Global Constitutionalism (2014), 3:2, 236–273 © *Cambridge University Press, 2014*
doi:10.1017/S2045381714000045

'Rules about rules' and the endogenous dynamics of international law: Dissonance reduction as a mechanism of secondary rule-making

THERESA REINOLD and MICHAEL ZÜRN
WZB Berlin Social Science Center, Global Governance Research Unit, Reichpietschufer 50, 10785 Berlin, Germany

Email: theresa.reinold@wzb.eu; michael.zuern@wzb.eu

Abstract: We can observe some developments that indicate a further strengthening of human rights and the rule of law even after 2001. These developments are puzzling as they occurred despite largely unfavourable scope conditions. This article offers an account of these developments that focuses on dynamics endogenous to the law. These internal dynamics provide a causal mechanism that sets in once a certain threshold of legalization has been reached. We employ the Hartian notion of secondary rules which we think is an especially helpful conceptual tool to analyse the endogenous dynamics of legal systems. To the extent that law is programmed towards consistency, secondary rules become necessary in an environment of rapidly increasing legal density to govern the complexity resulting from this proliferation of norms. Upholding consistency is necessary to maintain the autonomy of law in a Luhmannian sense and the 'morality' of the legal system in a Fullerian sense. Our goal is to show this and at the same move beyond an argument of system or normative functionality by identifying causal mechanisms that can explain the law's built-in drive towards secondary rules, and that are in accordance with broader social science theory. We use some insights from cognitive psychology to develop these causal mechanisms further. While testing these causal mechanisms would be beyond the scope of this paper, we hope to provide the conceptual tools for future empirical research on the dynamics of secondary rule-making and offer some empirical illustrations to demonstrate how dissonance reduction operates in practice.

Keywords: cognitive mechanisms; dissonance reduction; endogenous dynamics of legal systems; legal consistence; secondary rules

I. Introduction

International law has undergone significant changes in the last decades. It nowadays plays an active and often crucial role in many policy areas. The number of international treaties registered with the United Nations, for

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instance, has gone up from 8776 in 1960 to 63419 in 2010.[1] Yet two qualitative changes seem to be even more important than this quantitative increase in treaty norms. First, international law does not seem compatible anymore with the notion that there is no political authority besides the territorial State. Today, rules are made by majority decision in such important organizations as the World Bank, the International Monetary Fund and the European Union (EU), thus cancelling the vetoes of individual States and overcoming blockades. What is more, international courts adjudicate in cases of diverging interpretations of international rules and demand State compliance with their rulings – witness, for instance, the World Trade Organization Dispute Settlement Body. Second, international law has become more and more intrusive. From State interactions at the borders, international law has moved to address behind-the-border-issues that require States to regulate societal actors, and it has even begun to exercise direct authority over individuals in a relevant number of cases. Instead of merely ensuring peaceful coexistence *between* States, international law thus increasingly aspires to promote fundamental values *within* States, moving from a law of coordination to one of subordination. International lawyers, legal theorists and IR scholars have used different concepts to grasp these changes and understand their implications for global governance and rule of law promotion beyond the nation-state. The most important ones are legalization,[2] public authority,[3] constitutionalization,[4] global administrative law[5] and the international rule of law.[6]

[1] See <http://treaties.un.org/Pages/Home.aspx?lang=eng>, accessed 9 April 2014.

[2] See KW Abbott *et al.*, 'The Concept of Legalization' (2000) 54 *International Organization*; B Zangl and M Zürn, *Verrechtlichung – Baustein für Global Governance?* (Dietz Verlag, Bonn, 2004).

[3] A von Bogdandy and I Venzke, 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung' (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*; A von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 210 (Springer, Heidelberg, 2010).

[4] JA Frowein, 'Konstitutionalisierung des Völkerrechts' in CF Müller (ed), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, Berichte der Deutschen Gesellschaft für Völkerrecht 39 (Deutsche Gesellschaft für Völkerrecht, Heidelberg, 2000) 427–47; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law*.

[5] B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems*; N Krisch and B Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law*.

[6] B Zangl, *Die Internationalisierung der Rechtsstaatlichkeit. Streitbeilegung in GATT und WTO* (Campus, Frankfurt, 2006); A Nollkaemper, 'Rethinking the Supremacy of International Law' (2010) 65 *Zeitschrift für öffentliches Recht*.

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However, with the US turn towards unilateralism after 9/11, increasing resistance against international institutions in domestic political settings in Europe, and the rise of new powers such as China and India who emphasize a traditional understanding of sovereignty as the right to non-interference, the movement towards human rights as universal principles and the empowerment of international institutions arguably came to a halt. To the extent that the international institutional environment depends on the preferences and interests of major States and the relative distribution of power and influence between them, we would indeed expect to see setbacks on the path towards global constitutionalism and the internationalization of the rule of law. The failures to achieve consensus on a successor agreement to the Kyoto Protocol or to prevent mass atrocities in Syria are just two cases in point. At the same time, however, we nonetheless observe developments that indicate a further strengthening of human rights and the rule of law. These developments are puzzling as they occurred despite largely unfavourable scope conditions. This article offers an account of these developments that focuses on dynamics endogenous to the law. These internal dynamics provide a causal mechanism that sets in once a certain threshold of legalization has been reached. Focusing on the endogenous dynamics of international law does not mean that the causal mechanisms we have identified always trump negative external scope conditions. The goal of this article is not to develop a new theory of institutional development at the international level. Rather, we wish to enrich existing theorizing by highlighting and systematically developing a causal mechanism that has not found a place in a positive theory of international institutions so far: the law's endogenous drive towards consistency and coherence.

In so doing, we employ the Hartian notion of secondary rules which we think is an especially helpful conceptual tool to analyse the endogenous dynamics of legal systems. The concept comes with less normative baggage than related concepts and is therefore better suited to capture the dynamics of the international legal order which unfold even in the face of adverse political scope conditions. To the extent that law is programmed towards consistency,[7] secondary rules become necessary in an environment of rapidly increasing legal density to govern the complexity resulting from this proliferation of norms. Upholding consistency is necessary to maintain

[7] Note, however, that according to Luhmann, consistency is an internal feature of the legal system, and does *not* require consistency with broader societal understandings that are not part of positive law. These non-legal norms, he argues, are 'typically pluralistic'; hence demanding that the law be consonant with norms existing outside of the legal sphere would jeopardize legal certainty and predictability, which he views as central to the law's ordering function. See N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1993) 19, 78ff, 151ff, 223.

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the autonomy of law in a Luhmannian sense and the 'morality' of the legal system in a Fullerian sense.[8] Our goal is to show this and at the same move beyond an argument of system or normative functionality by identifying causal mechanisms that can explain the law's built-in drive towards secondary rules, and that are in accordance with broader social science theory. We use some insights from cognitive psychology to develop these causal mechanisms further. While testing these causal mechanisms would be beyond the scope of this paper, we hope to provide the conceptual tools for future empirical research on the dynamics of secondary rule-making and offer some empirical illustrations to demonstrate how dissonance reduction operates in practice.

In the following, we will first disentangle the concept of secondary rules from related notions which have been used to describe and appraise the changes in the international legal landscape over the past decades such as the rule of law, constitutionalization or legalization. Second, we review existing explanatory approaches to secondary rule-making which, in our view, do not sufficiently take into account the autonomy and morality of international law. Third, we will point to an important endogenous causal mechanism which needs to be incorporated into an explanation of the development of international law: secondary rule-making as a process of dissonance reduction. We shall argue that in international law, dissonance reduction must be achieved on two levels: on the level of primary rules, where an emerging situation of dissonance – either between actors' behaviour and norms or between conflicting norms – is mitigated through the application of secondary rules (such as rules of change or adjudication), but also on the level of the secondary rules themselves, which must be in line with collective understandings of fairness, balanced representation, etc.[9] Finally, we will present a number of empirical illustrations from the current history of secondary rule-making that demonstrate the role of dissonance reduction and underline the need for further, more detailed, empirical analysis.

II. Rule of law, constitutionalization and secondary rules

The endogenous dynamics of the law and secondary rules

Scholars who have sought to grasp the essence of the law tend to converge on a number of minimum requirements, or defining properties of the concept, such as determinacy, consistency and non-arbitrariness. In one of the most influential treatments, Fuller establishes eight essential

[8] See LL Fuller, *The Morality of Law* (Yale University Press, New Haven, CT, 1964).
[9] N Luhmann, *Rechtssoziologie* (Rowohlt, Reinbek, 1972).

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properties of law, or principles of legality, which, in his view at the same time constitute the inherent morality of a legal system and thus generate fidelity to the law.[10] In Fuller's view, legal norms must be general, prohibiting, requiring or permitting certain conduct. They must also be promulgated, i.e. accessible to the public, and prospective, not retroactive, enabling citizens to know what the law requires. The law therefore must be clear as well; it should avoid contradictions; it must be realistic and not demand the impossible; its requirements should be relatively constant over time. Finally, there should be congruence between legal norms and the actions of officials operating under the law.[11] These features of the law are necessary in order to be perceived as legally legitimate, i.e. in order to attract adherence and generate fidelity to the law.

To achieve these features of the law in a complex society it is necessary to develop a system of rule-making. Upholding Fuller's eight principles of legality thus endogenously implies a tendency for the development of secondary rules. In his seminal work 'Fairness in International Law and Institutions', Thomas Franck pointed out that the perceived fairness of a legal system is contingent upon it being 'rooted in a framework of formal requirements about how rules are made, interpreted and applied'.[12] These

[10] Fuller (n 8) 42–94. In Fuller's view the morality of a legal system is constituted by the mere features of a legal system – his eight principles of legality. To the extent that a legal system possesses these qualities, it deserves loyalty, or fidelity. Fuller and his contemporary HLA Hart were at loggerheads over the label of 'morality' for these eight principles of legality, which Hart preferred to call more modestly 'principles of good craftsmanship'. See HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford, 1983) 346. Hart maintained that Fuller's assumption that a law which was created and applied in accordance with these principles would necessarily be moral could be easily refuted with reference to morally repugnant legal systems such as Germany under the Nazi reign and Apartheid South Africa. Contra Fuller, Hart claimed that adherence to these eight principles of legality was not a sufficient condition for the law's morality. See Hart, *Essays*, 351. And indeed, Fuller's attempt to substantiate his claim about a necessary connection between the law's internal and external morality remains unsatisfactory. While he argues that empirically speaking, the two moralities usually go hand in hand, merely pointing to an *empirical* coincidence of the two moralities is not a very convincing *theoretical* answer to the question of whether Fuller's internal morality of the law is compatible with considerably iniquity, as Hart alleged, and thus does not deserve to be called 'morality'. See HLA Hart, *The Concept of Law* (Clarendon Press, Oxford, 1961) 202; Fuller (n 8) 152–62.

