<sup>77</sup> im Fall *Nada* von 2012<sup>78</sup> und im Fall *Al-Dulimi* von 2016.<sup>79</sup> Die Fälle demonstrieren, wie der *EGMR* als Organ des europäischen Menschenrechtsschutzes überhaupt dazu kommt, Resolutionen des *UNO-Sicherheitsrats* auszulegen: Beschwerdeführer im Fall *Al-Jedda* war ein in *Irak* geborener britischer Staatsbürger. Er reiste nach *Bagdad*, wo er im Oktober 2004 von britischen Soldaten aufgrund von Geheimdienstinformationen festgenommen wurde. Er wurde in eine Internierungsanstalt der britischen Armee in *Basra* gebracht und dort festgehalten. Dies wurde aus zwingenden Sicherheitsgründen für notwendig erachtet. *Al-Jedda* wurde verdächtigt, Anschläge auf die Koalitionstruppen im *Irak* geplant und dafür Terroristen rekrutiert zu haben. Strafrechtliche Anklage wurde nicht erhoben. Eine Internierung oder Präventivhaft ohne Absicht, in angemessener Frist strafrechtliche Anklage zu erheben, fällt nicht unter die nach Art. 5 Abs. 1 EMRK zulässigen Gründe für eine Freiheitsentziehung. Die britische Regierung behauptete auch nicht, dass die Anhaltung nach Art. 5 Abs. 1 EMRK zulässig war und berief sich auch nicht auf eine Derogation nach Art. 15 EMRK. Sie trug vielmehr vor, dass keine Verletzung von Art. 5 Abs. 1 EMRK vorliege, weil die daraus erwachsenden Verpflichtungen des Vereinigten Königreichs durch seine Pflichten aus Resolution 1546 verdrängt worden seien.<sup>80</sup> Bevor er über die Anwendung der Vorrangregel des Art. 103 UNO-Charta entscheiden konnte, musste der Gerichtshof prüfen, ob ein Konflikt zwischen den Verpflichtungen nach Resolution 1546 und jenen nach Art. 5 Abs. 1 EMRK bestand.

Der Beschwerdeführer *Nada* war ein ägyptisch-italienischer Geschäftsmann, der seit 1970 in der italienischen Enklave *Campione d'Italia* lebt. Auf Antrag der *Vereinigten Staaten* wurde er 2001 auf die Terrorliste aufgenommen, die vom *Sanktionskomitee* des *UNO-Sicherheitsrats* ins Leben gerufen worden war. Mit der Sicherheitsratsresolution 1390 (2002) verpflichtete der *Sicherheitsrat* die Staaten, allen Personen auf der Terrorliste unter anderem die Ein- und Durchreise zu untersagen.<sup>81</sup> Die *Schweiz* setzte diese Vorgaben mit der Verordnung über Maßnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama

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<sup>77</sup> EGMR (GK), *Al-Jedda* ./ *Vereinigtes Königreich*, Beschw.Nr. 27021/08, Urt. v. 7.7.2011.

<sup>78</sup> EGMR (GK), *Nada* ./ *Schweiz*, Beschw.Nr. 10593/08, Urt. v. 12.9.2012.

<sup>79</sup> EGMR (GK), *Al-Dulimi* (Fn.11).

<sup>80</sup> S/RES/1546 (2004) v. 8.6.2004.

<sup>81</sup> S/RES/1390 (2002) v. 16.1.2002.

bin Laden, der Gruppierung Al-Qaïda oder den Taliban (sogenannte Taliban-Verordnung) um. Damit war es *Nada* faktisch nicht mehr möglich, das nur 1,6 km<sup>2</sup> große Gebiet von *Campinone d'Italia* zu verlassen. Insbesondere machte es ihm das Verbot unmöglich, einen Arzt in *Italien* oder in der *Schweiz* aufzusuchen und Freunde und Bekannte zu besuchen. Im Jahr 2007 lehnte das *Bundesgericht* eine Aufhebung dieser Reisebeschränkungen ab.<sup>82</sup> Zur Begründung führte das Gericht aus, dass Sanktionsbeschlüsse des *UNO-Sicherheitsrats* für die Mitgliedstaaten nach Art. 25 UNO-Charta verbindlich seien und gemäß Art. 103 UNO-Charta allen übrigen völkerrechtlichen Verpflichtungen der *Schweiz* vorgingen. Erst im Jahr 2009 strich das Sanktionskomitee *Nada* von der Terrorliste mit der Folge, dass die *Schweiz* ihr Einreise- und Transitverbot aufhob.

