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Department of Law

**Between Law and Social Movement Organizations:
The Cycle of General Norms in World Society**

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degree of Doctor of Philosophy,
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Abstract

This thesis addresses the problem of the dissonance between the formulation of highly generalized norms in world society and the failure of those norms to find accommodation in law. To construct this problem and its possible solutions, the thesis adopts Niklas Luhmann's systems theory and functional method of analysis. Employing a distinction between private and public law, the thesis begins by examining the accommodation of such general norms in a model of global law beyond the state which is commonly held to accommodate an increasing range of norms at the global level. However, the limits of this legal system in relation to general norms are located in its exclusive specialization in the niches of world society and in its marginalization of state entities which remain crucial to the stabilization of those norms. The thesis therefore examines public international law as a legal system that is also increasingly orientated to realizing normative expectations of global public goods. Through analysis, the thesis identifies the limits of this legal system in relation to normative expectations of the prohibition of nuclear weapons. This antinuclear norm is nonetheless shown to be clearly formulated and recognized in world society, and the thesis traces the solution to this problem to transnational social movement organizations which stabilize the norm through formal decision-making and through communication of the norm to organizations of the political and legal systems. This forms the basis of a theory of the functional specification of social movement organizations as a solution to the problem of general norms. Finally it is argued that lawyers must develop a more definite appreciation of these developments, so that any structural relationship with social movement organizations reflects the functional importance they have gained in world society.

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1 Introduction

1.1 Introduction to the thesis

Following Talcott Parsons, we can assume that there is a link between greater differentiation and greater generalization of the symbolic basis, especially “values,” on which society seeks to formulate its unity. But what happens if generalized values can no longer be accommodated in differentiated society? If, although formulated and recognized, they are inadequately realized?

Luhmann (2013a), 154

The aim of this study is to investigate a related and more poignant question: what happens if norms arising in a similar context, and equally formulated and recognized in society, are inadequately realized in law? Norms also become couched at a higher level of generality with the progressive differentiation of society, and this is not simply a matter of deducing a process from an abstract functional requirement.¹ Rather, this can even be seen on a more concrete level in relation to the negative side-effects which arise from the increasing specialization and complexity of society.² The global scale of these side-effects generates normative expectations of a highly generalized character. In relation to the globalizing tendencies of a military, technological and scientific complex, for example, there arise expectations of peace and the prohibition of the use of weapons of mass destruction. In relation to the apparent destructive tendencies of expanding economic and technological systems, there arise expectations of prevention of the degradation of the natural environment and the conservation of biological diversity. In relation to the autonomous development of an economic system, channelled through global centres and tax havens with the aid of communications technology, there arise expectations of more sustainable and integrated development around the world. In relation to a co-evolution of the economic and health systems, instrumentalized in the pharmaceuticals industry, there arise expectations of universal access to adequate healthcare for children, supported by world food security and the

¹ A common criticism of the structural-functionalist approach to generalized values presented by Parsons (1971) is expressed in the question: ‘Why should it be that what is necessary does indeed happen?’, Joas (2008), 93.

² The functional differentiation of modern society is well recognized by sociologists beyond Parsons and Luhmann. See also, for example, Durkheim (1964); Simmel (1964); Weber (1968).

universal access to clean water and sanitation. The list of norms arising in response to the pathologies of an increased functional differentiation of modern society goes on and on, and, as they emerge, many fall under the existing umbrella of an even greater expectation of the universal positivization and peremptory status of human rights.

At the same time, this is not simply a matter of equating values with norms.³ Despite the obvious difficulties such expectations may face in respect of legal institutionalization, in modern society they often find formulation as proto-legal communications, as, for example, in the Universal Declaration of Human Rights 1948, or even as assertions of *jus cogens*,⁴ obligations *erga omnes*,⁵ or a so called ‘responsibility to protect’ doctrine.⁶ Beyond this, a broad range of general norms are now commonly asserted through submissions, *amicus* briefs, declarations, or other more informal channels in adjudication and deliberations before the multiplicity of courts and governance institutions at the global level.⁷ Moreover, it is the very global nature of the negative side-effects of functional differentiation which gives these norms such definite formulation.⁸ The completely new spatial dimensions of such problems,⁹ together with the ‘equalizing effect’ they may have in terms of exposing a large class of people to the same phenomena,¹⁰ means that the expectations they kindle are not as vague or relative as values. Instead they are so sharply perceived and strongly committed to that they often find a cogent and widespread formulation that is both sustained in institutional discourse and even highly resistant to disappointment. When people around the world claim anthropogenic climate change is real, for example, it is not simply a value they hold, but something they ‘know’ to be real (whether they are correct or not), and therefore something

³ Parsons (1971) is also often criticized for the way in which his concept of ‘societal community’ effectively merges generalized values with a cohesive system of norms. However, it is the relativity of values which distinguishes them from norms, for example on the basis that they do not represent the discursive elaboration of legal validity (Habermas, 1996, 154), or that they offer no prescription for action in cases of conflict (Luhmann, 2008a, 29).

⁴ See for example Articles 53 of the 1969 Vienna Convention on the Law of Treaties; see also the *Furundžija* case (*Prosecutor v. Furundžija*), case no. IT-95-17/I-T (1999).

⁵ *Case Concerning the Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain) (Second Phase)*, ICJ Reports 1970.

⁶ See for example, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 at paras 138–139.

⁷ See for example the increasing submission of *amicus* briefs by NGOs to the European Court of Human Rights, Van den Eynde (2013); even when normative expectations are unable to find any formulation in legal proceedings, they may still register as normative expectations on a general level. Thus, for example, in 2011 the Pacific island nation-state, Palau, announced its intention in a United Nations General Assembly debate to apply to the ICJ for an advisory opinion on legal responsibility for climate change. It was later dissuaded from doing so: see Beck and Burelson (2014).

⁸ The use of nuclear weapons against Japan in 1945 has been presented as the ‘first global event’, Albrow (2014a), 73; see also Jaspers (1953); Arendt (1994).

⁹ Blühdorn (2000), xiv.

¹⁰ Beck (1992), 36.

they see as requiring action and accountability.¹¹ In addition, functional differentiation also provides the medium for the increased communication of such norms. Norms are constantly galvanized by the multifarious social movements and nongovernmental organizations which organize themselves to project these expectations at the centres of legal and political institutionalization; by a global media coverage which may often help to scandalize public opinion and sensationalize the plight of such causes;¹² and through communications technology that allows the exchange of information and development of further forms of collaboration on the global level.¹³

Typically these concerns are associated with a critical theory approach which is generally focused on the potential alienating effects of the process of modernity.¹⁴ Ulrich Beck in particular has addressed the ways in which the global side-effects of modernity may promote normative expectations in society. Beck's concept of 'risk society' proposes a new epoch, characterised by technological, environmental and economic risks of an unprecedented scale and quality to human welfare and survival.¹⁵ One of the most important observations made in this respect is that such risks are no longer attributed to nature but, instead, become identified as 'problems resulting from techno-economic development itself'.¹⁶ Such a development is seen as promoting a 'reflexive modernity' in which society is increasingly confronted with its 'own products', and in which traditionally 'natural' problems are charged with a new social, political and cultural force.¹⁷ With this, it is argued, the 'motor of social transformation' comes to be based upon the side-effects of modernity rather than instrumental rationality, in which a 'public' emerges, not on the basis of 'consensus of decisions, but out of dissent about the consensus of decisions.'¹⁸

Beck's account of 'risk society' has proved highly influential as a sociological articulation of the issue of risk in modern society.¹⁹ Nonetheless, there are some issues with Beck's theory which limit its application to the present study. In particular, his optimistic concept of a 'reinvention of politics'²⁰ as a comprehensive shift from the nation-state towards

¹¹ Oreskes (2013), 560.

¹² Fischer-Lescano (2003).

¹³ Yang 2003; Lannon 2008; see also Anheier, Glasius, and Kaldor (2012), 3-10.

¹⁴ Finding its early powerful expression in Adorno and Horkheimer (1972).

¹⁵ Beck (1992).

¹⁶ *Ibid.*, 19. Even the weather comes to be seen as a risk in this sense, Hall (2012). This is an evolutionary pattern for society, symbolically represented by the probes currently expanding out into space.

¹⁷ Beck (1992), 154f. For a similar concept of a 'global age' defined by a new social awareness of the finiteness of society, see Albrow (1996).

¹⁸ Beck (2006), 339.

¹⁹ Blühdorn (2000), 82.

²⁰ Beck (1996).

civil society as the locus of political action which may comprehensively resolve the problems of such risks is lacking in important qualifications.²¹ It is doubtful that the nation-state can be so marginalized from any political solution to the kind of side-effects of functional differentiation which have been presented above, and there is little evidence to support the emergence of the radically different concept of politics that Beck presents.²² These problems are reflected in the lack of attention Beck devotes to the complexities of law and the legal institutionalization of the norms that might arise in response to the perceived pathological side-effects of modernity. Legalization is largely treated as following unproblematically from the imagined radical transformation of politics in risk society. This short-coming reflects the more general deficiencies of the critical theory tradition in terms of thinking about law in global society, which make it generally unsuitable for the present study.²³

The present study is not exclusively focused on phenomena which are external to law. By analogy, it is not only about the ‘soil’ within which transnational law grows, but also about the ‘roots’ of such law, and (depending on how one sees it) about the structures that evolve if there are any defects in the ‘natural’ absorption of environmental stimuli, or about those that evolve to protect law against the absorption of harmful externalities. Thus, a more refined sociological theory is necessary in order to gain perspective on both the social norms that arise in respect of the pathological side-effects of functional differentiation and the particular logics of the legal system. It is for this reason that the present study will rely upon the systems theoretical approach developed by Luhmann himself to address the question of what happens if general norms are inadequately realized in the differentiated forms of transnational law. His sociological theory of law is perhaps most infamous for proposing a concept of law as a distinct social system, removed from its environment and based only on itself. What is generally less noted is the way in which Luhmann’s sociological theory of law explicitly emphasizes the legal system as being a ‘differentiated functional system *within*

²¹ Blühdorn (2007), 5.

²² Goldblatt (1996), 86. Another common critique made of Beck’s concept of ‘risk society’ is that it suffers from ‘theoretical inconsistency’, most notable in respect of his ambiguity about whether such risks are real or whether they are social constructions (see Blühdorn, 2000, 86). It could be argued, however, that towards the end of his career, and arguably as a result of Luhmann’s influence, Beck came to premise his concept of ‘risk society’ on the more solid ground of risk as a social construct; compare, for example, Beck (1992) with Beck (2009) in this respect.

²³ Habermas has admittedly developed a sophisticated account of law and gives central place to the norm (1996), however, his approach is not useful for the present study of general norms excluded from law because it is too focused on the *potential* legal positivization of a wide array of norms through discursive rationality. That is, too much is externalized into the future under this theoretical model (which also highlights Habermas’ influence on reflexive law, Teubner, 1983) to provide the conceptual tools for constructing the problem of norms which can be formulated on some general societal level, yet go unrealized in law.

society'.²⁴ In striking this balance between an external and internal perspective on law, Luhmann can be said to have successfully transcended the classical division of labour between the jurist's fixation on the interpretation and application of law, and the sociologist's focus on the context and conditions of law. Luhmann's theory not only allows for an understanding of the particular logics of the legal system, but brings into view law's function in relation to the larger social system.²⁵ This dual focus becomes an important tool for the present study.

Admittedly the proposition of relying on Luhmann's sociological theory of law in the context of an issue typically associated with a critical theory of 'risk society' may strike some readers as odd. Luhmann is notorious for his so-called 'anti-humanism',²⁶ as well as for his 'post-natural' and 'post-ecologist' concept of the environment.²⁷ For him, human beings as psychological and biological systems are excluded from society as a system of communication, just as the natural world is.²⁸ Thus, environmental and humanitarian issues are always relative to the social systems that make them such, and any attempt to address them will only take effect within the system and not the environment—in other words, they achieve nothing but the reproduction of communication.²⁹ But Luhmann's so called 'anti-humanism' or 'post-ecologism' should not be exaggerated, and certainly does not in any way exclude the relevance of his sociological theory to the present topic. Starting from the position that 'there *are* self-referential systems',³⁰ Luhmann was all too aware of how the developed autonomy of such systems could lead to very real undesirable side-effects. Early in his career he already expressed concern about a 'disequilibria of functional differentiation' resulting from certain areas of society leaping ahead to the global level, prior to the development of, what he called, 'appropriate forms of life and institutions'.³¹ Towards the end of his life he appeared even more concerned about what the autonomy of functional systems would mean for society, pondering the consequences, for example, 'if science offered the possibility of producing energy from nuclear fission' for military purposes, or 'if

²⁴ Luhmann (1989a), 138.

²⁵ Luhmann (1995).

²⁶ Moeller (2012), 19ff. Which has apparently done much to alienate Luhmann from American readers, see for example, Diamond (1992), 1766.

²⁷ Blühdorn (2000), 129f.

²⁸ Luhmann (1989b).

²⁹ His ultra-sociological perspective answers an emphatic 'No!' to the proverbial question about whether a tree that falls in the woods when there is no one there makes a sound. It may well be, he admits, that 'oil wells may run dry and average climatic temperatures rise and fall', but if this does not register in communication it effectively does not happen, (Luhmann, 1989, 28f).

³⁰ Luhmann (1995), 15. Emphasis added. That 'reality', however, is based only on self-referential construction, (ibid., ff).

³¹ Luhmann (1985a), 258.

the dynamics of the international financial system' rendered liberal and socialist policies of regional and national political systems 'meaningless'.³²

Moreover, although Luhmann may not have had any hope for political or legal action effectively resolving the threat posed by functional differentiation to humanity or the natural environment, he did follow Beck in so far as he recognized how such problems are increasingly attributed to technology and decision-making in modern society.³³ This is important for this study, as it represents the locus where normative expectations may arise in response to the side-effects of modernity. The fact that, as technology expands, dangers in society come to be increasingly identified as risks taken by decision-makers, ultimately admits a degree social contingency that is always open to opposition and demands for further changes. To use the example above, no one will form normative expectations in relation to the nuclear fission involved in the birth of a star, but they can, and do, when the process is undertaken for other purposes by decision-makers in society.

On top of this, Luhmann is prepared to admit that the 'follow-up costs of modern, functionally differentiated society' cannot be ignored once they have become the subject of communication.³⁴ In this sense they become problems of communication and the stability of society itself. In particular, such risks pose a problem if they are generative of norms that are formulated and recognized in society, but inadequately realized in the various sectors of differentiated society. Such a tension between facts and validity, Luhmann argues, may register as paradoxical impositions on the 'life situation' of individuals, who require externalisations, or 'meaning', in such a way as to resolve the paradox.³⁵ Law, for its part, cannot escape a functional reference to such problems. The functional specification of the legal system in reference to normative expectations orientates it to such 'meaning' problems, and the continued reproduction of society. This is not to assert that the legal system becomes dysfunctional if it fails to fulfil this role in respect of general norms in world society—this is not the concern of the thesis. Rather it is to highlight the pertinent questions as to what happens to the norms which prove too general for realization in law, what structures evolve in reference to the problem, and how the legal system evolves in response to such structures.

³² Luhmann (2013a), 309.

³³ Although, in his own 'sociological theory' of risk, Luhmann consigned Beck's influential book on risk society (which had been published just the year before) to a single footnote (1993, 5, n.10). For detailed accounts of the similarities and differences between Beck and Luhmann, see Thornhill (2000), van Loon (2002), and Blühdorn (2000), (2007).

³⁴ Luhmann (2013a), 127.

³⁵ *Ibid.*, 156.