[11] This summary follows J Brunnée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010) 26. See N Krisch, 'Book Review: Jutta Brunnée & Stephen J Toope, Legitimacy and Legality in International Law' (2012) 106 *American Journal of International Law* 203 for an illuminating review of this book.

[12] TM Franck, *Fairness in International Law and Institutions* (Oxford University Press, Oxford, 1995) 8.

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‘formal requirements’ perform various important functions in a legal system: they solve the conundrum of the law’s validity by establishing *rules of recognition*; they enable the progressive development of the law, for instance when changed political circumstances call for new norms (*rules of change*); and they provide means to settle norm conflicts and ways to interpret indeterminate norms (*rules of adjudication*).[13] One may add that they should also spell out the consequences of norm violations (*norms of implementation*). These ‘rules about the rules’ are important, since the law cannot stabilize normative expectations – one of its major functions – if it is unclear, for instance, what the law is, who has authority to apply and enforce it, and who can be called upon to resolve norm collisions. To bring two heroes of legal theory together: without secondary rules primary rules can hardly generate fidelity to the law.

For a long time, these secondary rules were only weakly developed at the international level. Against this background, HLA Hart questioned the quality of international law:

> It is indeed arguable … that international law not only lacks the secondary rules of change and adjudication which provide for legislatures and courts, but also a unifying rule of recognition specifying ‘sources’ of law and providing general criteria for the identification of its rules.[14]

Hart considers international law to be a primitive legal system[15] which he contrasts with more advanced normative orders that include secondary rules. In primitive societies, Hart writes, conflicts between primary norms will not be resolved in the legal system itself, because there is no procedure for settling controversies over the interpretation of primary norms: ‘This defect in the simple social structure of primary rules we may call its *uncertainty*.’[16] A second defect from which primitive systems suffer is the *static character* of the rules: ‘There will be no means, in such a society, of deliberately adapting the rules to changing circumstances.’[17] The third deficiency is the *lack of adjudicatory mechanisms*: disputes as to whether a rule has been violated will occur interminably if there is no agent authorized to ascertain the fact of violation.[18] Hart concludes that the remedy for each of these defects primitive societies suffer from is the establishment of rules *about* primary rules.

[13] Hart, *The Concept of Law* (n 10) 91ff.
[14] Hart (n 10) 209.
[15] Hart (n 10) 208ff.
[16] Hart (n 10) 90.
[17] Hart (n 10) 90.
[18] Hart (n 10) 91.

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In 1961 – when Hart published his book – the international legal order indeed consisted mainly of primary rules, lacking a dense layer of secondary rules, which is why Hart considered it to resemble a primitive society.[19] In the past decades, however, this 'primitive order' has developed a rather elaborate set of secondary rules which generate fidelity to the law, even though they are frequently contested and partly underdeveloped.[20]

Secondary rules and related concepts

While the concept of secondary rules is linked to related concepts like the rule of law and constitutionalization, it also differs from these in important aspects. First, we see it as less normatively laden than concepts such as constitutionalization and the rule of law. Second, we argue that the concept of secondary rules necessarily applies to a legal order as a whole which is not necessarily true for the concept of legalization. Both features – the low degree of built-in normativity and the broad scope – qualify secondary rules as the concept most apt for our analytical purposes, which allows us to make sense of current changes within the international legal system.

Normativity: Major legal theorists argue – for other reasons than Fuller – that criteria with a moral meaning distinguish law from other social norms and regulations.[21] As opposed to this view, legal positivists like HLA Hart and Joseph Raz do not assign any independent moral value to the law as such. On this view, law is only a necessary condition for a good political order, not a *moral* virtue in itself. Theorists writing about the 'morality of law' as well as legal positivists however converge in viewing secondary rules as necessary to preserve the virtues (moral or not) of the law in complex legal systems. In this sense, secondary rules possess built-in virtues. The concept of secondary rules is in our view, however, normatively less demanding than cognate concepts such as the rule of law or the notion of constitutionalism.

[19] Hart (n 10) 208ff.

[20] The general notions about norm contestations apply to secondary norms as well; see A Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press, Cambridge, 2008).

[21] Two major proponents of this view are R Dworkin, *Law's Empire* (Belknap, Cambridge, MA, 1986) and J Habermas, *Faktizität und Geltung* (Suhrkamp, Frankfurt, 1992). Whereas Dworkin sees law as an argumentative practice in which integrity builds on both consistency (treating like cases alike) and justifiability in principled terms, Habermas derives the morality of law from the close connection to deliberative decision-making: the co-originality of democracy and law. See also R Alexy, *Theorie der juristischen Argumentation* (Suhrkamp, Frankfurt, 1992).

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There is no universally accepted definition of the *rule of law*.[22] Whereas the minimal version of the concept of the rule of law – such as the one referred to in the Raz citation above – seems more or less identical with the features of law identified by Fuller (and thus with law as such), all other concepts of the rule of law demand a *normative quality* that goes beyond the mere presence of secondary rules.[23] Beyond the most minimalist version, the grammar of all arguments about the rule of law is roughly the following. The rule of law first of all implies *authority of law and not of people*. Therefore, people in positions of authority should exercise their power within a constraining framework of public norms that includes limitations on the abuse of public power for private gain. Second, the rule of law requires *legal certainty and predictability*.[24] This is the requirement that norms and rules be laid down clearly in advance and be accessible to all; it also includes adjudication procedures and the specification of the consequences of norm violations. Third, this concept of the rule of law includes *legal equality*, i.e. the law must be the same for all legal subjects and must not contain arbitrary distinctions or special personal prerogatives for those in a position of social or political power. Finally, and partially implied in the first three components, the rule of law implies the *recognition of some basic individual rights*, even though the exact content and scope of these rights may differ. Understood this way, all the variations of the concept of the rule of law – beyond the most minimalist one – are more deeply imbued with normative content than the concept of secondary rules. This does not exclude the possibility to use the notion of an international rule of law as an ideal type and to identify movements in this direction (or away from it),[25] but the international rule of law seems to be no appropriate term to capture the current international state of affairs.

[22] Brian Tamanaha has listed a set of citations in favour of the rule of law, some of which were put forward by two-fisted authoritarian leaders. The widespread support for the rule of law therefore seems to be above all a function of different understandings of the meaning of the rule of law with a minimalist version utilized also by authoritarian leaders. See BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004). See also T Carothers, 'The Rule-of-Law Revival' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, Washington DC, 2006). The minimalist version, however, has little support in the academic realm.

[23] See RS Summers, 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 135.

[24] See, e.g., Carothers (n 22) 4; R Cass, *The Rule of Law in America* (Johns Hopkins University Press, Baltimore, 2001); J Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review*; J Waldron, 'Representative Lawmaking' (2009) 89 *Boston University Law Review*.

[25] See, e.g., S Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law*; I Hurd, 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World' (2011) 25 *Ethics and International Affairs*.

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The concept *of constitutionalization* also carries more normative baggage than the concept of secondary rules.[26] Constitutionalization in general can be described as a process in which different legal orders are integrated by the establishment of an ultimate legal authority in the form of a (written or unwritten) constitution that serves as higher law and enshrines fundamental values. While the rule of law may apply to each legal sphere, constitutionalism prescribes the way different legal spheres are integrated.

There are significant doubts about a global constitution. Legal pluralists suggest that major components of an international rule of law can be established in the absence of a global constitution. According to this view, a world in which different political authorities exist without being integrated in a hierarchical order must not be detrimental to the rule of law.[27] Similarly, it is argued that a number of possibilities and mechanisms – secondary rules so to speak – exist for solving conflicts between different legal orders. This may happen by means of mutual acceptance of general legal principles, thus allowing for a softer form of constitutionalization.[28] There are also good arguments that these collisions have to be solved outside the legal sphere, because they point to political matters.[29] In any case, the classical notion of constitutionalization seems to be rather demanding regarding the normative quality of primary and secondary rules.

Compared to both the rule of law and constitutionalization, the concept of *secondary rules* has less built-in normativity. While secondary rules are

[26] For important contributions on international constitutionalization see, e.g., JL Dunoff and JP Trachtman (eds), *Ruling the World: International Law, Global Governance, Constitutionalism* (Cambridge University Press, Cambridge, 2009); N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010); D Halberstam, 'Local, Global and Plural Constitutionalism: Europe Meets the World' in G de Búrca and J Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, New York, 2012) 150–202; J Habermas, *Zur Verfassung Europas: Ein Essay* (Suhrkamp, Berlin, 2011); A Wiener *et al.*, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1; critically: D Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447. See B Faude and B Staarmann, 'Constitutionalism beyond the Nation-State: The State of the Field' (unpublished working paper, WZB, 2013) for an encompassing literature review.

[27] Krisch (n 26).

[28] A von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2010) 63 *Neue Juristische Wochenschrift*; M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in JL Dunoff and JP Trachtman (eds), *Ruling the World: International Law, Global Governance, Constitutionalism* (Cambridge University Press, Cambridge, 2009) 258–325.

[29] J Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999).

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to some extent a necessary component of both the rule of law and constitutionalization, secondary rules do not necessarily need to have all the normative features of the rule of law or constitutionalization. We can think of legal systems with fully established secondary rules that openly violate principles of legal equality (as in the German Empire before 1914) or individual rights (as in China today) and do not possess the features usually associated with a constitution (the international legal system). The concept of secondary rules thus reduces the normative ambition inherent in other concepts such as the rule of law and constitutionalization, which makes it a more appropriate tool to capture the evolution of international law over the last decades.

