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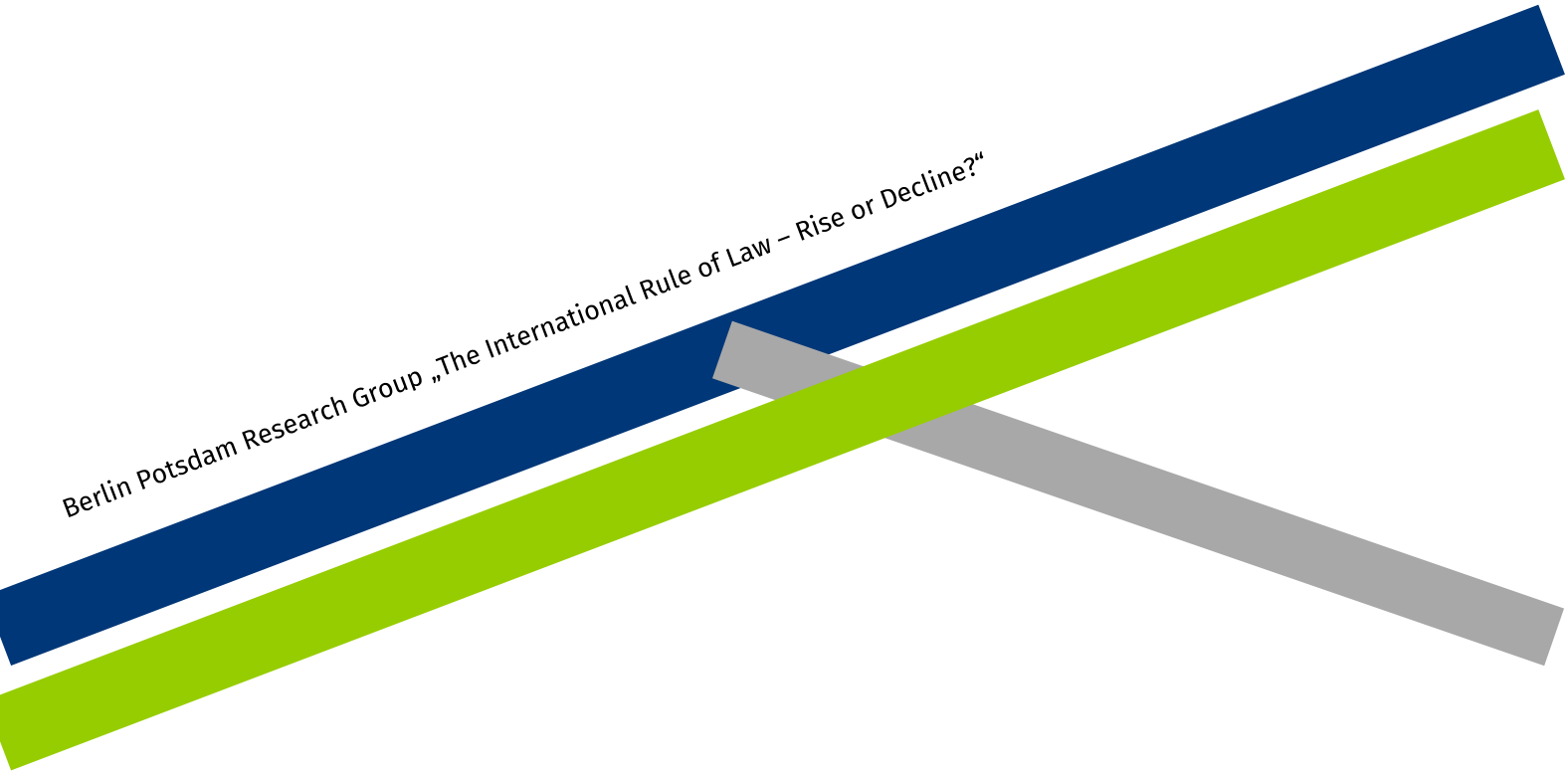
Heike Krieger & Georg Nolte

The International Rule of Law – Rise or Decline?

Points of Departure



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[*Please note: This is a work in progress.*]

The International Rule of Law – Rise or Decline? – Points of Departure*

Heike Krieger[1] *& Georg Nolte*[2]

Abstract:

The paper undertakes a preliminary assessment of current developments of international law for the purpose of mapping the ground for a larger research project. The research project pursues the goal of determining whether public international law, as it has developed since the end of the Cold War, is continuing its progressive move towards a more human-rights- and multi-actor-oriented order, or whether we are seeing a renewed emphasis of more classical elements of international law. In this context the term "international rule of law" is chosen to designate the more recent and "thicker" understanding of international law. The paper discusses how it can be determined whether this form of international law continues to unfold, and whether we are witnessing challenges to this order which could give rise to more fundamental reassessments.

* We thank the members of the Berlin Potsdam Research Group and the participants of its inaugural conference (www.kfg-intlaw.de) for their valuable comments on earlier versions of the paper. This is a work in progress.

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Contents:

1. Introduction

In 1950, Josef Kunz wrote about the "Swing of the pendulum". He argued that a period of overestimating international law during the League of Nations years was followed by a period of underestimating it. Kunz described the 1920s Geneva spirit where "legal arguments were at the core of every debate" and "literature on international law was greatly influenced by this general trend of optimism" – a development that later led to a wide discrepancy between the 1930s facts on the ground and the approach of parts of academic writings:

> "They had, as a first effect, the going to extremes, especially by a literature of wishful thinking. Fancy interpretations of the Kellogg Pact were put forward; the more 'collective security' was shown to be non-existent, the more the utopian writers emphasized it. The more the facts were in contradiction to their writings, the more lyrical they grew. The confusion between lex lata and lex ferenda, the mistaking of often contradictory trends and tendencies for new rules of international law already established … grew worse".[3]

With the Charter, according to Kunz, the pendulum swung to underestimating international law, as shown by the Charter itself, but in particular by the contemporary diplomatic and political practice:

> "The oratory contrasts strikingly with that of Geneva. If the most undiplomatic language, bitterness, invectives and political propaganda constitute realism, then there is plenty of realism."[4]

We suspect that it is again time, due to signs of crisis in the development of international law and international relations, to ask whether we are overestimating or underestimating international law. Of course, the development of international law, and that of international relations more generally, often takes place in the form of crises.[5] But we may now be seeing a crisis of unusual proportions which could require a reassessment of the state and role of international law.[6]

2. Generally held expectations and aspirations

The metaphorical question of "rise or decline?" evokes Edward Gibbon's "Decline and Fall of the Roman Empire". But we are neither historians nor do we want to be so pretentious as to predict the future. We are rather interested in reassessing the state and development of international law in our time. This involves asking whether there is reason to question certain widely-held assumptions about its general development, be they generally held (factual) expectations and (normative) aspirations.

Perhaps the most important expectation is the well-known image of an increasing inter-connectedness in a globalizing world "rendering obsolete the old Westphalian world of Great

[3] J. Kunz, 'Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 AJIL 135, 137 et seq.

[4] Ibid, 139.

[5] E.g. M. Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments, Cambridge 2013.

[6] It is, of course, always necessary to remain very self-critical regarding extraordinary claims, and not to fall into the trap of the contemporaries who often overestimate the significance of their own times and selves.

Power rivalries".[7] This expectation, or the possible reversal of this expectation, exerts some influence on the possibility or desirability of regulation in certain areas, in particular in economic relations or in cyberspace.[8] But today, we are seeing powerful political movements which question important forms of economic globalisa tion, including its legal dimension (e.g. WTO, TTIP, TPP). Such movements are having an effect on the actual working and further development of international legal regulation.

