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Venzke, I.

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Ingo Venzke

Amsterdam Center for International Law
University of Amsterdam

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Ingo Venzke
Amsterdam Center for International Law

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Amsterdam Center for International Law, University of Amsterdam

Contemporary Theories and International Law-making

Ingo Venzke*

I.   Introduction

Many contemporary theories approach international law-making with a shift in emphasis from the sources of law towards the communicative practices in which a plethora of actors use, claim and speak international law. Whereas earlier approaches would look at the sources as the singular moment of law-making, it is now generally understood that the broader process of speaking the language of international law contributes to its making. There are several main reasons for this shift. A first reason rests in the plain proposition that law not only lies 'in books' but also 'in action'.[1] Another reason for a move away from sources doctrine—at least as it has traditionally been spelled out—stems from the multiplication of actors as well as new forms and fora of law-making. A brief set of examples may clarify:

Consider, first, the distinction between 'combatants' and 'civilians', which lies at the core of international humanitarian law and which appears, among other places, in many different provisions of the 1949 Geneva Conventions. But to know what the law is, we cannot but ask what it 'really' means to be a 'combatant' or a 'civilian'. And the answer to that inquiry cannot be found anywhere but in the practice of interpreting these terms. Their meaning does not lie in or behind the text of the Geneva Conventions, but is instead the product of communicative practices that uses these terms. And these practices are not limited to state representatives who sign international treaties, but they include the opinions of military advisers, case law from domestic courts, the jurisprudence of international (criminal) courts and tribunals, statements of the

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[1] See already Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12–36.

International Committee of the Red Cross (ICRC), interventions by Non-Governmental Organizations (NGOs) such as Human Rights Watch, as well as the arguments of prominent legal scholars.[2]

Further, consider two specific examples from international economic law. When China joined the World Trade Organization (WTO) in 2001, it had made, among other things, a commitment to liberalizing trade in 'sound recording distribution services'. Does this commitment also extended to distribution by electronic means? A panel found that it did. On appeal, China argued that the scope of its commitments could not simply increase due to 'temporal variations in language'.[3] The Appellate Body disagreed and held that the terms—'sound recording distribution services'—were 'sufficiently generic that what they apply to may change over time'.[4] The Appellate Body decided a concrete case *inter partes*, but it is highly likely that its interpretation will carry onwards and instruct future practices.[5] Moreover, in some circumstances, trade agreements also oblige Members to base their domestic regulations on international standards, thus adding to the normative bite of standards adopted by institutions such as the Codex Alimentarius, itself established by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO).[6] In one recent case, the Appellate Body used a just revised decision of the Committee on Technical Barriers to trade (TBT)—part of the administrative underbelly of the WTO—to first see what actually amounts to an 'international standard' in the sense of the TBT Agreement and to then test a standard adopted under the Agreement on the International Dolphin Conservation Program (AIDCP) in that light.[7]

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[2] See in detail Ingo Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation' (2009) 5 Journal of International Law & International Relations 155–184.

[3] Appellate Body Report, *China—Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009, para 47.

[4] Ibid, para 396.

[5] According to the Appellate Body, its reports create 'legitimate expectations' among WTO members so that panels are expected to follow its precedents. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11/AB/R, 4 October 1996, p. 14.

[6] Panel Report, *European Communities—Trade Description of Sardines*, WT/DS231/R, 29 May 2002, para 7.77 (the European Communities cautioned that such institutions would turn into 'world legislators').

[7] Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/R, 16 May 16 2012; TBT Committee Decision on Principles for the Development of

Similar to the AIDCP standard, finally, there is a plethora of instruments that is typically grouped under the heading 'soft law'. Like the AIDCP standard, they may be referenced in multilateral as well as bilateral treaties. For example, an Agreement on Labour Cooperation complements the recent Free Trade Agreement (FTA) between Canada and Panama and links up to a series of Declarations of the International Labour Organization (ILO).[8] Furthermore, such soft law instruments may even gain normative force in the absence of any interaction with traditional sources of law, as OECD Export Credit Arrangements and even the global use of indicators illustrate.[9] Finally then, the multiplication of forms of legal normativity and fora of its making certainly prompt core questions about the concept of international law itself.

By way of introduction, these examples highlight why many contemporary theories see international law-making not as an act of signing an international treaty, but as a continuous communicative process of speaking and using the law. They also begin to illustrate the variety and multiplicity of actors who are involved in international law-making and, ultimately, they point to foundational questions: What is international law? Whereas the sources of international law— commonly summarized in the revered Art. 38(1) of the ICJ Statute— reserve law-making to states, the legal discourse knows many other actors and legal normativity comes in many other forms than treaties, custom, or general principles.[10]

Simply shifting emphasis towards communicative practices leaves a number of key issues unanswered. Crucially, it begs questions of foundations, of legitimacy, and of yardsticks for separating law from non-law. It poses core challenges to the concept of law. Sources doctrine has always been tightly bound up with thinking about the justification for the law and about its separation from other normative orders. The traditional narrative reads that international law is authoritative and distinct because it rests on the consent of sovereign states. Increasingly so, such

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International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the TBT Agreement, G/TBT/1/Rev.10, 1 January 1995, revised 9 June 2011.

[8] Stephan W Schill and Marc Jacob, 'Trands in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law' [2012] Yearbook on International Investment Law & Policy 141, 148.

[9] Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, 'Governance by Indicators' in Kevin Davis and others (eds), *Governance by Indicators. Global Power through Classification and Rankings* (Oxford University Press 2012) 3–28.

[10] Cf. Chapter 3 in this volume (____ on 'actors and subjects').

a view is contrasted with approaches that seek to find a foundation in universal values or community interests.[11] The present contribution neither rehashes the traditional narrative, nor does it spend much time on renewed articulations of international law's justification or its separation from other normative orders.[12] Rather, the following sections discuss how theories approach international law-making with a focus on their shift towards communicative practices as a defining feature.