Der Fall *Al-Dulimi* betraf das Sanktionsregime gegen *Irak*. Die Resolution 1483 (2003) schrieb unter anderem die Sperre von Konten und die Beschlagnahme von Geldern von Mitgliedern der Regierung *Saddam Husseins*, Mitgliedern seiner Familie und hoher Funktionsträger des früheren Regimes vor.<sup>83</sup> Das *Sanktionskomitee* setzte die Firma *Montana Management*, die ihren Sitz in *Genf* hat, und ihren Direktor, *Al-Dulimi*, in April 2004 auf die Sanktionsliste. In Umsetzung der Resolution beschlagnahmte die *Schweiz* im Jahr 2004 Vermögenswerte von *Al-Dulimi* und der *Montana Management*. *Al-Dulimi* versuchte vergeblich, über die *Schweiz* im *Sanktionskomitee* angehört und von der Liste genommen zu werden. Nach der ablehnenden Entscheidung des *Sanktionskomitees* führte die *Schweiz* die Beschlagnahme durch, weil sie sich dazu durch die Sicherheitsratsresolution verpflichtet sah. *Al-Dulimi* ersuchte schweizerische Gerichte vergeblich um Rechtsschutz. Das *Schweizerische Bundesgericht* sah sich als grundsätzlich nicht berechtigt an, das Vorbringen von Klägern zu prüfen, die von Sanktionsmaßnahmen des *Sicherheitsrats* betroffen sind, weil die Verpflichtung nach Art. 103, 25 UNO-Charta Vorrang vor anderen vertraglichen Verpflichtungen der *Schweiz* habe, einschließlich solcher Verpflichtungen, die sich aus der EMRK ergeben. Eine Ausnahme gelte nur für die Verletzung von *ius cogens*. Weil die Resolution 1483 eine strikte Verpflichtung enthalte und das Recht auf ein unabhängiges und unparteiisches Gericht nicht zum zwingenden Völkerrecht zähle, sah das *Bundesgericht* von einer Überprüfung der formellen und materiellen Rechtmäßigkeit

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<sup>82</sup> BGE 1A.45/2007.

<sup>83</sup> S/RES/1483 (2003) v. 23.5.2003, § 23.

der Listung von *Al-Dulimi* ab.<sup>84</sup> Weil die Schweiz nicht in der Lage war, die Streichung *Al-Dulimis* von der Liste zu bewirken, seien weder die Schweizerische Verfassung noch Art. 6, 13 EMRK verletzt.

Der EGMR stellte fest, dass es nicht seine Aufgabe sei, die Rechtmäßigkeit von Maßnahmen des UNO-Sicherheitsrats zu überprüfen. Wenn sich aber ein Konventionsstaat darauf berufe, dass er wegen einer nach Art. 25 UNO-Charta für ihn bindenden Sicherheitsratsresolution gezwungen sei, Konventionsrechte einzuschränken, so müsse der Gerichtshof den Wortlaut und die Reichweite des Resolutionstextes untersuchen, um sicherzustellen, dass er mit der Konvention im Einklang stehe.<sup>85</sup> Der Gerichtshof betonte zunächst, dass er die Ziele berücksichtigen müsse, zu deren Erreichung die Vereinten Nationen gegründet worden seien, neben der Wahrung von Weltfrieden und internationaler Sicherheit (Art. 1 Nr. 1 UNO-Charta) auch die Herbeiführung einer internationalen Zusammenarbeit, um u.a. die Achtung vor den Menschenrechten und Grundfreiheiten zu fördern und zu festigen (Art. 1 Nr. 3 UNO-Charta):

*[T]he Court ... must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms”. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations”. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language*

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<sup>84</sup> BGE 2A.783/2006, § 9.2.

<sup>85</sup> EGMR (GK), *Al-Jedda* (Fn. 77), § 76; EGMR (GK), *Al-Dulimi* (Fn.11), § 139.

would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.<sup>86</sup>

Wegen Art. 24 Abs. 2 Satz 1 UNO-Charta geht der *EGMR* also davon aus, dass bei der Interpretation von Sicherheitsratsresolutionen eine Vermutung dafür greift, dass der *Sicherheitsrat* im Zweifelsfall nicht beabsichtige, den Mitgliedstaaten eine Verpflichtung zur Verletzung grundlegender Menschenrechte aufzuerlegen. Angesichts der bedeutenden Rolle der *Vereinten Nationen* für die Förderung und Festigung der Menschenrechte müsse es klar zum Ausdruck kommen, wenn der *Sicherheitsrat* von den Staaten verlangen wollte, besondere Maßnahmen zu ergreifen, die im Widerspruch zum internationalen Menschenrechtsschutz stehen.<sup>87</sup> Im Ergebnis stellte der *EGMR* in allen drei Fällen Konventionsverletzungen fest (obschon er im Fall *Nada* die Vermutung als widerlegt betrachtete<sup>88</sup>).