Scope: A second feature of the concept of secondary rules is that it speaks at least implicitly to the international legal system as a whole instead of sectoral spheres or isolated legal subsystems. It is this feature which distinguishes it from the concept of legalization.[30] Legalization refers to a process by which it is ensured that regulations fulfil certain criteria. Abbott *et al.* identify three criteria of legalization: 'obligation', meaning that States or other actors are bound by a rule or a commitment; 'precision', meaning that the rules accurately and unambiguously define the conduct they require, authorize, or proscribe; and 'delegation', meaning that authority has been granted to third parties to implement the rules, including their interpretation, application, dispute settlement and further rule-making.[31]

Like our concept of secondary rules, legalization is normatively thinner than the rule of law. Contrary to the notion of secondary rules, it applies mainly to specific legal spheres, most often sectorally defined by issue areas such as trade or climate change or defined in terms of levels. To the extent that the concept of secondary rules also includes procedures for how to handle legal collisions between sectoral regimes as well as political levels,

[30] See Abbott *et al.* (n 2); KW Abbott and D Snidal, 'Why States Act through Formal International Organizations' (1998) 42 *Journal of Conflict Resolution*; B Koremenos, 'What's Left out and Why? Informal Provisions in Formal International Law' (2013) 8 *The Review of International Organizations* 137; MA Pollack and GC Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, Oxford, 2009) and also KD Wolf and M Zürn, 'Macht Recht einen Unterschied? Implikationen und Bedingungen internationaler Verrechtlichung im Gegensatz zu weniger bindenden Formen internationaler Verregelung' in KD Wolf (ed), *Internationale Verrechtlichung* (Centaurus, Pfaffenweiler, 1993) 11–28. KW Abbott and D Snidal, 'Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, Cambridge, 2012) 33–58 provide a succinct overview; see also EM Hafner-Burton, DG Victor and Y Lupu, 'Political Science Research on International Law: The State of the Field' (2012) 106 *The American Journal of International Law*.

[31] Abbott *et al.* (n 2).

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it reaches beyond specific issue areas and refers to a general framework of formal requirements about how rules are made, interpreted and applied.

In sum, for our specific purpose, accounting for and explaining the dynamics of the international legal system in the last decades, the concept of secondary rules is most apt since it provides a clear-cut descriptor which can be identified relatively easily, without normative assessments, and which refers to the legal system as a whole.

III. The theory and practice of secondary rule-making

After having defined and delineated the concept of secondary rules, we will now take a closer look at the politics of secondary rule-making, i.e. we explore the origins of secondary rules. In so doing, we want to flesh out a causal mechanism which points to dynamics internal to the law and which may unfold once a certain level of legalization has been reached. We call it secondary rule-making as dissonance reduction. We do not claim that this causal mechanism always trumps exogenous factors such as the international distribution of power or the interests of major States. We do insist, however, that under certain circumstances this internal dynamic may give rise to secondary rules even when the political scope conditions are not at all conducive to international institution-building.

Explaining the law's drive towards consistency as an internal process makes it possible to provide an improved account of international law which avoids reducing law to a function of external factors. While the relevance of secondary rules for the rule of law is widely appreciated, scholars have devoted little attention to explaining where the secondary rules of the international system come from, how they are transformed, and how they decay. Even Hart had very little to say about how secondary rules are (trans)formed, apart from sporadic references to revolutions, wars of secessions, etc as historical examples of triggers initiating change in the rules about the rules.[32] Considering the dearth of theorizing on this question, the object of this article is to contribute to an understanding of the causal processes underlying the emergence and transformation of secondary rules.

Explanatory accounts focusing on exogenous variables

While theorizing on the causal dynamics of secondary rule-making is still in its infant stages, some authors from both IR-theory and legal backgrounds have – at least implicitly – dealt with aspects of the subject matter under

[32] Hart (n 10) 117ff.

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the banner of concepts such as legalization, procedural politics, interstitial law-making, etc. While the emergence and transformation of these norms is usually explained with reference to external forces, some of the accounts point at least implicitly to the need to theorize internal dynamics as well.[33]

Legalization theorists, for instance, have suggested a set of explanatory variables such as transaction costs, uncertainty, implications for national sovereignty, heterogeneity of preferences, and power differentials that affect the 'hardness' of legal regimes.[34] The authors show that depending on the circumstances, both the powerful and the weak stand to benefit from legalization. Weak States frequently prefer hard legalization because it reduces possibilities for the arbitrary use of power,[35] while powerful States frequently use legalized arrangements to realize their own preferences as efficiently as possible.[36] Even though Abbott and Snidal stress the disproportionate influence exerted by powerful States on legalized agreements, it would be wrong to equate legalization with the practice of the powerful. The authors equally show that in the process of legalization, actors have to argue within the parameters set by the law itself, that is, they have to frame their argument in such a way that it is consonant with existing norms and techniques of legal reasoning.[37]

Theories of procedural politics and interstitial change also analyse rules that are secondary in character. Procedural politics[38] – 'everyday politics with respect to rules'[39] – is about how actors use, manipulate, and sometimes modify procedures to achieve their political goals. Jupille stresses that the choice of procedure is an 'acutely political' question,[40] which dovetails with our assumption that in secondary rule-making, the stakes are even higher than in primary rule-making, because the former

[33] Since there is no consensual definition of the terms 'exogenous' and 'endogenous' in the literature, we should note that our definition of exogenous refers to those drivers which are external to the legal system – such as political or economic developments – while endogenous dynamics are those that are internal to the law, such as the law's built-in drive towards normative consistency.

[34] KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 423. See also B Koremenos, C Lipson and D Snidal, 'The Rational Design of International Institutions' (2001) 55 *International Organization* 761.

[35] Abbott and Snidal (n 34) 447.

[36] Abbott and Snidal (n 34) 433.

[37] Abbott and Snidal (n 34) 427, 429.

[38] H Farrell and A Héritier, 'Introduction: Contested Competences in the European Union' (2007) 30 *West European Politics*; J Jupille, *Procedural Politics: Issues, Influence, and Institutional Choice in the European Union* (Cambridge University Press, Cambridge, 2004); J Jupille, 'Contested Procedures: Ambiguities, Interstices and EU Institutional Change' (2007) 30 *West European Politics* 301.

[39] Jupille, *Procedural Politics* (n 38) 2.

[40] Jupille, 'Contested Procedures' (n 38) 304.

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determine in the first place who has a say in shaping the latter. While this work concedes that political actors do not enjoy unlimited wiggle-room but are constrained by existing rules,[41] it has little to say about how exactly these existing structures actually constrain actors. Similarly, Héritier and Farrell, who write about interstitial institutional change, primarily focus on actors' bargaining strength as a determinant of institutional outcomes.[42] All of these approaches focus primarily on exogenous forces for legal development and in this way leave the endogenous forces such as legal consistency under-theorized.[43] Moreover, the need to construct normative consonance between explicit (black letter law) and the norms and mores of society at large is also neglected.[44]

In contrast to IR theory, international legal scholarship has only recently begun to engage in causal analysis of international rule-making.[45] Charlotte Ku's and Paul Diehl's monograph on *The Dynamics of International Law* probably comes closest to a comprehensive causal theory of secondary rule-making.[46] The authors ascribe two main functions to international law: providing the parameters and mechanisms for cross-border interactions, and shaping the values and goals that these interactions promote.[47] While they call the latter the 'normative system' of international law, the former is defined as law's 'operating system' and roughly corresponds to Hart's concept of secondary rules. Ku's and Diehl's goal is to provide an explanation for stasis or change in the operating system by fleshing out a number of factors:

> First, there must be some *necessity* for change in the operating system in order to give the new or modified norm legal effect. Yet pure necessity is not enough for operating system change; some type of political shock or change in the international environment must provide the impetus for

[41] Jupille, *Procedural Politics* (n 38) 5.

[42] Farrell and Héritier (n 38) 231ff.

[43] See archetypical J Goldsmith and E Posner, 'A Theory of Customary International Law' (1999) 66 *University of Chicago Law Review* 1113.

[44] GJ Postema, 'Implicit Law' (1994) 13 *Law and Philosophy* 366.

[45] Some – AT Guzmán, *How International Law Works: A Rational Choice Theory* (Oxford University Press, Oxford, 2008); K Raustiala, 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581; JP Trachtman, *The Economic Structure of International Law* (Cambridge, Harvard University Press, 2008) – in a more, others – JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford University Press, Oxford, 2006) – in a less sophisticated way. Because of their narrow focus, however, these contributions form at best building blocks of a broader, more nuanced explanation of secondary rule-making which has yet to be developed.

[46] PF Diehl and C Ku, *The Dynamics of International Law* (Cambridge University Press, Cambridge, 2010).

[47] Diehl and Ku (n 46) 2.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

> change to occur. Even in the presence of necessity and political shocks, however, change is still not guaranteed. Two conditions, opposition by leading states as well as domestic political and legal constraints, might prevent or limit the scope of the operating system change.[48]

They thus stress the obstructionist capability of powerful States over 'constructive' norm entrepreneurship, arguing that 'most critically, we see the power of leading states as lying in their ability to block operating system change rather than impose such modifications'.[49]

While Ku's and Diehl's approach has a lot to offer, we would dispute some aspects of their theory. First of all, the term 'operating system' discounts the political character of secondary rules. Secondary rules do not form technical systems, but are essentially the core of a political order. Second, their relative neglect of actors other than States risks missing an important part of the picture, especially when it comes to the forces behind legal consistency. Third, and most importantly, the absence of obstructive power or more generally the absence of adverse political scope conditions is in our view not a necessary condition for the development of secondary rules. The internal consistency drive of the legal system may lead to the development of secondary rules, even when power politics and other external factors militate against it. To use Diehl and Ku's terminology: necessity – or in our terms: the coherence of law – may trump obstructive power.[50]

In the following, we will flesh out a causal mechanism of secondary rule-making which is based on the assumption that the law's internal drive towards consistency is backed by cognitive dissonance reduction. In so doing, we do not offer a complete account of secondary rule-making that competes with Diehl and Ku's theoretical framework. We do not claim that the law's internal drive towards consistency alone can explain the entire range of possible outcomes in the area of secondary rule-making. Rather, our goal is to explicate a causal mechanism which is an important part of the causal story and which is not sufficiently taken into account in existing theorizing. Without integrating such a mechanism into a complete theory, it is hard to understand why we observe additional, and often only partially successful attempts to strengthen the legal system in spite of rather adverse political scope conditions which materialized after the fall of the Twin Towers in 2001, when unilateralist thinking dominated US foreign policy, new rising powers re-emphasized traditional notions of

[48] Diehl and Ku (n 46) 75 (emphasis in original).
[49] Diehl and Ku (n 46) 84ff.
[50] Necessity is, of course, an elusive variable.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

sovereignty, and domestic resistance against international authority grew almost everywhere in the Western world.

Secondary rule-making as dissonance reduction

In most general terms, the integrity of law is based on coherence. Most people would reject 'checkerboard laws' that fail to treat like cases alike and introduce arbitrary differences.[51] According to Luhmann, it is the programming towards consistency that delineates law from other social systems.[52] We proceed from the assumption that the legal process – defined by Fuller as the 'enterprise of subjecting human conduct to the governance of rules'[53] – exhibits an endogenous tendency towards consistency. If law loses consistency when getting more complex, it would lose one of its major virtues. This leads to a response. It is this built-in dynamic which leads to secondary rules in the face of growing legal density and complexity in the age of political denationalization. At first sight, this sounds like an argument of systemic or normative functionalism. We therefore aim at linking the 'morality of law' argument to secondary rules via a theory of social action. We use social processes which are rooted in social normativity and their cognitive correlates as *explananda* in order to understand the rise of secondary rules in the last decades. The role of cognitive theory in this argument is twofold.