The contribution proceeds by sketching the move from sources to communicative practice against the backdrop of the 'linguistic turn', which proposes that law is made 'in action' (II.). It then dedicates sections to principal contemporary theories, starting off with the New Haven School as a pioneering approach to thinking of international law-making as a process of authoritative decision-making (III.). Its heritage is refined in the theory of transnational legal process (IV.). In contrast to these voices from New Haven, systems theory abstracts from the political strategies of concrete actors and is therefore in a good position to recognize law as an autonomous enterprise (V.). Practice theory then combines, first, sociological thought on the heels of Pierre Bourdieu in an attempt to overcome divides between actor-centered and structural approaches and, second, philosophical insights of pragmatism that refine accounts of how communicative practices actually make international law (VI.). Governance theory then suggests paying more attention to regulatory networks as sites of law-making and to private actors whose normative output gains bite on the market place (VII.). The concluding outlook discusses the Global Administrative Law project and research centered on international public authority as responses to the normative challenges stirred up by the multiplication of forms and fora of international law-making (VIII.).

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[11] Hilary Charlesworth, 'Law-making and sources' in *The Cambridge Companion to International Law* (Cambridge University Press 2012); for a critical exposition of diverging approaches see Jochen von Bernstorff and Ingo Venzke, 'Ethos, Ethics and Morality in International Relations' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

[12] Issues of legitimacy are dealt with in chapter 4 [___]. Renewed articulations of a distinction between international law and non-law are developed, inter alia, in Jan Klabbers, 'Law-making and Constitutionalism' in Jan Klabbers and others (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 81-125; Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 Leiden Journal of International Law 335–368.

II.   From Sources to Communicative Practice

A.   Distinguishing law-making from law-application

Theories of international law have for some time converged on picturing law-making in terms of sources.[13] If law comes into the world through the channel of sources, interpreting and applying international law then is something different. It has nothing to do with making international law but rather with uncovering the law that was already made. To be sure, many great minds of the discipline have already spotted for time that international law develops in ways that cannot be captured through the lens of sources doctrine. For Hersch Lauterpacht it was for example 'the essential function' of the International Court of Justice (ICJ) to develop the law.[14] But, like many others, he speaks interchangeably of 'developing' the law and 'clarifying' it. [15] In his view, the practice of the court makes the law visible.[16] In Lauterpacht's parlance, which certainly leans towards a natural law foundation, the court gives voice to existing law—to the law that 'lies behind the cases'.[17] Scholars with a more positivist bend would place emphasis on the wording of the text itself, which 'must be presumed to be the authentic expression of the parties'.[18] Sir Gerald

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[13] Sources doctrine is commonly shaped in light of the revered Art. 38(1) ICJ-Statute, which was taken in verbatim from the Statute of the Permanent Court of Justice. For the impact of that article on the discipline of international lawyers, see Thomas Skouteris, 'The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law' in Fleur Johns and others (eds), *Events: The Force of International Law* (Routledge 2011) 69-80; Max Sørensen, *Les sources du droit international* (Munksgaard 1946) 40.

[14] Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 42

[15] In further detail Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 99–131; Georges Abi-Saab, 'De la jurisprudence. Quelques réflexions sur son rôle dans le développement du droit international' in *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor don Manuel Díez de Velasco* (Tecnos 1993) 19.

[16] Lauterpacht, *The Development of International Law by the International Court*, 42–43

[17] Lauterpacht, *The Development of International Law by the International Court*, 3–74 (the section is titled "The Law Behind the Cases").

[18] The words are those of Sir Humphrey Waldock, last Special Rapporteur of the International Law Commission working on the Law of Treaties ILC. See Yearbook of the International Law Commission, *Third Report on the Law of Treaties*, vol II, (1964) 5, 56.

Fitzmaurice similarly opined in a classic statement that 'texts must be interpreted as they stand, and, prima facie, without reference to extraneous factors'.[19]

In short, interpreting and applying the law is understood as distinct from law-making, which, as a matter of sources, lies beyond the reach of the everyday operation of the law. That is a view that also Hans Kelsen ultimately upheld even if he otherwise foreshadowed significant theoretical developments. Three elements of his *œuvre* are most salient for presenting the approach of contemporary theories to international law-making. First, Kelsen unburdened the concept of sources from much of its metaphorical and mystical baggage. In his view, sources are simply norms that authorize actors to create other norms.[20] With such an understanding in hand, sources can be found not only in Art. 38(1) ICJ Statute but at every level of the legal order. Art. 42 of the United Nations Charter is a source, for example, because it empowers the Security Council to adopt binding resolutions. More generally, whenever a norm is applied in any concrete case, it amounts to a source because it authorizes its interpretation. Second, interpretation is inescapably a creative activity that is not determined by the norm to be applied. The norm to be applied authorizes an interpretation but it does not determine the content of that interpretation. Kelsen critiqued orthodox judicial methodology for wanting to make believe that the act of interpretation is nothing but an act of understanding and clarification. The interpretation in any specific case (which amounts to a new norm for that case, the *Fallnorm*) cannot be discovered but only created.[21] In other words, there is 'no imperative without an imperatus'. [22] Every act of law-application is also one of law-making.[23] But, third, Kelsen stopped short of considering the impact

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[19] Gerald Sir Fitzmaurice, 'The Law and Procedure of the International Court of Justice. Treaty Interpretation and Other Treaty Points' (1957) 33 British Yearbook of International Law 203, 212.

[20] Hans Kelsen, Principles of International Law (Reinehart 1952) 303; cf. Jörg Kammerhofer, Uncertainty in International Law: A Kelsenien Perspective (Routledge 2011) 197-9.

[21] Kelsen, *Reine Rechtslehre* (Deuticke 1934), at 74 and 95.

[22] Hans Kelsen, *General Theory of Norms* (Clarendon 1991) 29, 203, with reference to Walter Dubislav, 'Zur Unbegründbarkeit der Foderungssätze' (1937) 3 Theoria 330, 335. Cf. Anton Schütz, 'Imperatives without imperator' (2009) 20 Law and Critique 233–243.