Gegen den Begründungsansatz des Gerichtshofs wurde eingewandt, die zitierte Vermutung gehe zu weit, weil der *Sicherheitsrat*, wenn er eine Situation nach Art. 39 UNO-Charta festgestellt habe, in einem Fall des Notstands handle. Auch würde Art. 103 UNO-Charta ausgehöhlt, der i.V. mit Art. 25 UNO-Charta im Konfliktfall einen Vorrang nicht nur der Verpflichtungen unmittelbar aus der Charta, sondern auch aus Sicherheitsratsresolutionen gegenüber Verpflichtungen aus anderen internationalen Übereinkünften anordnet.<sup>89</sup> Dem ist zu entgegen, dass der behauptete Zusammenhang zwischen einer Situation nach Art. 39 UNO-Charta und einem Notstand, der die Suspendierung von Menschenrechten erlaubte (s. etwa Art. 15 EMRK) zu pauschal ist. Andernfalls wäre die Schwelle für einen globalen Notstand im „Kampf gegen den Terrorismus“ schnell erreicht. Außerdem sind bestimmte Menschenrechtsgewährleistungen eben gerade notstandsfest. Im Hinblick auf den Vorrang der UNO-Charta ist insgesamt es wohl gefährlicher, Art. 103 UNO-Charta überzustrapazieren, als eine Ausbalancierung über eine Vermutungsregel zu versuchen. Auch greift der Hinweis auf Art. 103 UNO-Charta deshalb nur bedingt,

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<sup>86</sup> EGMR (GK), *Al-Jedda* (Fn. 77), § 102; s. auch EGMR, *Nada* (Fn. 78), §§ 171–172; EGMR (GK), *Al-Dulimi* (Fn.11), § 140.

<sup>87</sup> Ebd., § 102. Vgl. *Milanović, Al-Skeini and Al-Jedda* in *Strasbourg, European Journal of International Law* 23 (2012) 1, S. 121; *Zambrano, State Responsibility for Human Rights Violations. the Ultimate Control Test and the Interpretation of UN Security Council Resolutions*, *European Human Rights Law Review* 18 (2013) 2, S. 180 (185–186).

<sup>88</sup> EGMR, *Nada* ./ Schweiz (12.9.2012), § 172.

<sup>89</sup> *Wood, The Interpretation of Security Council Resolution* (Audiovisual Library of International Law, 2009), [http://legal.un.org/avl/ls/Wood\\_PS.html#](http://legal.un.org/avl/ls/Wood_PS.html#) (geprüft am 30.8.2016), 27:50.

weil es ja zugleich um die Ziele und Grundsätze der *Vereinten Nationen* selbst geht. Schließlich kann der *Sicherheitsrat* die Vermutung durchaus auch wiederlegen. Durch die Rechtsprechung des *EGMR* wird der *Sicherheitsrat* allerdings unter einen besonderen Rechtfertigungszwang gesetzt:<sup>90</sup> Eingriffe in Menschenrechte, die durch verbindliche Vorgaben des *Sicherheitsrats* gerechtfertigt werden sollen, bedürfen einer expliziten Grundlage im Resolutionstext; will der *Sicherheitsrat* solche Eingriffe verlangen, so muss er sich dafür also auch – vor der Weltöffentlichkeit – rechtfertigen; seine Verantwortlichkeit, die neben der Verantwortlichkeit der handelnden Staaten steht, wird dokumentiert.

Weiter wurde gegen eine vermutete Absicht rechtskonformen Verhaltens die fehlende Identität der rechtsetzenden Organe eingewandt. Die Vermutung habe keine Grundlage in den tatsächlichen Absichten dieser Organe.<sup>91</sup> In der Tat ist der *UNO-Sicherheitsrat* kein Organ der EMRK. Allerdings ist der entscheidende Punkt, dass die Vermutung gerade über das hinausgehen soll, was das rechtsetzende Organ tatsächlich beabsichtigt hat.<sup>92</sup> Eine andere Frage ist, ob das Sanktionsregime bei verständiger Auslegung tatsächlich eine Rechtskontrolle durch innerstaatliche Gerichte zulässt.<sup>93</sup>

Allerdings finden sich auch in der Praxis des *Sicherheitsrats* Anhaltspunkte, die eine Vermutung zugunsten der Rechtmäßigkeit stützen können. Es lässt sich durchaus feststellen, dass der *Sicherheitsrat* etwa bei der Einrichtung der *Jugoslawien-* und *Ruanda-Tribunale* darauf achtete, im Rahmen der Regeln des bewaffneten Konflikts zu bleiben, vor allem auch, um nicht den Grundsatz des *nullum crimen sine lege* zu verletzen. Auch im Hinblick auf die Wiedergutmachung von durch die Invasion *Kuwaits* verursachten Schäden achtete der *Sicherheitsrat* darauf, im Rahmen der geltenden Rechtsfolgen völkerrechtswidriger Handlungen zu bleiben.<sup>94</sup> Ähnliches gilt für die Leitlinien für *Sanktionsausschüsse*, die jedenfalls nicht die Absicht erkennen,

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<sup>90</sup> Kleinlein, Between Myths and Norms. Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law, *Nordic Journal of International Law* 81 (2012) 2, S. 79 (116).

<sup>91</sup> Peters, The Refinement of International Law. From Fragmentation to Regime Interaction and Politicization (geprüft am 30.8.2016), S. 16.