The most significant example for an aspiration is the notion of progress,[9] a notion which is enshrined in the Preamble ("to promote social progress and better standards of life in larger progress") and in Article 13 of the UN Charter ("progressive development of international law"), and which presupposes the existence of a shared common understanding of the direction international law will and should take. Whereas we do not see significant doubts about the notion of progress as such, the question of how to prioritize and distribute political and economic benefits (and thus "progress") in certain areas and under present conditions have moved to the forefront.[10]

Generally held expectations and aspirations inform theoretical approaches to international law. After the end of the Cold War a liberal view on the direction history is taking and regarding a narrow purpose of the State became a generally held expectation, and thereby assumed a hegemonic role.[11] Some contemporary theories of international law are closely linked to such a background understanding of the processes of legalization and judicialization of international relations which accelerated in the 1990s. The evolving understanding of basic legal concepts, such as international community, sovereignty, right to democratic governance, universal human rights standards, and the conception of the role of NGOs in international law, rely on expectations concerning a continuing process of legalization and they tend to see international law as developing in a specific direction. Such concepts have also been fed by a "global governance frame" which replaced a more anarchical view of international relations.[12] The lasting impact of such theories depends, at least partly, on the viability of the underlying background assumptions.

Generally held expectations and aspirations are not merely academic but of immense practical importance, since they have a direct impact on the legal practices of the pertinent actors. States usually negotiate treaties only when they expect that legally binding agreement between them can be reached and will be implemented. International organisations and States consider whether formal legal regulation is more preferable than informal coordination, including with non-state actors. Courts will adopt certain interpretations on the assumption that certain expectations will be fulfilled. The assertion of a "trend" often plays an important role in international legal argument

[7] Hurrell, International Relations and the Global Rule of Law: Some Reflections on the Long-run Picture, unpublished_manuscript, p. 1; on such an expectation: E. Benvenisti, 'Sovereigns as Trustees of Humanity', (2013) 107 American Journal of International Law 295.

[8] On the interrelatedness between assumptions about a constantly evolving process of globalization and the structural development of international law see: Benvenisti (note 7) , at 298 et seq.; J. Trachtman, The Future of International Law, Cambridge 2013, chapter 4/chapter 12.

[9] See e.g. T. Altwicker and O. Diggelman, 'How is "Progress" Constructed in International Legal Scholarship?' (2014) 25 EJIL 425; T. Skouteris, The Notion of Progress in International Law Discourse, The Hague 2009.

[10] Hurrell, note 7, p. 2.

[11] Hurrell, note 7, p. 3; see B. Simma/A. Paulus, ‚The International Community': Facing the challenges of globalization, 9 (1998) EJIL 266, at 276: 'Globalization' seems to call for a 'neo-liberal' theory of international law leading away from institution-building towards a belief in solutions reached without regulation by international authorities'.

[12] Hurrell, note 7, p 3.

and decision-making when the emergence or the change of rules is alleged, in particular in view of assumptions about the emergence of community interests or values within the international legal order.[13] Non-State actors prioritize their activities on the basis of assumptions of future developments, or of the continuation of a certain situation or relationship, as in the case of the envisaged conclusion of regional economic integration agreements.

3. Rise or decline "of international law"

Asking about a rise or decline "of international law" contains a contestable assertion regarding international law, which is whether it makes sense to raise the general question of the development of "international law", *as such*, as if international law could be a unified object of observation. To ask this question runs counter to modern approaches which break international law down into various elements, or regimes. Theories of fragmentation tend to deconstruct the idea that there is a coherent system of international law[14] by focussing their attention on an analysis of specific regimes and the interaction of these regimes with their respective non-legal "contexts". In fact, simple common sense suggests that a "rise" in one area, for example security cooperation against terrorism, may happen simultaneously with, or even go hand in hand with, a "decline" in another area, for example human rights or world trade.

There is, however, also the reverse risk not to see the wood for the trees. The legal adviser who articulates the opposition of the South African government against a decision of the International Criminal Court may not think that she has something in common with the legal adviser who formulates the justification of the Russian government for the purported annexation of Crimea. The connection between the two could, for example, be a more general increase of self-assertiveness and a corresponding relative loss of belief in the long-term beneficial effects of regulation at the universal level.

A variant of the contestable assertion which our question implies lies in assuming that international law indeed constitutes a more or less coherent legal system with its values, institutions, and decisions. This perspective is being challenged by pluralist accounts of international law.[15] We suspect that such challenges are not as fundamental as they may appear. It may be possible to reconcile them with an approach which takes the self-description of the international legal system seriously.

Thus, while it may be easier to apply the "rise or decline?" metaphor to specific developments in international law, more comprehensive assessments are also possible and desirable. A simultaneous "rise" in international environmental law and a "decline" regarding the rules on the use of force, for example, could give us reason to ask whether this tells us something about international law more comprehensively understood. We must, however, be careful with any kind of broad linear narrative. A linear progress narrative is as much an oversimplification as a linear

[13] ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, 3; Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, 63, at 76 para. 47; at 85 para. 75; S. Villalpando, The legal dimension of the international community: How community interests are protected in international law, 21 (2010) EJIL 387, at 394/407.

[14] But see M. Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' 13 April 2006, A/CN.4/L.682, esp. paras. 481 et seqq.

[15] E.g. Krisch.

decline narrative would be. International law may be temporarily in a slump which could be more easily overcome than it appears at any particular moment.

4. Situating "Rise or Decline": the "International Rule of Law"

Whether contemporary international law is on the "rise" or in "decline" can only be determined if it is situated within a larger temporal and substantive context. In order to characterize contemporary (public) international law, as it works in its context, we are using the term "international rule of law".[16] Why?

More or less since the Peace of Westphalia international law has developed as a European-centred, primarily inter-state, system of law with specific subjects, sources, and basic rules. In the course of the 20th century the system was further developed by the League of Nations, the United Nations Charter and various other rules, principles and institutions. Whereas States and other relevant actors, as well as academic authors have conceived this legal system in different ways, widespread agreement about its basic features developed among the relevant actors during the Cold War, despite important ideological differences.[17] By the end of this phase, international law had to some extent transcended its originally European, or northern, character as a result of the process of decolonization. We call international law as it developed until about 1990 "classical Charter international law" – although the expression "classical international law" is often used for the pre-Charter or the pre-League of Nations international law.

The quarter century which has elapsed since the end of the Cold War has seen significant developments which, at a minimum, have added a layer to international law.[18] Suffice it to mention the expansive practice of the Security Council, the conclusion of certain key multilateral treaties (e.g. FCCC, WTO), the widening and deepening of the legal protection of the individual (increase in human rights adjudication, ICC), an explosion of international adjudicatory bodies and adjudication more generally,[19] and a perception that many new actors, in addition to States and International Organisations, have entered the scene. On a more general level, a development occurred which consisted primarily in a higher degree of institutionalisation at the international level, a tighter network of rules in many areas, and a recognition of "thicker" human rights standards, including in areas where the applicability of human rights had been contested, as in the field of economic and social rights or with certain aspects of the extraterritorial application of human rights.