[23] Hans Kelsen, *Reine Rechtslehre* (Deuticke 1934), 82–3 and 95. On this point Kelsen draws heavily on Adolf Merkl, 'Das Doppelte Rechtantlitz' 47 *Juristische Blätter* 425 (1918).

that applying a norm has on that same norm. Applying a norm produces a new norm for the concrete case, but it does not change the norm on which it is based.[24]

B.   *The linguistic turn: Lawmaking in communicative practices*

Theoretical developments after Kelsen take his argument further by considering the feedback of applying a norm onto that same norm. They see the operation of the legal system not only as making law for concrete cases, but also as shaping the law to be applied. The main reason for this shift rests in the so-called 'linguistic turn', which disturbed received ideas about the relationship between words and the world—between language and reality.[25] Earlier, stability in the relationship between language and reality was thought to be provided by a connection between linguistic signs (the words) and something they represent (the world). But in his seminal *Course in General Linguistics*, Ferdinand de Saussure successfully defeated this view and instead argued that linguistic signs only gain meaning through their difference from other linguistic signs.[26] Not representation but difference constitutes meaning.[27] On Saussure's account, only tradition has the potential of stabilizing fluctuating distinctions, of stabilizing meaning as well as any norm to be applied.[28] But beyond that, there is no possibility of telling what a 'sound recording distribution services' in China's schedule of commitments 'really' are. To the extent that the meaning of that expression changes, the law changes with it.

A parallel line of thinking takes off with Wittgenstein's piercing view that words do not have a meaning other than that attributed to them by their use.[29] In his solemn observation, the best that can be done is to observe and find rules that describe the use of an expression. The meaning of the explanatory rule is of course subject to the same fate so that one is caught in an

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[24] This is why Kelsen had such troubles in coming to terms with 'wrong' and yet effective interpretations. See András Jakab, 'Probleme der Stufenbaulehre' (2005) 91 *Archiv für Rechts- und Sozialphilosophie* 333-365.

[25] For a concise and pointed introduction see Richard Rorty, 'Wittgenstein, Heidegger, and the Reification of Language' in Richard Rorty (ed), *Essays on Heidegger and Others*, vol. 2 (Cambridge Universtiy Press 1991).

[26] F de Saussure, *Course in General Linguistics* (Open Court 1983).

[27] F de Saussure, *Course in General Linguistics* (Open Court 1983) 65, 106.

[28] F de Saussure, *Course in General Linguistics* (Open Court 1983) 67-69.

[29] L Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell 1958) para 43

infinite regress. A rule is always dependent on another rule that explains how it should be used.[30] For Wittgenstein the consequence was clear: 'You must look at the practice of language, then you will see it.'[31] This was bound to hold true for the language of international law just as well.[32]

The challenge in this line of thinking for a convincing understanding of international law-making is further refined by John Austin, the 20th century philosopher of language, not the 19th century founding father of analytical jurisprudence. The 20th century Austin coins the concept of performative speech, which refers to communicative utterances that change the world.[33] The worn example is the utterance of the words 'I do' that can create the bond of marriage if performed in the right context. In a clever move, Austin tries to come up with distinctions that separate creative *performative* speech acts from simple *constative* speech acts such as 'this is an apple.'[34] If an interpreter only engaged in constative acts of the kind 'this is what the law is,' then she could possibly withdraw from any charge of actually making law rather than applying it. Austin suggests, however, that such as position is unattainable.[35] Every attempt at distinguishing performative from constative acts fails because it not possible to withhold from interpreting even simple objects such as apples, let alone complex phenomena such as law.[36] In short: 'Stating is performing an act'.[37]

These lessons of the linguistic turn have been still further developed in work centred on the concept of *performativity*, which connects to the work of Austin (and of John Searle in his footsteps) but cuts some ties as well.[38] Overall, it is employed to capture in any moment of using

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[30] L Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell 1958), para 198. See already I Kant, *Critique of Pure Reason* (Cambridge University Press 1998), 263

[31] L Wittgenstein, *On Certainty* (Oxford: Blackwell 1969), para 501.

[32] See in detail Venzke, *How Interpretation Makes International Law*.

[33] John Langshaw Austin, *How to Do Things with Words* (Oxford University Press 1979) 138–39; John Langshaw Austin, 'Performative Utterances' in *Philosophical Papers* (Oxford University Press 1979), 233-253.

[34] Austin, *How to Do Things with Words* ., at 140-41.

[35] Ibid*.,* at 141.

[36] J L Austin, *How to Do Things with Words* (Oxford: Oxford University Press 1979 [1962]), 142-43; S Fish, *Doing What Comes Naturally* (Durham: Duke University Press 1989), 488–91.

[37] Austin, *How to Do Things with Words* 139.

[38] For an introduction of the concept in legal theory see Sabine Müller-Mall, *Performative Rechtserzeugung* (Velbrueck 2012) ; R Christensen and K D Lerch, 'Performanz. Die Kunst, Recht geschehen zu lassen', in: Kent D. Lerch (ed), *Die Sprache des Rechts*, vol. 3 (de Gruyter 2006) 55-132.

and speaking (the law) the simultaneous presence of a transformation of the past and of the introduction of something new that reaches into the future.[39] The use of legal concepts shapes their content and develops the law in passing. Making law and interpreting it are not categorically different things, but law is made by way of interpretation.

C.   *Making law this way?*

It might well be asked at this stage whether making law in communicative practices is not, after all, different from signing a treaty? Among other things, it could be argued that contracting parties intended later legal developments to unfold as they did.[40] This seems especially plausible when they used specifically vague language that includes terms that are 'sufficiently generic that what they apply to may change over time' and when they mandate institutions with supervisory (e.g. UNHCR) and adjudicatory functions (e.g. WTO). Later developments, it could be said, then only 'complete the contract'.[41] Four preliminary points are in order:

First, even if tied back to treaty terms or accepted formulations of customary international law, interpretative practice still contributes to shaping the contents of commitments. Why not call this law-making? After all, second, tying the communicative practice back to the consent of contracting states is oftentimes simply dubious and suggests that actors are clairvoyant. That parties to the Refugee Convention could have foreseen the expression 'membership of a particular social group' to include women is very unlikely. Third, using and speaking international law not only connects to past acts, which enjoy the blessing of sources doctrine, but actually re-structure the legal discourse by introducing new terms into the debate. 'Enemy combatants' are a case in

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[39] In further detail see the work of Jacques Derrida, in particular his *Of Grammatology* (Johns Hopkins University Press 1998) and of Judith Butler, in particular her *Excitable Speech: A Politics of the Performative* (Routledge 1997).