<sup>92</sup> Milanović, Grand Chamber Judgment in *Al-Dulimi v. Switzerland*, <http://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/> (geprüft am 30.8.2016)

<sup>93</sup> S. EGMR (GK), *Al-Dulimi* (Fn.11), abweichendes Sondervotum der Richterin Nussberger: Einen Spielraum der Staaten anzunehmen laufe auf eine „fake harmonious interpretation“ hinaus.

<sup>94</sup> Wood (Fn. 2), S. 78.

sich über das anwendbare Völkerrecht hinwegzusetzen.<sup>95</sup> Auch die Irak-Resolution 1546 zur Nachkriegsordnung ließ keine Absicht erkennen, vom anwendbaren humanitären Völkerrecht abzuweichen.<sup>96</sup>

Aus dem in der Charta definierten Verhältnis von Selbstverteidigungsrecht und Kapitel VII lässt sich noch ein weiterer für die Interpretation relevanter Gesichtspunkt ableiten, der sich aus der Charta als Rechtsrahmen für den *Sicherheitsrat* ergibt. Art. 51 UNO-Charta lässt Maßnahmen zur – auch kollektiven – Selbstverteidigung nur zu, „bis der Sicherheitsrat die zur Wahrung des Weltfriedens und der internationalen Sicherheit erforderlichen Maßnahmen getroffen hat.“ Wenn eine Resolution Art. 42 UNO-Charta nicht explizit als Grundlage benennt, so kann dies lediglich dem Umstand geschuldet sein, dass sich ein Mitglied des *Sicherheitsrats* für die Zukunft die Berufung auf das Selbstverteidigungsrechts offenhalten wollte.

Ein auf die so etablierte Vermutung der Rechtmäßigkeit gestütztes wichtiges Argument lässt sich für die Auslegung der Sicherheitsratsresolution 678 fruchtbar machen: Die Delegation der Entscheidung über den Einsatz militärischer Gewalt an einzelne Mitglieder, auf die es hinauslief, wenn nicht der *Sicherheitsrat* selbst über die Folgen aus der Verletzung des Waffenstillstandes entschied, wäre mit dem Entscheidungsmonopol des *Sicherheitsrats* unvereinbar.<sup>97</sup>

## **2. BEDINGUNGEN DES ZUSTANDEKOMMENS VON SICHERHEITSRATSRESOLUTIONEN**

Nicht nur beeinflusst demnach die *UNO-Charta* als Rechtsrahmen die Auslegung von Sicherheitsratsresolutionen, auch die tatsächlichen Umstände des Zustandekommens der Resolutionen innerhalb der *Vereinten Nationen* sind zu beachten. Der Versuch, den vorbereitenden Arbeiten und Umständen des Zustandekommens einer Resolution ein größeres Gewicht zukommen zu lassen als nach Art. 32 WVK vorgesehen, folgt durchaus einem praktischen Bedürfnis. Der Resolutionswortlaut ist oft wenig belastbar. Grund dafür ist, dass die Bedingungen des Zustandekommens von Resolutionen im *Sicherheitsrat* als Organ der *Vereinten Nationen* sich wesentlich von dem Verfahren unterscheiden, das zu einem völkerrechtlichen Vertrag führt. Der *Sicherheitsrat* ist ein politisches Organ, dessen

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<sup>95</sup> Orakhelashvili (Fn. 42), S. 169.

<sup>96</sup> Orakhelashvili (Fn. 42), S. 173.

<sup>97</sup> Vgl. Kolb (Fn. 6), S. 258.



Tätigkeit von Gesetzmäßigkeiten der Diplomatie geprägt sind. Die Resolutionen kommen oft unter hohem zeitlichen und politischem Einigungsdruck zustande und sollen Handlungsfähigkeit demonstrieren. Sie stützen sich häufig auf Berichte des *Generalsekretärs*. Es gibt aber wenig Input vom *UNO-Sekretariat* einschließlich des *Office of the Legal Counsel*.

Ein standardisiertes Verfahren, das die Qualität und Konsistenz der Formulierungen sicherstellen würde, existiert nicht. In der Regel ergreift eine Delegation die Initiative und erarbeitet einen ersten Entwurf. Diese Delegation behält – als „penholder“ – dann zunächst die Kontrolle über das weitere Verfahren. Der Text wird als informeller Text mit den anderen Vertretungen der Mitglieder diskutiert. Sodann wird der Text allen anderen Mitgliedern des *Sicherheitsrats* zur Verfügung gestellt und Absatz für Absatz diskutiert, unter den Ständigen Vertretern in informellen Beratungen oder in inoffiziellen gemeinsamen Sitzungen. Erst danach wird der Text als offizielles Dokument des *Sicherheitsrats* zirkuliert, zuerst „in blue“, einer noch nicht vollständig finalisierten Fassung, entweder durch einen Sponsor oder mehrere Co-Sponsoren, oder aber durch den *Präsidenten des Sicherheitsrats*.<sup>98</sup>