If there is a greater challenge for this thesis, it is in successfully constructing the problem that there are indeed a class of general norms that do not find adequate realization in legal institutionalization. Law is a difficult discipline to engage with from this angle, as it does not directly lend itself to an analysis of norms which are formulated and recognized in general society, but inadequately realized within the legal system itself. In an orthodox approach to law, norms are either legal or illegal, and this is to be established by an argumentative practice which, on the one hand, is geared towards the legal system's own symbols of validity while, on the other, remaining constantly poised for a change of law. Moreover, as Luhmann and others have shown, law has evolved many sophisticated mechanisms for unfolding its own foundational paradox and for expanding itself, even in the most meagre and rarefied contexts.

As stated, Luhmann's sociological theory of law does offer a way of crossing between this internal and external boundary of the legal system to undertake the kind of analysis to be pursued in this study.³⁶ And there is some reassurance in this respect in the fact that Luhmann himself was willing to admit the increasing incidence of normative expectations which 'lie largely beyond the established juridical world of forms'—even if he chose not to make those norms a research topic in itself, but considered it rather as another factor pointing to the marginalization of law in world society.³⁷ However, Luhmann's line of analysis has been radically developed further by others in such a way as to propose a more robust concept of global law which obscures the issue, and ultimately makes it a little more difficult to rule out the legal institutionalization of general norms emerging in world society. This approach generally views the 'fragmenting dynamics' of functional differentiation as transforming and revitalizing law to engage the increasing dimensions of social life that cannot be reached by the territorially locked legal institutions of the nation-state.³⁸ Law can then be taken up by a plurality of private regimes in world society as a 'transient' medium capable of 'singing-to-every-tune' as specific social needs dictate.³⁹ In the 'Byzantine mixture of legal and social norms' that emerges,⁴⁰ the lines between traditional concepts of the 'public' and the 'private' become blurred in such a way as to suggest the potential legal institutionalization of 'a

³⁶ For a development of this approach as a redirection from 'systemic preference to critical absence', see Philippopoulos-Mihalopoulos (2010), 27ff.

³⁷ Luhmann (2004), 468ff.

³⁸ Zumbansen (2014), 334.

³⁹ Calliess and Zumbansen (2010), 151.

⁴⁰ Amstutz (2008), 466.

broader range of principles, than hitherto, including public law and human rights dimensions'.⁴¹

One of the boldest approaches in this respect is that of Gunther Teubner. In extensively identifying the ways in which functional spheres of global society have been able to juridify and even constitutionalize themselves without reliance on the traditional politico-legal mechanisms of the nation-state, Teubner has illuminated new ways in which the 'original needs for security of expectations and solution of conflicts' can be satisfied at the global level.⁴² More important in the present context, he has built up a concept of global law beyond the nation-state with an eye firmly fixed on the problem of the rationality maximisation of different global functional systems, which he sees as cloaking 'an enormous potential for the endangerment of people, nature and society.'⁴³ This has led him to the conception of a robust form of law to address these problems, and even one in which the incremental social positivization of fundamental rights at the global level is viewed as being 'completely plausible'.⁴⁴

Teubner's advances in this respect are such that it represents the first Rubicon to be crossed for an account of general norms unrealized in law. Just how can the problem of general norms be constructed if there is so much potential in the social positivization of norms? The challenge, however, is not as formidable as it might appear from a distance. Firstly, the hype surrounding Teubner's model of law can be deflated with critique. Despite the recognition that it has deservedly garnered, some have questioned the limits of Teubner's model of global law. Generally speaking, one may question whether the balance struck between 'ecologization' and 'modernization' can ever be achieved in the way in which Teubner imagines.⁴⁵ Specifically in the context of norms and legal validity, it has been pointed out how in practice such a particularistic approach will often tend toward favouring the regime rather than more general interests. In the words of Simma and Pulkowski: 'Life on the planet becomes more interesting than the fate of the universe.'⁴⁶ Moreover, this points to the further observation that what is often cited as 'global' in this context is actually taking place at more 'limited sub-global levels'.⁴⁷ These concerns are also reflected in an internal tension within systems theoretical accounts about the normative and political implications of

⁴¹ Collins (2008), 270.

⁴² Teubner (2004), 2.

⁴³ Teubner (2009), 330.

⁴⁴ Teubner (2012), 124.

⁴⁵ Latour (1998).

⁴⁶ Pulkowski and Simma (2006), 505.

⁴⁷ Twining (2009), 24. See also for this point in respect of human rights, Augenstein (2012).

such a model of law of world society.⁴⁸ While this is not directly an issue for the present study, the thesis takes seriously questions about the implications of the incremental and aggregative positivization of norms under Teubner's model of law, in light of the propensity for social systems to deviate from, rather than adapt, to ecological concerns.⁴⁹ Again the goal is not to engage in a full scale critique of Teubner's theory of law, but rather to question the ability of modern legal systems to adequately realize the kind of general norms involved.

Secondly, it should be highlighted that systems theory has, in recent years, increasingly moved away from the kind of questions which the present study addresses. Again this is most evident in Teubner's work, in so far as his theory of global law is developed through a progressive move from 'structure to process', from 'norm to action', and from 'function to code'.⁵⁰ Reflecting a more general trend, this pronounced concern with differentiating legal from other social phenomena has distracted much 'attention from other theoretical questions that are badly in need of attention.'⁵¹ It is quite common now for scholars who set out to examine the 'function' of law under a systems theoretical analysis to conflate that issue with one of 'coding', and to engage exclusively in an analysis of the latter.⁵² This is not to assert that function has been all together ignored by systems theorists of global law. Rather some have developed a concept of the function of law in world society as being divided—operating in an internal dimension as a predominantly normative medium, while simultaneously operating in an external dimension as a predominantly cognitive medium which facilitates the transfer of social components between the various normative orders of world society.⁵³ One might wonder whether function can really be split in this way without confusing it with an issue of 'performance',⁵⁴ but the important point is that, despite the way in which the concept of the function of law has been overhauled in recent years by systems theorists, none of this absolves law (or the observer) of reference to general norms which do not fit neatly into the various niches of fragmented society. Even in so far as they go unrealized in differentiated society, such norms remain a problem for meaning and communication.

The purpose of exploring the critiques made of Teubner's concept of global law will be to map out the limits of that legal system and to delineate more clearly the kind of norms

⁴⁸ Zumbansen (2014), 334, fn. 118.

⁴⁹ Christodoulidis (2011), (2013).

⁵⁰ For the tipping point in this direction, see Teubner (1992), 1450.

⁵¹ Twining (2003), 251.

⁵² Calliess and Renner (2009).

⁵³ Amstutz (2009), (2011); Kjaer (2013), (2014).

⁵⁴ On the distinction between 'function', 'performance', see Luhmann (1977), 36-38. According to Luhmann confounding function and performance must be 'carefully avoided' as it involves mixing up system references and thus results in 'considerable semantic confusion', Luhmann and Schorr (2000), 41; Luhmann (2013a), 96.

which are unlikely to find accommodation in that model. Part of the strength of Teubner's concept of the gradual legal realization of a range of norms in world society, lies in the way in which it successfully externalizes that realization into the future. While some have been willing to admit that such an externalization is 'a quest which is continuously pursued but is unlikely to be factually realised',⁵⁵ neither Teubner nor others have conceded this point. Teubner does admit, however, that not all normative expectations can be realized through the model of global law that he proposes; that, in light of the fragmented nature of world society, any 'high expectations' of global law must be curbed, and that the best that law can offer is 'a kind of damage limitation' by serving as a 'gentle civilizer of social systems'.⁵⁶ At other points Teubner acknowledges how 'groping attempts to juridify human rights cannot hide the fact that this is, in the strict sense, impossible', while lamenting the fact that such a 'burning issue' has 'no prospect of resolution' through law.⁵⁷ Beyond this, relatively few details are provided as to the kind of norms which are therefore unlikely to be juridified under global law, but it can be speculated that they would include some of those listed at the outset of this introductory chapter. Along with normative expectations of the prohibition of weapons of mass destruction or world food security, one could also include norms of the responsibility of nation-states governments to protect their populations from mass atrocity crimes, the obligation to extradite or exercise criminal jurisdiction in respect of human rights violations, the relocation of military spending for sustainable development, the prohibition of any national administrative action that degrades the natural environment, the conservation of fish stocks in the high seas, or even the extension of society into outer space or in exploration of the deep sea-bed.

The norms listed above as unlikely to find realization in Teubner's concept of global law reveal how the nation-state cannot be entirely marginalized from important normative questions in world society.⁵⁸ From this perspective, another legal system—more cumbersome, and famously consuming everything from 'apology to utopia'⁵⁹—looms into view. Although traditionally established on the basis of ensuring the peaceful coexistence of sovereign nation-states, public international law has evolved in the last sixty years to additionally orientate itself towards facilitating cooperation between such entities in relation

⁵⁵ Kjaer (2014), 137.

⁵⁶ Fischer-Lescano and Teubner (2004a), 1045.

⁵⁷ Teubner (2011a), 214.

⁵⁸ Indeed this is a frequent criticism of Teubner's concept of law, see Thronhill (2011b), 245; Kjaer, (2011b), 290. See also Mann (1997) for a more general thesis of the continued importance of the nation-state organization in a globalized society.

⁵⁹ Koskeniemi (2005).

to the pressing problems arising at the global level.⁶⁰ Moreover international lawyers have been relatively unperturbed by the fragmentation of world society which drives this, simply seeing it as a quality that has always marked the international system,⁶¹ and expanding itself instead through the proliferation of international courts and institutions that results from such a dynamic.⁶² Within the international legal system there has been plenty of scope to read these changes as the basis of an extension of public international law beyond its original inter-state basis towards a true *ordre public* which effectively ‘incorporates common interests of the international community as a whole, including not only states but also human beings’.⁶³ As such, the public international legal system can be said to have become functionally orientated to many of the normative expectations that emerge in response to the risks associated with functional differentiation.

Of course international law faces its own problems in realizing the highly generalized norms arising at the global level. Despite the increasing reference of that legal system to such norms, it remains structurally orientated to providing a legal framework for the sovereign independence of nation-states. The problems this underlying structural condition causes for the accommodation of global public goods are well-known.⁶⁴ Moreover, contrary to claims of a ‘waning’ of state sovereignty,⁶⁵ the structure of national sovereignty which emerged in the late Middle Ages appears to remain so deeply embedded within the current globalization and the functional differentiation of society itself that there is no end in sight for these problems. However, international law has been dealing with this tension between sovereignty and a more general reference since its inception, and it will be shown that international courts have evolved sophisticated mechanisms for overcoming this problem. These devices do not always realize general norms to the extent that many would like, yet, considering the difficulties international law faces in this respect, they do achieve a certain degree of the stabilization of those normative expectations. Much like global private law, public international law has kept pace with globalization through increasing self-reference and reliance on coding.

Again, this makes it difficult to pinpoint exactly where the limits of law are in relation to general norms. Yet, the balance between generalized norms and the atomistic interests of states can only be maintained for so long. The tension between global public goods and state

⁶⁰ Friedmann (1964).

⁶¹ See Report of the Study Group of the International Law Commission on the Fragmentation of International Law, U.N. Doc. A/CN.4/L.628. 13 April 2006. See also Jenks (1953).

⁶² van den Herik and Stahn (2012).

⁶³ Simma (2009), 268; see also Klabbers (2009b).

⁶⁴ Krisch (2014).

⁶⁵ And this is not only claimed by global private lawyers, see, for example, Schreuer (1993); Peters (2009a).

sovereignty puts the international legal system under incredible strain, and there have been cases which have brought the opposing references to general norms and sovereignty doctrine so sharply into contention that the legal system's usual devices have been simply rendered inadequate. The objective of this thesis will be to move towards this unfamiliar territory of the limits of law. This is not as sceptical as it may appear, though. Only from here can one begin to see the relevance of the problem of highly generalized norms in contemporary world society.

1.2 Methodology

As stated, the present study relies on Luhmann's systems theory, and it pays the 'high entry costs' for doing so. Luhmann's work alone is complex enough that it requires significant time and energy before one even knows how to use it. The limited attention which the methodological implications of the theory have received can be explained, partly at least, as a consequence of the epistemological basis of the theory being somewhat at odds with the 'canons of classical method'.⁶⁶ The basic distinction between system and environment, whereby the system must reduce environmental complexity through self-referential selection, does not give much hope for discovering the world 'as it really is'. For Luhmann, science is a social system as much as anything else, and the 'reality' arrived at through empirical research is therefore only the validation of the research's own constructions.⁶⁷

There are, nonetheless, 'methodological consequences' to the insight that social systems are free to organize and reproduce themselves,⁶⁸ and a very definite role for method that goes along with the theory. It is worth stopping to consider this because it will become central to this thesis. The method generally adopted with Luhmann's systems theory is 'the method of functional analysis'.⁶⁹ It involves beginning with social problems ('functional references', 'reference problems') and then comparing alternative social structures in terms of how well they contribute to the resolution of the problem.⁷⁰ This springs from Luhmann's aversion to Parsonian 'structural-functionalism', whereby given structures are assumed to serve some particular function.⁷¹ Parsons had it the wrong way round according to

⁶⁶ Besio and Pronzini (2010), para. 4.

⁶⁷ Luhmann (2012), 16.

⁶⁸ *Ibid.*, 17.

⁶⁹ Luhmann (1995), 52.

⁷⁰ Stichweh (2011), 10.

⁷¹ *Ibid.*

Luhmann—it should be ‘functional-structuralism’, that is the researcher should start with the social problem, the function that needs to be fulfilled, and *then* look for the structures that could do this.⁷²

This brings a degree of contingency into the relations between problems and solutions. Through it we come to ‘recognise the existence of structural dynamics, adaptation, development and, one of Luhmann’s key concepts, the functional equivalence of different kinds of structures.’⁷³ This redefines function as the ‘unity of the difference between a problem and several functional equivalent solutions to the problem’.⁷⁴ However, it is important to note that the purpose here is not one of solving the problem. The method of functional analysis ‘can (but does not have to) result in the possibility of substitution’—indeed, in most cases the problem will have already been solved.⁷⁵ It is also important to note that the aim is not to discover causal relations between problems and solutions in the form of cause and effect. Function, as Philippopoulos-Mihalopoulos points out, ‘is the question, rather than the causal answer’.⁷⁶ Again the concern for causal relations between problems and solutions is rejected by the epistemological basis of the theory. Rather the ‘insight’ of the functional method according to Luhmann ‘lies athwart causalities: it resides in comparing them.’⁷⁷ In other words, what are compared are the problem-solutions, the cause-effect relationships themselves. In this way, one not only keeps in mind the ‘purely hypothetical status of causal assumptions’, but actually brings them into the comparison.⁷⁸

At first sight this appears relatively straightforward: one identifies the problem, then looks to established solutions to the problem, then compares them with other problem-solutions, etc. However, its proper execution is somewhat more demanding than this. The comparison of functional equivalents presupposes a preceding theoretical analysis of the problem and the systems involved.⁷⁹ It is only through such analysis of the problem that a

⁷² Luhmann (1962); Hornung (2006), 191. Merton also criticized structural-functionalism on this basis, arguing the approach treated cultural forms as ‘specialized and irreplaceable’, and suggesting instead an alternative functions—some latent, some manifest, (1967), 88; see also Merton, (1957), 86ff.

⁷³ Hornung (2006), 191.

⁷⁴ Luhmann (2013a), 82. Luhmann may have drew some inspiration here from Merton’s notion of alternative functions, but whereas for Merton the issue was one of exposing latent functions, for Luhmann it is about the contingency of functional equivalents. Also Luhmann’s concept was also reflected in the idea of ‘equifinality’ advanced in von Bertalanffy’s open systems theory: ‘In any closed system the final stage is unequivocally determined by the initial conditions ... If either the initial conditions or the process is altered, the final state will also be changed. This is not so in open systems. Here, the same final state may be reached from different initial conditions and in different ways. This is what is called equifinality.’ Von Bertalanffy (1968), 40.

⁷⁵ Luhmann (2013b), 82.

⁷⁶ Philippopoulos-Mihalopoulos (2010), 68.

⁷⁷ Luhmann (1995), 53.