Such developments have raised the question whether international law has even changed its character. As much has been suggested by different theoretical approaches, coming not only from international lawyers,[20] but also from political scientists,[21] philosophers[22], and other social

[16] See e.g. A. Watts, 'The International Rule of Law' (1993) 36 GYIL34; J. Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3 ff.; S.Yee, Towards and International Law of Co-Progressiveness, Leiden 2004, chapter 3; B. Tamanaha, On the Rule of Law: History, Politics, Theory, Cambridge 2004; J. Waldron, 'The Rule of International Law' (2006) 30 Harvard Journal of Law & Public Policy 15.

[17] G. Tunkin, Das Völkerrecht der Gegenwart, Berlin 1963, 11 ff.

[18] The term can have many meanings, just as the term "rule of law" itself, see J. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547; S. Marks, 'The End of History? Reflection on Some International Legal Theses' (1997) 8 EJIL 449; Mutatis mutandis R. Jennings, International Law Reform and Progressive Development, in Liber Amicorum Seidl-Hohenveldern, Den Haag 1998, 325-337; see also W. Friedman, The Changing Structure of International Law, New York 1964.

[19] K. Alter, The New Terrain of International Law: Courts, Politics, Rights, Princeton 2014, esp ch 4.

[20] E.g. the debates on the fragmentation of international law, see M. Koskenniemi and Päivi Leino, 'Fragmentation of International Law: Postmodern Anxieties?' (2002) 15 Leiden Journal of International Law 553;

scientists. For our purposes and for the time being we merely assume that classical international law has made what may be called an "advance", or to put it more neutrally: a move, during the first two decades or so after the end of the Cold War.[23] We try to encapsulate this advance over the classical Charter international law, whose precise content may be debatable, by using the term "the international rule of law", instead of simply saying international law.

But is the choice of "1990" as the beginning of a new phase compelling, or does it simply represent a limited Germanocentric or a Eurocentric perspective?[24] It is true that, from a historical point of view, many developments which came to fruition in the 1990s have earlier roots, such as the human rights revolution, the development of environmental law, or the rise of China. But we submit that "1990" is ultimately the relatively best available point of reference. After all, many developments which had started before 1990 significantly manifested themselves in the international legal sphere only after that date.

The term "International Rule of Law" has many meanings, just as the term "rule of law" itself.[25] As we understand it here, the term is both open and restricted: It is open insofar as it invites to consider different aspects of modern developments, without however placing undue emphasis on any one of them. For example, the term "international rule of law" is often understood as referring to the question whether "the law" is actually "ruling" at the "international level".[26] Such a compliance-based understanding of the term focuses on adherence to the law and accountability.[27] Although compliance, or the lack thereof, has traditionally been perceived as being the Achilles' heel of international law, compliance has gained a particular importance in the past two decades or so as a means for assessing the state of international law. But this is only one of several aspects which may be relevant for assessing the state and direction of international law. Another aspect is the question of the "domestic analogy" in the sense of viewing international law, given its more

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on constitutionalization, see e.g. J. Klabbers/A. Peters/G. Ulfstein (eds.), The Constitutionalization of International Law, Cambridge 2009; on international legal pluralism, see A. Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 Indiana Journal of Global Legal Studies 621.

[21] See e.g. for the neo-institutionalist approach, R. Keohane, International Institutions and State Power, San Francisco/London 1989; J. Nye, Governance in a Globalizing World, Washington 2007; for the liberal theory of international relations, see e.g. A.M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503.

[22] See e.g. R. Dworkin, A new philosophy for international law, (2013) 41 Philosophy & Public Affairs 2–30; J. Rawls, The Law of Peoples: With the Idea of Public Reason Revisited, Cambridge (MA) 2001.

[23] See the 'Declaration of the High-level meeting of the General Assembly on the Rule of Law at the National and International Levels', 19 September 2012, A/67/L.1., recognizing several of these 'advances', such as the establishment of the WTO and the ICC.

[24] For an overview of alternative narratives, see e.g. D. Sachsenmaier, Global Perspective on Global History: Theories and Approaches in a Connected World, Cambridge 2011, esp. the introduction on 'Neglected Diversities'.

[25] See e.g. A. Watts, 'The International Rule of Law' (1993) 36 GYIL34; J. Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3 ff.; S.Yee, Towards and International Law of Co-Progressiveness, Leiden 2004, chapter 3; B. Tamanaha, On the Rule of Law: History, Politics, Theory, Cambridge 2004; J. Waldron, 'The Rule of International Law' (2006) 30 Harvard Journal of Law & Public Policy 15; R. McCorquodale, 'Defining the International Rule of Law: Defying gravity?', 65 (2016) ICLQ 277.

[26] See, e.g., the debate at the UN General Assembly's 6th committee on 'The Rule of Law at the National and International Levels' 68th session; a summary of the comments made by the States is available from http://www.un.org/en/ga/sixth/68/RuleOfLaw.shtml (accessed 11 January 2016).

[27] E.g. S/2004/616.

recent developments, through the lens of domestic standards of the rule of law and to ask whether it reflects, or should reflect, a "thick" or a "thin" version of "the rule of law".[28] In this perspective, the term "international rule of law" permits to conceive international law as a system which conforms to a certain standard, but it does not go so far as to claim stronger analogies with particular forms of state governance, as they are suggested, in particular, by constitutionalist approaches.

The designation of contemporary international law, as it has developed during the past 25 years, as "the international rule of law" is restricted insofar as we want to focus on the particular role of *legal* norms (rules and principles), in their interconnectivity as a system, as well as on the intrinsic value which law offers (*Eigenwert des Rechts*) for international relations in comparison to other normative orders.

5. "Rise or Decline" - Why now?

But why a more comprehensive assessment now, a quarter century after 1990? Certain indications suggest that an inquiry is timely.

a) Political developments

Some indications lie beyond the strictly legal sphere, but they constitute the political background which is likely to influence legal developments. Andrew Hurrell mentions three general developments: First, "the return of geopolitics", which is particularly visible in the case of the conflict in Syria (with its revival of the bipolar constellation, the involvement of regional powers, and ideological confrontation), but also in the cases of Crimea and the South China Sea.[29] Second, "the changing problem of legitimacy", referring to challenges for the current distribution of decision-making power in the international sphere. And third, "the shift of power away from the core western industrialized world".[30]

Specific features of these general developments are changes in economic conditions (e.g. rise of China, world financial crisis, evolution of a middle class in the global South, drop in oil prices), technological developments (e.g. cyber, clean energy, arms), political alliances (e.g. BRICS, rupture between NATO and Russia), domestic political conditions (e.g. blockade of US Congress, disintegrative tendencies in the EU, populist governments), and shifts in widespread beliefs (e.g. loss of faith in liberal economic policies, reassertion of nationalism, demands for transitional justice, public pressure to combat terrorism).

Some of those developments may be "normal", but it is certainly worth inquiring whether they may have an unusual effect on the international rule of law.

b) Systemically relevant disregard for international law

Systematic violations of international legal rules may be important indications for a challenge to, or a change of direction of, international law. Therefore, we should assess whether certain

[28] I. Hurd, 'The International Rule of Law: Law and the Limits of Politics' (2014) 28 Ethics and International Affairs 39 et seq.

[29] Hurrell, note 7, p. 6.

[30] Hurrell, note 7, pp. 6-8.

contemporary forms of violations are unusual in the sense that they call basic rules, or even the functioning of the system itself, into question.

