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A global law field: What makes law in world society?

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Introduction: The puzzle of global politics and law

350 years after the Treaties of Münster and Osnabrück, the "Westphalian" form of the modern state is undergoing substantial change. Unlike predictions of an outright "deterritorialisation" of politics and the end of the modern form of statehood,[1] however, the territorial form of politics has not vanished completely - quite to the contrary, it reasserts itself in a most violent way in different parts of the globe. Nonetheless, those who argue that in its basic premises of a territorial-cum-sovereign form the Westphalian system stands unassailed (Krasner 1995) do not seem to be able to account for the vast scope of changes in international politics either.[2] Regarding the first point of view, it is certainly correct that territorial boundaries have lost their regulative importance in many respects, most notably in the movement of monetary value on the financial markets, but also more generally in the cross-border flow of information, goods, services and - encouraged (tourism) or not (migrants and refugees) - people. Yet, this is not to conceal that *some* territorial boundaries in *some* respects have gained in importance; thus, the abandoning of border controls between the Schengen countries only became possible through a strengthening of the control function invested in the Schengen space's external boundaries.[3] In relation to the second point of view, claiming that territorial sovereignty as the hallmark of the Westphalian state system is not challenged in its foundations can only be asserted on the basis of a "structural-realist" view of the international system. While it is hardly disputable that territorial sovereignty still serves as an influential structuring principle, such a view dismisses *ab initio* issues such as the importance of non-governmental actors in the international system, the emergence of international and transnational forms of governance as well as the influence of norms and rules.[4] Again, most observers in what could rather loosely be

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[1] This is the very much "stylized" postmodern argument (which in this form is rarely made by "postmodernists" themselves; cf. the introductory chapter in Newman 1999.
[2] This critique is further developed in Albert/Brock 2000.
[3] See Steenbergen 1992; Anderson et al. 1996.
[4] The most common argument then is of course not to say that these developments are unimportant as such, but only that they are unimportant in relation to the international system which in its logic is basically unaffected by exogeneous developments.

termed the "middle ground"[5] between those two extreme positions would emphasize that modern statehood is undergoing a qualitative change in the context of global developments, but would equally point to the incremental and evolutionary character of this change, despite much rhetoric about "upheavals" and "epochal shifts". What those occupying this "middle ground" would usually concede to the statist view outlined above, is that the constitutive form of the international system of states stands unaltered. The state may have lost regulatory competencies in some respects and it may have significantly altered institutional structures and processes to adapt to a globalized environment. Yet, the most distinguishing feature of modern sovereignty in Weber's sense, the monopoly of the legitimate use of force and, intimately associated with it, the associated function of providing the guarantee for the validity of law by providing for its enforceability and functioning as its prime source (competence competence) still seems to be unquestioned, various developments in international, particularly human rights law notwithstanding. While the link between territory and several functions of the modern state, including the important links between territory and (national) identity have been altered if not entirely severed in some cases, the "core" link between territory and the nucleus of modern state sovereignty seems to stand rather uncontested.
Some internationa legal scholars, even if conceding that from an international relations-perspective the one just outlined represents a rather enlightened one, would certainly deem this view of things as insufficient. They would point out that through the development of international law, including international penal law, through the immersion of international human rights norms in national legal systems, through the function of trans- and international bodies and texts as sources of law etc. even the notion of territorial sovereignty has undergone a qualitative change, that indeed some kind of international law has evolved which can no longer be reduced to the sovereignties of individual states alone. While for most parts not concurring with the more radical view of territorial boundaries losing their significance entirely and thus arguing that state sovereignty does not cease to play an important, if not primary, role in the global legal system, most would argue that there is indeed "more" to international or "global" law than what is anchored in states as the law's sources and enforcers.[6]
While the first of the two preceding paragraphs has been framed so as to confer what is allegedly an "IR"-perspective, the second has phrased from an alleged "IL"-point of view. Certainly, many observers in these respective fields would concur with the way the arguments have been put. However, it is also certain that many would equally legitimately claim that it would be perfectly possible to put the paragraphs' associations of arguments with academic fields exactly the other way around. Even if not associated with the more "radical" view of a deterritorialisation of states, a number of IR observers can easily be found who would argue that the evolution of international law, but also of international rules and norms more generally, has challenged and altered the "core" of territorial sovereignty in a significant way;[7] vice versa, many international legal scholars would reject the idea that "soft law", for example, is more than a basically dispensable addendum to international law, in no way challenging the idea that international law, or "law" in general, remains tied to the conception of the sovereign territorial state.[8]
Thus, when looking at analyses of global change and the role of (international) law in them, one might easily gain the impression that confusion reigns not only when comparing the perspectives of IR and IL with each other, but rather even within these disciplines themselves. It

[5] No overview over the vast body of literature can be given here; see, as outstanding examples: Rosenau 1997; Ferguson/Mansbach 1996.
[6] Again, no overview over the literature is possible here; see, as concise examples of this lines of reasoning: Shapiro 1993; Friedman 1996; the points made in this and the preceding paragraph draw on and have been elaborated in Albert 1999.
[7] See, for example, Jacobson 1996.
[8] Typically for the form of argument, here in relation to European law in particular: König/Pechstein 1995.