⁷⁸ *Ibid.*, 53-54.

⁷⁹ Luhmann (1970), 25.

clear point of reference or criterion can be established under which different structures can be compared as functional equivalents.⁸⁰ In other words, it is only through such preceding analysis that the problem reference can be used as a ‘connecting thread’ to questions about other possibilities.⁸¹ This indicates the role differentiation and circular relationship between theory and method in Luhmann’s systems theory.⁸² It is the task of theory to construct the problem (and this means the problems generating observations are themselves scientific constructions).⁸³ Systems theory is especially useful here for breaking ‘through the illusion of normality, to disregard experience and habit’, to explain the ‘normal as improbable’.⁸⁴ For example, systems theory poses question such as, how are ‘old village forms of neighbourly help and gratefulness’, as instruments balancing out needs over time, capable of being supplanted by legally secured financial credit?⁸⁵ The task of method then is to generate analyses that in turn develop the theory. Thus, to stay with the example, one would research instrumental changes in the development of the economy from the seventeenth to nineteenth century, and plough the findings back into developing the theoretical construction of the problem.⁸⁶ However, the purpose of method is not to test a hypothesis by controlling a representative sample. Rather, theory ‘steers’ method, and searches for ‘tendencies that it regards as relevant and for which it can offer a meaningful interpretation.’⁸⁷

Through repeated application of theory and method in this respect, Luhmann was able to significantly develop theoretical understanding of social problems. In a basic sense the problem is always one of the difference of complexity between system and environment,⁸⁸ but as Luhmann’s social system theory developed the construction of basic problems became ever more specific. Knudsen catalogues these basic problems as ‘double contingency’, ‘contact’, ‘motivation or connectivity’, and ‘paradox’.⁸⁹ The problem of double contingency relates to the contingency of selections between ego and alter, and can be construed as the basis of emergence of the full range of social systems which mediate expectations through

⁸⁰ Hornung (2006), 192.

⁸¹ Luhmann (1995), 53.

⁸² Knudsen (2010), para. 12.

⁸³ *Ibid.*, para. 9 and 10. For Luhmann ‘functions are always constructions of an observer.’ (2013b), 83.

⁸⁴ Luhmann (1995), 115.

⁸⁵ Luhmann (1985a), 106.

⁸⁶ And one can also use systems theory in this sense while focusing more explicitly on the empirical method, see, e.g. Thornhill (2011c).

⁸⁷ Besio and Pronzini (2010), para. 10.

⁸⁸ A vestige of causality which Kjaer notes nonetheless undermines the otherwise radical constructivism of Luhmann’s theory, see Kjaer (2012), 162.

⁸⁹ Knudsen (2010), para. 24.

communication.⁹⁰ It will figure heavily in the present study. The problem of ‘contact’ relates to communication with individuals who are not present, and is resolved through diffusion media.⁹¹ It is not directly relevant to the present study, but will come up at various stages in so far as it relates to the effect of communication technology on the communicative network that give formulation to general norms in world society. The problem of ‘motivation’ relates to the need for improbable communication to be accepted and used as the basis of further communication. It will figure in the present study, not only because law itself is a symbolically generalized communication medium, but because the expansionist tendencies of media-steered subsystems are a significant aspect of the ‘dark side’ of functional differentiation which kindles highly generalized norms. Finally, the problem of ‘paradox’ relates to the contingency of all communication, and is resolved by invisibilizations and displacements. This problem will also present itself at several points in discussion of the issue of generalized norms that go unrecognized in law, and particularly in respect of how law often deals with the problematics of general norms.

Although the present study will draw on these concepts of social problems throughout, this does not mean that it can simply identify the problem of general norms as one of double contingency, for example, and then launch straight into a search for and comparison of possible solutions. Again it needs to be stressed at the outset that the method of functional analysis is ‘as much about analysing the problem something is a solution to, as it is about analysing how problems are solved.’⁹² The present study must therefore strive to construct the problem for itself as the criterion for comparing functional equivalents can only be established through construction and refinement of the problem reference. The basic problems established by Luhmann as presented above are only archetypes.⁹³ It is for this reason that I will spend the next four chapters, and the greater part of the thesis, constructing the problem and comparing functional equivalents in reference to such, before even arriving at a hypothetical statement of a functional substitute.

What is the point of all this? What problem does the functional method solve that is relevant to the present study? Somewhat ironically, what the examination of the issue of general norms (formulated and recognized on some general societal level but unrealized in ‘differentiated’ society) requires is an approach that can ‘break through the illusion of

⁹⁰ Luhmann (1995), 103ff.

⁹¹ Knudsen (2010), para. 24.

⁹² *Ibid.*, para. 32.

⁹³ *Ibid.*, para. 31.

normality'.⁹⁴ The very general nature of the norms, their exclusion from the now normal functional subsystems of differentiated society, means the problem can be easily obscured behind structures that have come to be taken for granted (again, it will be shown that in fact both global private law and international law have their own ways of invisibilizing the problem).

Luhmann's 'radical functionalism'⁹⁵ offers a way to break through this. The value of the functional method can be said to lie in its capacity to 'enable scientific research to surprise itself.'⁹⁶ As part of modern society, sociological research is permeated by the understandings of the object it aims to study.⁹⁷ The method of functional analysis, and the specific use of the problem/solution distinction serves as a way of interrupting or gaining distance from existing social structures. It is a way of generating observations and further analyses and questions. In this respect, Knudsen presents the functional method as a 'kind of dynamo' for systems theory.⁹⁸ The distinction of problem/solution 'becomes a solution to the problem of how to move analyses further'.⁹⁹ This is reflected, as Knudsen argues, in the 'peculiar form' of the problem/solution distinction.¹⁰⁰ It is 'empty' because it does not specify the content of the problem—this is achieved by theory. But once theory adequately constructs the problem, the problem/solution distinction becomes 'dynamic', enabling the singular analysis to transgress its own boundaries, and running together with other distinctions and thus opening up new questions.¹⁰¹ It is only at this point that the method pays off. As Luhmann says, it is only on the basis of the 'scaffolding composed' of statements arrived at through the functional method that it may 'seem worthwhile to investigate underlying causalities empirically.'¹⁰²

⁹⁴ See above, n. 84. Of course the norms themselves, that is their content, have not provided any basis for methodological guidelines. That is important because science as a social system depends on value-free communication. (Luhmann, 2012, 17).

⁹⁵ Thornhill (2000), 174.

⁹⁶ Luhmann (2012), 13.

⁹⁷ Knudsen (2010), para. 36.

⁹⁸ *Ibid.*, para. 38.

⁹⁹ *Ibid.*, para. 49.

¹⁰⁰ *Ibid.*, para. 50.

¹⁰¹ *Ibid.*, paras. 49 and 50.

¹⁰² Luhmann (1995), 54. Besio and Pronzini (2010) present a typology of empirical materials that are typically used in Luhmann's functional analysis: (1) explanation of trivialities as socially uncontested facts that are immediately observable (e.g., that one cannot be in London and Paris at the same time presents a space/time contradiction that has both increased and lessened with modernization, Luhmann (1995), 386.); (2) structural analysis through observation of operational recursivity (e.g., interviews and participant observation to identify chains of decisions taken within an organization, see below, Section 6.4); (3) semantic analysis in observing the distinctions employed by a social system in its self-description (e.g., content analysis of documents to identify the typical distinctions employed in corporate governance); and (4) the empirical observation of structural

It is for this reason that the functional method of analysis is adopted for the present study. By theoretically constructing the problem of general norms, and by utilizing this through the distinction of problem/solution, the study hopes to generate new observations and questions about general norms that go unrealized in law. It should be stated though that it is not the aim of the study to answer or explore the full range of questions and observations that can be generated by the functional method. Because the greater part of the thesis is to be taken up with developing the construction of the problem, even before the problem/solution distinction is fully operationalized, there will only be space for further analysis of a select few of the observations generated. This should not, it is hoped, detract from the thesis however. Exposing further possible solutions for general norms through proper construction of the problem, and ‘reproblematizing’ established institutions in view of possible alternatives,¹⁰³ is a necessary step towards further research in the area of general norms and law.

Finally, adopting this approach means that one does not start out in the typical fashion of identifying a research problem, then stating a hypothesis, and then devising research questions in order to test the hypothesis. The formulation of a hypothesis and the design of questions to test the hypothesis can only be arrived at after proper functional analysis (and again, so far as one continues to accept the tenets of the systems theoretical approach which generates the insight, one does not test the hypothesis in order to prove or disprove its ‘reality’, but rather to develop theoretical understanding). For this reason, the thesis does not begin by offering a hypothesis and laying out research questions to that end. The primary research question, as stated at the outset, is about generalized norms that are formulated and recognized at the global level, but which are inadequately realized in law. The rationale for this, as stated and as will be demonstrated further below, is that this specific question has not been subject to systems theoretical and functional analysis.¹⁰⁴ This question will be developed in the course of the thesis.

couplings (e.g. content analysis and interviews to identify ‘decision intersections’ of corporations, courts and patent offices in the development of pharmaceutical patents).

¹⁰³ Luhmann (2000b), 138.

¹⁰⁴ Of course the researcher can, nonetheless, be ‘highly idiosyncratic in his problem choices and may have value reasons for doing research’ (Luhmann, interview with Nico Stehr, Stehr (1982), 45). I would argue this is inevitable, and, as will be argued in the sixth chapter, Luhmann himself can be seen to have had ‘value reasons’ for the research he chose to conduct, and the research he chose not to conduct.

1.3 Thesis Outline

The use of systems theory and functional analysis directs the structure of the thesis. The next chapter will begin with analysis of the extent of positivization of norms that is likely to be achieved by global private law, and principally the model of global law beyond the state as presented by Gunther Teubner. This may appear somewhat arbitrary—the thesis could perhaps have equally started with public international law as a functional equivalent of global private law. However, Teubner’s model of law in particular is an obvious place to start because it presents a robust form of law that has evolved with globalization. Indeed, in many ways, it presents a model of global law that has evolved to address the dark side of functional differentiation which kindles highly generalized norms. It therefore imagines the social positivization of a range of fundamental norms that arise at the global level and which ostensibly remain locked out of the traditional politico-legal mechanisms of the nation-state.

The next chapter will then look in more depth at the extent of positivization of norms under Teubner’s concept of law. The aim is to further construct the problem of norms which arise from globalization but which are unlikely to find realization in the differentiated system of global law beyond the nation-state. This is not straightforward by any means. Teubner’s model of law envisions an incremental, aggregative positivization of norms and this externalization into the future may in itself stabilize norms to some degree. However, after considering the advances made by Teubner’s concept of law, the chapter will subject it to some critical analysis in order to bring it into proper perspective with the prodigious nature of highly generalized norms arising at the global level. What comes out of this is the insight that there are a class of norms which are clearly not included within the self-contained regimes of Teubner’s concept of global law, and these can be generally introduced as those norms which cannot rely solely on social positivization in marginalization of the nation-state. In the fourth section the chapter moves to methodological considerations to argue that through a series of ‘turns’, Teubner’s theory of law, and the systems theoretical approach to law in general, has moved away from asking the kind of questions that the present study is engaged with, and that the focus has generally shifted away from ‘function’ and more towards ‘code’. The fifth section of the next chapter will, however, briefly qualify this finding by discussing recent systems theoretical attempts to readdress the function of global law. The chapter will close by arguing that even where this is the case, however, the function of the norm and the normative function of law is conceptually reduced to the interior worlds of the fragments of global

society, and little attention is paid to law's reference to the norms that prove too general for those special spheres.

Thereafter, it is deemed necessary in the third chapter to return to an early point in Luhmann's systems theoretical account of law when law's functional reference to the norm was considered at a much more elemental level. Because the overarching aim here is the adequate construction of the problem of general norms that go unrealized in law, the chapter does not focus directly on the function of law itself, but begins instead by abstracting the norm from law and considering the function of the norm from this earlier systems theoretical perspective. Only after this analysis does the chapter move to considering the function of law as the congruent generalization of normative expectation in the *temporal*, *social* and *material* dimensions. This is very important because it becomes the criterion for considering functional equivalents at a later stage. Of course the function of law became less important to Luhmann's theory of law after his autopoietic turn, when it became clear that systems required binary coding to achieve their autopoiesis. However, the chapter will show also that Luhmann's shift to a theory of the autopoiesis of law in no way denied the importance of the function of law; in a sense it only made the search for functional equivalents all the more pressing.

At this stage the thesis will be equipped with a better understanding of the problem and a better awareness of the criterion for the search for functional equivalents. In the fourth chapter it will examine public international law in relation to the problem. The traditional functional reference of international law may have been to the regulation of interstate relations, however many consider international law to have adopted a broader social function as a result of the increasing globalization and interdependence of nation-states in response to the negative side-effects of functional differentiation. Moreover, as stated, the realization of some norms arising at the global level seems to require the action of the nation-state, and thus international law may prove a more stable route for the positivization of certain norms. Nonetheless, before moving to examine the positivization of norms on a more empirical basis in fifth chapter, chapter four aims to explore on a theoretical level some of the underlying structural conditions of international law which can be said to significantly undermine its ability to positivize highly generalized norms arising from the negative side-effects of an advanced stage of functional differentiation. The general theme of this chapter is that international law's emergence with the shift to the functional differentiation of society has entrenched another functional orientation of the legal system to the sovereignty of nation-states, which continues to undermine its realization of general norms. The three sections of

the chapter will present a tripartite scheme of structural conditions—the structural coupling between international law and politics, the relationship between international law and physical violence, and state sovereignty as segmentary differentiation—which are problematic in this respect.

Following those considerations, the fifth chapter will move to examining the plight of general norms in international law on a more empirical basis. Two norms will be looked at in particular in this respect. The first will be the normative expectation of the peremptory and universal status of human rights. This will be shown to occupy a very central but mysterious place in international law, something international law cannot turn away from but which it cannot seem to give any definite form or substance to. Through analysis of case law it will be demonstrated that international law has come to rely on a distinction between procedural and substantive law to unfold the paradox of this normative hierarchy in a consensualist legal order. This is presented as adequately maintaining the function of international law in respect of normative expectations of the peremptory status of human rights norms. However, it is also presented as highlighting the danger of the use of procedural rules amounting to a denial of justice. The second section of this chapter will go on to look at normative expectations of the prohibition of nuclear weapons and the famous example of *non liquet* when the International Court of Justice considered the illegality of nuclear weapons. The failure of international law in this instance to fully decide the question admitted regarding the illegality of nuclear weapons is presented in systems theoretical terms as amounting to a failure of law to secure its autopoiesis and as exposing the foundational paradox of the legal system. Most importantly the Court's non-decision in the nuclear weapons case is presented as the clearest example of a norm receiving formulation and recognition on a general level, but ultimately (and very clearly) failing to find realization in law.

Thus, having established at least one norm (the prohibition of nuclear weapons) that finds adequate formulation at the general level, but which cannot find realization in either global private law or public international law, chapter six moves on to considering functional equivalents beyond law in respect to that norm. It looks in particular to the many social movement organizations that were actively involved in bringing the normative question about the illegality of nuclear weapons to the Court. Even though Luhmann himself neglected to examine how social movements increasingly rely on organization, the chapter employs his systems theoretical concept of organization to highlight how social movement organizations are able to make decisions about general norms that law cannot decide, and how they are able to communicate those norms to their environment. It is argued that while the recursive

decision-making on the normative decision-premise of such organizations absorbs the uncertainty surrounding the general norm, the communicative capacity of those organizations allows them to keep the norm in circulation in society and thereby maintain the prospect that the norm may, *over time*, find realization within differentiated society. Whether the norm finds realization in law or not is beside the point. This is presented as a generalization of normative expectations in the *temporal*, *social* and *material* dimensions, and thus a possible functional substitute for law in respect of some highly generalized norms of global society.