[40] On the distinction between 'contract treaties' and 'law-making treaties' and for a further discussion of the term law-making as opposed to creating specific (contractual) rights and obligations, see Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic Journal of International Law 383–404.

[41] By Henrik Horn, Giovanni Maggi, and Robert W Staiger, 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 American Economic Review 394–419; Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 Journal of International Economic Law 507–538. Also see Geneviève Bastid Burdeau, 'Le pouvoir créateur de la jurisprudence internationale à l'épreuve de la dispersion des juridictions' (2007) 30 Archives de philosophie du droit 289–304.

point. Likewise the trade law discourse used to test whether a measure was 'primarily aimed at' the conservation of exhaustible natural resources in the sense of Art. XX of the General Agreement of Tariffs and Trade (GATT) even if the treaty language required such a measure to be 'related to'. Adjudication had coined the 'primarily aimed at' standard and it was treated as if it was the expression used in the GATT.[42] But, fourth, whereas law-making by way of sources above all requires will, law-making by way of interpretation in principle has to convince.[43] To thus repeat the question: why look at communicative practices as making law?

Granted, lawmaking by way of interpretation impacts the international legal discourse differently than any new treaty. Even after trade law jurisprudence had made all participants understand 'related to' as 'primarily aimed at', in one of its first cases the Appellate Body could brush this understanding aside because it did not rest on the 'wording' of the Art. XX and thus violated the rules of interpretation.[44] But the Appellate Body then set up a new body of precedents that again coated the GATT with new layers of meaning. Past interpretations generate normative expectations and shape the legal discourse. Others can simply not escape relating their own statements about the law to those of interpreters with authority.[45] The distinction between law-making by way of interpretation and through 'legislative' acts becomes more fluid. The reference to authority, however, opens up a new set of questions. In particular: whose interpretation then matters and is such authority justified? I will resume the normative implications of the shift in perspective from sources to communicative practice in the concluding outlook. In the following, I proceed by discussing in turn what contemporary theories offer for an improved understanding of international law-making in communicative practices.

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[42] See in detail Ingo Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 12 German Law Journal 1111–1140; see also Raj Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)' (1999) 9 Journal of Transnational Law and Policy 1.

[43] See in detail, Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute□: International Judicial Institutions as Lawmakers' (2011) 12 German Law Journal 979, 990–1.

[44] Appellate Body Report, US - Gasoline (note 30), 16-17.

[45] Ingo Venzke, 'Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction' (2013) 14 Theoretical Inquiries in Law ___forthcoming.

But an additional last point is in order before doing so. Not all lawmaking in communicative practices comes in the form of interpretation. Many soft law instruments can connect to and re-shape hard law obligations. But they can also create normative effects on their own and, to the very least, shift argumentative burdens. Many global indicators do precisely that. The fact that China struggles to undermine the World Bank's 'Doing Business Report' testifies to that reports relevance and impact.[46] Soft law can create forceful incentives for acting one way rather than another, sometimes backed by strong market mechanisms (think of voluntary product standards) or simply pull towards efficient co-ordination.

III.   The New Haven School

The New Haven School groups a number of scholars who worked on a policy-oriented view on international law that was very outspoken about its disdain for thinking in terms of formal sources.[47] It foreshadows both theoretical developments that see how hard law changes through interpretative processed and how the type of instruments that form part of the body of international law is much richer than Art. 38 ICJ-Statue would suggest. International law, Myres McDougal found, should be 'regarded not as mere rules but as a whole *process* of authoritative decisions in the world arena'.[48] Lawmaking neither ended nor started with sources. McDougal and his colleagues spelled out seven phases of decision-making and execution to help identify international law in legal processes whose main drive was the exercise of power.[49] The early views cast on international law-making from New Haven were decidedly functional and endorsed a substantive overarching end towards which all efforts should be directed; namely, the protection

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[46] The Economist, *Stand up for "Doing Business"*, 25 May 2013.

[47] See generally G J H v Hoof, Rethinking the Sources of International Law (Deventer: Kluwer 1983), 39–44; M Koskenniemi, The Gentle Civilizer of Nations (Cambridge: Cambridge University Press 2001), 474–80.

[48] M S McDougal, *Studies in World Public Order* (New Haven: Yale University Press 1960), 169. Also see R Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *International and Comparative Law Quarterly* 58–84, 58 ('international law is a continuing process of authoritative decisions'); B Cheng, Epilogue: On the Nature and Sources of International Law, in: *International Law: Teaching and Practice* (London: Stevens 1982), 203–233.

[49] M S McDougal, H D Lasswell, and J C Miller, *The Interpretation of Agreements and World Public Order* (New Haven, CT: Yale University Press 1967), 13–21.

of human dignity.[50] Doctrines of sources and references to Art. 38 ICJ Statute were replaced by a sociological view on what participants in legal discourse actually do.

In his seminal article 'International Lawmaking: A Process of Communication', Michael Reisman argued that scholarly teachings and judgments had developed a myth—the myth that international law could be found by looking at what Art. 38 ICJ Statute claims to be the sources of all law. [51] The model of positivism, he contends, is distorting precisely because it holds that law is made by the legislator.[52] Instead, Reisman maintains, international law emerges from the myriad of legal communications that a plethora of actors utter every day. In light of this observation, he developed a novel scheme, wholly unrelated to sources, that distinguishes legal from non-legal communications.[53] He notably finds that international law-making is not a function exclusively reserved for unitary sovereign states but is present in all legal communications.[54] Given that the international legal process is no longer dominated by governments alone, Reisman further finds that newly generated legal norms can conflict with norms that others might find with a formalist look at traditional sources of the law. His process-oriented view of international law transcends formalism and claims to be in a position of granting humanitarian concerns, voiced by a wide range of actors in international political discourse, a legal status even if they conflict with norms that have a formal pedigree in the sources of law. As in other sociological approaches to law, humanitarianism is construed as a social fact. It amounts to a point of reference for normative

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[50] See M S McDougal, 'International Law, Power, and Policy: A Contemporary Conception' (1954) 82 *Recueil des Cours* 137–259; W M Reisman (ed), *Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal* (New York: Free Press 1976). It is interesting to note that this comes close to idealist positions in a natural law tradition, see G J H v Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer 1983), 41.