Daraus folgt, dass die Erwartungen an Stabilität und Berechenbarkeit, die an eine wortlautorientierte Auslegung geknüpft werden, zu optimistisch sind. Wegen des besonderen Handlungsdrucks können nicht alle Gesichtspunkte und Eventualitäten berücksichtigt werden. Da Sicherheitsratsresolutionen für gewöhnlich nicht besonders detailliert sind, kann es sich als notwendig erweisen, im Wege der Auslegung bestimmte implizite Annahmen für nicht bedachte Situationen auszumachen.<sup>99</sup> Zu beachten ist auch, dass Sicherheitsratsresolutionen nicht nur Rechtspflichten festlegen oder Autorisierungen aussprechen, sondern Regierungen auch zur politischen Rechtfertigung ihres Verhaltens sowohl gegenüber der Weltöffentlichkeit als auch gegenüber der eigenen Bevölkerung dienen. Die Mitglieder des Sicherheitsrats gestehen sich deshalb unter Umständen in einem „agreement to disagree“ gegenseitig Formelkompromisse zu. Das Phänomen, das

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<sup>98</sup> S. zu den Arbeitsmethoden des *Sicherheitsrats*, *Sievers/Daws*, *The Procedure of the UN Security Council*, 4. Aufl., 2014, S. 243 ff.; *Security Council Report*, *Security Council Working Methods. A Tale of Two Councils?*, März 2014, <http://www.securitycouncilreport.org/special-research-report/security-council-working-methods-a-tale-of-two-councils.php> (geprüft am 30.8.2016).

<sup>99</sup> Ausgangspunkt auf anderer Grundlage auch für *Papastavridis* (Fn. 2), S. 101.

*Henry Kissinger* allgemein als „constructive ambiguity“ bezeichnet hat,<sup>100</sup> ist im *Sicherheitsrat* also Ausdruck der politischen Realität.<sup>101</sup>

Eine besondere „constructive ambiguity“ wurde auch im Fall der Resolution 2249 (2015) festgestellt.<sup>102</sup> Im fünften Absatz des operativen Teils der Resolution fordert der *Sicherheitsrat* die Mitgliedstaaten, „die dazu in der Lage sind, auf, unter Einhaltung des Völkerrechts, insbesondere der Charta der Vereinten Nationen sowie der internationalen Menschenrechtsnormen, des Flüchtlingsvölkerrechts und des humanitären Völkerrechts, in dem unter der Kontrolle des ISIL, auch bekannt als Daesh, stehenden Gebiet in *Syrien* und *Irak* alle notwendigen Maßnahmen zu ergreifen und ihre Anstrengungen zu verstärken und zu koordinieren, um näher definierte terroristische Handlungen zu verhüten und zu unterbinden, ...“. Derartige Formulierungen sind also nicht ungewöhnlich.<sup>103</sup> Die Zweideutigkeit liegt hier darin, dass unklar ist, ob mit dem Verweis auf die „Einhaltung des Völkerrechts“ auch die Grenzen des Selbstverteidigungsrechts gemeint sind, die Resolution als gerade keine darüber hinausgehende Autorisierung des Einsatzes militärischer Gewalt enthält. Angesichts der bei der Auslegung von potentiellen Autorisierungen gebotenen Zurückhaltung wäre hier die Annahme einer Autorisierung durchaus problematisch.

Der Natur- und Völkerrechtler *Emer de Vattel* sah in Fällen des Betrugs und der Doppelzüngigkeit den Grundsatz des guten Glaubens verletzt, wenn Verträge absichtlich zweideutig formuliert werden, um sodann die Gelegenheit zur Deutelei und die andere Vertragsparteien zu überlisten.<sup>104</sup> Bedauerlicherweise lassen sich

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<sup>100</sup> Jedenfalls wird Kissinger dieses Zitat zugeordnet, s. *Keller, Mitt and Bibi: Diplomacy as Demolition Derby*, *The New York Times* v. 12.9.2012.

<sup>101</sup> Security Council Report, Security Council Action Under Chapter VII. Myths and Realities (geprüft am 30.8.2016), S. 6.

<sup>102</sup> *Akande/Milanović*, The Constructive Ambiguity of the Security Council's ISIS Resolution, <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> (geprüft am 30.8.2016).

<sup>103</sup> So auch *Hilpold*, The fight against terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?, *Indian Journal of International Law* 55 (2015) 4, S. 535 (539).