Whilst no space is provided to undertake a broad empirical study of the hypothesis that social movement organizations could provide a functional substitute to law in respect of general norms, the chapter engages in some empirical research within the limited area of antinuclear organizations. According to the systems theoretical construction of the function, the research object is taken as the decisions of those organizations, and the communication of the antinuclear norm at the organization's environment. This is conducted through document analysis and interview of a select number of participants who are able to testify to the decisions of the organizations on normative decision-premises and the ways in which the organizations communicate and project those norms at the legal system and other system in their environment. This limited basis of empirical research will be used to refine the theory developed regarding the function of social movement organizations in world society.

There are a number of further research possibilities that present themselves on the hypothesis of the social movement organization as a functional equivalent to law in respect of general norms. However, the thesis uses the final chapter to look at how international law has come to structurally rely upon the development of civil society organizations. On the one hand, international law is construed to have adopted a limitative approach to civil society organizations which involves the development of principles and mechanisms to scrutinize the accountability of civil society organizations that take part in global governance. However, attempts in this direction are shown to inevitably rebound to questions about the legitimacy of law itself, and it is therefore argued that any limitative approach to social movements organizations in particular must be scaled back, and must at all points be guided by an awareness of the function and institutional context of these organizations in representing a 'global opposition'. On the other hand, law is presented as having developed a constitutive approach whereby the inclusion of civil society organizations is seen as directly relevant to the legitimacy of international law, and whereby mechanisms can be proposed to ensure the participation of such organizations in the formal law-making process. However, the chapter argues that even this kind of formalization may lead to a co-option and over-determination

that would ultimately frustrate the important function that such organizations may have achieved in world society. The chapter ends by arguing that as far as the participation of civil society organizations within international law is necessary, the legal formalization of those organizations for that aim must be sensitive to the function of those organizations in world society and the particular organizational arrangements which have evolved in that respect.

1.4 A note on terminology: ‘general norms’ and ‘world society’

The reader may by this stage have expected some clearer definition of the term ‘general norms’ beyond the basis that they are formulated and recognized in society without being realized in law. The generality relates to the perspective of the differentiated society, and particularly the legal system. However a clearer definition of those norms which are too general to find specification within the differentiated legal systems is something which can only be developed in the course of the thesis. At this stage the prefix ‘general’ is to be given its ordinary meaning: ‘not special: not restricted or specialised: relating to the whole or to all or most: universal: nearly universal: public: vague’.¹⁰⁵ For purely introductory purposes the generality can be loosely presented in the abstract by drawing upon the three ‘meaning’ dimensions Luhmann identifies as being used to construct ‘meaning’ in social systems.¹⁰⁶ In the *social* dimension, the generality could refer to the vague institutionalization of those norms in respect of law, the difficulty of identifying a clearly defined *demos* which holds such normative expectations, and the apparent dislocation between the social arenas in which those norms are formulated and the differentiated legal systems available at the global level. In the *material* dimension, it could refer to the difficulty of defining the boundaries of the context of those norms, and how they might meaningfully attach to various factual patterns in which the norm might arise. Finally, in the *temporal* dimension the generality could refer to the cumbersome nature of those norms being such that they cannot be externalized into the future with mere promises, or with distinctions which avoid the issue and present only a justice ‘to come’. They require, as it will be seen, clear and consistent decisions.

These meaning dimensions will be demonstrated to be directly relevant to the function of law. Moreover, the generality of the norm in each of these dimensions should disappear when an adequate solution to the problem can be pinpointed.

¹⁰⁵ *Chambers English Dictionary*, Cambridge: W & R Chambers Limited, 1988.

¹⁰⁶ Luhmann (1995), 59-102.

Secondly, a brief note should be made about the use of the terms ‘world society’ and ‘global society’ in the thesis. The German *Weltgesellschaft*, as Luhmann uses it, is somewhat more technical, referring specifically to a single communicative network and temporal horizon that expands the globe.¹⁰⁷ The term is also used by new-institutionalist scholars in a technical sense to denote the global expanse of cultural ideals.¹⁰⁸ Nonetheless, the difference between ‘world society’ and ‘global society’ is not great,¹⁰⁹ and the thesis will at times employ the terms interchangeably, often in reflection of the theoretical approach it is discussing. Thus, for example, it might use the term ‘world society’ while discussing Luhmann’s systems theory, and then switch to the term ‘global society’ when discussing the approach of international lawyers. This should not, hopefully, cause the reader serious confusion.

¹⁰⁷ Luhmann (1997a); Luhmann (2012), 85ff; Albrow (2014b), xxxv-xxxvi.

¹⁰⁸ See for example, Drori, Hwang and Meyer (2006).

¹⁰⁹ Albrow, (2014b), xxxv-xxxvi.

2 Beyond global law beyond the state?

2.1 Introduction

It is a noted mark of distinction for Luhmann's functionalist approach to law that it predicted the fragmentation of law in world society¹ some twenty-nine years before the International Law Commission felt compelled to formally address the 'risks ensuing from the fragmentation of international law'.² In 1971 Luhmann hypothesized that, in order to remain an important risk carrier of societal evolution, law would ultimately have to reflect the functional differentiation that was driving the development of world society.³ The problem, which was all too evident at that point in history, was that law remained chronically anchored in the framework of national political systems, which, unlike many other areas of society, had not been able to leap ahead to the global level. The problems did not end there though, as he saw it. In fact, if one is inclined to credit Luhmann's prescience, it may also be said that he successfully predicted the increasing 'relative normativity'⁴ of law at the global level because the only way it was envisaged that law could adapt to these societal developments was through the further admittance of cognitive mechanisms into its basic normative structure. Many of the functional areas which had developed their autonomy and expanded beyond territorial boundaries—such as economy, science, technology, news broadcasting, tourism, or research—clearly indicated a 'non-normative style of expectation' which Luhmann in 'speculative exaggeration', presented as a 'shift of evolutionary primacy from normative to cognitive mechanisms.'⁵ Thus it was envisaged that law would have to transform in such a way that the structural conditions for learning within each social system would be supported through 'normalisation'.⁶ Here one can already see the problem looming of the tension between this cognitive shift and the need for normativity. And, with that, one can then see the

¹ Fischer-Lescano and Teubner (2004a), 1000.

² For final report see, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006.

³ Luhmann (1971).

⁴ Another phenomenon which has caused some professional anxiety amongst international lawyer, see Weil (1983). For more balanced accounts of the challenge of soft law to international legal scholarship, see Ellis, (2012), 313; Chinkin (1989).

⁵ Luhmann (1985a), 262.

⁶ Luhmann (1971).

basis of the closing sentence of Luhmann's final treatise on law: the further speculative exaggeration that law 'might well level off with the evolution of global society.'⁷

Despite these ominous warnings scholars have since been able to transform Luhmann's 'speculative exaggeration' of law's demise into a story of law's expansion. Through identification of the ways in which law becomes 'parasitic on the codes and rationalities' of the multifarious fragmented areas of contemporary society,⁸ law has been reimagined as a highly dynamic social system that is, in fact, 'everywhere' in a functionally differentiated society.⁹ Thus, in looking beyond the traditional political institutional centres to explore the 'peripheries' where law meets with other social sectors,¹⁰ this approach has tapped into the global arenas beyond the nation-state which are 'populated by a multitude of norm makers',¹¹ and which also normatively engage in 'jurispersuasion' and make claims to legal authority.¹² Law is instrumentalized in these spheres when it reconstructs the social conflicts of transnational communities, alienates them to a sufficient degree from their particularistic contexts, and refines them through a tailored juridification process.¹³

Within this approach, the work of Gunter Teubner stands out in particular. In developing a very bold concept of law and constitutionalism at the global level, Teubner is commonly acknowledged as a 'leading exponent',¹⁴ presenting 'one of the most highly evolved positions' in the field,¹⁵ and as someone 'at the forefront' in developing an inspiring sociological theory of law that engages the enormous complexity and fragmentation of world society.¹⁶ However, what really makes Teubner's work particularly relevant to the present study is the way in which he has, for decades now, developed a concept of law which has consistently engaged with the 'dark side' of functional differentiation and the destructive side-effects of such systemic autonomy which generate highly generalized norms in world society.¹⁷ In a sense Teubner is consumed with- and driven by questions about the

⁷ Luhmann (2004), 490.

⁸ Sand (2013), 203.

⁹ Zumbansen (2009), 30.

¹⁰ Teubner (2004), 75.

¹¹ Zumbansen (2006), 745.

¹² Schiff Berman (2005), 538-539.

¹³ Cotterrell (2012), 15.

¹⁴ Walker (2012), 17.

¹⁵ Thornhill (2011b), 244.

¹⁶ Verschraegen (2011), 218.

¹⁷ See, for example, Teubner (1997b), (2010a), (2011b), (2011e). Other approaches also identify a far-reaching transnational legal system, even constitutionalization, beyond the traditional public sphere (Calliess and Zumbansen, 2010, 34, 168; Zumbansen, 2012a), which is able to accommodate a range of public policy concerns, including human rights. (Zumbansen, 2006). Although these approaches are not so emphatically directed at the negative side-effects of functional differentiation, and are arguably somewhat more reserved than Teubner's envisioned legalization and constitutionalization of human rights, focusing, for example, on civil

‘implacable compulsion for growth’ of self-reproducing social systems,¹⁸ the destructive tendencies which result from this, and how law can address these issues in a heterogeneous and polycentric society. Arguably it is his prolonged engagement with these fundamental questions, and the sophisticated theory of law he has built up in answer to them, which makes Teubner such a controversial and exemplary figure in this field. Teubner’s contribution is specifically located in his explicit recognition that the contemporary significance of human rights issues lie, not in the traditional concern for the protection of individuals against the misuse of political power, but in the ‘broader problem of protecting global societal differentiation and offsetting the external, negative consequences of globalised function systems for society at large, the environment and individual persons.’¹⁹

As stated in the introductory chapter, in order to be able to trace the ‘connecting thread’ from the problem reference of general norms to functionally equivalent structures, it is necessary under the systems theoretical and functional method to first construct the problem fully. The first step in this respect is to theoretically establish that there are likely to exist a class of norms that cannot be accommodated by the dynamic model of law beyond the nation-state that is increasingly presented as positivizing a range of norms which arise at the general global level. It is both the ambition of Teubner’s model of law, and the extent in which it engages the dark side of functional differentiation which generates highly generalized norms at the global level,²⁰ which marks it out as a sturdy foil for the purposes of the present study. With this in mind, this chapter will proceed in four sections. The first section will present a more detailed picture as to the extent of legalization envisaged under Teubner’s concept of global law. In recent years the way in which Teubner has developed this concept has come to be seen as announcing something of a ‘normative turn’ for systems

litigation in municipal courts (see also Koh, 1991; Scott, 2001), which even in 2006 was deemed ‘mixed at best’, and reflecting ‘problematic aspects’ (Zumbansen *ibid.*, 747). These problems have become even greater since the US Supreme Court’s limitation of alien tort litigation in the *Kiobel* case (*Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. (2013), 1659, 1669; see Young, 2014; Paust (2014); see also Augenstein, 2014, 53ff; and for further discussion of the case, see below, section 5.2).

¹⁸ Teubner (2011e), 14.

¹⁹ Verschraegen (2011), 218.

²⁰ This is not to suggest that Teubner presents his concept of global law as a panacea to the ills of society. One can often find, buried within in his work, muted warnings for the reader to curb her enthusiasm for legalization at the global level. For example, after laying out an extensive pluralist model for law in global society, Teubner—together with Andreas Fischer-Lescano—concludes by suggesting that any ‘high expectations’ of global law under their model must nonetheless be ‘curbed’ in light of the fragmented nature of global society, and that if such a model of law can achieve anything under these circumstances, it is only to offer a kind of ‘damage limitation’ to dampen the destructive tendencies of autonomous subsystems, as a ‘gentle civilizer of social systems’ (Fischer-Lescano and Teubner (2004a, 1045). Even his later concept of societal constitutionalism, which may be presented as having shifted ‘to ‘doing justice’’ (Christodoulidis 2011, 239) to a ‘global public interest’ (Teubner 2012), comes with a lament over the impossibility of ever ‘doing justice’ to ‘real people’ (Teubner, 2012, 148).

theoretical accounts of law.²¹ The label is an intriguing one in the context of his study, and the first section aims to examine how his approach has come to earn this label. The second section will move on to consider critiques of Teubner's model of global law with the aim of scaling down and properly framing such a model of law in the context the kind of prodigious normative expectations outlined as the subject of the study in the introductory chapter. The inherent technocracy of Teubner's model of law beyond the nation-state has raised concerns about the political implications of law-making so removed from organized civic participation,²² and it is worth exploring these in so far as they highlight the jurisdictional limits of such a model of law. Once Teubner's model of law has been scaled to the perspective of the problem of highly generalized norms the third section will move on to consider why the question about the fate of general norms has been precluded from analysis under the systems theoretical account of law developed by Teubner and others. If the second section addresses substantive issues in terms of questioning the normative capacity of Teubner's global law, the third section addresses methodological issues in terms of identifying how the theoretical construction of global law beyond the nation-state has increasingly engaged in a shift of focus from 'function' to 'code' that has effectively obscured from view the kind of questions taken up in this study. The fourth section will qualify this to some degree by demonstrating how recent systems theoretical accounts of global law have sought to re-address function. However, even this will be shown to be a rather blinkered perspective on function, and ultimately one that also fails to engage the question of the present study.

2.2 Systems theory's 'normative turn'

As much as Teubner has been consumed by the potentially dire consequences of the 'freed up energies' of the functional systems of global society 'spinning out of control',²³ he has not given into fatalism about catastrophe. Although his concern may, to some extent, reflect the traditional concerns of the Frankfurt School, he follows Luhmann in so far as he sees catastrophe as 'contingent'.²⁴ Things, in other words, could always turn out differently. This, undoubtedly, is part of the strength of his approach. The odd mix of acute sensibility to the

²¹ Christodoulidis and Francot-Timmermans (2011).

²² Kjaer (2014), 148.

²³ Teubner (2011b), 224.

²⁴ Often framed by the different reactions of Marx, Weber and Luhmann to the destructive energies of functional differentiation, see Teubner (2010a), 330; (2011b), 224; (2012), 78.

destructive energies of functional differentiation, together with a perceived contingency of catastrophe, has spurred Teubner to push the boundaries of a paradigm that ‘the system cannot operate in its environment’,²⁵ without ever seemingly losing faith in the promise of *deus ex machina*. This has no doubt proved foundational for a concept of law which is now seen as providing a potential ‘line of defence against the structural violence of the logics of systems running amok.’²⁶

On a more concrete level, these advances can be traced back to the concept of ‘reflexive law’ which Teubner developed in the early 1980s. This concept of reflexive law will be examined further below—for now it is necessary only to note the way in which the concept of reflexive law proved a forerunner for the concept of global law beyond the state. As a response to the crisis of the welfare state and the problems of excessive juridification, ‘reflexive law’ entailed a much more fluid and rarefied concept of law, which was able to seep into and sensitively regulate the various niches of modernity.²⁷ It was thus ‘reflexive’ in the sense that it was conceived as being able to take up, as need be, the many different rationalities of a functionally differentiated society, and to translate them into its own code.²⁸ As such, this concept of law reflected functional differentiation itself, and this later became an important quality for law in relation to the advanced globalization of society, when functionally differentiated areas exploded their boundaries and developed their autonomy at the global level.²⁹ In response to the dissonance between an increasing normativization at the transnational level, and the inadequacy of traditional politico-legal frameworks of the nation-state, Teubner identified the ways in which law emerges out of the fragmented social institutions which had ‘followed their own path’ to the global level.³⁰ In much the same way that reflexive law had been able to attach to and legalize various rationalities in modern society at the national level, law is seen as taken up in the ‘norm hungry’ autonomous fragments of global society.³¹ Where the autonomy of these social fragments is such that law is able to develop appropriate ‘instruments of second order observation’³²—in a process of self-juridification that can be compared to Hart’s concept of a legal system through the

²⁵ Luhmann (2002a), 50.