Some say that the rules on the use of force, which are the basic rules in any legal system, have recently been violated at the international level to a degree which calls into question their further plausibility. Whereas violations of the prohibition on the use of force which occurred during the Cold War at least triggered significant legal debates in State practice, recent developments may suggest a disregard for international law which is systematically more relevant:[31]

Unilateral interventions and unilateral interpretations of UN Security Council resolutions in the cases of Kosovo, Iraq and Libya may have contributed to undermining the credibility not only of the intervening States, but may even have called into question the Charter system as a whole. The lack of a forceful UN General Assembly reaction to Russia's attempt to annex Crimea is another indication for a loss of normative certainty.[32] The long paralysis of the Security Council in the face of the armed conflict in Syria and in disregard of the "Responsibility to Protect" under the World Summit Outcome Document[33] questions the legitimacy of the Charter system. Outside the Charter rules, prohibitions under customary international law have also been weakened. State practice in relation to Libya and Syria suggests that States deviate from established understandings of the obligations in relation to the prohibition of the use of force and the right of self-defence, for example in view of the delivery of arms to Libyan and Syrian rebels.[34] The Paris terror attacks 2015 have finally brought the old question whether the state-centred *ius ad bellum* is fit to deal with challenges arising from violent non-state actors to the forefront. The mix of a perceived loss of credibility and legitimacy, a sometimes blatant disregard for some of the most fundamental rules of international law, as well as an apparent lack of capacity to reform the UN system of collective security, may all be indications for a decline, at least when compared to the role which the Security Council played in the 1990s.

More importantly, it may be that - leaving the case of Kosovo 1999 aside - the 2003 invasion of Iraq was not merely the exceptional breaking of the rules by a big power, but the beginning of a generally more liberal, or rather permissive, attitude towards the rules regarding this instrument of State power. The invasion and occupation of Crimea has been justified, in part, with reference to the case of Kosovo, and the debates among international lawyers about the legality of the different interventions in the civil wars in Iraq and Syria has not received much attention in State practice or in the general public.[35] It is of course necessary to bear in mind that the death of the rules on the use of force have on previous occasions been announced prematurely, and that those rules should

[31] For an alternative reading see, however, M. Hakimi/J. Katz Cogan, The two codes on the use of force, (2016) 27 EJIL 2016 257.

[32] UN Doc. A/RES/68/262 27, 27 March 2013; A. Zumach, Globales Chaos – Machtlose Uno, Zürich 2015, 109; Brazil, India, and South Africa have apparently abstained in the vote on the GA resolution on Crimea in reaction to perceived excesses of Western States during the Libyan intervention.

[33] A/RES/60/1, 24 October 2005, paras. 138 and 139.

[34] See e.g. T. Ruys, 'Of Arms, Funding, and Non-Lethal Assistance: Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 CJIL 13 ff; on the parallel case of Libya, see O. Corten and V. Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus in Bello' (2013) 18 Journal Conflict and Security Law 84.

[35] For instance, the Russian intervention in the Syrian civil war has not been challenged on legal grounds by any State participating in the UN Security Council debate of 30 September 2015, UN Doc. S/PV. 7527.

not too be easily be discarded.[36] At the same time certain structural developments, such as the coming into existence of a cyber-space or the difficulty to characterize attacks and to attribute them to States may have led to a more fundamental challenge for those rules.

c) Structural developments

Another significant development is structural in the sense of calling into question the role of international law as a necessary or useful framework for international relations and cooperation. Some are observing a "stagnation of international law" as States appear to be concluding less treaties than would be expected, and that they often prefer informal forms of cooperation which give them more flexibility.[37] If true, this tendency could entail significant advantages in terms of flexibility, the possibility of involving non-State actors, and of leaving room for democratic decision-making at the national level. On the other hand, such a tendency would also carry with it all the disadvantages of informalization, in particular the increase of hegemonic governance, decrease of legal accountability and a lack of legitimation through democratic procedures.

One possible consequence of a difficulty to conclude new treaties is the intensification of calling different existing treaties into question as not serving their purpose in our times. Fortunately, the challenging of the Geneva Conventions after 9/11 has led to an intense debate, in which national courts played an important role, and which resulted in a reappraisal and thus a re-legitimation of the Conventions. But it is unlikely that this example will repeat itself for most other treaties should they be challenged in a comparable way.

Mention should also be made of the crisis of customary international law, as a source of international law. A classical source, customary international law seems to be significantly more contested, both at the international and at the national level. At the international level the insecurity about the character and the interplay of its elements leave its authority affected. Moreover, it may be questioned whether customary international law can accommodate certain rapidly changing international developments, for instance in view of the impact which new technological developments might exert on international humanitarian law. At the national level, customary international law is sometimes called into question as a binding source of law,[38] and sometimes treated as inferior to national legal concepts, in particular because it might run counter to certain domestic legal standards of legality and legal security.

d) Contestations of a value-based international law

If contemporary international law is understood as a value-based system contestations of certain of its rules and principles can be perceived as being a symptom of a crisis of the international rule of law. However, the quality, or substance, of legal rules and principles depend on the eye of the

[36] T.M. Franck, 'Who Killed Art. 2 (4)? Or: Changing Norms Governing the Use of by States' (1970) 64 AJIL 809; M.J. Glennon, 'Why the Security Council Failed' (2003) Foreign Affairs, May/June issue.

[37] J. Pauwelyn/R. Wessel/J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 EJIL 733.

[38] See e.g. J.P. Kelly, 'The Twilight of Customary International Law' (2000) 40 VJIL 449; ECJ, Judgment of the Court of 16 June 1998 – A. Racke GmbH & Co. v. Hauptzollamt Mainz. – Case 162/96, para. 52 ("However, because of the complexity of the rules in question and the imprecision of some of its concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.").

beholder. Some think that the principal value of the current international legal order lies in the recognition of classical individual human rights, for others it is peace and security, still others emphasize duties of solidarity regarding collective goods, such as sustainable development or a healthy environment, not to forget those for whom – national or other – self-determination is a fundamental value. It is both true, but also too easy, to say that all these values are inherent in the international legal order and that they need to be pursued simultaneously. The question of priorities cannot be avoided.

We proceed from the widely-shared assumption that the process of legalization and judicialization which has accelerated in the 1990s has transformed international law from an emphasis on state-oriented principles and underdeveloped human rights obligations, towards a more value-based order which is operationally capable of protecting and serving the individual. The World Summit Outcome Document demonstrates that, in 2005, not only legal theorists but also States have proclaimed a global legal order in which universal values emphasizing the rights of individual persons are reinforced and certain common goods are protected, whereas sovereignty-related discourses had been moved to the background. Some authors have tried to describe this development by using notions, such as "cosmopolitan law"[39] "humanity's law"[40] "moralization", or "humanization"[41] of international law[42] relying, in particular, on a liberal human rights vision.

We try to capture this possible "moralization" of international law and international relations[43] by using the concept of legal values (instead of common interests/common goods). Indications for a decline of the international rule of law will accordingly lie in tendencies which produce a serious shift in the recognition and interpretation of universal value-based rules and principles which protect individual persons. Practices of torture and extrajudicial killings which are committed with a claim of right would be an obvious example and signal. Debates about exceptions to immunities in cases of grave human rights violations[44] as well as the "peace or justice" debate raise the question whether certain forms of "moralization" have really been generally accepted by the relevant actors. Again, perceptions of decline depend on the normative position of the observer. Since contestations may be part of norm internalisation,[45] or of norm creation, it is important to identify where contestations aim at furthering new global legal values, or a change of emphasis between different recognized global values, and where, in contrast, interpretative disputes lead to the dissolution of legal standards. Ultimately, the picture may not be very clear. The Kosovo intervention, or informal standard-setting in environmental law, may, for example, reflect a rise in a value-based approach which at the same time results in a decline of formal legal structures.