<sup>104</sup> *Vattel*, *Le Droit des Gens Ou Principes de la Loi Naturelle. Appliqués à la conduite et aux affaires des Nations et des Souverains* (1758), 1916, Ch. XVII, S. 460–461: „Les Conjonctures varient, & produisent de nouvelles espèces de cas, qui ne peuvent être ramenés aux termes du Traité, ou de la Loi, que par des inductions tirées des vues générales des Contractans, ou du Législateur. Il se présente des contradictions, des incompatibilités, réelles ou apparentes, entre diverses dispositions ; il est question de les concilier, de marquer le parti qu'il faut prendre. Mais c'est bien pis, si l'on considère, que la fraude cherche à mettre à profit même l'imperfection du langage ; que les hommes jettent à dessein de l'obscurité, de l'ambiguïté dans leurs Traités, pour se ménager un prétexte de les éluder dans l'occasion. Il est donc nécessaire d'établir des Règles, fondées sur la raison & autorisées

diese Schwierigkeiten mit der Wortlautauslegung nur zum Teil durch eine Berücksichtigung der Umstände des Zustandekommens kompensieren, ist doch angesichts der Verfahrensweise, die zu einer Resolution führt, ein Großteil der Verhandlungsgeschichte der Öffentlichkeit nicht zugänglich.<sup>105</sup> Nach dem Ende des Kalten Krieges wurde offenkundig, dass die Zunahme der Aktivitäten und die wachsende Bedeutung des *Sicherheitsrats* im Widerspruch zu den angewandten Verfahren und Arbeitsmethoden standen. Der amerikanische Völkerrechtler *Michael Reisman* formulierte: „[A]s the Council has become more effective and powerful, it has become more secretive“.<sup>106</sup> Die Arbeitsmethoden („working methods“) des Sicherheitsrats sind seither einem ständigen Wandel unterworfen und gerade die Verbesserung der Transparenz ist seit den 1990er Jahren Gegenstand verschiedener Bemühungen.<sup>107</sup> Zuletzt fand am 19. Juli 2016 auf eine Initiative der japanischen Präsidentschaft eine Debatte über die Arbeitsmethoden des Sicherheitsrats statt. Die dort diskutierte Erklärung des Präsidenten zu den Arbeitsmethoden vom Oktober 2015 nahm die Anstrengungen der *Informal Working Group on Documentation and other Procedural Questions (IWG)* zur Verbesserung der Transparenz, einschließlich einer regelmäßigen Unterrichtung interessierter UNO-Mitgliedstaaten durch den Vorsitz in Abstimmung mit den Mitgliedern des Sicherheitsrats zur Kenntnis und forderte die *IWG* zu weiteren Fortschritten in diese Richtung auf.<sup>108</sup> Daran, dass die Entstehungsgeschichte von Sicherheitsratsresolutionen nur unvollständig dokumentiert ist, hat sich bislang aber wenig geändert.

### 3. ABGELEITETE SPRACHE ANLEHNUNG AN DIE SPRACHE DER CHARTA

Der derivative Charakter von Sicherheitsratsresolutionen manifestiert sich nicht nur darin, dass die Interpretation den Rechtsrahmen berücksichtigen muss, den die Charta-Ordnung aufstellt. Auch die Sprache der Resolutionen ist eine abgeleitete Sprache. Sie nimmt explizit Bezug auf die Formulierungen in der Charta. Entfernt

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par la Loi Naturelle, capables de répandre la lumière sur ce qui est obscur, de déterminer ce qui est incertain, & de frustrer l'attente d'un Contractant de mauvaise-foi.“ Der Grundsatz des guten Glaubens hat Eingang sowohl in Art. 31 Abs. 1 WVK als auch in Art. 2 Nr. 2 UNO-Charta gefunden.

<sup>105</sup> *Wood* (Fn. 2), S. 80–82.

<sup>106</sup> *Reisman*, *The Constitutional Crisis in the United Nations*, *American Journal of International Law* 87 (1993) 1, S. 83 (85).

<sup>107</sup> *Fassbender*, *The Role for Human Rights in the Decision-making Process of the Security Council*, in: ders. (Hrsg.), *Securing Human Rights? Achievements and Challenges of the UN Security Council*, 2011, S. 74 (86 ff.). S. etwa *United Nations Security Council, Note by the President of the Security Council*, 26 July 2010, UN Dok. S/2010/507.

<sup>108</sup> UN Dok. S/2015/59.

sich die Sprache einer Resolution zu weit von der Charta-Sprache, wird es schwieriger für die Resolution, als rechtsverbindlich akzeptiert zu werden.<sup>109</sup>

Wichtigstes Beispiel dafür ist, dass Zweifel an der Bindungswirkung einer Resolution begründet sind, wenn die fragliche Formulierung nicht den Wortlaut von Art. 25 UNO-Charta („accept and carry out the decisions of the Security Council“) aufgreift und statt des Verbs „decide“ eine andere Wendung wie „urge“ oder „endorse“ gebraucht. Die gewöhnliche Bedeutung oder der allgemeine Sprachgebrauch hilft hier wenig weiter. „Endorse“ kann danach so viel bedeuten wie „to support“, aber auch „to approve“ oder eben auch „give permission“.<sup>110</sup>