is seemingly the case that while conceptualizations of global politics, of law, and of the role of law in global politics abound, these conceptualizations rarely do approach what could be justifiably be called theoretically comprehensive accounts - let alone *one converging* account - of the function and role of law in a "globalising" world. What hasn't been achieved in two disciplines over the decades can't be done in this paper either. But it can propose a conceptual route which as yet has not been explored to a significant extent. What it takes as a starting point is the observation that a new and significant dialogue between IR and IL has (re-)emerged recently, exemplified in what is termed here the "IR/IL-link-literature" which goes further than most previous conceptualizations of international rules and international law in that it has produced a number of contributions that at least converge on a number of questions and *argumentative forms*. After a brief overlook over the points of contact between IR and IL that have been identified in the IR/IL-link literature, the present contribution discusses the potential and the shortcomings of what is called here the "continuum argument". This argument, which in its basic form is shared by a number of IR and IL approaches, basically settles for only a relative or gradual definition of international law or international regimes, respectively international legal rules versus international non-rules. On the one hand, it is argued that the continuum argument carries significant potential in advancing the understanding of the role, function and importance of international (legal) rules in the context of global change, particularly also by furthering, if not always explicitly, the notion of the inherently processual and socially constructed character of international (legal) rules. On the other hand, however, a lack of clear-cut criteria allowing a definition of law is also seen to create a number of shortcomings. In the final section it is proposed that rather than taking the issue of "what is law" as unsettled in this context or to settle for a more or less arbitrary working assumption of what constitutes law, it is exactly the uncertainty-creating embeddedness of law and other systems of rules in a complex social world which allows for a satisfactory definitory solution. However, while notions on the stateless character of new forms of law and notions of legal polycentricity and multiplicity are seen to provide valuable insights into the emerging structures of the "global law field", they still are in need of a definition of law which is able to connect these developments in their variety to processes of global change.[9] It is suggested that such a definition can not be achieved by defining an essence of law, but only by defining as law what law describes as law. The main question for a conceptually rich account of the emergence of law and legal rules in a global context as well as their relation to other forms of rules, particularly international regimes, is thus not one of where the boundary between legal and non-legal rules can be established, but how it is maintained and possibly transgressed.

(Inter-)Disciplinary agendas on rules and law

The "IR/IL-link"

Although international relations and international law are constitutively linked through the formers "separation" from the latter in the inter-war years, and although always a few people indeed managed to be at home in both disciplines, the "constitutive" debate between idealism and realism that characterizes the schism between the two disciplines long served as an effective barrier for interdisciplinary engagement.[10] With realism being the dominant paradigm in IR, and particularly with the success of "structural realism" or "neorealism", IL basically came to represent the "idealist" part of the realist-idealist debate, the part which had with some success been driven out of the IR discipline itself. Constant and various punctual engagements notwithstanding, it has only been in recent years that a fair number of contributions have

[9] On the idea of polycentricity, cf. Sinha 1996; Petersen/Zahle 1995.

[10] For an illuminating account of the origins of IR and the relation to IL, cf. Schmidt 1998.

emerged that call for a systematic inspection of mutual compatibilities and points of beneficial exchange between IR and IL.[11] In terms of intellectual debate, it is particularly IL that seems to have recognizes the development of regime theory in its various guises in IR as a promising development in this respect (cf. Abbott 1989; Setear 1996). Affinities between a discipline that inquires about the way that certain rules and norms influence state behavior and a discipline that is primarily concerned with the law between states are obvious. Nonetheless, most contributors stop short of arguing for an outright merger of the two agendas. Rather, the idea seems to be prominent with many international legal scholars that international relations scholars have after decades of absence finally "discovered" the importance of law but fail to admit it by not using the "L-Word" (cf. Chayes/Chayes 1995).
One main protagonist of the "liberal institutionalist" or "regime"-approach in international relations seeks to justify the continued non-use by arguing that "two optics" are at work in IR and IL (Keohane 1997). Inspecting his argument, however, it ermeges that the "optics" described merely represent a rather limited set of perspectives and specific approaches within the two fields. Not unlike other contributions in the IR/IL-link-literature, the "optic" that the field of IR is supposed to represent is limited to the "'Instrumentalist' optic", which "focuses on interests and argues that rules and norms will matter only if they affect the calculations of interest by agents" (Keohane 1997: 489). Keohane contrasts this to a "normative" optic, which is supposed to be represented by IL, but into which one could legitimately integrate much of the flourishing "constructivist" IR literature which has emerged in recent years which seeks to explore who how norms and rules in fact are constitutive for the formation of interest, rather than exogenous factors merely affecting an interest-based calculus.[12] Thus, while Keohane (1997: 494) asserts that both optics as necessary, yet neither is sufficient, he clearly does not consider to open up routes of exploration by expanding beyond the narrow confines of the optics described.
That IR as well as IL cannot be reduced to one optic each is observed by Robert Beck (1996: 4) when he states that "both disciplines are thoroughly heterogeneous". Seen from an epistemological and methodological point of view, it seems that both disciplines are characterized by similar "conceptual divides" between "empiricist" and "critical" approaches (cf. ibid.: 5) and thus strikingly similar in the variety of their "optics". To acknowledge such a similarity-in-heterogeneity, however, makes a straight juxtaposition of two monolithic disciplines look rather inappropriate. Against this background, it is easier not to get distracted form substantial theoretical and problems by a logic of interdisciplinary competition (e.g. who is the "patient" and who is the "cure"), but rather move ahead to identify possible common thematic agendas.
Beck lists a set of four questions which the assembled texts from IR and IL scholars in the volume on *International Rules* are supposed to assist answering, a set of questions which can thus, inter alia, be taken to guide an at least rudimentary common research agenda. These questions are (see Beck 1996: 8-17):

1. What relationship exist (should exist) between international rules and morality?
2. Why do actors comply with international rules?
3. What influence do domestic political factors exert on behavior related to international rules?
4. How are international rules formulated?