As the legal system is programmed towards consistency it sets on the one hand the conditions for any change of legal substance. *Opinio juris* elevates a particular practice to a law-generating act. Whereas it is bound by shared understandings in the concerned society and the role hegemonic actors play therein, it is only through the articulation of *opinio juris* that international law can be (trans)formed: '[W]hat only *opinio juris* can do, only *opinio juris* can undo'.[54] *Opinio juris* is key to transforming facts and social norms into law. Yet *opinio juris* is crafted by individuals. The drive towards consistency of the legal system needs to be translated into actions within this system and is thus akin to the cognitive need of individual actors to avoid dissonance. This connection was also recognized by Ronald Dworkin in his writings on law as integrity, where he argues that '[o]ur instincts condemn' checkerboard laws which fail to treat like cases alike and thus give rise to cognitive dissonance.[55] The *opinio juris* requirement and its dependence on coherence in turn qualifies the power hypothesis:

[51] Dworkin (n 21) 179ff.
[52] See Luhmann (n 9).
[53] Fuller (n 8) 162.
[54] GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer, Deventer, 1983) 101.
[55] Dworkin (n 21) 180.

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powerful States cannot shape and reshape legal norms as they please – international legal norms are not commands, but are based on *intersubjective* standards of appropriateness developed in the legal system. Powerful States thus have to make an effort to create this intersubjective quality against the background of existing legal norms. In this sense, legal rules are both a product of power and a constraint upon its exercise.

On the other hand, the legal system cannot exist independently of shared understandings.[56] A legal system, as Neil McCormick explains, must go beyond legal consistency in a technical sense. Each legal rule and the system as a whole must make sense in the eyes of those who have to act upon it.[57] So there is a double requirement for the integrity of the law: technical consistency with other legal rules and coherence with the overarching principles held by a society. Actors seeking to justify a certain practice would have to show that their act is in line with existing law (i.e. they would have to construct normative consistency), or garner collective support for an amendment of the law that would bring the law in line with shared understandings held by society at large. If this adjustment does not happen, i.e. '[w]hen the conflict between a society's shared understandings and legal rules is too stark, legality can come under significant strain'.[58]

To the extent that the normative features of law are part of the shared understandings, the practice of secondary rules increases the compatibility of the law not only with *opinio juris*, but also with broader societal norms. Considering the distinct rationality of the law, a theory of secondary-rule making which does not take into account how the need for consistency is translated into a disposition of norm-makers to construct legal consistency would thus be reductionist. Martti Koskenniemi famously articulated the notion of international law as constantly oscillating between apology and utopia. International law, he argued, cannot be understood as completely detached from political interests and State behaviour, because then it would seem utopian and slip into insignificance.[59] Yet on the other hand,

[56] Brunnée and Toope (n 11) ch 2.

[57] N MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford University Press, Oxford, 2005) 124.

[58] Brunnée and Toope (n 11) 66. Law, in order to induce compliance, must therefore be in accordance with, or at least not starkly contradict, the wider practices and mores prevailing in society, because law is, 'by its very nature … deeply implicated in the practices and conventions of the communities it governs', G Postema (n 44) 377. Gerald Postema calls these practices and conventions 'implicit law', and this implicit law in turn determines whether the behavioural demands made upon the legal subjects by explicit laws are perceived as reasonable and legitimate.

[59] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge, 2005).

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

a law which lacks distance from State behaviour and is widely regarded as being merely a fig leaf for the pursuit of the selfish interests of powerful States loses its legitimacy which it based on its built-in normativity. The law thus seeks to somehow reconcile two conflicting demands. On the one hand, the law must be responsive to political interests (including those of the most powerful actors in the system), if it does not want to be completely sidelined, yet on the other hand, the morality of law requires that the legal system retain a certain degree of autonomy from the political sphere, and that the law be seen as binding the powerful and the weak alike – even if this takes place to different degrees. Otherwise, the concept of law would be stripped of some of its core components, especially equality and non-arbitrariness – and consequently of its virtues and (if present) morality. The legal system's presumption in favour of normative consistency translates into the need for secondary rules especially in contexts of high legal density and a fluid and contested normative environment. In these situations, secondary rules can serve the maintenance of legal consonance.

One can conceptualize this drive for internal consistency in the legal system by utilizing cognitive psychology. In his classic contribution, *A Theory of Cognitive Dissonance*, Leon Festinger[60] proceeds from the basic assumption that human beings constantly strive to achieve cognitive consonance, or reduce cognitive dissonance, respectively. The term cognitive dissonance denotes 'the existence of non-fitting relations among cognitions', the latter being defined as 'any knowledge, opinion, or belief about the environment, about oneself, or about one's behavior'.[61] The theory of cognitive dissonance is part of a larger set of theorems in psychology that emphasize the power of consistency. Nobel laureate Daniel Kahneman conceives of the human mind as divided into two subsystems – system 1, which is intuition-based and thus in charge of 'fast-thinking', and system 2, which is tasked with reflection – 'slow-thinking' – and thus (ideally) functions as a check on system 1. System 1 strongly prefers coherent causal stories over incoherent ones, and, in its drive towards consistency, also influences our intellectual system 2.[62] Several psychological aspects follow this logic. The so-called halo effect, for instance, testifies to the human mind's desire for coherence. If people are given identical lists of characteristics of two individuals – one list starting with the positive features and ending with the negative ones, and the other grouping the same characteristics in reverse order – a clear majority of

[60] L Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press, Stanford, CA, 1957) 2ff.

[61] Festinger (n 60) 3.

[62] D Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, New York, 2011) pt 1.

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people will judge the first person more positively than the second.[63] Similarly, the tendency to reduce ambiguity as well priming and framing effects are based on this mechanism.

Using these insights, we can identify three archetypes of dissonance as sources of normative change: legal norm–behaviour dissonance; legal norm–legal norm dissonance; legal norm–shared understanding dissonance:

- First, if a given behaviour violates an existing and accepted rule, this creates cognitive dissonance in the original meaning of Festinger. *Norm–behaviour dissonance* is a source of institutional change. Assume a powerful State X is criticized for violating a given primary norm. The alleged culprit may respond to these charges by arguing that the primary norm in question was not applicable to her behaviour in the first place; or that it was applicable, but should be interpreted in a way that would render her behaviour legal; or that her behaviour was illegal but legitimate, since it responded to overwhelming non-legal (moral or political) considerations with which the law ought to be made consonant. Since (primary) norms are inherently indeterminate, such conflicts over the interpretation of the law will generate a normative demand for secondary rules such as rules of adjudication, in order to decide among competing claims and thus restore legal certainty and the morality of law. In these discourses over the interpretation of primary norms, actors seeking to reduce dissonance between their behaviour and existing norms tend to get rhetorically entrapped, because other actors will expect a consistent commitment to the enunciated norms in the future, demanding fidelity to the law in a Fullerian sense. Operationally speaking, the justification of given interests in legal terms and its contestation thus precede the rise of secondary norms. Let us call this mechanism the *justificatory trap mechanism*.[64] Norm–behaviour dissonance may give rise to secondary rules via a second pathway, for external actors who point to such a norm and justify their criticism with reference to a particular norm begin, according to the logic of reducing dissonance, to further internalize this norm. We know from psychological research that

[63] Kahneman (n 62) 108ff.

[64] This mechanism resembles the one which is well known to international institution students as entrapment through rhetorical action – see F Schimmelfennig, *The EU, NATO and the Integration of Europe: Rules and Rhetoric* (Cambridge University Press, Cambridge, 2003); F Schimmelfennig, 'Strategic Action in a Community Environment: The Decision to Enlarge the European Union to the East' (2003) 36 *Comparative Political Studies* 156 – or via the boomerang model, see ME Keck and K Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca, NY, 1998); T Risse, SC Ropp and K Sikkink (eds), *The Power of Human Rights. International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999).

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humans have a tendency to convince themselves of the rightness of their doing and in this way internalize norms which were originally (partially) used to legitimize our behaviour. If, for instance, a policy official justifies strategically motivated criticism with reference to a legal norm, the norm may move up in her preference ordering. In the same way, if representatives of international organizations justify intrusions into domestic legal orders with reference to the rule of law or democracy, the international organization is more likely to incorporate these norms into its own policies and procedures. Operationally speaking, to the extent that international organizations are involved in regulating secondary rules of Member States, they tend to internalize these secondary rules. Let us call this the *self-persuasion mechanism*.[65]

- The second type refers to a dissonance between different legal norms. If compliance with a given legal norm leads to non-compliance with another, a desire to resolve this *norm–norm dissonance* arises. To the extent that the density of primary rules increases, collisions between different primary rules as well as conflicts over the implementation of these rules become more likely. The drive for consonance thus leads to a growing demand for establishing secondary rules in order to handle these conflicts on the legal turf. Operationally speaking, secondary rules should therefore develop in parallel with primary rules. This leads especially to rules about norm-interpretation and norm-implementation. Let us call this the *conflict resolution mechanism*.[66]
- The third type of dissonance arises in situations in which a given understanding of a legal norm violates broader societal norms and understandings. In this case we speak of *legal norm–shared understanding dissonance*. Assuming a long-standing legal norm – such as open discrimination of certain members of society – does not sit well with the broader normative understandings prevalent in this society anymore. In this case there are essentially two ways to bring the norm in line with shared understandings to maintain the legitimacy of law: one is court decisions through which a reinterpretation of existing law takes place; the other option is legal change via new rule-setting. Both responses require secondary rules. Let us call this the *normative adaption mechanism*.[67]

[65] See also M Zürn, *Interessen und Institutionen in der internationalen Politik: Grundlegung und Anwendung des situationsstrukturellen Ansatzes* (Leske & Budrich, Opladen, 1992) 134.

[66] This effect is even exponential. With one primary rule, there can be no collision, with two, we can have one collision, with four rules we can have six collisions and with 18 rules, one can have already 153 collisions.

[67] Legal theorists who see morality inscribed to law implicitly accord a central role to this mechanism. See Dworkin (n 21) and Habermas (n 21).