[39] M. Kaldor, 'Cosmopolitanism and Organized Violence' in S. Vertovec/R. Cohen (eds.), Conceiving Cosmopolitanism: Theory, Context, and Practice, Oxford 2002, 268.

[40] R. Teitel, Humanity's Law, Oxford 2011.

[41] T. Meron, 'The Humanization of International Law' (2006) 94 AJIL 239.

[42] Altwicker/Diggelmann (n 9).

[43] See e.g. K. Hutchins, 'The Possibility of Judgment: Moralizing and Theorizing in International Relations' (1992) 18 Review of International Studies 51; for a critical view, see D. Kennedy, The Dark Side of Virtue: Reassessing International Humanitarianism, Princeton 2005.

[44] H. Krieger, Between Evolution and Stagnation – Immunities in a Globalized World, (2004) 6 Goettingen Journal of International Law (2014) 2.

[45] See A. Wiener and U. Puettner, 'The Quality of Norms is What Actors Make of It' (2009) 5 JILIR 1, 7: '[N]orm contestation is a necessary component in raising the level of acceptance of norms'.

e) Institutional challenges

An institutional perspective can also identify significant developments.[46] The multiplication and expansive practices of international organizations and international courts has often been interpreted as proof for the maturing process of international law.[47] In particular, the judicial and quasi-judicial settlement of international disputes is often understood to be a symptom for the judicialization of the international order and an important element of the international rule of law.[48] However, the reluctance of states to accept the jurisdiction of international courts or to participate in their proceedings questions the proposition of a rise of international courts. Recent examples seem to suggest that States which are re-emphasizing their sovereignty are less likely to participate in judicial or arbitral proceedings.[49]

Even under the European Convention of Human Rights sovereignty-based conceptions are merged with arguments based on democratic values in order to reject human rights protection by an international court. Such arguments have most prominently been raised in the UK[50] but can also be found in France[51], Hungary, the Netherlands[52], Russia, the Scandinavian countries[53] and Turkey. Moreover, there are indications that an increase of the number of cases does not necessarily entail a strengthening of the role of international courts and therefore the international rule of law. Some disputes may even become more difficult to resolve if dealt with in international judicial or arbitral proceedings.[54] The development of the international rule of law by international courts will probably be impeded by the fact that in some areas, in particular in investment arbitration, ad hoc arbitral tribunals are unable to deliver a coherent and foreseeable jurisprudence.[55] The vigorous public debate in some European States over the legitimacy of the current system of investment protection reflects such concerns. If – for various reasons - States withdraw from international organizations, courts and tribunals, this may have repercussions on the character and authority of public international law as a whole and contribute to a decline of the international rule of law.

6. Methodological Questions

We are confronted with methodological challenges when we try to assess whether international law is “rising” or “declining”. How can we identify a crisis of the legal system and evaluate law’s

[46] The text under this subheading has been written together with Andreas Zimmermann.

[47] See for the impact of a judicialization of international law e.g. G. Biehler, Procedures in International Law, Berlin and Heidelberg 2008; for the role of international institutions in general, see J. Alvarez, International Institutions as Lawmakers, Oxford 2006.

[48] See Alter (n 19).

[49] PCA: South China Sea; ITLOS: Arctic Sunrise Proceedings; ICJ: Marshall Islands v. India); Y. Shany, Assessing the Effectiveness of International Courts, Oxford 2014, 31 et seqq. J. Tallberg/J. McCall Smith, ‘Dispute Settlement in World Politics: States, Supranational Prosecutors, and Compliance’ (2012) EJIR 1.

[50] B. Baade, Diskurswächter – Zur Rolle des EGMR im demokratisch-rechtsstaatlichen Entscheidungsprozess.

[51] Wachsmann, ‘Réflexions sur l’interprétation “globalisante” de la Convention européenne des droits de l’homme’, in: La conscience des droits. Mélanges en l’honneur de Jean-Paul Costa, Paris, 2011, 667.

[52] B. Oomen, ‘The application of socio-legal theories of legal pluralism to understanding theimplementation and integration of human rights law’ (2014) 4 European Journal of Human Rights 471.

[53] Lavapuro et al, ‘Rights-based constitutionalism in Finland and the development of pluralist constitutional review’ (2011) 9 International Journal of Constitutional Law 505.

[54] This may be true for certain cases before the ICJ (Georgia v. Russia (2008) and Croatia v. Serbia (1999-2014).

[55] S. Schill, ‘System-Building in Investment Treaty Arbitration and Lawmaking’ (2011) 12 German Law Journal 1083.

state and development? How do we recognize which symptoms and phenomena are relevant in this process? Against which standards do we assess the state of the law? How far can lawyers answer these questions on the basis of their methodological tools and how far is it advisable to turn to historians, political and other social scientists for help?

We think that classical legal methodology can contribute significantly to an analysis of the state and development of international law. Lawyers have always observed whether and how legal rules form, identified contestations and violations, and whether and how the law is treated in comparison to other forms of social organisation. And they have almost always felt responsible for giving overall assessments about the state of "the law"[56], even if such assessments may appear to be empirically incomplete or theoretically deficient. Whereas there are certainly limitations of intra-legal analysis, we do believe that such analysis is useful and serves a purpose which is difficult to replace.

a) Symptoms and Causes

Our hypothesis that we are faced with a significant crisis of the international legal system is based on (what may be) symptoms: in particular that there currently appears to be systemically relevant disregard for international law, or structural and institutional developments which challenge its integrity, as well as contestations of a value-based international law. Such symptoms do not, however, imply any strong assertion regarding the "real causes" for developments in international law.

It is at this point where, broadly speaking, lawyers and political scientists often pursue different agendas. Political scientists are mostly primarily and directly interested in "real causes". To take an historical example: the real cause for the end of the bipolar international order of the Cold War may have been the economic crisis of the Soviet Union, or the exhaustion of the belief in socialism, or some combination of the two. For operating lawyers, such causes may be relevant for their broader understanding of the international order, but they cannot directly integrate them into their analysis of the law. They rather tend to observe, in the first place, certain phenomena, or symptoms, by which a particular rule, or system of rules, is challenged or operates differently than it did before. They then try to deal with the different mode of operation of the system by applying certain secondary rules of that system ("sources"), in their management and the interpretation of its rules. Thus, for lawyers, the decline of the Cold War order may have manifested itself in the conclusion of certain agreements that had been considered impossible to conclude before (e.g. INF Treaty), the occasional use of certain institutions which had not been blocked before (e.g. SC in the late 1980's), or the acceptance of certain new language.

Today, there are a number of "real causes" that may ultimately affect law. These include changes in economic conditions, technological developments, political alliances, domestic political conditions, and shifts in widespread beliefs.[57] Such real causes may ultimately have an effect on international law. This effect is, however, not direct: It may simply be the product of a political process, like the conclusion of a treaty, which results in a legal act that is designed to resolve a new problem. It may

[56] E.g. H. Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1 et seqq,; H. Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 AJIL 260 et seqq.; W. Friedman, Changing Structure (n. 18), 81 et seqq.; B. Simma, From Bilateralism to Community Interest, (1994) 250 RdC 229.