[51] M Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 *American Society of International Law Proceedings* 101–20.

[52] Ibid., at 107.

[53] Ibid., at 108, drawing on a more detailed argument in M S McDougal and M Reisman, 'The Prescribing Function in World Constitutive Process: How International Law is Made' (1980) 6 *Yale Studies in World Public Order* 249–84.

[54] M Reisman, 'A Jurisprudence from the Perspective of the "Political Superior"' (1996) 23 *Northern Kentucky Law Review* 605–28.

judgment and for legal argument with a certain distance to positive legal provisions that might be spelled out in the UN Charter, for instance.[55]

IV.   Theory of transnational legal process

The theory of transnational legal process (TLP), a spin-off from New Haven, shares the critique of legal positivism and formalism. It adapts the concept of 'jurisgenesis' from the work of Robert Cover to look at the law-generating interactions among a multitude of actors rather than the formal sources of the law.[56] But this approach does not share the earlier New Haven School's 'conviction that if knowledge is properly put to the task of the realization of values, the results will lead inevitably to human betterment'.[57] In contrast, TLP does not, at least not at first glimpse, put international law in the instrumental service of given goals. Its chief architect and proponent Harold Koh rather claims that the participation and interaction of the grand variety of non-state actors as well as the internalization of norms ensures the legitimacy of the jurisgernerative transnational legal process.[58] It remains opaque, however, why that should be the case. The main point of TLP appears to be its contribution to when, why and how international law induces compliance.[59] As an approach to understanding the making of international or transnational law it tends to be vague or simply mute.

Mary Ellen O'Connell has attempted to fill this theoretical gap within the framework of TLP. She flashes out how international law changes in light of new concerns and objectives. But in doing so, she ends up embracing a functionalist-instrumentalist perspective (placing international law in the service of given goals), which she first strongly rejected. In the end she

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[55] M Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The special problem of humanitarian intervention' (2000) 11 *European Journal of International Law* 3–18.

[56] H H Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181–207; it borrows the concept of 'jurisgenesis' from the work of Robert Cover, see R M Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4–68.

[57] R A Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 *Yale Law Journal* 1991–2008, 2002, quoted in F Hanschmann, Theorie transnationaler Rechtsprozesse, in: S Buckel, R Christensen, and A Fischer-Lescano (eds), *Neue Theorien des Rechts* (Lucius und Lucius 2009), 375–400, 384.

[58] H H Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181–207, 205.

[59] H H Koh, 'Bringing International Law Home' (1998) 35 *Huston Law Review* 623–81.

demands reaching out to society's values where treaties and customary rules do not fully support a desired outcome and thus reaches back to classical voices from new Haven. [60]

The strength of TLP seems to lie in its account of norm compliance, but not without follow-up questions. The theory suggests that the interaction between a variety of actors in a transnational legal process is jurisgenerative. At the same time it contends that such processes account for norm compliance by way of internalization. Both propositions are probably true, but they stand in uneasy tension. Is it a given norm that is internalized or does this norm change in the process of internalization? Is it not a process that portrays law-creative features? The latter seems more plausible and fits with TLP's theoretical background. Yet the thought is not developed further.

Wayne Sandholtz picks up TLP as a theoretical frame in order to ask head-on how norms change. He arrives at a cyclic model in which disputes triggered by events generate debate that in turn changes norms. [61] This bodes well for a better understanding of international law-making. Yet, again, TLP accounts primarily for processes of norm internalization rather than change. The law-creative aspect is nebulous to the extent that Sandholtz confines his observation to social norms because, as he writes, '[i]nternational law, of course, has well-established rules for adding to or changing the stock of international legal norms: the sources of international law. New rules emerge and existing rules evolve through the formal process of treaty creation as well as through the development of customary law.' [62] How legal norms change is not even part of the question and an investigation of how law is made thus lies outside, or at best at the fringes, of his study. It appears to be a lucky coincidence that at the end of each of his norm cycles governments signed a new treaty and thus the question did not arise with much force whether the legal norm had changed prior to that. In the last chapter Sandholtz ponders the question, however, whether, in light of the Iraq war and in view of arguments centred on the plundering of Iraqi museums, there

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[60] M E O'Connell, 'New International Legal Process' (2004) 36 *Studies in Transnational Legal Policy* 79–107, 104.

[61] W Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford University Press 2007). Cf. W Sandholtz and A Stone Sweet, Law, Politics, and International Governance, in: C Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004), 238–71; W Sandholtz and K Stiles, *International Norms and Cycles of Change* (Oxford University Press 2009).

[62] W Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford University Press 2007) 9.

now exists an obligation for the occupant to protect cultural property. He suggests that there is a consensus that carries such an interpretation of the law. And [w]hen a consensus emerges, the rule is altered.'[63] But on his account, the *law* changes through the formal channels offered by the sources of international law.

Paul Schiff Berman's approach may be read as a correction of this shortcoming. Berman also leans on Cover's work on jurisgenerative practices—the continuous contestation among interpretative communities that 'do create law and do give meaning to law through their narratives and precepts'.[64] This opens the door for sketching law as existing in numerous co-existing, competing, and overlapping normative universes. Cover did not himself engage in debates of legal pluralism but his work certainly lends itself in support of pluralist conceptions of law when he writes that 'all collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word "law"'.[65] Law is not tied to recognized sources but emerges from social interaction among a variety of actors, including multinational corporations, non-governmental organizations, international organizations, terrorist networks, media and, in special circumstances, individuals. There is no centralized process of lawmaking but there are multiple normative communities, which generate their own legal norms. The grand picture is one of global legal pluralism.[66] The focus does not rest on shifting the contents of any commitments that contracting parties might have made, but on the generation of new norms completely detached from avenues of formal law-making. TLP thus draws attention to a whole range of instruments that form part of international law.