While problematic and open questions in both disciplines, exploring them can undoubtedly benefit from the variety of angles from which they are approached in IR and IL. While the first question for IL scholars requires them to unearth more explicitly the underlying philosophical assumptions of international law, IR theorists would be able to provide historical and systematic

[11] The corpus of literature is too extensive to listed here; see, for example, Slaughter 1993
[12] One of the many overviews: Checkel 1998.

accounts regarding the "order/justice"-problem in international politics (cf. Wæver 1996), and the effective influence of moral deliberations in power political struggles in particular (cf. Wright 1996). Whereas most IR theorists, in attempting to approach the second question, will point to the way in which compliance influences actors' calculations or even, structurally mediated, the formation of interests (cf. Zürn 1992), recent theoretical contributions in international law have attempted to provide more "thick" accounts of why actors obey international law, particularly taking into account a number of cultural and other factors that usually do not enter into accounts of rational interest formation (Franck 1990; Chayes/Chayes 1995). While the third question is dealt with in a variety of ways in the institutionalist research agenda in IR,[13] it does not seem to have attained high prominence in IL research. However, this may very well be due to the way the question is formulated (the influence of domestic *political* factors on behavior related to international rules) which systematically excludes the influence of domestic *legal* factors in this regard. While in relation to the fourth question IR can point to a whole range of accounts on regime formation etc., IL would obviously be able to contribute insights on the various effective "sources of law" in the international legal order.

It seems obvious that the four listed questions altogether as well as each of them individually provide fertile ground for a scholarly exchange from which both the respective IR and IL accounts stand to gain. Nonetheless, by identifying possible common points of interest one cannot help but also register the commonly shared problems which do seem to stand in the way of cooperation. Thus it is both the quality of the basic terms employed as well as the exact demarcation between them which remain unclear in relation to these questions: thus, most strikingly, it is not clear from the outset as to what (if anything) exactly distinguishes "international legal rules" from (international) "rules" in a more general sense. Even if it is possible to settle for an obvious answer and define international "legal" rules as all those (international) rules that form a part of international law, this throws open the possibly even more basic question on what distinguishes international law from non-legal rules, a question which leads right into the questions of what defines law and whether, according to such a definition, international law really qualifies as "proper" law (see Kratochwil 1983).

While it seems obvious that these issues are at the basis of long disputes in both disciplines, the question for those proposing an intensive collaboration should be whether their problematic nature rests intrinsically with their "fundamental" character, or rather from the fact that IR and IL in fact constitute themselves on quite divergent answers to them. It does not seem to be a worthwhile exercise to engage in an interdisciplinary exchange or even, as Slaughter et al. (1998: 383; see also Abbott 1992) hope, a "joint discipline", if such a possible basic divergence is not properly reflected. A "joint discipline" would require these basic questions on the meaning of rules and law to be common *guiding questions,* and the IR-IL collaborative effort an attempt to commonly approach these. If, IR and IL turn out to give quite different answers to these questions, then this does not prevent collaboration, but requires to first of all take a step back and ask what the consequences of different conceptions of law and rule are for the possibilities of collaboration, but also for agreeing on the substantial definitions for these terms.

It is against these basic questions regarding the distinctions between legal rules and rules as well as the character of law as law that a number of answers provided by various IR/IL-approaches can be surveyed in order to assess chances and limits of converging on these basic issues. As has been noted at the outset, to put the issue as a question of IR *versus* IL-approaches might very well systematically exclude commonalties between approaches from the two disciplines which are in fact greater than commonalties to neighboring approaches within the discipline. However, both because these various approaches must be situated first and foremost within their disciplinary contexts, as well as the fact that the "IR-IL"-link literature so far has

[13] However, the more "vibrant" discussions in IR research currently seem to focus on the reverse question, i.e. how international norms shape state behaviour; cf. Risse et al. 1999.

concentrated on rather selective parts of both disciplines, such an ordering, for the time being, seems legitimate.