#### 4. SERIELLE PRAXIS DES SICHERHEITSRATS

Einen Unterschied zu völkerrechtlichen Verträgen bildet der Umstand, dass Sicherheitsratsresolutionen oft im Zusammenhang einer Serie von Resolutionen auszulegen sind.<sup>111</sup> Schon das *Namibia*-Gutachten von 1971 hat darauf hingewiesen,<sup>112</sup> dass einzelne Resolutionen im Zusammenhang eines ganzen Clusters von zum selben Thema ergangenen Resolutionen auszulegen sind. Bei Verträgen dagegen kommt es nach Art. 31 Abs. 3 WVK unter anderem auf spätere Übereinkünfte auf der Grundlage und die spätere Übung bei der Anwendung des auszulegenden Vertrags an. Teil einer Serie ist etwa die im dritten Absatz der Präambel zu Sicherheitsratsresolution 2249 (2015) formulierte Bekräftigung, dass der Terrorismus in allen seinen Arten und Erscheinungsformen eine der schwersten Bedrohungen des Weltfriedens und der internationalen Sicherheit darstellt, ist Teil einer langen Reihe von Sicherheitsratsresolutionen, die dem Terrorismus gewidmet sind.<sup>113</sup> Der *Sicherheitsrat* stellt im Folgeabsatz zudem fest, dass die vom IS ausgehende Bedrohung des Weltfriedens und der Sicherheit weltweit und beispiellos ist. Aus dem Umstand, dass sich diese Aussagen in der Präambel finden, und auch aus der erörterten Regelungsstruktur der Charta folgt allerdings, dass sie wenig für die Fortentwicklung des Selbstverteidigungsrechts gegenüber nichtstaatlichen

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<sup>109</sup> Wood (Fn. 89), 20:45.

<sup>110</sup> Security Council Report (Fn. 101), S. 35, Endnote 20.

<sup>111</sup> Wood (Fn. 2), S. 87.

<sup>112</sup> IGH, *Namibia*-Gutachten (Fn. 33), § 108: „Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and a cumulative effect.“

<sup>113</sup> S. die Website des *Security Council Counter-Terrorism Committee*, <http://www.un.org/en/sc/ctc/resources/res-sc.html> (geprüft am 30.8.2016).

Akteuren hergeben. Die Präambel gehört zwar zum Wortlaut der Resolution und kann hilfreich für die Auslegung sein, vor allem zur Ermittlung von Sinn und Zweck. Vorsicht ist aber angebracht, denn oft ist die Präambel nur der Abladeplatz für Vorschläge, die als operative Paragraphen nicht akzeptabel waren.<sup>114</sup> Die zitierte Aussage zum Terrorismus als Bedrohung des Weltfriedens in der Resolution 2249 bezieht sich an dieser Stelle auf die Praxis, in der Präambel „eine Bedrohung oder ein[en] Bruch des Friedens oder eine Angriffshandlung“ nach Art. 39 UNO-Charta festzustellen. Art. 51 UNO-Charta setzt dagegen einen „bewaffneten Angriff“ voraus;<sup>115</sup> hier erweist sich also die serielle Praxis als für die Auslegung entscheidend.

Aber auch über die Grenzen einer bestimmten Situation und Thematik hinweg lassen sich einzelne Formulierungen in Sicherheitsratsresolutionen nur aus der Serie von Formulierungen heraus verstehen und interpretieren, die in ähnlichen Situationen gefunden wurden. So hat sich etwa für eine Autorisierung des Einsatzes militärischer Gewalt ein Baustein etabliert, der sich aus drei Elementen zusammensetzt. Soll eine derartige Autorisierung klar und rechtssicher formuliert werden, so muss sie erstens gemäß Art. 39 UNO-Charta das Vorliegen einer Bedrohung oder eines Bruchs des Friedens oder eine Angriffshandlung feststellen, zweitens die Formulierung „acting under Chapter VII“ enthalten oder sich auf einen konkreten Charta-Artikel aus Kapitel VII beziehen und drittens das Verb „decides“ verwenden.<sup>116</sup>

Die – teilweise ausgeprägte – modulare Spezialgrammatik des Sicherheitsrats ist also einerseits Ergebnis seiner Praxis insbesondere seit 1990, andererseits aber – wie gezeigt – durch die Sprache der Charta selbst geprägt. Die „gewöhnliche Bedeutung“ ist hier also etwas anderes als bei einem völkerrechtlichen Vertrag. Das ist etwa auch für die Auslegung von Resolution 2249 (2015) relevant: Das dort im fünften Absatz des operativen Teils verwandte Verb „auffordern“ („to call upon“) wurde etwa in einem Gutachten des Wissenschaftlichen Dienstes des Bundestags

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<sup>114</sup> Wood (Fn. 2), S. 87: „dumping ground for proposals that are not acceptable in the operative paragraphs“; Kolb (Fn. 6), S. 259: „poubelle de luxe“.

<sup>115</sup> Finke, Von Schrotflinten und dünnem Eis – Darf sich Deutschland an einem Militäreinsatz in Syrien beteiligen oder nicht?, <http://www.juwiss.de/85-2015/> (geprüft am 30.8.2016).