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[63] Ibid., at 262.

[64] P S Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301–29, quoting R M Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4–68, 40.

[65] R M Cover, 'The Folktales of Justice: Tales of Jurisdiction' (1985) 14 *Capital University Law Review* 179–203, 181.

[66] P S Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301–29; also see P S Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155–1237. See also Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Northwestern University Press 2002). This kind of legal pluralism is notably different from that of Nico Krisch and others who are concerned with the relationship between legal orders of different levels of governance, see Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010).

V.   Systems Theory

The theoretical framework of systems theory paints a quite similar picture of law-making in communicative processes but it sets itself apart from policy-oriented jurisprudence à la New Haven by remaining bound to understanding interpretation in law as a distinct enterprise that cannot be reduced to the exercise of power or the pursuit of values. It recognizes that speaking the language of the law compels actors to use certain arguments, a certain logic. It critiques external perspectives on legal practice for reducing legal practice to the logics of other systems such as political, economic, or cultural systems with their respective logic. Legal practice, in its view, then becomes indistinguishable—politics by other means.[67]

One of systems theory's overarching propositions is that law is an autopoietic subsystem of society that encompasses all communications containing claims about (il)legality.[68] 'Autopoiesis' here is a term taken from biology which roughly means self-reproduction and it comes in handy for Niklas Luhmann to grasp the features of social systems.[69] The concept is used to suggest that communications within a system can only operate by reference to communications of that same system—legal claims have to refer to legal claims in order to be valid legal claims.[70] Legislation— law-making through the channels of sources—can enter the legal system only by way of a 'structural coupling' between the political and legal system. In the domestic context this path is paved by constitutions.[71] In the international context this coupling portrays significantly different characteristics and the chances of input from the political into the legal system seen to be rather minimal, with two principal implications.[72] First, international law is understood to evolve in

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[67] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1045, 1003–4; N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993), 9–18.

[68] N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993), chapter 2.

[69] The concept has been further refined for law as a subsystem by Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993).

[70] N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) 98.

[71] N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993), chapter 9.

[72] N Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 1993), 582; G Teubner, 'Global Bukowina': Legal Pluralism in the World Society, in: *Global Law Without a State* (Dartmouth 1997), 3–28, 6; A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of

rather significant distance from political-legislative input. Second, since the functional and institutional differentiation of the political and legal system is only little advanced when compared with domestic contexts, communicative operations in international law tend to portray more elements that would usually belong to other systems. In other words, international legal argument would show more references to morality and politics, for instance.[73]

Furthermore, with specific regard to international law-making, the world society and international law are characterized by functional specializations rather than territorial delimitations. Leaning on Eugen Ehrlich's sociology of law, Gunther Teubner points towards 'Global Bukowina', which are subsystems within the global society that create their own normative orders.[74] The overlaps with global legal pluralism as it has developed from TLP are evident. Teubner argues that 'global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions'.[75] And also in his outlook the role and impact of non-state actors is of increasing importance in societal law-making processes.[76] A feature to which systems theory draws specific attention is that society falls into distinct sectors that are institutionally organized in various regimes and driven by particular rationalities.[77] Law is fragmented along regimes that cater to the to economic or environmental interests, for instance.[78]

With the conceptual move towards autopoiesis, Luhmann finds a fitting response to the challenges of the linguistic turn and the troubles of an infinite regress in the use of rules. Remember, in the wake of Wittgenstein the question had been how it is possible to follow a rule if

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Global Law' (2004) 25 *Michigan Journal of International Law* 999–1045, 1014–17 (coining the notion of 'auto-constitutional regimes' in this regard).

[73] The legal system then is not operationally closed. N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993), 157.

[74] G Teubner, 'Global Bukowina': Legal Pluralism in the World Society, in: *Global Law Without a State* (Dartmouth 1997), 3–28 with reference to E Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot 1967), 390.

[75] G Teubner, 'Global Bukowina': Legal Pluralism in the World Society, in: *Global Law Without a State* (Dartmouth 1997), 3–28, 7.

[76] Andreas Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (Velbrück 2005).

[77] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1045.

[78] See in detail Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

its use always depends on another rule, and so forth. The answer Wittgenstein gave was that rule following is a matter of practice.[79] Practice here is used in a manner akin to habit or custom. It is a cultural phenomenon of almost natural quality—practitioners acquire the ability to follow a rule in processes of socialization.[80] An actor must have learned in practice what a rule means—she must have use internalized the practice so as not to be in doubt about its meaning.[81] It may thus be deemed most fitting to think of norm change as a process of evolution, as systems theory does. The 'blind force of natural selection' would change and make international law.[82]

But the understanding of legal change as an evolutionary process, in a theoretical meaningful way, faces a number of obstacles.[83] One core challenge for such an understanding emanates already from Max Weber's astute argument: 'the mere *change of external conditions* is neither sufficient nor necessary to explain the changes in "consensual understandings". The really decisive element has always been *a new line of conduct* which then results either in a change of the meaning of existing rules of law or in the creation of new rules of law.'[84] It continues to be a task for theory to develop an account of legal change and law-making that captures legal interpretation as a distinct enterprise that is not reduced to politics, morality, or culture, on the one hand, and that still maintains a grasp on actual lines of conduct. A renewed conception of practice might be well suited to help meet that chore.

VI.   Practice theory

Theories that give prime consideration to the concept of practice have for a while been mainly structuralist (and mainly Marxist). On the whole, they have not combined a conception of practice

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[79] L Wittgenstein, *Philosophical Investigations* (Blackwell 1958), para 202. 209. Cf. B Bix, *Law, Language and Legal Determinacy* (Oxford University Press 1993), 38–45.

[80] Wittgenstein shows right at the outset of his *Philosophical Investigations* that learning a language is not about explaining what an expression means but about drill and training, see para 208.

[81] L Wittgenstein, *Philosophical Investigations* (Blackwell 1958), para 219.

[82] N Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 1993), 239–96.