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These three types of dissonance may eventually lead to more complex legal systems composed of primary as well as secondary rules. Legal actors dislike dissonance and therefore have an internal tendency to resolve it. This tendency is reinforced by observers who expose and criticize these dissonances and therefore put external pressure on the system to adapt itself. In sum then, we aim at identifying a causal mechanism that is based on an internal dynamic towards the proliferation of secondary rules in international law. This dynamic is embedded in the legal system and triggered by the increased complexity and density of international law. It can lead to the development of additional legalization in the form of secondary rules even when political conditions are not conducive to such institutionalization.

IV. Secondary rule-making in practice

In the remainder, we cursorily discuss a set of cases that illustrate the dynamics of dissonance reduction in secondary rule-making. All of these cases touch upon some of international law's essentially contested concepts – both on the level of primary as well as secondary rules – and exposed rifts among powerful and less powerful members of international society, with each seeking to mould the rules about the rules according to their own preferences. These discussions are by no means intended to be fully-fledged case studies but rather empirical illustrations of our argument about the role of dissonance reduction in secondary rule-making. They lend some credibility to our basic argument but also show its limitations. Three features of these illustrations in particular need be kept in mind. First, we started out by looking for instances in which powerful States resisted outcomes that involved the development of secondary rules. It is in these cases that the role of internal dynamics can be shown best. Second, because we chose to focus on those 'hard cases', we did not in all cases discern manifest institutional changes. However, the presence of processes and activities challenging existing structures is taken as indication that the causal mechanism we hypothesized was at play. Third, while we have used cognitive theory to develop our theoretical argument, the case studies do not look directly at cognitions (or indications of it), but stay in the intersubjective realm of communication and justification. Despite this caveat, we believe that the empirical illustrations below support our argument regarding institutional change as a result of the law's internal drive toward consistency, once a certain level of legalization has been achieved.

We moreover believe that the illustrations chosen do not only reflect isolated events of dissonance reduction, but rather indicate a broader trend

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in global governance, namely the increasing articulation of demands upon international organizations to subject themselves to more rigorous rule of law standards. Empirical evidence suggests that the dissonance between the rule of law standards promoted by IOs in Member States on the one hand, and the IOs' frequent failure to live up to these standards themselves has in recent years increasingly been exposed by civil society and other norm entrepreneurs. In some cases this has resulted in significant institutional changes – the changes made to the UNSC's listing procedures as a result of the *Kadi* case are but one indicator of this trend.[68]

The International Criminal Court and the crime of aggression

Rules of adjudication help to resolve disputes arising out of diverging interpretations of primary norms which result from the law's inherent indeterminacy.[69] While this is a problem common to all legal systems, it is particularly acute in the pluralist and fragmented global realm. In the international realm rules of adjudication which regulate the relationship between different legal regimes assume more and more relevance to prevent the 'loss of an overall perspective on the law'.[70] In order to ensure the overall coherence of international law it has been suggested to empower the International Court of Justice (ICJ) to review the decisions of other international tribunals and authoritatively resolve norm collisions.[71] The ICJ was established by the United Nations Charter and has the authority to settle disputes between States which have consented to its jurisdiction, as well as issuing advisory opinions on international legal matters.[72] At the 2010 Review Conference on the Rome Statute establishing the International Criminal Court (ICC) in Kampala, Uganda, which was tasked, *inter alia*, with clarifying the ICC's jurisdiction over the crime of aggression,[73] the ICJ was considered as one possible trigger activating the ICC's jurisdiction over the crime of aggression.

[68] For a more comprehensive analysis, see M Heupel, G Hirschmann and M Zürn, 'Internationale Organisationen und der Schutz der Menschenrechte' (unpublished manuscript, 6 August 2013).

[69] Tamanaha (n 22) 78ff.

[70] ILC Study Group on the Fragmentation of International Law, 'Difficulties Arising from the Diversification and Expansion of International Law', 11, UN Doc A/CN.4/L.682 (International Law Commission) (unpublished manuscript, 24 September 2012), available at <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>, accessed 15 May 2014.

[71] G Hafner, 'Pros and Cons Ensuing From the Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 861ff.

[72] See Chapter XIV of the UN Charter.

[73] See N Deitelhoff, *Überzeugung in der Politik. Grundzüge einer Diskurstheorie internationalen Regierens* (Suhrkamp, Frankfurt, 2006) for an explanation of the establishment of the ICC against the stated interest of the US.

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The crime of aggression has long been the subject of debate among scholars and practitioners alike. After the Nuremberg trials, hopes were high that the new criminal law of individual responsibility for the crime of aggression would soon become part and parcel of the international rule of law, yet these hopes were immediately quashed because States could not even agree on what the term 'aggression' actually meant:

> Repeated efforts to define aggression foundered throughout the twentieth century as continuing political and cultural differences among states have prevented the formation of consensus. Strong and weak states have long been sharply divided over when the use of force is appropriate.[74]

These contestation processes pitted the powerful against the powerless, with the former insisting on a narrow definition of aggression that would not prevent them from projecting force abroad, whereas the latter supported a broad definition that would shield them from all kinds of external interference.[75] What was needed was therefore not only a more precise definition of the primary norm of non-aggression, but also secondary rules of adjudication which would move conflicts about whether or not the crime of aggression had been committed from the political terrain to the legal turf and thus contribute to a strengthening of the rule of law.

When the US invaded Iraq in 2003, the perceived dissonance between the invasion of a sovereign State with Article 2(4) of the UN Charter unleashed a fierce debate about what it means to wage a war of aggression, resulting in the newly established ICC being flooded with over 240 communications concerning the legality of the war.[76] Since the ICC at the time did not have jurisdiction over the crime of aggression,[77] the Prosecutor declared that he did not 'have the mandate to address the arguments on the legality of the use of force or the crime of aggression' and instead referred to the ongoing deliberations on these issues in the ICC Assembly

[74] MJ Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 *Yale Journal of International Law* 72. After protracted debate, the UN General Assembly in 1974 finally adopted a resolution defining aggression, which, even though nonbinding in nature, is today widely regarded as forming part of customary international law. See A/RES/29/3314, 14 December 1974.

[75] Glennon (n 74) 111.

[76] International Criminal Court, Office of the Prosecutor, 9 February 2006, available at <http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>, accessed 19 August 2013.

[77] When the Rome Statute establishing the ICC was adopted in 1998, the crime of aggression was included among the four core crimes falling within the ICC's jurisdiction, yet no consensus could be reached on the exact definition of the crime, as well as the question of jurisdictional triggers. These questions were left to be resolved by the first Review Conference.

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of States Parties (ICC ASP).[78] These deliberations focused on both primary norms (i.e. what does aggression mean? How should the prohibition on the use of force in Article 2(4) of the Charter be interpreted? Does it cover, for instance, anticipatory self-defence and humanitarian intervention?) and secondary rules of adjudication, i.e. which body should be empowered to decide whether aggression had taken place?

Negotiations at the 2010 ICC Review Conference, which took place in Kampala, Uganda, revolved around three[79] main issues: first, the definition of the crime of aggression; second, the triggers activating the ICC's jurisdiction; and finally, the role of State consent, which turned out to be intimately linked to the issue of trigger mechanisms. The Review Conferences adopted a draft definition of aggression based on an agreement in 2002, when the ICC Assembly of States Parties had established a Special Working Group on the Crime of Aggression (SWGCA).[80]

The 'elephant in the room' at Kampala were possible exceptions to the prohibition on the use of force, such as anticipatory self-defence or humanitarian intervention.[81] The US, having conducted both types of interventions in the past and thus having been confronted with claims that its behaviour was inconsistent with some of the most deeply entrenched norms of international law, had sought to make its behaviour seem consonant with international law by lobbying for a restrictive interpretation of the concept of aggression that would not cover such interventions.

[78] International Criminal Court (n 76).

[79] A fourth issue that was hotly debated at Kampala was the process for amending the Rome Statute, which, however, will not be discussed in this article. Suffice it to note that States parties agreed to delay the exercise of jurisdiction over the crime of aggression until at least 2017. The implementation of the Kampala consensus is not only dependent upon 30 ratifications, but also requires a further decision by States parties to be made in 2017. See Resolution RC/Res.6, 11 June 2010, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>, accessed 11 April 2014. The resolution provides for the insertion of the following text after art 15 bis of the Rome Statute: '2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.'

[80] See Report of the Special Working Group on the Crime of Aggression, February 2009, Resolution ICC-ASP/7/20/Add.1, Annex II., at Annex to Appendix, reproduced in S Barriga, W Danspeckgruber and C Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003–2009* (Princeton, Liechtenstein Institute on Self-Determination, 2009).

[81] M Gillett, 'The Anatomy of an International Crime: Aggression at the International Criminal Court' (International Criminal Tribunal for the Former Yugoslavia, 2013) (unpublished manuscript, 7 June 2013) 15, available at <http://www.iccnow.org/documents/SSRN-id2209687.pdf>, accessed 19 August 2013.

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A number of other Western States equally opted for a restrictive definition of aggression, whereas most non-aligned countries favoured a broad definition along the lines of the draft provided by the SWGCA that made reference to the list of acts contained in the annex to General Assembly resolution 3314[82] without specifying a particular threshold and thus covering a broad range of forcible measures.[83] In order to garner support for a restrictive definition of aggression, the US pointed out that the proposed definition was at odds with customary international law (*norm–norm dissonance*).[84] This would in turn undermine the fundamental principle of legality:

> Prosecutions based on a definition of aggression that does not reflect customary international law would create the risk that individuals could face criminal penalties for uses of force that have not traditionally been considered unlawful by the international community … in the absence of a clear and accepted definition of the crime, potential defendants would not have clear guidance about what actions are prohibited, raising fundamental questions of fairness and due process.[85]

In the end, however, the delegations present at Kampala did not share Washington's concerns, and adopted a broader definition based on the SWGCA's draft.[86] At the insistence of the US delegation, however, a list of understandings was added to the definition in order to clarify the level of gravity required to establish that the crime of aggression had been committed.[87]

While the definition of the crime of aggression was a highly sensitive question, the issue of secondary rules of adjudication proved to be even more controversial. The debate revolved basically around the question whether the United Nations Security Council (UNSC) should be given a monopoly on adjudicating whether the crime of aggression had taken place and thus trigger proceedings before the ICC, as suggested by the

[82] See n 74 above.

[83] C Kress and L von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179, 1190ff.

[84] Statement by Harold Hongju Koh at the Review Conference of the International Criminal Court, Kampala, Uganda, 4 June 2010, available at <http://www.state.gov/s/l/releases/remarks/142665.htm>, accessed 11 April 2014.