What is an international (legal) rule?
While is was pointed out in reference to the IR-IL-link debate that for most of its part international rules are thematized by the new forms of institutionalism in IR, this approach, particularly its prominent subset of "regime-theory", is of course not the first one to acknowledge that "rules matter". Rather, the idea of a normative order supplementing the power political structures of world politics featured quite prominently with the so-called "English School" of international relations and its notion of an "international society" of states, whose heyday in the 1960s certainly antedates the new institutionalism.[14] That the latter achieved more attention in the IR-IL-link context is due to the fact that the English School never represented the "mainstream" of American IR theorizing, always occupied a marginal place in the debates. The new institutionalism, however, developed mostly out of and in contrast to the realist - and later neorealist - "mainstream" which stood so firmly apart from IL since the realist-idealist debates of the 1920s and 1930s.
Developed in order to account for continued cooperation among allegedly self-interested actors (states) in international politics under the condition of hegemonic decline (or the absence of an hegemon; cf. Keohane 1984), the concept of international regimes varies from more "thin" to more "thick" conceptualizations.
In "thin" conceptualizations, the referent objects of analysis remain to be the actors' self-interests. Norms are not understood to derive their binding force from any kind of obligation other than that stemming from rational calculus. The only mediation of self-interest is achieved through the process of instititionalization, which can be conceived of in a variety of ways (cf. Keohane 1989). Based on more or less "thin" notions, regime research has produced an impressive array of studies over the years, constantly refining its conceptual part as well as providing a great number of empirical studies. Particularly noteworthy in this respect seems to be a constant shift of attention to the role of non-governmental actors in international/transnational regime-formation. In recent years, research conducted by the Tübingen-group in particular has been devoted to a conceptual fine-tuning of regime theory (Rittberger 1993, Hasenclever et al. 1997). In overview, nonetheless, analysts have rather moved away from the "common-sense" definition (Krasner 1983: 2) by emphasizing various parts of and adding some features than converge on a refined common understanding. However, all do converge by assuming international regimes to be rule-based structuring devices of international and transnational relations, although accounts of why they bind individual actors continue to vary widely (ranging from regimes merely reflecting rational calculi of self-interest to creating a normative framework with a quasi-moral authority[15]). For most parts, however, as the Chayes' aptly observe, regime theorists shy away from using the "l-word". It would nonetheless seem to be mistaken to simply say that regime theory has "rediscovered" the law but fails to name it as such for reasons of disciplinary bias: regime theorists are very well aware of the existence of international law. What is true, nonetheless, is that regime theory has great difficulties in distinguishing the concept of international regime from that of international law, a difficulty which for most of regime theory's parts is dealt with by simply ignoring the latter.
While most regime theorists would probably agree that regimes and law share the character of being rule-based systems of norms which create some kind of obligation and form the basis for (global, international, transnational) institutionalization processes, they differ widely as to the character of the rules, the quality of the norms' normativity, as well as the kind of and reason

[14] In overview: Dunne 1998.
[15] If one sees them in the context of an intenrational society that basically signifies a normative-ethical order; cf. Hurrell 1993

for the obligation created. As yet, no clear-cut criteria seem to have emerged which would allow a clear distinction between legal and other types of regimes independent of the specific circumstances of the situation. After systematically posing a number of questions regarding, among others, regime membership, the sources and character of compliance obligations, as well as judiciability, Oran Young in his much-appraised study on *International Governance* largely fails to develop these clear-cut criteria as well. Regarding the generative sources of legal and non-legal prescriptions, he finds "no support for the view that the generative sources of legal prescriptions differ in some fundamental way from those of other prescriptions" (Young 1994. 189). Equally noticing, for example, that formalization is not a reliable criterion for distinguishing legal from non-legal regimes, Young's discussion thus already argues on the ground of what can be termed the "continuum argument". According to this argument, in the end the difference between international law and international regimes, or but differently, (international) legal and non-legal rules is only gradual in argument. Thus, while not offering no clear-cut criteria for distinguishing between legal and non-legal regimes/rules, a "continuum argument" at least seems to offer a pragmatic working definition that serves most analytic purposes fair enough.

In order to understand the attractiveness of such a "pragmatic" understanding that leaves important conceptual issues stand unresolved, it is important to recall the context in which Young's study is situated. It forms an important contribution of the growing literature on international or global "governance without government", which in the context of this argument could be described as providing a more "thick" account of regimes. This literature is concerned with the possibilities of political regulation and control in absence of the authoritative mechanisms and enforcement guarantees that are provided by the sovereign state. While this kind of research has experienced its probably biggest *conceptual* impetus from research on the European integration process, it has evolved from and thrives on research on international regimes in other contexts as well. Its main import in relation to the regime literature seems to be, however, that it has been able to embed the latter into a wider conceptual framework of global change which in this comprehensiveness it was lacking before, given its basic predication upon state- and actor-centered concepts. It is within such a broader view of international or global systems of governance (with and without) government (see Rosenau/Czempiel 1992; Kohler-Koch 1998; Zürn 1998), that a gradual rather than a principled distinction between legal and other rules achieves most of its explanatory value. Such a view allows to thematize the evolution of orders of governance as "judicialization" ("Verrechtlichung"; cf. K.D. Wolf/Zürn 1993[16]), without requiring an absolute marker of when non-legal rules become legal ones. This argument of basically a "continuum" between non-legal and legal rule/regimes is also the result of the inspection of various approaches to international law and international regimes in the volume by Beck et al. In his concluding chapter to that volume, Anthony Arend seeks to formalize the continuum by framing it as a coordinate system with the axes depicting the degrees of control and authority exercised by certain rules (Arend 1996: 302). Logically extending the idea of a "continuum" of rules and regimes along the legal-non-legal spectrum, D. Wolf and Michael Zürn (1999) argue that the same continuum of law-like characteristics can usefully be applied to the field of law itself, with domestic law exhibiting the strongest law-like characteristic and international law the weakest.[17]

[16] See Teubner 1984 for a discussion of the notion of "Verrechtlichung" in more general terms.
[17] In addition, this argument provides Wolf/Zürn (1999) with a conceptual handle on European law, which sits conceptually uneasy between state and international law; while Wolf/Zürn argue for a gradualist apporach that situates European law in the continuum betwen national and intenational law, others argue more for unity and uniqueness of Europan law as a legal system of its own (see Bogdandy/Netteheim 1996) or assume a median position between these two lines of argumentation (Albert 1998); see also Weiler 1991 which is still the "classic" on these issues.