²⁶ Christodoulidis and Francot-Timmermans (2011), 188.

²⁷ Teubner (1983).

²⁸ Zumbansen (2009), 21.

²⁹ Luhmann noted these trends as early as 1972 (1985a), but ‘globalization’ did not become a pronounced sociological subject until the early 1990s, see for example Appadurai (1990), Roberston (1992).

³⁰ Teubner (1997), 4.

³¹ Teubner (2010a), 331.

³² Teubner (1997), 8.

establishment of ‘rules about rules’³³—then they emerge as ‘self-contained legal regimes’ of global society.³⁴

Initially, much of these self-juridifying regimes were limited to the specialized spheres of the global economy, producing what Teubner labelled a ‘new *lex mercatoria*’ as an emerging self-regulated legal system³⁵ which did not originate within the politico-legal structure of the nation-state, but which relied on commercial contract as means of de-paradoxifying its self-referential foundation.³⁶ Over time this model has been developed to recognize such self-juridifying mechanisms in other social spheres. Contra any ‘crude’ reduction to simple association with market supremacy,³⁷ such self-juridification is now commonly attributed to the emergence of other areas of global law, such as *lex digitalis*,³⁸ *lex constructionis*,³⁹ *lex sportiva*,⁴⁰ and countless other areas such as transnational copyright law, medical patent protection, transnational criminal law, international financial regulation and transnational cybercrime.⁴¹ Moreover, the coupling of law with a plurality of incompatible rationalities is considered to be only a good thing; much like Habermas’ discourse theory of law, and Ladeur’s theory of ‘post-modern’ law, such a ceaseless ‘contextualization’ and ‘relativization’ of law is seen as opening ‘possibilities for productive confrontations between discourses.’⁴²

Despite the wide range of norms that would obviously find legalization in the constellation of various specialized technical regimes of global society, there is no basis of a normative hierarchy supporting the peremptory status of norms under such a polycentric model where the binding decision is replaced by a ‘sequence of decisions within a variety of

³³ Hart (1997).

³⁴ Fischer-Lescano and Teubner (2004a).

³⁵ For an opposing view, see Michaels (2007), who after considering empirical evidence, concludes that ‘*lex mercatoria* is not a self-sufficient legal system.’ (458); See also, Shultz (2008).

³⁶ Teubner (1997), 12. This refers to the systems theoretical concept of the foundational paradox of functional systems which must be externalised and invisibilized through the use of distinctions (Luhmann 2013a). In order to not be disabled by such a paradox, it must externalized or made invisible to the functional system. See below, section 4.2, n. 89.

³⁷ Calliess and Zumbansen (2010), 6.

³⁸ See, for example Calliess (2002, 188), who defines this as ‘a third-level autonomous legal system beyond municipal and public international law, created and developed by the law-making forces of an emerging global civil society, founded on general principles of law as well as societal usages, administered by private dispute resolution service providers, and codified (if at all) by private norm formulating agencies.’

³⁹ Perez (2004); Fischer-Lescano and Teubner (2004a), 1034.

⁴⁰ Teubner (2015), 6.

⁴¹ Fischer-Lescano and Teubner (2004a), 1034; see also, Calliess and Zumbansen (2010).

⁴² Teubner (1997b), 160. Others who also consider such ‘relativization’ and ‘contextualization’ of law as productive, see it nonetheless as leading to something of an ‘ironic turn’ for reflexive law, in that law potentially comes to be seen as just another, albeit highly particular, form of communication, see Zumbansen (2009).

observational positions in a network'.⁴³ Nevertheless, together with Andreas Fischer-Lescano, Teubner has developed an intriguing concept of how normative expectations of the preemptory status of norms may indirectly gain legalization under their model of law. Careful to avoid the two extreme positions of natural law based on established hierarchy of preemptory norms on the one hand and the 'hijacking' of human rights by the logics of the decentralised closed regimes on the other, Teubner and Fischer-Lescano instead stress a certain 'network logic' and the 'indirect effect' of norms reflecting a 'common validity core' in their theoretical model.⁴⁴ Of course any subordination of the self-contained legal regimes to a common validity core is fundamentally at odds with the dynamics of functional differentiation,⁴⁵ but Teubner and Fischer-Lescano are able to circumvent this by maintaining that 'the autonomous and decentralized reflections of networks nodes'—which as part of a network seek compatibility with other nodes—can build on the '*assumption* of common reference points' to the preemptory norm.⁴⁶ Thus, each functionally differentiated regime is able to construe the preemptory norms of general society through their own reflexive mechanisms. This is 'nothing but an operative fiction' they admit, but by building on such a fiction each regime is seen to potentially orient their own rule-making to the 'abstract, seemingly common philosophical horizon'.⁴⁷ According to Teubner and Fischer-Lescano there is no need to, in fact, harmonize the reference points. Rather, all that is required is some 'prompting' of the 'regime-internal self-organization so the different regimes can establish their own grammars for their version of a global *ius non dispositivum*'.⁴⁸ This prompting role, they imagine, can be taken up by a range of processes, including the 'scandalizing of sectors of public opinion', 'pressure from international politics', or 'co-operation between autonomous regimes'.⁴⁹

This must be seen to represent the first bold step in the 'normative turn' in Teubner's system theory of law. Such illusory integration may not achieve the aspirations of a normative hierarchy expressed by international lawyers,⁵⁰ but considering the problems that international law has faced in establishing preemptory norms—which will be explored in the fifth chapter—the concept of functional regimes constructing 'common' preemptory norms

⁴³ Fischer-Lescano and Teubner (2004a), 1018.

⁴⁴ *Ibid.*, 1033.

⁴⁵ Indeed why Teubner and Fischer-Lescano should strive at all to reconcile their model of law with the concept of preemptory norms is in itself interesting, see Paulus (2004).

⁴⁶ Fischer-Lescano and Teubner (2004a), 1033.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 1034.

⁴⁹ *Ibid.*

⁵⁰ See for example Orakhelashvili (2008), or Tomuschat (1999).

represents a real attempt at securing the ‘intra-regime responsiveness to the immediate human and natural environment’ from a disciplinary apparatus which had hitherto considered such ecological awareness impossible.⁵¹

Systems theory’s so called ‘normative turn’, however, only really hit its stride in Teubner’s concept of societal constitutionalism developed in more recent years. Teubner’s thesis in this respect, briefly stated, is that in contrast to notions of a constitution emerging suddenly in ‘the representative institutions of international politics’ or as ‘a unitary global constitution overlying all areas of society’, the constitution of world society is ‘emerging *incrementally* in the constitutionalisation of a multiplicity of autonomous subsystems’.⁵² In this respect, Teubner points to the secondary rules of self-contained legal regimes as constitutionalizing themselves when they juridify norms of a ‘quality’ that are parallel to those of traditional political constitutions.⁵³ This ‘quality’, moreover, does not depend on political institutions which have evolved within the framework of the nation-state,⁵⁴ but rather depends on them being of both a ‘constitutive’ and ‘limitative’ nature.⁵⁵ Such norms are ‘constitutive’ when they promote inclusion within the relevant social sphere; they are ‘limitative’ when they forestall the crowding out effects and prevent the expansionist tendencies of the functional systems ‘tipping into destructiveness’.⁵⁶

The potential ‘tip into destructiveness’ of functional systems is seized upon by Teubner as a pivot point for a trajectory into the constitutionalization of world society. In fact, experience of the ‘dark side’ of functional differentiation is seen as ‘almost an essential condition of the transformation of the inner constitution’ of social systems.⁵⁷ ‘Drawing a bow’, as he puts it, from the self-harming growth compulsions of social systems,⁵⁸ Teubner presents the point where the catastrophic effects of functional differentiation are directly immanent as a ‘constitutional moment’ which induces the system to a ‘process of critical self-reflection’.⁵⁹ It is here that Teubner presents the opportunity for law to bring ‘external pressures’ to bear in such a way as to push the system into ‘self-limitation’.⁶⁰ However, in recognition that it is only possible to develop limitations from within the offending system-

⁵¹ Fischer-Lescano and Teubner (2004a), 1037.

⁵² Teubner (2010a), 221. Emphasis added.

⁵³ Teubner (2012), 74.

⁵⁴ Although, somewhat problematically, they are ‘highly political’ (Teubner, 2011d, 248), and rely, to some degree, on ‘instruments of state power’ (ibid., 250).

⁵⁵ See also Fischer-Lescano (2007), 17.

⁵⁶ Teubner (2012), 79.

⁵⁷ Teubner (2011e), 10.

⁵⁸ Ibid.

⁵⁹ Teubner (2012), 75.

⁶⁰ Ibid., 84.

specific logics,⁶¹ it is not the law *per se* or any other external social process which enables such self-reflection in the immediate risk of crisis, but rather the coupling of the ‘medial reflexivity’ of law with the ‘medial reflexivity’ of the focal social system itself.⁶² This ‘double reflexivity’⁶³ is the key to Teubner’s societal constitutionalism. It can be seen as a ‘structural coupling between “societal law” and “societal politics”’.⁶⁴

Of course this, in itself, will not temper the destructive tendencies of functional systems; reflexive law’s ‘sensitivity to context’⁶⁵ may allow for the constitutional code of the focal social sphere to take precedence, while still remaining geared towards an expansionist ‘tip into destructiveness’. But the ‘normative pulse’ of this model lies within the proposed ‘hybrid reflexivity’ of subsystems.⁶⁶ In this respect, Teubner presents a ‘hybrid binary meta-code’ as emerging, which ‘takes precedence not only over the legal code, but also the code of the function system concerned.’⁶⁷ As such, it provides an additional level of reflection through which it sensitizes the reflexivity of the focal social system to ‘public responsibility’.⁶⁸

This represents a considerable departure from the pessimism of Luhmann’s original hypothesis about law in global society. With it, the systems theoretical account of law in world society can now be said to reflect ‘profoundly normative expectations’.⁶⁹ From here Teubner even considers it ‘completely plausible’ for fundamental rights now to be incorporated into the systems theoretical concept of law at the global level.⁷⁰ Whereas before, he had been careful about posing any ‘worldwide validity, higher right, and constitutional

⁶¹ Teubner (2011e), 18.

⁶² Teubner (2012), 104.

⁶³ *Ibid.*, 105. In this respect, Teubner develops Luhmann’s concept of the structural coupling of the legal and political systems as a means of externalizing the foundational paradoxes of both, and of channelling environmental irritations into the respective systems (Luhmann, 2004). Under Teubner’s societal constitutionalism, however, the emerging transnational regime law deals with the problem by externalizing its paradox to the authority of the focal social system, while the focal social system externalizes its paradox to the evolved legal regime. This has led to ‘four remarkable phenomena’: a proliferation of judge made law, a resurgence of natural law, a change of direction for protest movements, and the differing status of emerging constitutions, see Teubner (2015).

⁶⁴ Guski (2013), 526. Although Teubner’s ‘societal politics’ here (which might be described as the reflexive capacity of the functional regime to regulate its first-order operations through second-order observation) is not political enough for some. Kjaer sees Teubner’s concept as excessively focused on the legal at the exclusion of the societal political dimension. For Kjaer constitutions do not occur between law and any given system, but only when law can be structurally coupled to regulatory structures which possess a ‘distinct political quality’ (Kjaer, 2011b, 310), which he sees as only being present in his stringent concept of ‘formal organisation’ (Kjaer, 2014, 112, 137ff).

⁶⁵ Calliess and Zumbansen (2010), 5.

⁶⁶ Christodoulidis (2013), 655.

⁶⁷ Teubner (2012), 110.

⁶⁸ *Ibid.*

⁶⁹ Priban (2012), 453.

⁷⁰ Teubner (2012), 124.

rank of universal human rights⁷¹ as being within the reach of a necessarily fragmented global law,⁷² Teubner now considers the alternative of leaving them to the ‘contingencies’ of international law ‘hard-to-swallow’, and sees their claim to universality now demanding instead ‘worldwide legal validity’.⁷³

For this reason Teubner views it necessary to look to the potential located within the self-contained regimes of global society. He emphasizes that it is only the ‘decision practice of transnational regimes themselves that enacts fundamental rights within their borders.’⁷⁴ As an example of such ‘social positivization’ of fundamental rights in global society, Teubner points to how the World Trade Organisation (WTO) may draw upon social norms in such a way as to ‘positivize standards of fundamental rights that are valid within the WTO’.⁷⁵ The same thing, he argues, can be said in respect of private arbitral tribunals within the International Chamber of Commerce, the International Centre for Settlement of Investment (ICSID) or the Internet Corporation for Assigned Names and Numbers (ICANN). But what is important to note here is that it is the special regimes themselves which are seen as making the ‘validity decision’ on the norm when their arbitral tribunals select them as standards of fundamental rights in their individual rulings and their specification of which fundamental rights are binding within the particular regime.⁷⁶

As to the question of whether fundamental rights apply also to private actors, Teubner postulates that we should ‘consider the concept of generalisation and respecification’.⁷⁷ The first step involves generalization of fundamental rights beyond the nation-state context to consider their ‘overall social significance’. This draws upon concepts which presented the function of fundamental rights in relationship to the medium of power, that is, specifically in relation to the political;⁷⁸ as Thornhill puts it, the semantic fusion of sovereignty and rights contributed to the emergence of the modern nation-state, by allowing ‘the state to consolidate a distinct sphere of political power and employ the political power as an abstracted and inclusive resource’, while at the same time allowing it ‘restrictively to preserve and to

⁷¹ Teubner (2012), 124.

⁷² Fischer-Lescano and Teubner (2004a).

⁷³ Teubner (2012), 124.

⁷⁴ Teubner (2012), 129 [*sic*].

⁷⁵ *Ibid.*

⁷⁶ Teubner (2012), 129. And it is only here, in this limited sense, that scandalization by protest movements, NGOs and the mass media may be involved in the law-making process for Teubner, i.e., only when ‘the standardised norms are integrated via secondary standardizations’ (*ibid.*).

⁷⁷ Teubner (2012), 132.

⁷⁸ Luhmann (1965), (1990); Thornhill (2011c), 153-239; (2012), 416ff.

delineate a functional realm of political power'.⁷⁹ Teubner develops this concept, however, by abstracting this dual role of fundamental rights beyond the political system to apply it to all functional systems in society, to ensure the 'overall population in the function systems of world society and exclusion of individual and institutional areas of autonomy from these function systems.'⁸⁰ In this sense fundamental rights are said to guarantee, on the one hand, the 'inclusion of the overall population within the relevant social sphere' and, in this way, contribute to the constitutive function of civil constitutions 'when they support autonomisation of social-sub areas.'⁸¹ On the other hand, fundamental rights are also involved in the limitative function of social constitutions, giving individuals and institutions outside the constituting social sphere guarantees of autonomy against its expansionist tendencies.⁸²

If the first step, then, is about conceiving fundamental rights beyond the context of the nation-state, the second step (respecification) is about the question as to what is appropriate to the receiving field at the global level. This is not simply a case of adapting state articulated fundamental rights to the particular qualities of private law—that, he admits, would be too specific. Instead respecification, according to Teubner, means that fundamental rights 'must be readjusted to the rationality and normativity of different sub-areas.'⁸³ Essentially this means that fundamental rights must take the form used to communicate within the formal organization of those respective media. Thus, it is important to note that rather than 'falsely homogenizing fundamental rights in state and society', what is being advocated here is the 'indirect effect' of fundamental rights, that is they are only operationalized through a 'context-specific transformation' within the specific regime.⁸⁴

According to Teubner it is only when coming to consider the inclusionary effect of fundamental rights, however, that 'it becomes clear what it means to orient the generalization and respecification of fundamental political rights towards function system-specific media instead of abstract values.'⁸⁵ Here, for example, the political right to vote and rights of an active civic nature which permit the entire population access to the political power medium can be generalized in such a way 'that access to communication media in all function systems

⁷⁹ Thornhill (2011a), 392. See also Luhmann (1965), (1990).