<sup>116</sup> Wood (Fn. 2), S. 82; Security Council Report (Fn. 101), S. 4; Hilpold (Fn. 103), S. 541. S. auch Orakhelashvili (Fn. 42), S. 162.

als Ermächtigung eingeordnet.<sup>117</sup> Umgangssprachlich oder nach der gewöhnlichen Bedeutung könnte man in einer Aufforderung in der Tat sogar mehr sehen als eine bloße Autorisierung. Anhand der modularen Grammatik des Sicherheitsrats ist aber die Deutung naheliegend, dass eben keine rechtsverbindliche „decision“ über die Autorisierung des Einsatzes militärischer Gewalt getroffen werden sollte.

Ein weiteres Beispiel für die Spezialgrammatik ist die erstmals in Resolution 678 (1990) zu findende Formulierung „all necessary means“ mit der auch der Einsatz militärischer Gewalt autorisiert wird.<sup>118</sup> Diese Grammatik ist in gewissem Umfang modular, statt „all necessary means“ können etwa auch die Wendungen „all necessary measures“ oder „all necessary action“ gebraucht werden. Aber gerade der Blick auf die serielle Praxis offenbart etwa die Irak-Resolution 1441 (2002) als Gegenbeispiel, denn dort wird nur mit „ernsthaften Konsequenzen“ („serious consequences“) gedroht.<sup>119</sup>

Auf der Website des *Sicherheitsrats* findet sich ein „Repertoire“ der Praxis des *Sicherheitsrats*, das der Charta-Gliederung in Kapitel und Artikel folgt und so Artikel für Artikel über die Aufschluss über die jeweilige modulare Grammatik des *Sicherheitsrats* geben kann.<sup>120</sup>

## VI. FAZIT

Damit zeigt sich, dass die Auslegungsregeln des WVK-Regimes als Teil der Universalgrammatik des Völkerrechts flexibel genug sind, um – ohne grundlegende Änderungen in der Herangehensweise – auch auf Sicherheitsratsresolutionen angewandt zu werden. Besonderheiten ergeben sich allerdings aus dem derivativen Charakter von Sicherheitsresolutionen als Sekundärrecht in Form von Vermutungsregeln zugunsten der Rechtmäßigkeit und aus der seriellen Praxis des *Sicherheitsrats*. Vermutungsregeln haben durchaus das Potential, den Rechtfertigungszwang für den *Sicherheitsrat* zu erhöhen. Will der *Sicherheitsrat* den Mitgliedstaaten Einschränkungen von Menschenrechten verpflichtend vorschreiben, so ist ihm das grundsätzlich nicht verwehrt. Allerdings muss er entsprechende

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<sup>117</sup> Wissenschaftliche Dienste des Deutschen Bundestags, Sachstand: Staatliche Selbstverteidigung gegen Terroristen. Völkerrechtliche Bewertung der Terroranschläge von Paris vom 13. November 2015, 2015, WD 2 - 3000 - 203/15, S. 14.

<sup>118</sup> *Papastavridis* (Fn. 2), S. 101.

<sup>119</sup> *Orakhelashvili* (Fn. 42), S. 163 m.w.N.

<sup>120</sup> Repertoire of the Practice of the Security Council, <http://www.un.org/en/sc/repertoire/> (geprüft am 30.8.2016).

Verpflichtungen der Mitgliedstaaten explizit formulieren und unterliegt damit einem gesteigerten Rechtfertigungsdruck. Darin kann man eine sanfte Konstitutionalisierung der Praxis des *Sicherheitsrats* sehen, die in diesem Fall extern vom *EGMR* bewirkt wird, sich aber mittelbar auch auf die – oft als Verfassung bezeichnete<sup>121</sup> – UNO-Charta bezieht. Auf diese Weise kommt der UNO-Charta als rechtlichem Rahmen für das Handeln des *Sicherheitsrats* und damit dem derivativen Charakter von Sicherheitsratsresolutionen verstärkt Bedeutung zu. Die ist eine Entwicklung, die sich nach 1990 erst allmählich ergeben hat. Damit wird zugleich deutlich, dass sich die „Auslegungsregeln“ in der Zeit verändern. Dass die Interpretationspraxis insgesamt nur bedingt stabil ist,<sup>122</sup> zeigt sich zudem darin, dass die Vermutungsregeln zumindest potentiell auf die Formulierungspraxis des *Sicherheitsrats* bzw. der die Formulierungsaufgabe wahrnehmenden *penholder* zurückwirkt. Diese potentielle Reflexivität ist wiederum eine Besonderheit von Sicherheitsratsresolutionen als seriellen Akten des Kollektivorgans *Sicherheitsrat*. Bei völkerrechtlichen Verträgen ist eine vergleichbare Responsivität der Rechtsetzung auch potentiell nicht zu erwarten.

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<sup>121</sup> Grundlegend *Fassbender*, *The United Nations Charter as the Constitution of the International Community*, 2009.

<sup>122</sup> Instruktiv zu dieser Problematik *Venzke*, *Is Interpretation in International Law a Game?*, in: Bianchi u.a. (Hrsg.), *Interpretation in International Law*, 2015, S. 352 m.w.N.

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