Despite the obvious advantages of providing not only a flexible account of the characteristics of (international) legal and non-legal rules, but also one that at least for social scientists lends itself to immediate operationalization in order to study specific issue areas (e.g. European integration), the "continuum argument" exhibits a serious flaw. As all other approaches that seek to merge or delineate between international law and international regimes (as well as, for that matter, all legal theory) it cannot, even in a pragmatic sense, ignore the basic question of what makes law law in the first place. The "continuum argument" does not get around this issue, it mostly fixes it by adopting a specific particular concept of law. While it thus may be able to provide an attractive conceptual framework for specific analytical purposes, it may seem to fail in establishing a solid ground on the basis of which IR and IL could develop a joint research agenda. While this point will be returned to below, it should be noted at this stage that the continuum argument nonetheless opens some promising vistas not only for collaboration across, but also within discipline. Thus, by emphasizing the possibilities of the evolution of law in its law-like characteristic in the context of European integration, for example, but also by identifying "judicialization " ("Verrechtlichung") as an important (or at least possible) element of global change on the basis of regime-formation, this direction of inquiry stands to open routes of communication with approaches that stress the socially constructed and processual character of international rules (such as the works of Onuf, Kratochwil etc.).

Like the IR literature in this respect, the international law-literature also remains split between more "thin" and more" thick" conceptualizations of regimes. Arguably, the "thin" ground here is represented by legal positivists as well as those working within a natural law tradition. The "thinness" here consists in basing the lawness of law on basically but one criterion, on some notion of a factual legal sphere here and on some notion of morality there. As in IR, however, it is possible to identify a strand of "thick" conceptualizations in IL as well. "Thick" here refers to the fact that the lawness of international law is seen to be established by either a relevant claim being successful in a relevant social context (McDougal/Laswell-New Haven School; cf. McDougal/Laswell 1996) or more generally by its socially constructed nature. Concomitantly with the differing conceptualizations of the lawness of law, the various approaches of course also disagree to significant extents as to what form the sources of law. This pertains to the sources in a double sense of: its empirical origins (i.e. whether to include some parts of "soft law" as law) and the sources of law's validity (e.g. whether it is valid through the backing of state sovereignty alone, or because it forms part of systems of symbolic validation etc.). While many of these "thick" approaches in international law share with their counterparts in IR an at least implicit adoption of some kind of "continuum argument" (cf., for example Chayes/Chayes 1995; Franck 1990), often though not always mediated through the notion of the socially constructed character of rules, they equally share with them the basic problem of not offering a clear-cut definition of what constitutes law in relation to non-law. While for most IR scholars the continuum argument might present more of a convenience than a problem, international legal scholars will be well aware of the fact that in trying to establish the lawness of international law, they touch right upon basic questions of legal philosophy, i.e. the intricacies of the notion, the validity, the origins and the scope of "law" in general which cannot be easily ignored. It is in this sense that one of the few scholars who provides a conceptually rich account of international rules that seems to be equally at home in IR and IL states: "the concept of law itself has become increasingly problematic" (Kratochwil 1989: 82).

Of course, it may very well be that no advances toward greater clarification and a satisfactory answer to the question of "what is law" can be made in this regard at all. Thus, one could agree with Kratochwil (1989: 5) who argues that this is the case because the concept of law in itself is ambiguous. It would then appear however, that the problem of finding a reliable building block for establishing grounds of communication both between and within IR and IL is only deferred. Thus, one could argue that Kratochwil in the end only makes a semantic move when leaving aside the "ambiguous" concept of law and instead settles to achieve a more solid

conceptualization of rules and norms in general. Of course, one could also make the point and ask why it would seem to be necessary to advance on these basic conceptual issues in the first place in order to be able to establish collaborative vistas between IR and IL. And indeed, as has been suggested above, the fact that a number of approaches within IR and IL seem to converge around one version or the other of a "continuum argument" opens up a number of points of contact:

This does not only refer to those quite obvious commonalties in relation to analyses of rule validity and compliance that are enabled by constructivist accounts, but also on the applied analysis of dense regulative environments such as the European Union which defy most "classical" accounts from both disciplines, yet stand to gain from a "gradualist" account of judicialization and governance beyond governments that approaches in both disciplines can offer (cf. Armstrong 1998). The productive exchange that has unfolded in this regard in European integration research is not limited to this issue area, of course. Thus, the idea to conceive of a set of embedded norms or regimes in the international system as the nucleus of some kind of international "constitution" (cf. Stone 1994; Reus-Smit 1997) also points in a similar direction of possible common engagements.[18] Another area that could probably be engaged with in an enlightening manner by applying the gradualist arguments from both an IR and an IL perspective would be the proliferating forms of private international authority (cf. Cutler 1999a, 1999b)[19]. Thus, for example, the continuing disagreements on whether the "new law merchant", i.e. contemporary rules and practices of "lex mercatoria" and international arbitration and private dispute settlement constitutes law or not seems to be entirely contingent on the definition of law and the willingness of the parties involved to concede possible modifications on what constitutes law.[20] Here, the "continuum"-argument could provide valuable new insights.