⁸⁰ Teubner (2012), 134.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*, 135.

⁸⁴ *Ibid.*, 136.

⁸⁵ *Ibid.*, 137.

are not only permitted, but actually guaranteed by means of fundamental rights.’⁸⁶ That, of course, cannot be implemented in its generality, as some kind of political right of access to society, but is rather a ‘task of a careful respecification to formulate the function system specific conditions in order to permit access to diverse social institutions.’⁸⁷ What is envisaged here is a neat downloading or funnelling of the general norm into the specific logics of the functional regime, without filtering off its legitimating character. Where this is achieved, Teubner speculates, ‘such fundamental rights of inclusion might also act as a trigger for greater socio-political aspirations.’⁸⁸

While the inclusionary effect of fundamental rights is still seen to be at a rudimentary stage of development, the protective, exclusionary effect is seen to be ‘considerably further advanced’.⁸⁹ Here, such rights set boundaries to totalizing tendencies of function systems. Politics is an obvious offender in this respect, but for Teubner social problems in a functionally differentiated society cannot be limited to the relation between the nation-state and the individual, political institutions in general, or even the more diffuse conceptions of power in a Foucauldian sense. Since all function systems are prone to expansionist tendencies, the ‘fragmentation of society is today central to fundamental rights as protective rights.’⁹⁰ As the violations of fundamental rights stem from functional differentiation and the totalizing tendencies of function systems, Teubner argues that there is no longer any point in approaching their horizontal effect as an issue of balancing the private rights of actors. The issue of human rights, he argues, should be seen as the ‘endangerment of individuals integrity of body and mind by a multiplicity of anonymous, autonomized, and today globalized communicative processes.’⁹¹

The above elements can be said to represent the main features of the ‘normative turn’ in Teubner’s systems theory of law. It constitutes a formidable attempt to thoroughly engage the destructive tendencies of functional differentiation, and the risks such developments pose to society and the natural environment. The sophisticated architecture of Teubner’s theory in engaging these pressing problems, together with the clarity with which it is often presented has, as noted, received considerable recognition for its potential advance in light of the difficulties faced for legalization at the global level. But the institutionalization of Teubner’s theory is now such that it is difficult to get a clear picture of the limits of this model of

⁸⁶ Ibid.

⁸⁷ Ibid., 138.

⁸⁸ Teubner (2011a), 206.

⁸⁹ Ibid., 139.

⁹⁰ Ibid., 141.

⁹¹ Ibid., 144.

legalization. Teubner is not exactly clear where those might lie, and the incremental and aggregative nature of the social positivization of norms creates something of a presumption of a justice ‘to come’. This places a certain onus on the researcher who wishes to address the issue of norms which cannot be accommodated within such a model of law to turn this presumption itself into a problem. It is in this regard that the thesis turns to critique of Teubner’s model of law.

2.3 Some problems with global law beyond the state

There is certainly legitimacy to the argument that ‘our analytical lens ought not to be *how the law performs* in the context of globalization, but in how we *theorize the relation between law and society*.’⁹² The opportunities and challenges that globalization has resulted in for society will not be met if one simply resigns to the demise of law, and thus limit one’s focus, for example, to social norms and power relations at the global level. However, this should not be a bar to re-problematizing established legal institutions and considering alternative solutions, for this will only generate further insights into the relation between law and society. Thus, the current section considers some criticisms that have been made of Teubner’s theory of global law in order to get a more solid idea of where the limits of the social positivization of norms under this model of law lie, and thus to construct the problem of general norms that cannot be accommodated in law. The section first presents the common criticism that Teubner’s concept of global law ignores the continued centrality of the nation-state to the positivization of many norms that arise at the global level, before linking this to a systems theoretical critique about the likelihood of the mechanisms of ‘reflexive hybridity’ being able to achieve the ecological awareness that is essential to the legalization of fundamental rights under Teubner’s model of law.

The more common criticism levelled at Teubner’s concept of law and societal constitutionalism is that it fails to sufficiently articulate the significance of the nation-state at the global level, and that consequently it comes to rely on it without recognizing that it is doing so. Thornhill, for example, notes that, although Teubner presents a sophisticated theory of how societal constitutionalism emerges on the basis of functional differentiation and the potential risks thereof, he fails to consider the ways in which political power within the nation-state and the international system has also evolved as a result of functional

⁹² Zumbansen (2012c), 53f.

differentiation, and the way in which both transnational law and the trajectory of the nation-state are deeply intertwined as a result.⁹³ Thus, according to Thornhill, Teubner makes ‘no conceptual attempt either to disarticulate power from the state, or to render meaningful the semantic relation between politics (that is, social exchanges having to do with power) and statehood’.⁹⁴ Thus, it might be said that Teubner, in his ambition to identify the societal positivization of norms without reliance on statist mechanisms, conceptually marginalizes the role of the nation-state in transnational society. In this sense, although Teubner appears to have advanced the concept of the role of civil society in the development of transnational law, he effectively reproduces the old distinction between private and public, only to focus on one side of it.

A consequence of this omission is the way in which it conceptually obscures juridification of issues which must rely on ‘standards which are general across domains.’⁹⁵ Thus, as Paulus points out, balancing between two opposing logics will not always be possible, and in those instances a ‘political’ choice will ultimately be required.⁹⁶ For him, the ‘legitimacy’ of a decision under those circumstances ‘can only come from a process which is considered legitimate by the international community at large’.⁹⁷ Gert Verschraegen makes a similar observation in respect of human rights. For him the nation-state retains a ‘crucial, mediating role’ in respect of human rights, despite the functional differentiation of society. As the recent ‘migrant crisis’ in Europe only shows, ‘the old distinction of citizens and strangers remains of critical importance’.⁹⁸ And this relates not only to constructing borders to keep strangers out, but also to the privilege it accord governing bodies within those borders. Thus the juridification and constitutionalization of specialized regimes of world society will not be able to protect the rights of those ‘unfortunate’ individuals who remain the ‘captives’ of weak or failed nation-states as Verschraegen says.⁹⁹ Rather, the protection of the fundamental rights of those individuals continues to rely either on ‘domestic (and increasingly regional) regimes’¹⁰⁰ in terms of ensuring the transnationally constructed rights of their citizens, or on a coalition of domestic regimes willing to intervene within the borders of another to enforce those rights.

⁹³ Thornhill (2011b), 245.

⁹⁴ *Ibid.*, 245.

⁹⁵ Walker (2012), 20.

⁹⁶ Paulus (2004), 1054.

⁹⁷ *Ibid.*, 1054.

⁹⁸ Verschraegen (2011), 223; potentially reversing core EU institutions, see Robert Lane Greene, ‘Why the Schengen agreement might be under threat’, *The Economist*, 24 April, 2015.

⁹⁹ Verschraegen (2011), 224.

¹⁰⁰ *Ibid.*, 225.

Further problems with Teubner's concept of law can be identified from a more direct systems theoretical perspective. Foremost, in this respect, is questioning the 'medial reflexivity' which is held up as the 'decisive criterion' of Teubner's concept of societal constitutionalism.¹⁰¹ Luhmann called this 'processual self-reference', or simply 'reflexivity', and stated that the basic form of this mechanism is 'always selection of selection'.¹⁰² The primary advantages of such is that it allows communication processes to acquire 'a greater degree of freedom', 'a greater range of application', 'a growth of selection achievement', 'better capacity to adapt',¹⁰³ and even 'enables processes to guide and control themselves.'¹⁰⁴ One can see this in every day communication, from simply asking someone to clarify a communication term (e.g., 'What do you mean when you say 'functional differentiation'?), or in a more advanced setting, for example, in the way emergency room doctors establish a way of talking to each other to increase the conditions they can address and the actions they can take.¹⁰⁵

Teubner aims to capitalize on this social dynamic towards a greater range of application through the mechanism of hybrid reflexivity, i.e., not just the reflexivity of the social system itself, but the 'double reflexivity' that comes about when processual self-reference is applied in this way to another form of processual self-reference. However, it must not be forgotten that the establishment of such reflexive mechanisms always requires 'a certain protection against interference from other types of processes', and can be guaranteed only by 'differentiation and *specification* of particular societal part systems in social reality',¹⁰⁶ and with this the inevitable condensation of self-referential selections of the system. Thus, it not only leads to a greater range of application, but may also result in the greater indifference of the system to its environment. It thus might be questioned whether the system can maintain its own reflexivity in hybridity with another reflexive system in its environment.

Writing about 'reflexivity' in 1984, Luhmann left open the question as to the effect of frequent reflexivity on the 'manner and the clarity with which participants experience themselves as persons.'¹⁰⁷ However, as far as it can be seen, Luhmann's answer in this respect would not admit to the kind of ecological awareness that Teubner's theory of societal

¹⁰¹ Teubner (2011b), 277.

¹⁰² Luhmann (1995), 450.

¹⁰³ *Ibid.*, 452-454.

¹⁰⁴ *Ibid.*, 454.

¹⁰⁵ Nobles and Schiff (2007), 156.

¹⁰⁶ Luhmann (1985a), 167, emphasis added; see also Luhmann (1970).

¹⁰⁷ Luhmann (1995), 452.

constitutionalism relies on.¹⁰⁸ Thus, in his final major work, *Die Gesellschaft der Gesellschaft*, he says: ‘systems theory must abandon the cherished idea of inferring the adaptation of the system to the environment from the causal relations between the system and the environment. ... As far as I can see the overall effect is not adaptation, but greater deviation.’¹⁰⁹ Thus, the ‘adaptation’ Luhmann admitted to previously in his analysis of processual self-reference may be said to be purely adaptation of the system to the complexity of the environment, and not the type of adaptation as an external influence compelling ‘learning adaptation’ in the system on which Teubner relies in his theory of societal constitutionalism.¹¹⁰ In other words, according to a strict Luhmannian analysis, Teubner’s hybrid reflexivity is more likely to result in systemic deviation from ecological concerns rather than any real line of defence against the destructive tendencies of functional systems.¹¹¹

To an extent such a conclusion is also reflected in the ‘internal critique’ of Teubner’s theory made by Emiliios Christodoulidis.¹¹² His concern might be said to be more about the legitimacy of the ‘politics’ that is implied in Teubner’s concept of societal constitutionalism, but in making his points in this direction he underlines many of the potential limits of Teubner’s model of law with respect to the potential juridification of norms generated beyond the more narrow confines of the self-contained regime. Christodoulidis does not see the catastrophic consequences of functional differentiation as being so contingent, nor does he have as much faith in the ‘hollowed out’ constitutionalism imagined by Teubner being able to address the risks that it is called upon to respond to.¹¹³ Directly questioning the quietly presumed capacity of such an ‘incremental, aggregative and fragmentary’ model of positivization, Christodoulidis worries that the ‘hallmark’ constitutional qualities we have come to expect may always come ‘too late’ under such a model.¹¹⁴ For him, the problem starts even with the idea of a constitutional moment. How do we know when it is reached, he asks. Where will it register? History, as he notes, is littered with instances of social devastation, where not only did constitutional moments fail to register, but, in some cases,

¹⁰⁸ See also, Luhmann (1992a).

¹⁰⁹ Luhmann (2012a), 76.

¹¹⁰ Teubner (2012), 93.

¹¹¹ This conclusion is also reflected somewhat by Philippopoulos-Mihalopoulos: ‘If we accept that hybrids mollify the pain of paradoxes, then systems will never be questioned, since their Achilles tendon will be safely deferred in continuously different subterfuges of supposed hybridity.’ (2012), 4.

¹¹² Christodoulidis (2011), 238.

¹¹³ *Ibid.*, 239.

¹¹⁴ Christodoulidis (2013), 649. And this is not, in his view, alleviated by the ‘exaggerated’ prospect of hybrid meta-codes, which he sees as merely holding up the ‘incommensurable logics of spheres to scrutiny’ rather than underwriting or guaranteeing the passage from external to internal politicization’, (*ibid.*), 656.

where there is ‘not even a trace of the language that the vanquished used to describe the loss of their worlds.’¹¹⁵

Christodoulidis is sceptical, also, of the concept of a ‘reflexive equilibrium’ of constitutive rules as a means of keeping the ‘imperialistic tendencies’ of partial rationalities in check through ‘limitative’ considerations of their proper boundaries and spheres.¹¹⁶ How likely, he asks, is that the different constitutive and the limitative logics will balance and be commensurate? After all, the respective rationalities, as he points out, operate at different levels: one ‘sub-systemic’, while the other at a more primary social level.¹¹⁷ The real problem as Christodoulidis sees it is that, in the delicate balance struck by Teubner between the specific and the general, the general is always more likely to be re-oriented and over-determined by the specific in practice.¹¹⁸ This is construed as always potentially ‘short-circuiting back to the operational requirements of the system to the detriment of the system’s performance’, and one might add ‘function’, in world society.¹¹⁹

Yet, it is in the context of the proposed generalization and respecification of fundamental rights that is perceived as being particularly problematic. Generalizations, as Christodoulidis points out, are ‘as much selective suppressions as they are selective actualizations.’¹²⁰ This is inherent to a theory of self-reproducing systems. Thus, the danger is that what is selected from the environment as the ‘general’ may be actualized within the system in such a way as to be ‘overdetermined in the direction—and by the requirements—of its respecification.’¹²¹ Obviously if this is the case, ‘it might not always be constitutionalism’s most cherished achievements that survive the transplantation to the global level.’¹²² This, Teubner might say, depends on what one means by ‘constitutionalism’, but he does clearly relate constitutional norms to fundamental rights and global public interest, and Christodoulidis has a point when he says that it may be impossible to negotiate the tension between what is generalized as constitutional and what is appropriate to the specific field in

¹¹⁵ *Ibid.*, 634.

¹¹⁶ Christodoulidis (2011), 240.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 239. The actual terms used by Christodoulidis are ‘functional’ and ‘normative’, but one must suppose that ‘functional’ here does not have its ordinary systems theoretical meaning as orientation towards society as a social system, see below 2.4.

¹¹⁹ Christodoulidis (2011), 239.

¹²⁰ Christodoulidis (2013), 640.

¹²¹ Christodoulidis (2011), 240.

¹²² *Ibid.*

this respect. There will inevitably be an asymmetry here, and with that, a likely ‘collapse into the ‘re-specification’ pole of what is ‘appropriate to the receiving field’’.¹²³

One might expect that such a ‘collapse into the respecification pole of what is appropriate to the receiving field would limit the results in terms of ‘inclusionary’ and ‘exclusionary’ fundamental rights norms. With regard to the former, Teubner states that it is the ‘task of careful respecification to formulate the function-system specific conditions in order to permit access to diverse social institutions.’¹²⁴ He gives the examples of ‘essential services in the economic system’, ‘compulsory insurance in the health system’, and ‘guaranteed access to the internet for the whole population’, as ‘cases where the third-party effect of fundamental rights would guarantee undistorted access to social institutions.’¹²⁵ But, whether they do in fact is never explored in the text. Certainly it is not difficult to find empirical examples of contrary practice in this respect. In an ICSID case involving investment protection in a hybrid public-private dispute, for example, an annulment committee denied the importation of some European Court of Human Rights jurisprudence upholding shareholders rights of access: ‘The extent of the protections afforded by an investment protection treaty,’ the committee said, ‘depends in each case on the specific terms of the treaty in question’.¹²⁶ In this respect it found comparisons with differently worded treaties ‘outside the field of investment protection’ to be of ‘limited utility’.¹²⁷ Even the one example Teubner highlights as ‘an informative example of a right to inclusion’¹²⁸—‘internet neutrality’—is problematic in this respect. For example, one could note the conclusions of a recent report commissioned by the Council of Europe on ‘ICANN’s policy and procedure in light of human rights’ which concluded that ICANN’s current standards ‘do not fully comply with the right to freedom of expression’; that ‘it is desirable that the people-centeredness of ICANN’s policy development is further improved’; that a ‘balance must be struck between economic interests and other objectives of common interest’ and: that ‘the historically grown establishment of ICANN as a private corporation under Californian law may not be a sustainable solution for systematically taking into account human rights law.’¹²⁹

¹²³ Ibid., 241.