[83] In detail Venzke, *How Interpretation Makes International Law*, 38-42

[84] Max Weber, *Economy and Society* (University of California Press 1978) 755.

with lines of conduct.[85] It was in particular Maurice Merleau-Ponty who brought life into the concept of practice and who conceived practice as historically situated speaking, thinking, and acting.[86] This is an important change of perspective: It notably recognizes the feedback that acting has on the structures that constitute and constrain actions. Anthony Giddens pinned down the idea in his classical argument that '[s]tructural properties of social systems are both the medium and the outcome of the practices that constitute those systems.'[87] In brief, norms and actors are co-constitutive.[88] For international law-making this means that it is indeed what lawyers make of it, but they are constrained by what they make.[89]

The work of Pierre Bourdieu offers further inspiration for this line of theoretical thinking that explores practice between the snares of conduct that is oblivious to structural constraints and reified structures that exist independent of human action. Bourdieu argued that past structuralist approaches blunder into the trap of equating what they see as objective observation (unburdened with dealings of living persons) with the view that actors themselves have of their practice.[90] Social actors tend to be ignored where they should really be included as a constitutive element of the social world. On the contrary, however, only taking account of practice without any critical detachment and understanding for structural predispositions would fall for the fallacies of an unbroken subjectivism. Sociological insight would then be impossible. In other words, factors that explain conduct—an actors' legal interpretation, for instance —should not be equated with the

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[85] Among the exceptions see M Hardt and A Negri, *Multitude. War and Democracy in the Age of Empire* (Penguin 2006) (drawing on Judith Butler's work, see *supra* note 37___).

[86] Maurice Merleau-Ponty, *Adventures of the Dialectic* (Northwestern University Press 1973), 37. Cf. C Taylor, 'To Follow a Rule . . .' in: C Calhoun, E LiPuma, and M Postone (eds), *Bourdieu: Critical Perspectives* (University of Chicago Press 1993), 45–60, 49.

[87] A Giddens, Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis (Macmillan 1979), 69.

[88] A Wendt, *Social Theory of International Politics* (Cambridge University Press 2000), chapter 2.

[89] Compare Martti Koskenniemi, 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice' in United Nations, *Collection of Essays by Legal Advisrers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999) 495-523, 523('International law is what international lawyers do and how they think.').

[90] Pierre Bourdieu, *The Logic of Practice* (Standord University Press 1992) 29–39. See also the juxtaposition of internal and external perspectives in legal scholarship, H L A Hart, *The Concept of Law* (Oxford University Press 1997 [1961]) 88–9.

reasons actors themselves see for their actions. Bourdieu developed his sociology in an attempt to overcome this divide with a praxeological epistemology.[91]

      A further source of inspiration may be found in theoretical pragmatism, especially in the work of Robert Brandom who, among other things, offers a persuasive response to the rule-following paradox (the infinite regress in applying a rule whose interpretation always hinges on yet another rule). Brandom argues that once an actor has consented to a rule, she has committed herself in relation to others to using certain concepts. The actual content of those commitments, the meaning of the concepts they use, is consequently the product of a process of 'negotiation' with others.[92] Whether somebody meets his or her commitments can only be gleaned from communicative practice itself. Notably, in this practice, applications of a concept in the present have to connect to the past in a way that convinces future applications. In order to illustrate the point, Brandom resorts to a case-law model of communication in which '[t]he current judge is held accountable to the tradition she inherits by the judges yet to come'.[93] Interpretation (in international law) is an activity that is both creative and constrained. In fact, it always has to be constrained if it wants to be creative. Interpretation as practice makes law in the present and in so doing is tied back to the past by the future. Practice theory, in this way, offers a development of thinking in the wake of Austin and Searle by refining how we can understand 'transformative iterations'[94], or, in other words, incremental law-making in communicative processes.

      For an understanding of the making of international law, much can be gained from practice theory. Jutta Brunée and Stephen Toope have ventured into that direction with their interactional account of international law, but without the full benefit of the turn towards practice.[95] Practice theory offers a persuasive account of how interpretation in law can be understood as both creative as well as constrained—as a law-making practice that combines the

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[91] Pierre Bourdieu and Loïc J D Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992) 7–11; Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977) 37 and 203 fn 49.

[92] R Brandom, 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' (1999) 7 *European Journal of Philosophy* 164–89, 173.

[93] Ibid., 181.

[94] Above ___.

[95] Jutta Brunée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

intention of actors with structural constraints.[96] Actors struggle for the law and seek to exercise semantic authority by establishing their own statements about the law as reference-points for later legal discourse. The constraints lie in the limits set by interpretative communities as to what an interpreter 'can get away with'. The question then becomes: 'What makes an interpretation acceptable?'[97]

VII.   Governance theory

The examples of making law by shifting the meaning of 'civilian', 'refugee' or 'sound recording distribution services' tie interpretative practices back to terms that are part of the traditional sources of international law. They hardly capture the complexity of contemporary law-making processes. Not only do legal discourses establish other reference points such as 'enemy combatant' or 'primarily aimed at' in a way that becomes almost indistinguishable from other terms that enjoy the blessing of sources doctrine. But the forms and fora of law-making processes have multiplied significantly. Voices from New Haven as well as those inspired by systems theory have already drawn attention to that complexity. Under the loose heading of governance theory, this section discusses networks, other informal processes, and private actors in the making of international law.

In her sketch of 'A New World Oder', Anne-Marie Slaughter finds a lot of international law, little of which has been made in ways that could be seen through the lens of sources doctrine.[98] Her theory disaggregates the state and highlights how its parts—civil servants of the ministries, above all, but also judges and legislators—interact with their counterparts across

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[96] In detail Venzke, *How Interpretation Makes International Law.*

[97] Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communitites* (Harvard University Press 1980) 338-355. For international law specifically, also see Ulrich Fastenrath, 'A Political Theory of Law: Escaping The Aporia of the Debate on the Validity of Legal Argument in Public International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (Oxford University Press 2011) 58–78, 77-78.