[85] United States Senate Committee on Foreign Relations, 'International Criminal Court Review Conference, Kampala, Uganda, 31 May–11 June, 2010. A Joint Committee Staff Trip Report Prepared for the Use of the Committee on Foreign Relations', 111th Congress, 2nd Session, Comm. Print 111-55, 2 September 2010, available at <http://www.gpo.gov/fdsys/pkg/CPRT-111SPRT58002/html/CPRT-111SPRT58002.htm>, accessed 11 April 2014.

[86] J Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49, 93.

[87] See Annex III of Resolution RC/Res.6 (n 79).

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International Law Commission's 1994 Draft ICC Statute.[88] The ILC approach would have further politicized the work of the Court, however, and was therefore difficult to reconcile with the notion of the international rule of law and the separation of powers. As Summers points out, a

> 'rock bottom' requirement for the rule of law is that formal rules and processes exist for the generally reliable and truthful resolution of disputes over facts ... A legislative body cannot ultimately perform these functions. Nor can administrative officials unless special institutional steps are taken. This is because officials will themselves often be parties to disputes over validity, interpretation, and fact, and over available remedies and sanctions, and thus not be in an appropriate institutional position themselves to resolve such disputes, impartially, consistently and congruently.[89]

No wonder then that even within the ILC the proposal was contested. Doubts were voiced regarding the proposal's ability to attract sufficient support within the ICC ASP, which turned out to be justified, as the negotiations at the Review Conference showed. Most delegations were opposed to a secondary rule that would accord the UNSC an exclusive role in triggering the ICC's jurisdiction over the crime of aggression. This opposition 'reflected deep dissatisfaction with the Security Council among developing countries, and concern that Security Council decisions would reflect the interests of the five permanent members rather than the interests of the international community as a whole'[90] (*norm–shared understanding dissonance*). Those who were in favour of a Security Council monopoly (the P5, unsurprisingly), however, had long maintained that allowing other bodies such as the ICJ or the UNGA to trigger the ICC's jurisdiction would be at odds with the UN Charter. In 2001, already, Washington had voiced concerns that such a transfer of authority would raise 'profound issues of consistency with the Charter ... Neither the General Assembly nor the International Court of Justice may properly infringe upon the role given exclusively to the Security Council by the UN Charter'[91] (*norm–norm dissonance*). However, the Charter speaks of the Council's 'primary', not exclusive, responsibility for the maintenance of international peace and security; hence it is not surprising that the majority of delegates did not perceive a dissonance between the provisions of the UN Charter and

[88] The ILC draft is available at <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf>, accessed 15 May 2014.

[89] Summers (n 23) 133.

[90] United States Senate Committee on Foreign Relations (n 85).

[91] 'Crime of Aggression: Statement by the United States', 26 September 2001, available at <http://www.state.gov/documents/organization/16461.pdf>, accessed 11 April 2014.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

the proposal to endow actors other than the UNSC with the competency to activate the ICC's jurisdiction.

After prolonged haggling, a two-track procedure for activating the Court's jurisdiction over the crime of aggression was adopted. Under the first track, the ICC's jurisdiction would be activated by a Security Council referral.[92] Under the second, the Court's jurisdiction would be activated by State referral or the Prosecutor's exercise of her *proprio motu* powers.[93] However, before launching an investigation, the Prosecutor must consult the UNSC and may only go ahead with the investigation if the Council either determines that an act of aggression has occurred, or fails to make a determination on this issue.[94] In the absence of a Security Council determination, the Prosecutor must receive a green light from the ICC's Pre-Trial Chamber before opening an investigation.[95] So far, the secondary rules governing the ICC's jurisdiction over the crime of aggression resembles the regime governing the Court's jurisdiction over the other three core crimes of the Rome Statute. However, they depart from the latter in important ways, namely by providing for an opt-out mechanism for State parties and by positing that the ICC may not exercise jurisdiction in respect of a crime of aggression committed by the nationals or on the territory of States that are not parties to the Rome Statute (except, of course, in cases in which the UNSC has referred a situation).[96] This means that officials from States not parties to the Rome Statute who possess veto rights in the UNSC will be effectively shielded from the ICC's prosecution. Had the US not exercised its leverage, it is unlikely that the decision that was ultimately adopted would have exempted non-parties from key portions of the secondary rules regime governing the ICC's jurisdiction.[97] This significant concession to geopolitics notwithstanding, the preservation of the ICC's powers to act in the absence of a Security Council referral was greeted as an important achievement in 'detaching prosecution from political whims'.[98] The conference outcome also shows the *normative adaptation mechanism* at play, as the perceived dissonance between a UNSC monopoly and the interests of the international community at large

[92] See Resolution RC/Res.6 (n 79).

[93] Ibid.

[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] Trahan (n 86) 91ff.

[98] T Ruys, 'Defining the Crime of Aggression: The Kampala Consensus', Leuven Centre for Global Governance Studies Working Paper No 57, January 2011, available at <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp51-60/wp57.pdf>, accessed 11 April 2014.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

was reduced by crafting a new secondary rule that accorded the UNSC a prominent, yet not exclusive role in activating the ICC's jurisdiction.

In sum, different types of dissonance were involved in the debate over giving the ICC jurisdiction over the crime of aggression. The debate was initially spurred by the perceived incompatibility of Washington's invasion of Iraq with the rules governing the use of force (*norm–behaviour dissonance*). When States met at Kampala to design a regime of primary and secondary rules governing aggression proceedings before the ICC, the US justified its position in the following manner. With regard to the primary norm defining the crime of aggression, Washington argued that the proposed definition was at odds with customary international law (*norm–norm dissonance*). With regard to the secondary rules of adjudication, the US – seconded by the other permanent Security Council members – argued that allowing bodies other than the UNSC to trigger aggression proceedings would be inconsistent with the UN Charter (*norm–norm dissonance*). This viewpoint was called into question by most other delegations who pointed to the Council's lack of legitimacy in representing the interests of the international community at large (*norm–shared understanding dissonance*). In the end, the secondary rules agreed upon at Kampala reflected a complex compromise which naturally did not eliminate the dissonances perceived by each actor or group of actors entirely, but at least mitigated some of them, and was greeted as an important achievement in strengthening the international rule of law.[99]

The UN Security Council and the responsibility not to veto

The question of whether the five permanent members of the UNSC's sway over the making and application of international law is consonant with the rule of law was not only a hotly debated issue at Kampala, but is also at the heart of the debate over the responsibility not to veto (Rn2V), an offshoot of the responsibility to protect (R2P). The history of both concepts illustrates the justificatory trap mechanism at play, i.e. it shows how powerful States became entrapped in their own normative rhetoric and how contestation about the interpretation and application of the emerging primary norm of R2P triggered demands for a secondary rule of implementation.

The enormous selectivity of humanitarian interventions authorized by the UNSC was seen increasingly as undermining the legitimacy and 'morality' of those interventions.[100] A new secondary rule – the responsibility not to

[99] Ruys (n 98).

[100] See B Zangl and M Zürn, *Frieden und Krieg. Sicherheit in der nationalen und post-nationalen Konstellation* (Suhrkamp, Frankfurt, 2003) chs 8, 9; see M Binder, 'Humanitarian Crises and the International Politics of Selectivity' (2009) 10 *Human Rights Review* for the causes of the selectivity of international interventions and data on it.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

veto – is meant to reduce *norm–behaviour dissonance* by ensuring consistency in the application of R2P, thus heightening the legitimacy of the UNSC as a protector of civilians and bolstering its fidelity to the law. At the same time, the debate over Rn2V exposed another type of dissonance, that is, *legal norm–shared understanding dissonance*. While the UN Charter imposes few *legal* limits on the use of the veto, an intersubjective consensus has emerged in recent years that even though those who pay the costs of an intervention should be accorded a privileged position in the Council's decision-making, they should not (ab)use this privilege to further their narrow national interests. The concept of Rn2V has not yet consolidated into a secondary rule. This does not mean, however, that pressure on the P5 to explain and justify the (ab)use of their veto rights has subsided, on the contrary. In a remarkable volte-face, one P5 member – France – affirmed its support for the responsibility not to veto, thus fuelling hopes that the other four permanent members will follow suit.

The concept of Rn2V emerged from the debate over the responsibility to protect. The gist of the concept of the responsibility to protect is that 'state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself'.[101] However, if a State proves unwilling or unable to live up to its responsibilities, i.e. if it violates basic human rights or does not prevent such violations, the international community has a residual responsibility to act. The principle of non-intervention thus yields to the international responsibility to protect.[102] The discourse about R2P was triggered by a decade of (mostly) Western interventionism on behalf of human rights in the post-Cold War era, culminating in NATO's controversial bombing of Serbia in 1999. Even though the intervening parties did not consistently assert a *legal* right to humanitarian intervention but mostly justified their actions on moral grounds, the war against Serbia did set off a process of self-entrapment, as a normative expectation began to emerge that those same States that had intervened in Serbia to safeguard human rights would display a consistent commitment to the emerging (yet still opaque) norm of atrocity prevention in the future in other places of the world as well.

A string of humanitarian crises which followed the Kosovo intervention and the publication of the ICISS report has demonstrated that patterns of

[101] International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (International Development Research Centre, 2001) (unpublished manuscript) xi, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, accessed 15 May 2014.

[102] ICISS (n 101).

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

accepted justifications in the field of atrocity prevention have indeed changed, and that the language of R2P has provided proponents of intervention with a powerful vocabulary to press for tough action against human rights violators. Yet those States which had intervened in Kosovo in 1999 have not been consistent in their commitment to atrocity prevention, thus giving rise to dissonance between their proclaimed (legal or moral) responsibility to protect civilians from mass atrocities on the one hand, and their actual behaviour on the other hand. One of the reasons for this implementation deficit is that the content of the primary R2P 'norm' remains opaque;[103] another reason is that the secondary rules governing the implementation of R2P are contested, in particular those regarding the UNSC's responsibility to react to atrocity crimes. With regard to the latter, the concept of the responsibility not to veto has recently gained traction internally.[104] The origins of Rn2V date back to the ICISS report, whose authors proposed that 'a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution'.[105] The main challenge faced by proponents of Rn2V is that in order to modify – through an amendment of the UN Charter – the existing secondary rule which grants the P5 veto powers over implementing R2P, they will need the consent of just those actors whose privileges they seek to curtail, because a redistribution of authority for the maintenance of international peace and security requires the consent of a two-thirds majority of UN Member States, including the permanent members of the Security Council. The possibilities for normative innovation are thus circumscribed by existing procedures, which grant a handful of powerful States a veto over the revision of these procedures.