[57] See above at V. 1.

be more complicated in a sense that a "real cause" does not translate into a legal formalisation of some sort, but is rather taken into account, in the interpretation or application of a given legal principle or rule which is thereby reconstructed. In any case, a real cause needs to be translated somehow into the legal system, or it is not taken into account – which may then be to the detriment of the functionality of the legal system while preserving its integrity.

Lawyers may, to a certain extent, be agnostic of the "real causes" of legal development. This does not mean that they are necessarily ignorant of them. They are, however, in the first place supposed to determine the relevance of such phenomena according to legal standards. Such standards are not identical with standards used in social sciences. For example, for lawyers it is not of primary importance whether the rule of customary international law which requires armed forces to distinguish between combatants and civilians came into existence for humanitarian reasons or in order to preserve military discipline. However, in order to understand the significance of this rule for political, moral, historical or other purposes, including for the secondary legal purpose of the interpretation of the rule, this may well be essential to know.

The same is true for the assessment of international law today. It may be possible to identify certain changes of the law without knowing its political or other causes for sure. It is, of course, better if lawyers do know more, and this is particularly true if they try to assess the general state and development of the law. Here inter-disciplinary work may allow for an assessment whereby a legal analysis can take causal explanations of other sciences into account for the purpose of formulating a more broadly informed diagnosis about factual and normative lines of development of the international legal order. Different disciplinary perspectives may complement each other and offer parameters which explain different emphases. An interdisciplinary approach may thus help to identify individual symptoms and simplistic explanations as well as prevent to overestimate the importance of single symptoms of crisis. Despite the fact that inter-disciplinary work is no panacea and may have its own shortcomings,[58] we should therefore not be content with an intra-legal methodology. But learning by lawyers from academics in other fields may be selective.

Thus, when we concentrate on what we call systemically relevant disregard for international law, structural and institutional developments which challenge its integrity, as well as contestations of a value-based international law, we do not want to conceal hidden assumptions about possible real causes for a "rise or decline" of international law. We simply do not know whether a domestically induced blockade of the US Congress or a more dynamic international environment contributes more decisively to an observed stagnation in the conclusion of treaties. We are certainly interested to know more about the "real cause" for this phenomenon, but, as lawyers, we think that we can say something meaningful about this phenomenon even if we do not know exactly about the causal explanations.

b) The Standard and its Criteria

Ultimately, our assessments regarding rise or decline depend on the standard we apply and its criteria. By relying on the "International Rule of Law" in the sense of international law as it has

[58] J. Klabbers, 'The Relative Autonomy of International Law or the forgotten Politics of Interdisciplinarity' (2004) 1 JILIR 35 et seqq.; see also M. Koskenniemi, The Gentle Civilizer of Nations, Cambridge 2002, 500, calling for a 'culture of formalism'; B. Oomen, 'The application of socio-legal theories of legal pluralism to understanding the implementation and integration of human rights law' (2014) 4 European Journal of Human Rights 471.

developed during the last 25 years we have agreed on a substantive normative standard as a point of reference for our assessment of the state of the international legal order thereafter. But what are the pertinent criteria for identifying whether this order is in rise or decline? Are we talking about a qualitative or a quantitative understanding of "rise or decline" of the international rule of law? Does "rise" signify the idea that more international law in and of itself constitutes more progress,[59] or do we rather look for certain substantive developments in the law?

From a comparative perspective the most obvious substantive standard is to ask whether this "type" [60] of international law, is being transformed into another type of international law. Should international law now best be characterized as moving towards some kind of global law, be it ordered or messy, or should it be conceived as relapsing towards a more classical type in which the primacy of States goes together with considerably more room for unabridged political pressure and developments. This inquiry is at the same time agnostic and engaged. It is agnostic insofar as it recognizes that a possible "decline" of "the international rule of law" may well result in the "rise" of a better system of global law. In that sense, rise or decline are not synonymous with desirable or undesirable. On the other hand, the inquiry is engaged in the sense that we want to assess whether "the international rule of law", as it stands, continues to represent the most appropriate model for conceiving international law. This does not, however, imply any inherent normative pre-understandings about whether "international law is inherently good" or needs to be preserved.

In order not to fall into a trap of normative pre-conceptions a substantive evaluation of the model's appropriateness will need to identify the functions and characteristics of international law, as it stands, and thus define more explicitly what the intrinsic value, which international law offers (*Eigenwert des Rechts*), means in comparison to or within other normative orders. Here we pursue a rather classical pragmatic approach based in positive law. For us, the international rule of law does not encompass what any particular theory or substantive perspective, such as constitutionalism, global administrative law, or critical legal studies, conceives as contemporary international law. We rather choose to focus on the self-description of this system of rules, or the more or less agreed self-understanding of the relevant actors, which are primarily States, as the normative framework for the development of international law.

How the role of law in the international order is conceived will impact on any substantive assessment of whether law is rising in the sense of a progressive development or whether it "produces the wrong results" and obstructs "just" outcomes. To ask whether we are overestimating or underestimating international law is intrinsically related to the question whether we should hold more or less ambitious views about what law can do.[61] Debates around global justice will at least partly depend on whether one considers law as a means for promoting social change or for processing it.[62] Defining characteristics of the international order, such as international law's claim for universality and multilateralism, will also bear upon any evaluation. If universality is an intrinsic

[59] For such an understanding see J. Trachtman, The Future of International Law, Cambridge 2013, 2 et seq./Chapter 4; on this ideal and its history, see J. v. Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Politics' (2014) 25 EJIL 977; for a more critical perspective on this progress narrative, see J. Klabbers, 'International Institutions' in J. Crawford/M. Koskenniemi (eds.), Cambridge Companion to International Law, Cambridge 2012, 228.

[60] Max Weber, Die "Objektivität" sozialwissenschaftlicher und sozialpolitischer Erkenntnis (1904), Gesammelte Aufsätze zur Wissenschaftslehre. Tübingen 1988, 146 et seq..

[61] Cf. Hurrell. note 7, p. 8.

[62] Cf. G. Abi Saab, Whither the international community, (1998) 9 EJIL 248, at 256.

feature of "the international rule of law", a shift to regional legal orders will imply significant changes, in particular where such a shift is accompanied by the creation of different legal standards. If multilateralism counts, the international rule of law is challenged when States increasingly act unilaterally. Accordingly, we also assume that the development of the "International Rule of Law" should not be measured against the standards of national law,[63] as this would obscure perceptions of international law's particular functions and characteristics.

An assessment of the direction into which international law moves also needs to take into account the specific features of "law-reform" in the international system. Obviously, formal law-making processes are an important indication for progress or regression in international law, such as instances of the conclusion or termination of international treaties or the desuetudo of customary international law rules. Likewise, formal law-making processes that are interrupted or stopped can reveal discord among the relevant actors when substantive rules cannot be agreed upon. However, since the development of international law heavily relies on interpretative processes, discursive practices and informal strategies relevant developments can also be identified on the basis of structural changes in the overall legal system or within its individual rules. For instance, a shift from regulating substance to regulating procedure, from providing for detailed rules to setting broader frameworks might likewise reflect a decreasing ability of States to agree on common substantive legal rules.

Developments can, of course, be assessed by other standards than by the dichotomy "rise or decline" of international law. Non-compliance and contestations, for example, may be considered as being symptoms for an ongoing dialectical processes of legalization and politicization of international rules and institutional interventions.[64] A decrease in the conclusion of new treaties may not reflect disagreement among the relevant actors but simply indicate that international law has matured or that there are more refined ways to adapt treaties. Moreover, the current crisis of the international system may not reflect a crisis of the law, in the first place, but it may signal a need for reconfiguring the role of the State more broadly. Or else, the crisis of international law might foreshadow more fundamental shifts in the overall understanding of law as a regulatory mechanism also in national law. Alternative explanations must be kept in mind. But we suspect that the metaphorical question of "rise or decline" is fruitful.