[98] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004).

borders in loose networks that generate legal normativity.[99] She understands transnational legal politics not as pushed by an aggregate of 'national' interests but as the product of diverging interests, which individuals and organized groups pursue transnationally.[100] Soft law instruments can be as useful in this vein as formal law-making. Oftentimes, soft law instruments open up new paths of action. In his panorama of practices, Legal Adviser to the U.S. Department of State and spearhead of the theory of transnational legal processes, Harold Koh, notes that 'what we are doing is not "lawmaking" per se, so much as it is what international-relations theorists call "regime-building"—in the sense of fostering discussion and building consensus about a set of norms, rules, principles, and decision-making procedures that converge and apply in a particular issue area.'[101] Overall, this practice has lead to greater heaps of what may be called 'informal law'.[102]

Such perspectives have a specific strength in capturing law-making by private and hybrid actors, be it in interaction with other 'formal' law, or in splendid isolation. Examples include the normative output of the International Standardization Organization (ISO) or of the International Accounting Standards Board (IASB), for instance. In their nuanced overview of rule-making in private governance, Tim Büthe and Walter Mattli, identify market-based selection mechanisms that give some actors the capacity to impose rules onto others.[103] A classical example would be the purchasing power of big retailers such as Walmart and the rules they can impose down their supply chains. Standards on 'Corporate Social Responsibility' can and do gain legal normativity

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[99] The concept of network plays an important role in this strand of thinking, Slaughter, *A New World Order* 34; see already A H Chayes and A Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 2.

[100] Anne-Marie Slaughter, 'Law in a World of liberal States' (1995) 6 European Journal of International Law 503–538, 508.

[101] Harold Hongju Koh, 'Remarks: Twenty-First-Century International Lawmaking' (2013) 101 Georgetown Law Journal 725–747, 742, with reference to Robert O. Keohane, 'The Demand for International Regimes' (1982) 36 International Organization 325.

[102] Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn and others (eds), *Informal International Lawmaking* (Oxford University Press 2012) 11. Also see Ramses A. Wessel, 'Informal International Law-Making as a New Form of World Legislation?' [2011] International Organizations Law Review 253–265

[103] Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011)

through their reception in the market place.[104] At least at this stage, voices start to differ more loudly as to whether that is till law, 'properly so called'.[105]

VIII.   Outlook: Global Administrative Law and International Public Authority

The complexity of forms and fora of international law-making below the radar of traditional sources doctrine poses significant challenges, not the least to the concept of law and to the possibilities of thinking in terms of sources more generally.[106] Moreover, the diversification of actors and institutions who can indeed exercise authority by contributing to the making of international law fundamentally challenges the traditional narrative of legitimacy of international law according to which international law exists and should be because unitary states have consented to it.[107] Contemporary theories converge on the fact that this narrative no longer holds. For one thing, it does not hold because law is not fixed at the moment it enters the world through the channel of sources but is instead in constant making through communicative practices in which a variety of actors weigh in on the struggle for the law.[108] In addition, not everything that matters passes legally is necessarily connected to the sources of law. Soft law instruments and even such things as indicators, many of which only on the very first glimpse do not have a regulative governance effect.[109]

While sources doctrine has tried to tie international law to the consent of unitary states because state sovereignty was thought to be the exclusive building block for legitimate international order, further complementary mechanisms of legitimation now need to be explored

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[104] A Peters, L Koechlin, and GF Zinkernagel, 'Non-state actors as standard setters: framing the issue in an interdisciplinary fashion' in A Peters and others (eds), *Non-State Actors as Standard Setters*, vol. 817 (Cambridge University Press 2009); Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011).

[105] On competing conceptions of law see Benedict Kingsbury and Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (Oxford University Press 2011) 79.

[106] For a response to these challenges with a view on 'rescuing' the doctrine of sources see Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011).

[107] See Chapter 2 in this volume [___].

[108] Rudolf von Jhering, The Struggle for Law</i>, no date

[109] Davis, Kingsbury, and Merry, 'Governance by Indicators' 3–28.

simply because sources do not capture everything that matters.[110] That is, finally, what the projects on global administrative law (GAL) and on international public authority (IPA) are about.

The GAL project has mainly been crafted as a response to growing accountability deficits in global governance processes, which are, above all, law-making processes. It is guided by the thought that those processes are best understood as administration and it defines global administrative law 'as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies'.[111] General principles of an administrative law character are introduced as a possible cure: principles of transparency, procedural participation, reasoned decision, and review. With these procedural demands, the GAL project in effect takes on the challenge of offering a more dynamic approach to law-making.[112] Substantive standards—including proportionality, means-end rationality, avoidance of unnecessarily restrictive means, and legitimate expectations—further complement the procedural principles.[113] How to apply those principles and standards in concrete cases is a lasting question, not the least because, as the protagonists of the GAL project well realize,'[a]ccountability can dissipate effectiveness, participation can result in capture by special interests, transparency can mean populism triumphs over justice.'[114]

Research centered on international public authority likewise responds to legitimatory concerns with regard to the normative output of international institutions. It observes the transformations of governance and connects to the tradition of public law in its dual function of constituting as well as limiting public authority.[115] If public authority is understood as the law-

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[110] For a notable (early) attempt at expanding the doctrine of sources in this regard, see Godefridus J H van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983).

[111] B Kingsbury, N Krisch, and R B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61, 17.

[112] On such a need see Yannick Radi, 'Standardization: A Dynamic and Procedural Conceptualization of International Law-Making' (2012) 25 Leiden Journal of International Law 283–307 (adding 'coherence' as a key demand to the set of principles).

[113] B Kingsbury, N Krisch, and R B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61, 37–42.

[114] B Kingsbury and N Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1–13, 4.

[115] A v Bogdandy, P Dann, and M Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375–400, 1380.

based capacity to legally or factually limit or otherwise affect other actors' use of their liberty, then public law is precisely concerned with the tension between such authority and individual or collective freedom.[116] Making international law by way of interpretation and otherwise may well be captured as an exercise of public authority if actors have the capacity to establish their own statements about the law as reference points for legal discourse that others could only escape at a cost. Overall it seems that, in the current setting of global governance, not sources are the main site where law, politics and power meet, but the communicative practices in which a variety of actors struggle for the law. Attention and critique should be apportioned accordingly.

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[116] Ibid., at 1376; A v Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 *European Journal of International Law* 7–41.