¹²⁴ Teubner (2012), 138.

¹²⁵ Ibid.

¹²⁶ *Azurix Corp.v. The Argentine Republic* (ICSID Case No. ARB/01/12) (Annulment Proceeding), para. 128.

¹²⁷ Ibid.

¹²⁸ Teubner (2012), 138.

¹²⁹ See report by M. Zalinieriute and T. Schneider, ‘ICANN’s Procedure and Policy in Light of Human Rights, Fundamental Freedoms and Democratic Values’, DGI (2014) 12, 7. See also for details of further empirical evidence in this respect, Komaitis, K. (2010): ‘*The Current State of Domain Name Regulation*’, London: Routledge, 96ff.

Problems in this regard are even more prominent in respect to Teubner's third imagined area of fundamental rights: the guaranteed undistorted access to social institutions in relation to 'essential services in the economic system'.¹³⁰ Nonetheless, Teubner seems to place his hopes more in the horizontal effect of fundamental rights and in their protective function as being 'considerably further advanced' than the rudimentary stage of development of rights of inclusion into the diverse social spheres of global society.¹³¹ In particular Teubner holds up as exemplary, in this respect, increasing judicial recognition of actions against multi-national corporations for violations of fundamental rights. However, this might still be said to be a matter of interpretation. The evidence Teubner cites in support of his claims are ambivalent in this regard,¹³² and for many privatization still 'highlights the possible dangers of decreased respect for human rights.'¹³³ This is an area where 'exaggerated legal claims and conceptual ambiguities' are known to have caused confusion and doubt amongst many lawyers.¹³⁴ In relation to the international investment arbitration, for example, others maintain that 'investment tribunals remain relatively reluctant to engage in human rights arguments brought by one of the parties, despite the sometimes obvious relevance of human rights issues'.¹³⁵ Teubner's reference to the World Trade Organization (WTO) as 'one well-known example of constitutional emancipation' is one which Christodoulidis takes issue with in particular. Such 'emancipation', Christodoulidis argues, 'entails the progressive dismantling of labor protection as an unavoidable effect of the global organization of trade that circumvents any possible municipal safeguards.'¹³⁶ A key moment of this 'emancipation', he points out, was when, at the Singapore summit of 1998, the WTO 'washed its hands of any involvement in labor disputes', and thus relieved itself of 'the regulation of international trade of its effect on the world's producers.'¹³⁷

Finally, Teubner and Fischer-Lescano's scheme for bolstering *jus non dispositivum* in a functionally differentiated global society can also be construed as being susceptible to the collapse into the logics of the receiving field. How likely is it in practice that the differing

¹³⁰ Teubner (2012), 138.

¹³¹ Ibid., 139.

¹³² Ibid., 124, n. 3. For a different conclusion on review of the same, see De Brabandere (2009).

¹³³ Clapham (2006) 12.

¹³⁴ Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CAN/2006/97 (22 Feb. 2006), at para. 59. Moreover, there seems to be a prevailing opinion among international lawyers orientated to non-state actors that multinational corporations have no direct obligations under international law today, see de Brabandere (2012: 6).

¹³⁵ de Brabandere (2012), 7.

¹³⁶ Christodoulidis (2013), 643.

¹³⁷ Ibid., 643.

versions of *ordre public* constructed within the separate regimes as network nodes will ‘gradually move closer together’ through the illusion of a common reference point? It is difficult in this respect to overlook the fact that some regimes are more powerful than others. Jaye Ellis, for example, in addressing the issue of sustainable development law, points to the dearth of institutional environmental or human rights equivalents to the WTO.¹³⁸ Any environmental ruling by the WTO, as she says, ‘would have an impact that environment and human rights regimes would find difficult to match.’¹³⁹ Ellis argues that Teubner and Fischer-Lescano’s network model is not likely to be effective in achieving ‘global public interests’.¹⁴⁰ Instead, as she sees it, we would more likely be presented with a ‘network in which one group of nodes—those devoted to trade and finance—vastly outweighed others in terms of influence and impact.’¹⁴¹ According to Ellis there is even a danger that Fischer-Lescano and Teubner’s strategy of realizing peremptory norms ‘might actually make regimes like the WTO more powerful and exacerbate the disequilibrium among environment, society and economy.’¹⁴² This can be presented as a more specific expression of Christodoulidis’ systems theoretical concern for the tension between generalization and respecification collapsing into the logics of the receiving field, and of the ‘system surging along the trajectory of its self-reproduction.’¹⁴³ Ultimately, it is difficult to see how Teubner and Fischer-Lescano’s network model of the indirect effect of peremptory norms by delineated regimes orienting themselves to the ‘fiction of a common reference point’ amounts to anything other than an example of the kind of simple ‘transitional semantics’ that Teubner criticizes in attempts to expand nation-state rights fundamental standards to the global level.¹⁴⁴

This section has endeavoured to show that, despite the very real advances made by Teubner in the conception of law beyond the nation-state, there will likely be a certain class of norms arising at the global level which will not find realization with that model of law. Exactly which norms are unlikely to find accommodation in that model of law has not been stated with any precision. However, the possibilities have been limited in two respects. First, there are those norms which can only be established through communicative reference to the nation-state. As demonstrated, Teubner’s model of law ignores the continued and

¹³⁸ Ellis (2010).

¹³⁹ *Ibid.*, 70.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 71.

¹⁴³ Christodoulidis (2013), 650.

¹⁴⁴ Teubner (2012, 126), in reference to Ladeur and Viellechner (2008).

fundamental role of the nation-state in globalized society,¹⁴⁵ and therefore makes little provision for those norms which seemingly rely upon some prospect of state action for their realization. Secondly, it can be said that the degree to which Teubner's model relies on the specialized reflexive mechanisms of highly differentiated social spheres is unlikely to accommodate the full range of norms which are formulated at a much more general level and which are, in reflection, of a much more generalized character.

The construction of the problem of such norms and insight into further possibilities is not only achieved by problematizing this model of law in a substantive sense, however, but also through analysis of the methodology which has led to this approach. The next section will address how Teubner and others have made a series of turns away from the perspective from which one can gain an insight into the problem of general norms.

2.4 A series of 'turns' away from the function of law and norms

It may strike the reader as odd to assert at this point that the way Teubner has developed the systems theoretical account of law has effectively led to a pronounced focus on the law's coding to the exclusion of any focus on the function of law and norms. Admittedly, section 2.2 did detail the way in which Teubner has consistently engaged the dark side of functional differentiation as a threat to society itself, and presented the very real advances he has made in developing a robust concept of law beyond the nation-state, capable let's say, to some degree at least, of mitigating such a threat. The point is, however, that this is not about the *function* of law. That is, it is not about law in relation to society as the larger social system.¹⁴⁶ Instead it is about the *performance* of law as the orientation of law towards other subsystems and, *even more so*, about *reflexion* as the orientation of functional subsystems to themselves—not only law's reflexive orientation, but the reflexive orientation of other functional systems that law structurally corresponds to under this model of law.

This is not another critique along the lines of '[r]eflexive law can only be self-reflexive law', and therefore can only observe its environment through its own self-reference.¹⁴⁷ Hopefully enough was already said in the last section to underline this difficulty as it might relate to the problem of general norms. Rather than critiquing Teubner's development of the

¹⁴⁵ The term 'fundamental' is not used lightly here, as will become clear from the argument presented in the fourth chapter about the role of the sovereign nation-state in the functional differentiation of society.

¹⁴⁶ Luhmann (1977), 36; Luhmann and Schorr (2000), 41.

¹⁴⁷ Luhmann (1992a), 397-398.

systems theoretical concept of global law on such a substantive basis this section merely aims to draw attention to the way in which Teubner and others have made a series of turns away from the function of law to focus more on code, and that this has precluded the kind of perspective of the problem of general norms that one would need for the present study.

First there was the ‘reflexive turn’. Before the concept of social autopoiesis had taken hold, Luhmann was developing a more open systems approach which very carefully presented the function of law as the congruent generalization of normative behavioural expectations¹⁴⁸ (this will be examined further below). Teubner never had much use for it.¹⁴⁹ Instead he started out more with the ‘goal to transcend controversies between functionalism and critical theory’, and with a concept of ‘reflexive law’ that drew on Nonet and Selznick’s ‘responsive law’ and Habermas’ ‘discursive rationality’.¹⁵⁰ In this Teubner explicitly addresses Luhmann’s tripartite schema of system orientations (function, performance and reflection) and argues that an incompatible tension between function and performance results from the fact that the ‘production of congruent normative generalizations may not suffice to provide rules that are well suited to resolve concrete conflicts’, and because the legal system, ‘through processes of conflict resolution, may produce norms which cannot be congruently generalized.’¹⁵¹ Teubner argues that it is the task of legal reflexion to reconcile these ‘inherent tensions between function and performance’,¹⁵² and that law can ‘best do this by imposing restrictions on the legal performance dimension’.¹⁵³ That is, rather than trying to establish comprehensive regulation through a central legal system, the performance of law should be restricted to ‘more indirect, more abstract forms of social control.’¹⁵⁴ But what is seen as ‘crucial’ to this achievement is ‘the structural correspondence between *legal* norms and the opportunity structure within societal subsystems.’¹⁵⁵ This essentially represents the crux of the reflexive law approach that developed in response to the exhaustion of the welfare state: law that is ‘*reflexive of* the many different societal rationalities, which the law was charged to “translate” or “reformulate” into its own language, using the legal code.’¹⁵⁶

¹⁴⁸ Luhmann (1985a), 77.

¹⁴⁹ Teubner (1988), 231.

¹⁵⁰ Teubner (1983), 245-270.

¹⁵¹ *Ibid.*, 272-274. According to Luhmann, the function of law is not to resolve conflicts; that is law’s *performance*. The function of law, stated simply, is to contribute to the reproduction of society, which will be detailed in the next chapter

¹⁵² *Ibid.*, 274.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* Emphasis added here to highlight that ‘norms’ here is a careless reference to legal normativization.

¹⁵⁶ Zumbansen (2009), 21. For a more ‘ambiguous’ definition, see Calliess (2002), 190-191.

There is no doubt that such a concept of reflexive law has been very important for the development of law in response to the increasing complexity of society and the apparent deficiencies of centralized juridification, and that it was even a logical step for lawyers who wished to develop law at the global level where traditional centralized mechanisms of law-making were lacking anyway. However, the development of reflexive law quite deliberately pushed function—as a more comprehensive orientation of law to the general social system—into the background. As stated, Teubner viewed the functional orientation of law to congruent normative generalizations as adding little to the resolution of conflicts in polycontextual modern society. Unfortunately, the function of law was even equated to some degree with a problematic reliance on a ‘central, elevated place of sovereignty in terms of power and knowledge’¹⁵⁷. As Teubner puts it, the ‘reflexive orientation does not ask whether there are social problems to which law must be responsive’, but rather ‘seeks to identify opportunity structures that allow legal regulation to cope with social problems without, at the same time, irreversibly destroying valued patterns of social life.’¹⁵⁸ There is a perceived need in this respect to move away from orientation to the general so that law can develop the ‘very particular’ relationships with other functional social spheres, and provide responses to the ‘specific context’ in which problems arise.¹⁵⁹ And this entails a decided shift of focus away from orientation to the system of society and towards orientation of functional subsystems to themselves: reflexive law is about aiding other social systems in achieving ‘*self-organization and self-regulation*’, about fostering mechanisms that ‘*further the development of reflexion structures within other social subsystems*’.¹⁶⁰

These developments were compounded through the ‘autopoietic turn’. In many respects Teubner’s theory of reflexive law was primed for conjunction with the theory of social autopoiesis. Teubner had drawn on Habermas’ theory of communicative action to conceive of reflexive law as facilitating ‘communicative processes by guaranteeing the “external constitution” of the communicatively structured social sphere’,¹⁶¹ and in suggesting general social communication as an ‘epistemic minimum in modern society that serves as a common base for autonomization of social discourses’ to ensure law’s structural correspondence with

¹⁵⁷ Zumbansen (2009), 19.

¹⁵⁸ Teubner (1983), 274.

¹⁵⁹ Zumbansen (2009), 20.

¹⁶⁰ Teubner (1983), 275. Emphasis added to first citation.

¹⁶¹ Ibid.

other social systems.¹⁶² Once the theory of social autopoiesis emerged and the basic social element came to be seen as the communicative event—i.e., when the focus shifted from structure to process—then the opportunity really presented itself to ‘transcend controversies between functionalism and critical theory’.¹⁶³

By the mid-1980s Luhmann was also shifting his focus away from structure to process. With the autopoietic turn Luhmann came to recognize that functional specification alone would be insufficient to secure the differentiation of the functional subsystem. The temporalization introduced by the concept of social autopoiesis meant differentiation required a recursive closure that could only be achieved through the network of the system’s operations.¹⁶⁴ For law this meant that the function of congruent generalization of normative expectations would no longer suffice for closing the legal system, and that this instead would only be achieved by the binary coding of legal/illegal, as an internal structure, established on the reflexive mechanisms of the legal system and allowing for recursive connection of system operations.¹⁶⁵ Despite this shift in focus from structure to process, however, Luhmann did not altogether jettison concern for the function of law and focus exclusively on the legal system’s reflexivity¹⁶⁶—as will be demonstrated further in the next chapter.

For Teubner, on the other hand, the shift in theoretical focus necessitated by the autopoietic turn is much more pronounced. Once the differentiation of the legal system came to be seen as depending on coding and not function, and that law could only effectively stabilize expectations through the distinction of legal and illegal, then the mandate was provided for an even more concerted focus on the reflexive mechanisms of the legal system which secured coding. The dominant perspective that came to be adopted is well summed up by Calliess’ description of the implications of the theoretical shift in focus from ‘the level of norms to the level of communication’:

Suddenly things are very easy, for all law is positive law, i.e., valid by decision only. To form a legal system one basically needs three communications: (1) a claimant (ego),

¹⁶² Teubner (1989), 73. Indeed Habermas considers Teubner’s theory of reflexive law to be ‘inconsistent with the architectonic of systems theory’, and claims the theory to be more germane to his own theory of law based on discursive rationality, Habermas (1996), 52-56.

¹⁶³ Teubner (1983), 245.

¹⁶⁴ Luhmann (2013a), 90.

¹⁶⁵ Luhmann (1992a), 1427f.

¹⁶⁶ See however, Kjaer (2013, 797) who argues that Luhmann developed a ‘one-sided focus’ on the reflexivity of social systems while ‘systematically playing down’ the performance and function dimensions, leading, as he sees it, to an ‘implausible description of society’. This is debatable however, as, for example, Luhmann’s last major treatise on a theory of *society* (2012, 2013a) or his final late (and unfinished) account of religion (2013b) contain significant functional analysis of system orientation to the general social system.