Nonetheless, as manifold and potentially fruitful the points of engagements may be which can be seen to thrive on a more or less pragmatic or relative definition of "law", there remain important areas in which this lack of agreement on a clear-cut answer to these basic conceptual issues seems to stand in the way of further analysis. The "continuum"-argument can not be stretched forever. Thus, for example, one need not propagate a substantial argument about a "just" international order or, for that matter, an understanding of international law in the natural law tradition in order to perceive that for example in instances of "humanitarian" intervention the discourses and "continua" of ethics, law and politics and their respective rules diverge. An intervention may be accounted for by IR theorists as being in accordance with the norms, rules and procedures of a specific security regime *and* even be seen as morally justified, yet being clearly in defiance of international law. As Oran Young observes, international regimes can uphold and support illegal activities. In this regard, it seems to be the norm and notion of "sovereignty" itself which serves as a stumbling block against an unlimited application of the continuum argument in analyzing the structural change of the set international (legal) rules. Even if one does not make a principled argument about the lawness of law being dependent on its emergence and final guarantee in a sovereign source, then it remains an observable fact that the most "lawlike" law that structures the "continuum" is the law set and enforced within and by sovereign states. And vice versa: it seems exactly to be the competence to be sovereign sources of law and possess competence competence that marks the sovereign state and which makes notions of competing sovereignties (e.g., "sovereign firms") seem metaphorical a best,

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[18] But it should be noted in this regard that some see the evolution of some kind of inter- or supranational "constitution" to be not an "evolution" of international law, but to be in outright contradiction to its basic principles; cf. for this argument: Falterbaum 1995: 248

[19] See however Kennedy 1994 who argues that a "shifting balance" between public and private regulation int the international sphere only appears as such before an idealized model of the state that does not account for the changing forms of statehood.

[20] See: Mertens 1996; Stein 1995; Carbonneau 1990.

no matter how extensive their abilities to establish non-legal rules. Why this is problematic for continuum arguments that basically proceed without having established a firm answer on what constitutes the lawness of law becomes clear if one reverses the problem. The problem with the continuum argument and a gradual account of lawness within law as well as between international legal rules and other kinds of legal rules is *not* the idea that "judicialization " ("Verrechtlichung") takes place out of processes of international institutionalization and regulation. And it is *not* the idea that various forms of rules and laws (international, European, municipal etc.) exhibit varying degrees of lawness. In such a view all international rules and legal orders would comprise but one global law field, although of greatly varying intensity and characteristics. The problem rather arises, however, when one seeks to ask why on the background of such a continuum or "global law field" it is that there are *still* rules and regimes which no one arguably would describe as "legal". In other words: once an absolute boundary between international legal and other rules has been abandoned through a continuum argument and been replaced by only relative criteria in order to distinguish the two, then the explanatory problem becomes not why it is that some rules can evolve into or have the character of international law, but why dense and highly effective international regimes continue not to be seen as law whereas some legal norms which are widely disobeyed clearly qualify as (international) law. Or to illustrate the problem in relation to Oran Young's observation referred to above: it is very important to note that from the observation that some international regimes support or regulate illegal activity he does not infer that the regimes are illegal. They are not illegal, but obviously also not legal in this case, but rather *non-legal* and thus arguably not located within a "continuum" between international legal and other rules.
It seems that there is no way around acknowledging that in order to understand the role, function and impact of law and other international rules, it is impossible to get by without a clear-cut definition of what law *is* from a certain point on. The pragmatic solution of the continuum argument in the end is not able to provide clear boundary-markers and often settles for a more or less arbitrary definition of law. Yet it seems that the problem is shared by approaches in IR and IL. Furthermore, neither in IR nor in IL do there seem to be inherent mechanisms at work which would have prohibited at least some approaches within these fields to arrive at some version of a continuum argument, important conceptual differences notwithstanding. In addition, both in IR and IL a continuum argument seems to work rather well with more or less philosophically and sociologically inspired approaches that put an emphasis on the basically socially constructed and processual character of international (legal) rules. While this may be laudable in and for itself, it also serves to underscore the point that the conceptualization international (legal) rules stands to profit from being embedded in a broader account of social change. While this may at first seem to lead straight back into the problematic that no clear-cut definition of the law is available for the purpose, I will argue in the following that it is exactly this embeddedness of international (legal) rules within comprehensive processes of global social change that allows for a satisfactory and clear-cut definition of law that does not share the vague character of continuum arguments in this respect.

From continuum to disjuncture: the plurality of legal forms

The structure of most "continuum" arguments is either to seek referential points (such as "control" or "authority") common to *all* rules, legal or not, in relation to which the rules and regimes in question can be located and their quality assessed; or to proceed with *one* "ideal model" of what constitutes law - or at least which rules exhibit the highest lawlike qualities ("Rechtsqualität")-, in relation to which all other rules can be weighed in their lawlike qualities.