7. How to assess today's role of international law in a changing global order

On the basis of our methodological assumptions we propose a multi-angle perspective for assessing today's role of international law in a changing global order. Here, we distinguish between historical, actor-centered, system-oriented and justice-focused approaches.

a) Historical approaches

Historical approaches offer various accesses to our inquiry. Past experiences of paradigmatic shifts in the international order suggest different standards against which present changes can be assessed. Contemporary discourses are often rooted in earlier debates which requires us to

[63] See, however, H. Lauterpacht, The Function of Law in the International Community, Oxford 1933, reissue 2011, 439 ff.

[64] M. Zürn, M. Binder and M. Ecker-Ehrhardt, 'International Authority and its Politicization', (2012) 4 International Theory, 69-106; A. v. Bogdandy and I. Venzke (eds.), International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance, Berlin 2012.

identify those historical topics relevant for today's developments.[65] Contestations of the past offer alternative readings of legal developments. Reconsidering periodization might matter in order to examine what is changing and why it is changing, which periods are the rule and which are the exception. Thus, comparative historical methods allow to reconsider standards and assumptions.

One may doubt, for instance, whether a paradigmatic change took place at all after 1990, at all, or whether it was just a continuation of what happened before during the Cold War. If so, an inquiry is due as to why it was possible to promote international legal development under the conditions of the Cold War. If, in contrast, one reads "1990" as a moment of western hegemony in the process of creating international law, the "international rule of law" as it has emerged during the last 25 years, might appear much more as an exception in the overall development of international law than as the rule. More fruitful historical inquiries might go back further in time. One possibility is the era of the "first globalisation" during the 19th century[66] or a critical analysis of the Westphalian narrative.

Here, and elsewhere, discussing "Historical analogies and prior experiences" in actual practice may be as useful as comparing more theoretical "Assessments of previous generations of scholars" which may, at the same time, offer some insights for a self-reflective approach about the role scholars take in periods of transition and paradigmatic change.

b) Actor-centered approaches

Many political scientists and economists recommend adopting an actor-centered perspective on the law. While public international lawyers traditionally tend to treat the law as a "system" from which rules and orders emanate, political scientists emphasize that the law is formed by actors which pursue specific interests. This has in turn been criticized by some legal scholars because it would over-emphasize specific power relationships at the expense of relatively stable structural features. Still, debates about the effect of the United States as a dominant power, for example, have demonstrated that relevant legal developments can at least partly be explained on the basis of an actor-centered approach.[67] Such actor-centered approaches can, *inter alia*, focus on the role of more or less powerful States, or on the role of non-State actors.

If we are indeed witnessing a shift from a "unipolar" to a "multipolar", or even a "zeropolar" world, the relative position of influence of more recently empowered or relapsing States, or other actors, may well influence international law's structural features and content and its general direction. Accordingly, an actor-centered approach may generate possible reasons for deeper structural changes in the international order. Therefore, we should inquire into whether the concept of 'Rising Powers' (or relapsing powers) can contribute to evaluating the current state and future development of international law. Are there indications that new power relationships may have an effect on the debate on basic rules, community values and interests or do they simply render negotiations more difficult? Can we observe different priorities in terms of legal values or greater indeterminancy in the structure of legal rules or stronger contestations of universal institutions? An actor-oriented perspective also asks the question whether non-state actors contribute to a rise or decline of international law: are they strengthening or weakening the international legal system?

[65] Hurrell, note 7, p. 1.

[66] A. Anghie, Imperialism, Sovereignty and the Making of International Law, Cambridge 2004; J. Osterhammel, The Transformation of the World: A Global History of the Nineteenth Century, Princeton 2014.

[67] M. Byers/G. Nolte, US Hegemony and the Foundation of International Law, Cambridge 2003.

For global constitutionalist approaches NGOs play an important part in legitimizing international law. Such approaches focus on the democratic deficits which they perceive in the international system and against which they call for the participation of the individuals and NGOs in global governance. NGOs are thus perceived as a way to introduce individual participation.[68] Therefore, the importance of NGOs within international organizations, their successful attempts to act as "norm-entrepreneurs", for instance in promoting the conclusion of the Anti-Personnel Mine Ban Convention, and their role in furthering compliance are part of a narrative on the rise of international law.

At closer inspection, however, this picture becomes blurred. NGOs must not conform to particular criteria. Even under the far-advanced rules of the Council of Europe NGOs are not required to have democratic structures themselves, a fact which throws their legitimizing role somewhat into doubt.[69] Most influential NGOs have their roots and support in the Global North.[70] The role of NGOs as norm-entrepreneurs is ambiguous, insofar as they do not necessarily support international regulation. In the debate on food security, for example, some NGOs push for more sovereignty rather than for more international rules.[71] In international humanitarian law, the debate on autonomous weapons, as it was influenced by NGOs, allegedly suffers from misinterpretations of the law. The introduction of the concept of "meaningful human control" may dilute established international legal principles.[72] Finally, the political will to include NGOs or other non-state actors into law-making processes may lead to more informal rules or standards. Participation of NGOs may be easier to realize in informal regulatory processes since states and non-state actors (who lack international legal personality) can act on a more equal footing in such contexts.[73] Thus, transparency and participation may come with costs for the formal international legal order.

Violent non-state actors challenge the international legal order insofar as they aim to exclude themselves from this order. Since the 1990s we have witnessed particularly far-reaching changes of the application of the UN Charter in response to challenges by violent non-state actors. The international system may have changed as a result, but it is hard to say whether this would be a rise or a decline, or whether it is rather an instance of the "endless recalibrations" in the process of adapting the law to new challenges. As far as compliance is concerned, violent non-state actors seem to contribute more clearly to a decline of international law, as is evident for international humanitarian law in non-international armed conflicts since the 1990s.

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[68] A. Peters, 'Dual Democracy' in J. Klabbers/A. Peters/G. Ulfstein (eds), *The Constitutionalization of International Law* (2009), pp 263-341, 315 et seqq.

[69] H. Krieger, 'The Conference of International Non-Governmental Organisations of the Council of Europe' in M. Breuer/ S. Schmahl, The Council of Europe: Its Law and Policies, Oxford forthcoming.

[70] S. Hopgood, Human Rights: past their sell-by date, 2013, https://www.opendemocracy.net/openglobalrights/stephen-hopgood/human-rights-past-their-sell-by-date.

[71] Bernstorff 2014 EJIL (n.59), 989.

[72] For the debate see: Expert Meeting, Autonomous Weapons Systems: Technical, Military, Legal and Humanitarian Aspects, Geneva 26 to 28 March 2014, http://reliefweb.int/sites/reliefweb.int/files/resources/4221-002-autonomous-weapons-systems-full-report%20%281%29.pdf.; on the problem of weakening established protection standards: R. Crootof, ,The Meaning of 'Meaningful Human Control' (December 18, 2015). Temple International & Comparative Law Journal, Vol. 30, 2016. Available at SSRN: http://ssrn.com/abstract=2705560.