The veto rights of the P5 have long been anathema to the 'significant majority of Member States'[106] who believe that this places a small group of powerful States above the law and who have sought to rewrite the secondary rules governing decision-making in the UNSC. In 1993, the UN General Assembly established an open-ended working group to consider

[103] See, e.g., T Reinold, 'The Responsibility to Protect – Much Ado about Nothing?' (2010) 36 *Review of International Studies*; T Reinold, *Sovereignty and the Responsibility to Protect: The Power of Norms and the Norms of the Powerful* (Routledge, London, 2012); C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law*.

[104] Citizens for Global Solutions, 'The Responsibility Not To Veto: A Way Forward' (2010), available at <http://globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf>, accessed 20 August 2013.

[105] ICISS (n 101) 51.

[106] A/61/47, 14 September 2007.

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'all aspects of the question of increase in the membership of the Security Council and other matters related to the council'.[107] The working group organized several rounds of consultations on these matters which tackled, *inter alia*, the issue of limiting the use of the veto in situations involving mass atrocities.[108] However, consensus on these matters was not forthcoming, as the P5 insisted that any reform of the Security Council leave the essence of their veto powers intact.[109] The consultations organized under the auspices of the working group thus quickly reached a dead end.[110]

In light of the almost insurmountable procedural hurdles of amending the UN Charter, a coalition of smaller States (the S5 – Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland), seconded by civil society, has begun to explore a different avenue for changing the rules of implementation for R2P through a non-binding General Assembly resolution, where rule-making power is much more evenly distributed than in the UNSC. This resolution would establish a code of conduct for the P5, asking the latter to abstain from using their veto in situations involving mass atrocities and also requesting those States which cast a veto nonetheless to publicly explain the reasons for doing so, 'in particular with regard to its consistency with the purposes and principles of the Charter of the United Nations and applicable international law'.[111] The S5 sought to make their proposal palatable to Member States by highlighting its consistency with the provisions of the UN Charter and the 2005 World Summit Outcome Document.[112] At the same time the S5 proposal was geared towards forcing those who do cast a veto to acknowledge the dissonance between their actions and widely accepted norms of international law (*norm–behaviour dissonance*). Hence, Jordan's Ambassador Prince Zeid claimed that while

[107] A/RES/48/26, 3 December 1993.

[108] A/61/47, 14 September 2007.

[109] Ibid.

[110] Citizens for Global Solutions (n 104) 3.

[111] A/66/L.42/Rev.1, 3 May 2012.

[112] 'Regarding our recommendation on the use of the veto we would like to underline, at the outset, that the S5 fully respects the Charter-based right to veto … our recommendations contain nothing radical or revolutionary. The first recommendation to explain the reasons for resorting to a veto is nothing fundamentally new since it is already practiced to some extent by the permanent members of the Security Council. The recommendation # 20 to refrain from using the veto to block action in situations of "atrocity crimes"… is in line with the 2005 World Summit resolution which states, in its paragraph 139, that "the international community, through the United Nations, also has the responsibility to use appropriate … means … to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"', Presentation of S5 Draft Resolution L.42 on the Improvement of the Working Methods of the Security Council, 4 April 2012, NLB CR-3, available at <http://responsibilitytoprotect.org/Working%20Methods%20reform%20-ambassadors%20statement%204%20April%202012%281%29.pdf>, accessed 20 August 2013.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

the UN Charter accords the Security Council primary responsibility for the maintenance of international peace and security, the Charter also requires that the Council's decisions be consonant 'with the principle of justice and international law'.[113] Genocide and mass slaughter, he continued, are certainly not consistent with those principles.[114]

Even though the S5's push for enhanced Security Council accountability *in principle* seemed to enjoy a significant measure of support among Member States,[115] when the S5 decided to put their draft resolution to a vote, they encountered great opposition on the part of the P5.[116] When it became clear that the draft resolution could not muster the requisite majority in the General Assembly – what exactly constituted the 'requisite majority' in this case was subject to debate, because the secondary rules governing UN General Assembly decisions on matters relating to the Security Council are themselves contested[117] – the S5 decided to withdraw the resolution. They announced, however, to further consult with those Member States that had expressed support for the draft resolution and, should these consultations lead to a new dynamic, to return to the matter.[118]

And indeed, the S5 initiative gathered new momentum in 2012, when charges of hypocrisy where increasingly levelled against the UNSC for its failure to hold the Syrian regime responsible for the atrocities committed against its own people. Referencing draft resolution A/66/L.42/Rev.2 on the responsibility not to veto, the Singaporean delegate, for instance, denounced the behaviour of

> those permanent members that repeatedly express outrage at what is happening within the Council on issues like Syria are the same ones that blocked A/66/L.42/Rev.2. Trumpeting moral outrage over the Council's non-action is particularly hypocritical because whatever divisions there may be among the P5, they are united in having no limits placed on their use or abuse of the veto.[119]

[113] Quoted in M Lynch, 'Rise of the Lilliputians', 10 May 2012, available at <http://turtlebay.foreignpolicy.com/posts/2012/05/10/rise_of_the_lilliputians>, accessed 20 August 2013.

[114] Quoted in Lynch (n 113).

[115] Citizens for Global Solutions (n 104) 7.

[116] Quoted in Lynch (n 113).

[117] See the UN Office of Legal Affairs' opinion on that matter, available at <http://www.foreignpolicy.com/files/fp_uploaded_documents/120516_20120514174320.pdf>, accessed 20 August 2013.

[118] United Nations Department of Public Information, 'Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council's Working Methods to Avoid "Politically Complex" Wrangling', 16 May 2012, available at <http://www.un.org/News/Press/docs/2012/ga11234.doc.htm>, accessed 20 August 2013.

[119] S/PV.6870, 26 November 2012.

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Remarkably, at the same debate one of the P5 publicly announced that it would henceforth support the S5 push for limiting the use of the veto in cases involving mass atrocities: 'France supports the permanent members of the Council voluntarily and jointly foregoing the use of the veto in situations under the Council's consideration in which mass atrocities are being committed and, more generally, which pertain to the responsibility to protect', the French representative proclaimed, thus increasing justificatory pressure on the other permanent members to explain the dissonance between their verbal commitment to R2P on the one hand, and their failure to live up to their responsibilities in the context of the current crisis in Syria on the other hand.[120] The general tone of the debate was one in favour of a Rn2V, with only Russia explicitly speaking out against it. It thus seems fair to conclude with Liechtenstein's ambassador that 'the accountability needs and the relevant pressure on the Council are increasing, as is illustrated in connection with the widespread and systematic crimes committed against the civilian population in Syria'.[121] In the case of France, the justificatory trap mechanism has resulted in a remarkable policy change and has nourished hopes that a stable normative expectation will emerge in the future that the international community will intervene on behalf of endangered civilians whose government manifestly fails to meet its sovereign responsibilities. In 2013 a new initiative of 22 UN Member States (ACT) was launched which took over the baton from the S5 and now pushes for increased accountability, coherence, and transparency of the UN Security Council's decision-making processes.[122] The initiative has already had some success in driving a wedge between the P5, as not only France is sympathetic, but apparently also the UK, which participated in the launch of ACT last May.[123] Observers moreover believe that 'pressure is likely to mount on the US, given that the incoming UN Ambassador, Samantha Power, is a prominent advocate of mass atrocity prevention'.[124]

In sum, the debate over Rn2V tells us several things about the role of dissonance reduction in legal systems, and here especially *norm–behaviour dissonance/legal norm–shared understanding dissonance*. For one, it shows that even the most powerful members of the international community have come under pressure to answer to those who are affected

[120] Ibid.

[121] Ibid.

[122] V Lehmann, 'Reforming the Working Methods of the UN Security Council. The Next ACT', August 2013, available at <http://library.fes.de/pdf-files/iez/global/10180.pdf>, accessed 9 April 2014.

[123] Lehmann (n 122) 5.

[124] Ibid.

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by their decisions, and to demonstrate that their behaviour is consistent with fundamental primary norms of international law. Whereas the supporters of Rn2V have not prevailed so far, at least the requirement of reason-giving enshrined in Rn2V seems to be established by now. The debate over Rn2V has demonstrated that these processes of reason-giving have triggered a dynamic of its own which may at the end of the day lead to the adoption of a new secondary rule. While no further adjustment of the secondary rules of implementation has taken place yet, the P5 have come under increasing pressure to justify their privileges, especially if these prerogatives lead to a failure to act decisively in the face of mass atrocities.

Universal jurisdiction and the concept of immunity

The ascendancy of the contested concept of universal jurisdiction has led to collisions with long-established primary norms of international law, such as the norm of immunity (*norm–norm dissonance*). The history of the concept illustrates how the increasing density of primary norms generates a demand for secondary rules (such as rules of implementation) that can resolve such collisions between primary norms (*conflict resolution mechanism*). Just like in the other cases described above, the struggle over the scope and meaning of the concept of universal jurisdiction pitted powerful against weaker actors – in this case, the European Union against the African Union (AU).

The controversy came to its head when the ICJ handed down a highly controversial judgment in the *Arrest Warrant* case. The diplomatic haggling that accompanied the proceedings before the ICJ is indicative of the contestedness of the primary norms of universal jurisdiction and immunity. In 2000, the Democratic Republic of the Congo (DRC) initiated proceedings against Belgium before the ICJ in respect of a dispute concerning an arrest warrant issued by Belgium against Congolese Foreign Minister Abdulaye Yerodia Ndombasi, charging him with war crimes and crimes against humanity.[125] The arrest warrant was issued on the basis of Belgium's 1993 statute providing for jurisdiction over war crimes and crimes against humanity wherever they are committed.[126] The principle of universal jurisdiction, which underlies the statute, posits that certain crimes are so abhorrent that every State in the world is entitled (or even obliged) to prosecute them, regardless of where the crime was committed and regardless of the nationality of the victims, perpetrators, or any other

[125] See *Democratic Republic of the Congo v Belgium*, Case Concerning the Arrest Warrant of 11 April 2000, International Court of Justice, 14 February 2002, 2002 ICJ Rep. 3, para 13, available at <http://www.icj-cij.org/docket/files/121/8126.pdf>, accessed 20 August 2013.

[126] *Democratic Republic of the Congo v Belgium* (n 125) paras 13–15.