Independently of this defining move, however, all continuum arguments are exposed to what is basically a *sociological-empirical* question of whether there is a criterion to establish that the great variety of rules in the international arena all belong to a factual sphere or continuum of law in absence of a clear definition of it. To posit a continuum of rules and law with varying qualities and densities of law in order to account for the varying regulative and structuring effects produced by various orders of rules and norms seems to presuppose some kind of commonly shared answer to the questions of what is law and what is not which allows to identify the belonging of a rule to the continuum of (legal) rules in the first place. However, it seems that after all such a commonly agreed definition of what constitutes law does not exist. This begs the principal question of whether it is possible to find or posit a single coordinate system for a continuum of legal and non-legal rules which can then be applied to a varied and complex global social reality, or whether the disjunctures and complexities exhibited by these realities prohibit the application of such a coordinate system, let alone a common understanding of what actually constitutes a (legal) rule or "law".
What basically led Kratochwil to abandon the search for an unambiguous definition of "the law" in his work on *Rules, Norms and Decisions* was the idea that "the law" could more profitably be decomposed and analyzed as "a choice-process characterized by the principled nature of *norm*-use in arriving at a decision through reasoning. What the law *is* cannot therefore be decided by a quick look at statues, treaties, or codes..., but can only be ascertained through the performance of rule-application to a controversy and the appraisal of the reasons offered in defense of a decision" (Kratochwil 1989: 18). While this of course begs the question what then in one way or another links the enormous variety of norms and rules that can be identified in the world (or international politics alone), *after* "the law" has been decomposed into rules and norms in the first place, Kratochwil elegantly solves this question by proposing to rebrand the law as not a substantial body of rules and norms, but rather as a "'style' of reasoning" (Kratochwil 1989: 205ff).[21] This is basically to say "that reasoning with legal rules differs substantially from the type of reasoning appropriate for making policy decisions". While Kratochwil has heralded a processual and constructivist turn in reasoning about international (legal) rules and thus very much opened the "discursive space" which seems to enable the proliferation of continuum arguments in their various guises, his argument about the law as a style of reasoning still carries with it some unclarities. Although it offers an elegant way to establish a ground for distinguishing between legal and non-legal realms without settling for a definite criterion in a positivist vein, it becomes analytically problematic when various "styles" of reasoning overlap *in specific choice-situations* (thus, there is no inherent reason why in making a policy-decision someone should not be guided first and foremost by legal reasonings). This is not to say that the different styles of reasoning will not be predominate in their respective "subject domains", just that there seems to be no reason why this should necessarily and constitutively be the case. That said, it seems that to identify the "law" as a "style of reasoning" may above all only be an empirical generalization rather than a theoretically grounded statement. Nonetheless, it may very well be that not the identification of law as a "style of reasoning" is the problem, but rather the narrow focus on "choice-situations".

Law as the operation of law

In order to grasp the issue of what constitutes law and the distinction of legal versus non-legal rules, one may in fact have to abstract from specific (if generalizable) choice-situations, yet be specific enough in order to account for the tremendous variety of legal and non-legal rules (regimes) that can be observed. The starting point for an analysis of legal and non-legal rules in a complex social world thus conceived would be less a concept of rules or law, but rather the

[21] The idea of a "'style' of reasoning" seems to present an advance in Kratochwil's position from his earlier account of law as a "rhetorical device" (Kratochwil 1983).

factual complexity of the social world. Seen from this perspective, it is first of all those areas of "law" that do pose difficulties for a number of legal and social scientific disciplines that are most interesting conceptually. The "legal character" of lex mercatoria, the setting of binding rules by private actors (companies, rating agencies), but also the establishment of transnational regimes of all kinds of sorts, all do form overlapping, yet also quite qualitatively different sets of qualitatively different rules, legal or not. To locate them within a "continuum" of law and rules would mean to foreclose the analysis of their character in a wider social order by imposing a common denominator whose existence would have to be etablished empirically in the first place. Thus, the initial guiding assumption in analyzing these areas and deciding whether they form "law" would thus not be a reference to *a* common understanding of law, let alone the relation of these rules to state sovereignty. Whether they form law would rather be established by observing whether those rules refer to *one of many* understandings of law - and the classical mode of a law grounded in state sovereignty would only be one of those, yet a still powerful one. In the sense of Teubner's (1996a) "Global Bukowina", this first of all means to argue for a theory of legal pluralism: "Global law can only be interpreted appropriated by a theory of legal pluralism and a theory of the sources of law conceived pluralistically accordingly" (Teubner 1996a: 257; transl. MA).[22]
In contrast to analyses which use the form of the continuum argument, such a concept of legal pluralism carries various advantages:

- First, it allows to address the various forms of legal and non-legal rules in their entire variety. A pluralist view does not per se exclude the application of the continuum argument in analyzing (legal) rules, but only as long as such an argument does not lead to results which may be neat conceptually, yet implausible empirically. Such an implausibility occurs empirically when vastly different rules are put into one basket; rather than advocating the use of but one continuum, a pluralist concept allows to bundle a number of non-exclusive continua of rules
- Second, a pluralistic concept does not depend on a particular reading of what constitutes law in order to be able to analyze processes of international institutionalization and judicialization. Rather, it allows and in fact calls for observing the various concepts of law and their application as social facts in themselves. It thus allows to join together the analysis of (legal) rules with their embeddedness in various conceptual frameworks which are themselves effective in (pre-)conceiving the perception of rules and law. This addition of a second-order perspective on (legal) rules allows to link those to broader issues of social change.
- Third, a pluralistic concept remains open for newly emerging forms of rules and law. While it can acknowledge the continuing binding power of forms of law that can be conceived according to more or less "classic" models of IL and IR, it does not face the issue of either modifying the model or having to fit new forms of law and rules into it every time such new forms do arguably arise.

In advocating a pluralistic concept of law it is important, however, not to confuse this with a concept that would leave the identification of what counts as a legal rule and what doesn't to the sole discretion of the observer. This would result in a *pluralistic* concept turning into an *arbitrary* one. Even a pluralistic concept of law needs a criterion that allows to distinguish law from non-law. However, a pluralistic concept of law does not establish what law is on the basis of an "essence" or "notion" of it. It is less interested in what the law is, but how it maintains its boundaries (Luhmann 1997a: 14ff). And if the focus of attention shifts more the "core" of law to the boundaries of law, then there is *only one criterion to identify what counts as law: and that is what the legal system describes as law*: a rule becomes a legal rule only if observed by the legal system as belonging to itself in distinction to its environment. While in an important sense

[22] On this, see the contributions in Teubner 1996b; also Teubner 1989.