[73] Cf. Pauwelyn/Wessel/Wouters, EJIL 2014 (n 37), 742.

c) System-oriented approaches

In international relations theory signs of crisis have prompted a shift in the research from "norm diffusion" to "norm erosion" based on either constructive or critical norm research often related to a discourse theory of law and normativity.[74] In this context the existence of a legal rule or a social norm is often considered to depend on the degree of compliance with it.[75] In order to distinguish the decline of a legal rule from its mere violation authors assess disputes/contestations in order to identify the relevance of normative arguments about the binding character of a rule and its content.[76] Parts of international law have always suffered from a lack of compliance. Violations of the law also happen in States under the rule of law without impairing the perception of the continued validity of the legal order.[77] There is a well-founded professional reluctance among lawyers to draw far-reaching normative conclusions from violations of the law or compliance deficits even where these violations are accompanied by justificatory discourses. To what extent are these methods for identifying the state of single legal rules therefore relevant for an assessment of the "rise or decline" of international law as a system? Is the lack of compliance of certain of its rules already symptomatic of transformations at a deeper level, or would we look for a systematic lack of compliance throughout the entire legal system?

A system-oriented approach also throws a light on other possible causes for deeper structural changes of the international legal order. Scholars focusing on the protection of global public goods sometimes doubt the capacity of international law to constrain or push States to act in the community interest. This doubt entails two aspects: some regulatory challenges, in particular in the environmental field, may be so complex ("wicked problems")[78] that traditional forms of law may not be able to provide an effective regulatory mechanism. This could explain why environmental law is characterized by standard setting and soft law structures, including important parts of the Paris Agreement on Climate Change. More specifically, views have been expressed according to which self-interested States are incapable or unwilling to act for the global good. Thus, there is a whole branch of literature focusing on law-making alternatives to multilateral treaties on global public goods.[79] They postulate a turn to unilateralism ("unfriendly unilateralism"; EU climate protection measures) or hierarchical law-making (Security Council and climate change/Security Council and Ebola crisis). Does such a shift to other fora and structures, if it exists, imply a rise or a

[74] N. Deitelhoff/L. Zimmermann, Things we lost in the fire: How different types of contestations affect the validity of international norms, PRIF Working Paper No. 18, December 2013; for constructivist approaches: M. Finnemore/K. Sikkink, International Norm Dynamics and Political Change, (1998) 52 International Organization 887-917; T. Risse/S. Ropp/K. Sikkink, The Power of Human Rights,: International Norms and Domestic Change, Cambridge 1999; T. Risse/S. Ropp/K. Sikkink, The Persistent Power of Human Rights, Cambridge 2013; for a cycle theory of norm change: W. Sandholtz/K. Stiles, International Norms and Cycles of Change, Oxford 2009; W. Sandholtz, Prohibiting Plunder, Oxford 2007; see also A. Chayes and A. Chayes, 'On Compliance', (1993) 47 International Organization 175-205; for approaches of legal scholars see inter alia M. McDougal and M. Reisman, 'The Prescribing Function in the World Constitutive Process: How International Law is Made, in: M. Mc Dougal and M. Reisman (eds.), International Law Essays, Mineola 1981, 355-380; H. H. Koh,Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599–2659.

[75] E.g. M. Glennon, How International Rules Die', (2005) 93 Georgetown Law Journal 939 - 991.

[76] Sandholtz (n. 74); on contestations see also A. Wiener, A Theory of Contestation, Berlin 2014.

[77] G. Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 EJIL 70, 74 doubts the value of this analogy.

[78] H. Rittel/M. Webber, Dilemmas in a General Theory of Planning, (1973) 4 Policy Sciences 155-169.

[79] A. van Aaken, 'Is International Law Conducive to Prevent Looming Disaster?', U. of St. Gallen Law & Economics Working Paper No. 2015-09; M. Hakimi, 'Unfriendly Unilateralism' (2014) 55 HILJ 105; N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL 1.

decline, or just a "simple" change? It will be interesting to see, for example, whether the Paris Accord on Climate Change will lead to a reassessment of the debate about stagnation in treaty-making.[80]

d) Justice and legitimacy

The state of international law may finally be viewed through the lens of justice and legitimacy. The question of global distributive justice is one of the greatest present-day challenges. A widely perceived inability of international law to provide for or sufficiently contribute to global justice might be a cause for a decline narrative insofar as international law, as it has been formed by the relevant actors, does not meet the normative aspirations of parts of a global public opinion. But is it at all appropriate to expect that international law, as it stands, can play a major role in improving distributive justice?[81] Is overloading international law with expectations of justice perhaps an indication for political failure? Do attempts to claim aspects of global justice before international and national courts entail serious costs for other legal principles, such as legal security (e.g. retroactive application of the law)? A pertinent case may be the CARICOM claim for reparations for historical injustices which links reparations with development issues.[82]

The search for legitimacy in international law may equally be a symptom for a normative crisis. The rise of legitimacy discourse dates back to the 1990s which suggests that it is not necessarily a symptom for "decline": Indeed, legitimacy may be invoked to challenge and justify growing powers of international organizations and thus correspond to the "rise" of international law and international institutions in the 1990s. But the legitimacy discourse has also turned into an instrument to criticize the influence of international law and international institutions in general. Where the assessment and enforcement of legal claims is left to the States individually and is not transferred to centralized organs with enforcement powers, arguments of legitimacy tend to dissolve binary legal categories (legal - illegal). The by-now classical example is the conclusion of the Independent International Commission on Kosovo which claimed that the humanitarian intervention in Kosovo was „not legal, but legitimate." Such an approach gives room to break the law in order to reform it, as much as to abuse legitimacy arguments for specific interests.[83] Such use of legitimacy discourses is not restricted to the rules on the use of force but it can also be observed, for example, where States are unwilling to implement international law domestically. In the context of the use of force, we may have even moved beyond invocations of legitimacy, and are observing instances of the use of force, such as in Syria, which, although legally questionable, do not even seem to trigger a serious debate about their legality. This may itself be a sign of a certain crisis of international law as a means of regulating international affairs.

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[80] For the debate on stagnation, see Pauwelyn/Wessel/Wouters, EJIL 2014 (n 37); specifically on the Paris Accord, see J. Pauwelyn and L. Andonova, 'A Legally Binding Treaty or Not? The Wrong Question for Paris Climate Summit' EJIL Talk, 4 December 2015, http://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit/;

but see A.M. Slaughter, http://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12.

[81] J. v. Bernstorff, 'International Law and Global Justice' (2015) 26 EJIL 279 et seqq.

[82] E.g. Adress delivered by Professor Sir Hilary Beckles, Chairman of the CARICOM Reparations Commission, House of Commons, Parliament of Great Britain, Committee Room 14, Thursday, 16 July 2014; http://www.caricom.org/jsp/pressreleases/press_releases_2014/pres188_14.jsp.

[83] C. Daase, 'Die Legalisierung der Legitimität: Zur Kritik der Schutzverantwortung als emerging norm' (2013) 88 Friedens-Warte 41; G. Nolte, 'Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten' (1999) 59 ZaöRV 941.

8. Outlook

There is no clear and definitive answer to the question of the rise or decline of the international rule of law. But we need to pursue it. There are sufficient indications for being apprehensive. Most legal and political scientists did not consider the possibility of a Brexit before it happened. As much as a Brexit is not necessarily the end of European integration, certain challenges to the international rule of law will probably not lead to its demise. But it is important to face the possible challenges and to reflect upon the resilience of the international legal order, and to identify the possibilities for its progressive development. If we have identified some points of departure for such an exercise this paper has served its purpose.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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