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type of connection with the prosecuting country.[127] In its application, the DRC claimed that '[t]he *universal jurisdiction* that the Belgian State attributes to itself' was dissonant with established principles of international law, namely the 'principle that a State may not exercise its authority on the territory of another State', the principle of sovereign equality, as well as Yerodia's immunity.[128] Subsequently, however, the DRC reduced the scope of its application to the alleged violation of Yerodia's immunity.[129] The Court therefore confined itself to making a pronouncement on the issue of immunity while leaving aside the question of universal jurisdiction. This decision was criticized by a number of individual judges, who observed that 'there can only be immunity from jurisdiction where there is jurisdiction'.[130] In its application, the DRC argued that incumbent foreign ministers enjoy absolute immunity from criminal prosecution.[131] Belgium, by contrast, contended that immunity does not shield an official from prosecution for acts committed not in performance of his or her functions, particularly if the act in question violated international jus cogens.[132]

The Court ruled that incumbent foreign ministers enjoy immunity from prosecution in foreign national courts for acts committed in an official capacity,[133] and that no exception to this rule exists in respect of war crimes or crimes against humanity.[134] It emphasized, however, that immunity should not be equated with impunity, as an incumbent foreign minister could still be tried by his or her home State or before an international tribunal.[135] The Court also stated that after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period in office,

[127] Council of the European Union, 'AU-EU Report on the Principle of Universal Jurisdiction', 7, 12th Session of the AU-EU Ministerial Troika, 8672/1/09 REV1, 16 April 2009, available at <http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf>, accessed 20 August 2013.

[128] *Democratic Republic of the Congo v Belgium* (n 125) para 17.

[129] Ibid para 21.

[130] International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium, Judgment of 14 February 2002), separate opinion of President Guillaume, para 1, available at <http://www.icj-cij.org/docket/files/121/8128.pdf>, accessed 20 August 2013.

[131] *Democratic Republic of the Congo v Belgium* (n 125) para. 11.

[132] Ibid para 56.

[133] Ibid para 54.

[134] Ibid para 58.

[135] Ibid para 61.

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as well as in respect of acts committed during that period of office in a private capacity.[136]

Yet the Court did not take a stand on whether war crimes and crimes against humanity fall into the latter category. In her dissenting opinion, ad hoc Judge Van den Wyngaert challenged the Court's interpretation of the scope of immunity, claiming that foreign ministers do not enjoy immunity for violations of jus cogens.[137] She also regretted that the Court had dealt with the issue in a very technical way, thus bypassing the underlying fundamental norm–norm dissonance:

> In a more principled way, the case was about how far States can or must go when implementing modern international criminal law … It was about balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities. The Court has not addressed the dispute from this perspective and has instead focused on the very narrow question of immunities of incumbent Foreign Ministers. In failing to address the dispute from a more principled perspective, the International Court of Justice has missed an excellent opportunity to contribute to the development of modern international criminal law.[138]

Van den Wyngaert concluded that international law indeed permits universal jurisdiction over international core crimes[139] and that universal jurisdiction could also be exercised in absentia, contrary to the DRC's assertion.[140] Even though Van den Wyngaert's view was not shared by the majority of judges on the bench, her dissenting opinion exposed the *norm–norm dissonance* underlying the case, and flagged the need to (re)balance the diverging interests protected by the norms at issue.

The Yerodia incident prompted the AU to mount a flurry of diplomatic activity aimed at preventing what was perceived as a politicization of the principle of universal jurisdiction. African leaders felt that the (public) issuance of arrest warrants for sitting African State officials was dissonant with fundamental principles of international law such as the sovereign equality of States, the officials' immunity, and the presumption of innocence: 'For African states, this evokes memories of colonialism.'[141]

[136] Ibid para 61.
[137] Ibid para 1.
[138] Ibid paras 5, 6.
[139] Ibid para 59.
[140] Ibid paras 57, 58.
[141] Ibid para 36.

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The AU therefore called for secondary rules that could help reduce this dissonance by clarifying the scope of the concept of universal jurisdiction, thus reducing possibilities for politicizing this concept and re-establishing legal certainty. More specifically, the AU proposed the establishment of an international regulatory mechanism 'with competence to review and/or handle complaints or appeals arising out of abuse of the principle of universal jurisdiction by individual states'.[142] Moreover, following intense lobbying by the African Group, the UN General Assembly eventually adopted a resolution calling for further discussion and clarification of the concept.[143]

While no international regulatory mechanism has been established yet which would enshrine rules of adjudication/implementation that could provide guidance as to how to weigh universal jurisdiction versus immunity, the matter continues to be high on the agenda of global governance, as the heated debate sparked by the issuance of an ICC arrest warrant against Sudanese President al-Bashir has shown.[144] To the extent that the number of countries which have adopted a concept of limited immunity is now in the majority and still growing, this will not change. Currently, the AU is seeking an ICJ advisory opinion on the scope of the immunity principle through the UN General Assembly, hoping to thereby clarify the contours of this contested primary norm of international law. In sum then, the immunity of State officials from criminal proceedings in foreign national courts remains a contested issue.[145] The underlying *norm–norm*

[142] African Union Executive Council, 'Progress Report of the Commission on the Abuse of the Principle of Universal Jurisdiction', 16th session, 25–29 January 2010, available at <http://www.iccnow.org/documents/EX_CL540%28XVI%29.pdf>, accessed 20 August 2013.

[143] UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction', 65th session, UN Doc. A/RES/65/33, 10 January 2011, available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/33>, accessed 20 August 2013.

[144] T Reinold, 'Constitutionalization: Whose Constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court' (2012) 10 *International Journal of Constitutional Law* 1076.

[145] In 2012 the ICJ took a stance on the separate issue of the immunity of States from the jurisdiction of the courts of other States. In *Jurisdictional Immunities of the State* the Court had to decide whether or not Italy had acted unlawfully in allowing civil claims to be brought against Germany in Italian courts for Germany's violations of international humanitarian law during World War II, and in seizing German property on Italian soil. See *Germany v Italy: Greece Intervening*, Jurisdictional Immunities of the State, International Court of Justice, 3 February 2012, 2012 ICJ Rep. 99, available at <http://www.icj-cij.org/docket/files/143/16883.pdf>, accessed 8 April 2014. Germany had asked the court to find that Italy had violated the jurisdictional immunity which Germany was entitled to under customary international law (paras 15, 16). Italy, by contrast, argued that Germany was not entitled to immunity for two reasons: 'first, that immunity as to acta jure imperii does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State'. Second, Italy maintained that because peremptory international law always

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dissonance has triggered demands for the creation of secondary rules institutionalized in a new international regulatory mechanism.

V. Conclusions

In this article we sought to show that because of the law's internal drive towards dissonance reduction, legal processes display a tendency toward the emergence of secondary rules when the number, intrusiveness and complexity of primary rules increases – even in the face of adverse external conditions. In the first part of this article, we argued that the concept of secondary rules has a 'competitive edge' over cognate concepts such as constitutionalization and the rule of law mainly because it carries less normative baggage. The concept of secondary rules enables us to capture the dynamics of international law without at the same time necessarily having to welcome these developments as cornerstones of the international rule of law. At the same time, secondary rules are certainly a *necessary* component of both the rule of law and the concept of constitutionalization. In this sense, we argue that to the extent that we can identify the operation of the three coherence mechanisms identified above, it is not necessarily the morality of law, but certainly the integrity of law and the idea that like cases should be treated alike which are reinforced. To be sure, this is a descriptive or empirical statement. The choice of secondary rules as a conceptual tool is empirically motivated, not normatively. By showing that legal systems have an internal drive towards consistency, we do not exclude the possibility that this dynamic may, under certain circumstances, trigger more far-reaching normative changes. In the long run, it may foster law's integrity built on the co-originality of the rule of law and democracy. As Nico Krisch has put it:

trumps any inconsistent rule of international law, and because the immunity principle does not have peremptory status, the immunity principle had to give way (paras 61, 92). The Court rejected both arguments, concluding that Italy had violated the customary international law of sovereign immunity (paras 77–79, 91–97, 135, 139). Dissenting Judge Cançado Trindade, however, claimed that State immunities are a privilege which ought to be reassessed in light of 'fundamental human values', and that the gravity of the human rights violations Germany was accused of removed any bar to jurisdiction. See *Germany v Italy: Greece Intervening*, dissenting opinion of Judge Cançado Trindade, paras 40, 53–62, available at <http://www.icj-cij.org/docket/files/143/16891.pdf>, accessed 8 April 2014. Dissenting Judge Yusuf in turn held that customary international law on sovereign immunities was currently in a state of flux and that the scope of the immunity principle had contracted over time. He also claimed that State immunity should not be interpreted in a vacuum, but had to be balanced against other norms of international law, including fundamental human rights and norms of international humanitarian law. See *Germany v Italy: Greece Intervening*, dissenting opinion of Judge Yusuf, paras 21–30, available at <http://www.icj-cij.org/docket/files/143/16893.pdf>, accessed 8 April 2014.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press

> The structure of law thus tends to resist inequality, and this resistance increases with the strength of legal order – the more international law moves from contracts to law and from primary to secondary rules and institutions, the more the resistance grows. The more international law becomes constitutionalized, the more it pulls toward equality.[146]

Hence, even though the seemingly unconquerable stronghold of inequality in international relations – the UNSC – continues to defy demands to make its procedural rules consonant with the values held by the international community at large (thereby reducing *legal norm–shared understanding dissonance*) and to ensure a consistent application of R2P (thus reducing *norm–behaviour dissonance*), there are signs of fissure. To the extent that the debate over subjecting international organizations to the rule of law gains traction internationally the P5 will find it increasingly difficult to justify the blatant dissonance between the Council's procedural rules and accepted norms of international law. This process will take time – history teaches us that normative structures are rather inert – and there is no guarantee for success. At the end of the day, internal dynamics must encounter favourable external conditions in order to produce significant changes. Moreover, in situations where weaker actors do not seek to create secondary rules *in vacuo* but attempt to modify existing rules which give the powerful veto rights over subsequent rule modifications (*legal norm–shared understanding dissonance*), dissonance reduction will be harder to obtain. In spite of these limitations, the illustrations in the last part of this article lend some credibility to our basic argument that the law's programming towards consistency may give rise to secondary rules via the reduction of three types of dissonance – with potentially even more far-reaching long-term implications. The examples of secondary rule-making reviewed in the empirical section of this article as well as recent trends in international law thus justify a cautiously optimistic belief in the 'civilizing force of dissonance reduction'.

Acknowledgements

We would like to thank Armin von Bogdandy, Nico Krisch, André Nollkaemper, and Rainer Schmalz Bruns as well as the participants of the WZB Rule of Law Colloquium for their helpful comments and criticism. Thanks also to Rebecca Majewski and Georg Simmerl for research assistance.

[146] N Krisch, 'More Equal Than the Rest? Hierarchy, Equality and U.S. Predominance in International Law' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, Cambridge, 2003) 152.

https://doi.org/10.1017/S2045381714000045 Published online by Cambridge University Press