this argument resembles Hart's (1973: 115-141) distinction between an inner and an outer perspective on law, it also differs from it in important respects, most importantly by the definition being purely operative and lacking a structural account (Luhmann 1997a: 41). This is also a main difference to Kratochwil, who has taken a step in the right direction, but by adopting a more or less "processual" definition of law ties it to individuals or institutions/organizations who do the processing. In contrast, an operative definition which sees law as operations of observation by the legal system on the basis of a legal/illegal code allows to get read of the empirically implausible assumption that only one "style of reasoning" can be found (or analytically stylized) in concrete choice situations of institutions or individuals.
It seems important to be entirely clear about the basic theoretical argument in this respect: what is basically proposed, in accordance with the facticity of the complexity of a functionally differentiated social world, is to refrain from any substantial definition of law. The idea behind this is not only that there is a de facto disagreement between various theories and philosophies of law in this respect, but also that this disagreement need not be resolved but observed and accounted for in reflections on law as part of a wider social world.
Against such a background, a pluralistic, object-related reformulation of law allows for significant exchange between IL and IR. By reconfiguring the basic mode of questioning and replacing "What (is the law)" with "How (does it construct and maintain its boundaries)" it becomes possible to consistently thematize the formation of law in contrast and in interaction with other processes of rule-formation within the context of global change. It is in this sense that there is no "law" in and for itself, but only a "law" of world society.[23] Nonetheless, even without subscribing to the wider theoretical implications of such an enterprise (which would firmly embed any theory of law within a theory of society[24]), it is possible to use the operative-pluralistic concept of law in order to can gain valuable insights into number of specific areas which are of interest to those that study international (legal) rules within and at the interstices of IL and IR.
An immediate analytical consequence that follows from an operative-pluralistic concept is that the legal character is no established by the scientifically observing analyst, but by the observing legal system. This is of course not meant to suggest that a legal rule could not also as well serve as a rule in the political system. Thus an international regime may very well be a part of the "global law field" as well as a regime regulating non-legal relations of communication and exchange. It is not legal *as* a regime, but only *for* something.
Put more in terms of IL, this first of all seems to confirm the well-known dictum that "international law is what international lawyers do". But that is not the case. International lawyers do many more things than international law. This is because international lawyers are persons and thus share with Kratochwil's choice-situations the problem of being part not of one, but of many contexts. Some communication of international lawyers may form part of international law if it is observed by the legal system as part of itself. But communication of international lawyers may as well form part of scientific, political, or other systems.
In terms of more concrete collaborative vistas for IR and IL, this reformulation of the concept of law first and foremost raises questions on how the boundary of the legal systems is maintained and transgressed and how something is appropriated, i.e. observed as law in the legal system. A

[23] "World society" is used here in a descriptive sense and not in order to connote a particular model of normative integration; see World Society Research Group 2000.
[24] See, more generally, Luhmann 1997b; however, if one adopts an operative notion of law it is important to note that although the legal system forms a part of society as much as it observes society to constitute its environment, "reflection" as self-observation does only occur withing the system. It would thus be not entirely accurate to treat the legal system as a "reflective device" of society (cf. Coplin 1965). Additionally, it should be noted that the "reflexivity" of legal norms very oftem serves as a political-normative ideal rather than as a description of the functions of the legal system (cf. Neyer 1999); this is however only possible if law itself is accorded a basically social-integrative function (cf. Habermas 1992) which is however impplausible if one accepts the basic insight of an operative autonomy of the legal system.

first analytical step would consist in basically rereading the great amount of the empirical studies in this regard. Thus, for example, the extensive study by Dezalay/Garth (1996) on international commercial arbitration could be reconceptualized as a study not only of how a set of rules come to be described as law; transferred to the issue European integration, the interesting question would less be one of whether the observed rules are legal rules and constitute a European legal system or constitution, but how and when rules come to be described as law by the legal system (national courts, lawyers etc.; but *not* within the scientific system!)
Of course, a number of difficulties remain with such an approach that cannot be followed through here, particularly relating to the relation between politics and law. Thus, for example, while Teubner argues for a strong structural coupling between the political and legal system, which in his opinion may in fact ultimately lead to a "reappropriation" of legal fields such a as the "lex mercatoria" by the political system, the spriritus rector of an operative definition of law in the context of a modern systems theory of society, Niklas Luhmann, would presumably attach more weight to the *operative* autonomy of the legal and political system, de-emphasizing the effects of structural coupling and, in effect, a political regulation or reapprobriation" of law.

Summary

The previous analysis has started with the seemingly moderate task of inspecting possible routes for communication and collaboration between the fields of international relations and international law, both of which in themselves represent a great variety of approaches that seek to conceptualize global change with their respective theoretical apparatuses. While the explicit "IL/IR-link" literature seems to focus on but a small number of these approaches, the "continuum argument" appears to signal some kind of substantive convergence of IL and IR perspectives in conceptualizing law and the character of legal versus non-legal rules in general. It was argued that like most other approaches, however, continuum arguments depend on some explicit or implicit *substantive* resolution of the basic (philosophical) question of what constitutes law or a legal rule. It was furthermore argued that any substantive resolution erects obstacles to the analysis of qualitatively new forms of law that emerge in a changing social world. While processual accounts of law are pointing in the right direction, i.e. away from substantive accounts, only an operative understanding of law seems to be able to allow enough room for a pluralistic concept of law that is able to account for the pluralism of legal forms that can be observed in world society.

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