(2) a defendant (alter), and (3) a court (alter ego, generalised other). These communicative acts constitute a legal system by using the code legal/illegal ... There is no need for norms ... Norms will just come naturally with the decisions ... Norms as the structure of a legal system are thus produced by communication, as a by-product of processing legal acts.¹⁶⁷

Calliess' reference to 'norms' here apparently means 'legalized' rather than 'social' norms. However, the statement that 'there is no need for norms' is also indicative of the exclusion of functional reference to norms under this perspective. Because law 'only stabilizes behavioural expectations' through a distinction of legal and non-legal,¹⁶⁸ the emergence of the reflexive mechanisms of the legal system which enable legal coding come to be seen as most important, and everything else as secondary. Ironically, even Teubner's concept of a more graduated autopoiesis of the legal system reflects this. Whereas Luhmann's 'all or nothing' approach to social autopoiesis¹⁶⁹ may have imposed an abrupt distinction between law and society, it did present the autopoietic legal system as being just one (albeit significant) step away from general society. Teubner's conceived stages of legal autonomization, on the other hand, placed a greater conceptual distance between the separation of generalized society and law as autopoiesis. While it did include at the lowest stage 'social conflict' this only escalates through stages of increasing self-reference until law achieves autopoiesis through the self-referential constitution of its elements in a 'congruent manner'.¹⁷⁰ And there is no doubt that Teubner's interests lie in the focus on these latter stages of legal autonomization, where one is free to engage in the 'dissolution of social and legal realities into discursivity.'¹⁷¹

Finally, this shift of focus away from *norm* and *function* was consolidated with the 'linguistic turn'. In developing the concept of legal pluralism, Teubner argued that the 'inherently static, nondynamic, nonprocessual character' of the structuralist focus on law's reference to normative expectations was unsuitable for delineating law in a complex society and unsuitable for providing criteria for legal pluralism.¹⁷² Thus Teubner suggested a 'linguistic turn' which he read as common to legal autopoiesis and postmodern

¹⁶⁷ Calliess (2002), 195-196.

¹⁶⁸ Fischer-Lescano and Teubner (2004b), 1066.

¹⁶⁹ Teubner (1988), 222.

¹⁷⁰ *Ibid.*, 223-224.

¹⁷¹ Teubner (2002a), 203.

¹⁷² Teubner (1992), 1449-1450.

jurisprudence.¹⁷³ The ‘decisive move’ here is presented as one ‘from structure to process, from norm to action, from unity to difference and, most important for the legal proprium, from function to code.’¹⁷⁴

Teubner relies on this linguistic turn to develop legal pluralism. It is seen as bringing forth the ‘dynamic processual character’ of legal pluralism and allowing for the clearer delineation of law from non-law in the complex social environment.¹⁷⁵ Once the linguistic turn is taken, then legal pluralism is ‘no longer defined as a conflicting set of social norms in a given field, but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.’¹⁷⁶ This would later prove useful of course in addressing the problem of the ‘inchoate forms of global law’,¹⁷⁷ where it provided the basis of a ‘global living law’ that, in distinction to Ehrlich’s concept, ‘does not draw its strength from the law of ethnic communities’ or ‘the life-world of globalized and functional networks’, but is founded on ‘the proto-law of specialized organizational and functional networks which are forming a global, but sharply limited, identity.’¹⁷⁸ Once again it is seen as necessary that the ‘core concepts of the classical sociology of law’ be obscured to the ‘background’, and that the focus shifts from ‘structure to process’, ‘norm to action’, ‘function to code’.¹⁷⁹ Only this, it is argued, ‘brings forward the dynamic character of worldwide legal pluralism and delineates legal from other types of social action.’¹⁸⁰

These series of turns have been important in developing law in orientation to the complexities of functionally differentiated society. However, taking these successive turns has effectively obscured from any perspective on the problem of general norms taken up in this study. That problem can only be properly constructed from a functionalist perspective which focuses, not only on the function of law, but on the function of the norm in society. Before exploring that however, attention must be turned briefly to those systems theoretical accounts which have recently sought to address the function of global law, and to determine whether they, unlike Teubner, accommodate the problem of general norms.

¹⁷³ Teubner (1992), 1444.

¹⁷⁴ *Ibid.*, 1450.

¹⁷⁵ *Ibid.*, 1451.

¹⁷⁶ *Ibid.* Emphasis removed.

¹⁷⁷ Teubner (1997), 4.

¹⁷⁸ *Ibid.*, 6-7.

¹⁷⁹ *Ibid.*, 6, 12.

¹⁸⁰ *Ibid.*, 12.

2.5 The function of law in the multiple worlds of global society

Despite the increasingly pronounced focus on coding and process, the function of law has not been altogether absent from systems theoretical accounts of law in world society. To begin with the distinction between normative and cognitive expectations which was instrumental to the development of Luhmann's earlier functionalist account of law has proved, and continues to prove central to systems theoretical accounts of law in world society. Furthermore, there has recently been a more concerted effort to refocus on the issue of the function of law and to distinguish further the function of law at the global level. This section aims to show, however, that despite the continuing influence of Luhmann's concept of the function of law in society, and the renewed attention on function of law at the global level, systems theoretical accounts of law in world society continue to focus on coding at the expense of function, or continue to concern themselves with the interior worlds of social subsystems rather than reference to the larger social system. In other words, none of these developments have really involved a return to the kind of elementary basis of the function of law in social interaction provided for in Luhmann's earlier account, and thus, none have been able to include within their purview the problem of general norms with which this thesis is concerned. This section then will assess the development of systems theoretical understandings of the function of law in world society in respect of the issue of general norms.

While Teubner made a decisive move away from structure to process, norm to action, function to code, etc., others have made more attempt to address the function of law in world society. Calliess and Renner, for example, ostensibly address the function of law in their critique of the economic approach to social norms. Following Luhmann, they state that in 'relation to society as a whole, "law fulfils only one function": "the stabilization of normative expectations," i.e., expectations that are upheld even in case of disappointment.'¹⁸¹ This serves their critique of Eric Posner's view of law as a regulator of the behaviour of social actors. However, the focus on the systems theoretical account of function of law is short-lived and attention quickly turns to one of coding, albeit under the illusion (and this is important) that we are still talking about 'function'. Thus, just as Teubner is quick to note that 'normative expectations alone cannot alone create law', Calliess and Renner are quick to

¹⁸¹ Calliess and Renner (2009), 267.

move to the ‘process in which law decides which norms to protect’.¹⁸² From here, the focus shifts to the ‘second-order observation’ mechanisms and the ‘operative closure’ of the legal system as the ‘network of legal communications perpetually referencing to other legal communications’.¹⁸³ That function ‘can only be fulfilled within the self-referential structures of a legal system’ seems to warrant the issue being subsumed under that of coding.¹⁸⁴ Thus, the focus is on what it takes to *fulfil* and *guarantee* function, rather than the function of law itself. For Calliess and Renner the function of law is only ‘guaranteed through the self-referentiality of legal communications’.¹⁸⁵ Their specific contribution here is to point out how this necessarily involves the development of two ‘enabling conditions’.¹⁸⁶ The first they define as the ‘verbalisation of conflicts’ allowing for ‘the communication of a social conflict in terms of legal/illegal and vis-à-vis a third party’.¹⁸⁷ The second enabling condition, they argue, is to be found in ‘points of reference for the interlinkage and mutual reference of legal communications’.¹⁸⁸ These enabling conditions are comparable to Luhmann’s concept of the *social* and *material* dimensions of the function of law. The selection mechanisms of law they envisage are arguably comparable to the *temporal* dimension of the function of law (which will be explored in the next chapter). However, Calliess and Renner never make the explicit connection here to the concrete concept of the function of law, nor do they seem to be occupied by any kind of reference to the larger social system beyond countering Posner’s theory of the marginalization of law in society. Ultimately, their concern is with coding and the differentiation of the legal system through its reflexive mechanisms.¹⁸⁹

The compulsion to skip to the focus on issues of coding of global law can be seen as a result of anxiety about theorising how law can institutionalize the norms that emerge in society beyond the framework which has traditionally been relied upon within the territorial boundaries of the nation-state. In striving to determine whether law can ‘apply the distinction of legal/illegal without its embeddedness in the conventional institutional framework of the

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid., 267.

¹⁸⁵ Ibid.

¹⁸⁶ Amstutz (2008).

¹⁸⁷ Calliess and Renner (2009), 268.

¹⁸⁸ Ibid., 269.

¹⁸⁹ Though it may not be exactly orientated to the concern of this thesis, there is something germane to this in Amstutz’s critique of Calliess and Renner’s concept of the function of law. Amstutz clearly differentiates the evolutionary steps of variation, selection and retention to point out that Calliess and Renner’s central criterion of the legal system’s ability to ascertain ‘what it has done so far’ only indicates that the system engages in the retention or stabilization of already selected norms, but in no way indicates that that system also engages in norm selection and thus fails to identify ‘what the selection criteria for legal norms are’, Amstutz (2008), 471.

nation-state',¹⁹⁰ systems theoretical lawyers are consumed with the problem of 'deciding where to draw the line between legal and non-legal norms.'¹⁹¹ Understandably, many are weary of falling into a trap of merely describing society and of neglecting the important questions of how law can evolve to answer many of the questions of world society. But, as such, there is a tendency to conflate function with code, and to ignore the more elementary social roots of law.

There has of late, however, been recognition that the function of law in world society may be so problematic as to warrant more careful attention. The first moves in this direction were made by Marc Amstutz. Amstutz has sought to demonstrate that the function of law in world society cannot simply be treated as a functional equivalent to the traditional law of the nation-state.¹⁹² For him the assumption that the function of law in world society is to deal with the problem of the systemic stabilization of normative expectations is 'highly problematical'¹⁹³ and 'must be abandoned'.¹⁹⁴ Amstutz instead draws upon Luhmann's concept of how the evolutionary primacy shifts from normative to cognitive mechanisms in world society¹⁹⁵ to argue that 'the primary functional reference of global law will be to expectations that are cognitive in nature.'¹⁹⁶ This does not imply that normative expectations disappear entirely; one of the tasks of the legal system in intervening in the internal dispute of a social system is to lend the operative closure and self-referential structures that Calliess and Renner fixate on as a way of maintaining the *counterfactual* character of expectations within that social system. As Amstutz points out, however, whether or not the intervention succeeds will depend on the operations of the disrupted social system. That is, any established *normative* order in which counterfactual expectations can be secured is limited to the boundary of the social subsystem.

This leads Amstutz to focus on another potential function that comes about in the way that law 'alienates' the dispute that emerges from the particular social system:

The point has to be for the legal resolution of the conflict to sensitise the conflict-laden system to its 'blind spots', i.e., to support the system in recognising its misperceptions in its

¹⁹⁰ Calliess and Zumbansen (2010), 45.

¹⁹¹ Amstutz (2008), 466.

¹⁹² Kjaer (2012), 172.

¹⁹³ Amstutz (2011), 58.

¹⁹⁴ *Ibid.*, 59.

¹⁹⁵ Citing Luhmann's view that 'it is better to react to very high and functionally specific complexity with learning processes than with counterfactual attempts to maintain prescribed expectations', Luhmann (1971), translation provided by Amstutz (2011), 58.

¹⁹⁶ Amstutz (2011), 59.

observation of its own environment and in drawing conclusions from this selfsame recognition, in order to bring about conduct which is more appropriate to that very environment.¹⁹⁷

Amstutz views this as a way for law to intervene, for example, in the economy through mitigation of an obsession with profit and through the promotion of empathy for alternative social interests; or in science through a balancing of ‘progress’ with protection of the natural environment and future generations.¹⁹⁸ But of course this function of world law, as Amstutz imagines it, reflects the anticipated shift to the evolutionary primacy of cognitive mechanisms. Law can only achieve this function through learning ‘to see itself as part of the environment’, and thereby forcing itself ‘to develop the conceptions of its environment that enable and support its task’.¹⁹⁹ In other words, law’s primary function in world society is not one of stabilizing counterfactual expectations, but rather one of facilitating learning processes which allow for the transfer of meaning components between social spheres and to thereby increase the compatibility between the fragments of world society.²⁰⁰ In this way, Amstutz clearly articulates the concept of law in world society as having two functions: a minor one in providing a normative order to regulate the social conflict within the social system into which it intervenes (and which therefore depends upon the boundaries of the social system); and a more prominent cognitive based function in which the legal system floods the environment ‘to make voyages of discovery into society’s *‘mondes intérieurs’*’, which then allows it to highlight the blind spots of disrupted social systems.²⁰¹

This line of analysis has been echoed and developed further by Poul Kjaer.²⁰² He also conceives the cognitive aspect as playing a larger role in world society, but recognizes the importance of ‘structures characterised by a strong normative component’ in world society.²⁰³ Thus, the cognitive primacy of world society for Kjaer does not simply entail a reduction in normative-based communication, a zero-sum game in which more of one implies less of the other. Instead it is seen to constitute a ‘reconfiguration’ of the normative and cognitive dynamic, as an evolutionary response to multiplicity of normative orders in world society that are defined by their ability to condense norms as law through the self-referential structures of

¹⁹⁷ Amstutz (2009), 312.

¹⁹⁸ Amstutz (2009), 312.

¹⁹⁹ Amstutz (2009), 312.

²⁰⁰ Amstutz and Karavas (2009); Kjaer (2012).

²⁰¹ Amstutz (2009), 312.

²⁰² Kjaer criticizes Fishcer-Lescano and Teubner’s (2004a) apparent assumption that the function of global law is relatively unproblematic, and undifferentiated from that of nation-state law, Kjaer (2012), 172.

²⁰³ Kjaer (2014), 76.

a developed legal framework.²⁰⁴ In respect of such a multiplicity of normative orders, Kjaer makes the distinction between, what he calls, the ‘internal’ and ‘external’ dimensions of law. ‘The former’, as he says, ‘is oriented towards the internal stabilisation and condensation of such orders, while the latter is oriented towards the establishment of compatibility between a given normative order and other normative orders.’²⁰⁵ Each dimension attributes differing weights to normative and cognitive structures in accordance with their function, with the orientation towards internal condensation being closely linked to the upholding of normative expectations, while the orientation towards external compatibility is seen as constituting ‘a structural setting in which adaptability through the reliance on cognitive approaches tends to dominate.’²⁰⁶ Normative-based communication play a ‘strategic’ role in this reconfiguration, while cognitivization increasingly takes up a ‘tactical’ role, at the ‘operational level’, ‘at the level of method rather than theory, and at the level of policy rather than politics’.²⁰⁷

Thus, similar to Amstutz, Kjaer conceives law in world society as having two functions: an internal dimension in which law is to uphold normative expectations against disappointing reality and an external dimension to facilitate the transfer of social components between the fragments of world society. And despite Kjaer’s attempts to avoid presenting the dialectic of normative and cognitive expectations as a ‘zero sum game’, under this model, the traditional function of law in upholding normative expectations again recedes further into the background while a new dominantly cognitive function comes to the foreground for law in world society. In contrast to national law, transnational law, in orientation to the external dimension, is said to be ‘primarily orientated toward establishing frameworks of transfer and mutual adaptation’.²⁰⁸ In fact, Kjaer adopts the perspective that what is commonly referred to as ‘transnational, global or world law’ is in reality only the ‘external law of normative orders’.²⁰⁹ This, he argues, becomes especially clear when the distinction between reflexivity, performance and function of law is kept mind. As established by Luhmann, the function of nation-state law is to facilitate social interaction by maintaining normative expectations even when they are not factually realized in society. The function of transnational law, he argues, is also concerned with social integration, but the *manner* in which this is achieved is completely different from national law—in fact, the ‘direct opposite’, as he says.²¹⁰

²⁰⁴ Kjaer (2013), 788.

²⁰⁵ Kjaer (2014) 65.

²⁰⁶ Ibid.

²⁰⁷ Kjaer (2013), 788.

²⁰⁸ Ibid.

²⁰⁹ Kjaer (2014), 77.

²¹⁰ Ibid., 75.

According to Kjaer, this runs deeper than the contrast between national law facilitating social integration by upholding counterfactual norms and transnational law facilitating social integration by providing for the learning process for the compatibility and transfer of social components in a fragmented world society. It also relates to a contrast between the way in which the former introduces ‘a kind of ‘friction’ which tends to reduce the contingency, volatility and speed of social change’, while the latter is ‘oriented towards *reducing the ‘friction’ which societal processes*, such as economic transactions, encounter due to the existence of the diversity of cultures, functional spheres and states’.²¹¹ Kjaer speculates that this may ‘explain why transnational law is characterised by a far higher level of judicial activism in the sense that courts tend to act as the catalysts—rather than as the enforcers—of already established norms’.²¹²

Nonetheless, Kjaer does not deny the relevancy of such a normative function altogether. Instead, he acknowledges the continued importance of normatively based communication in world society, for example, citing morality as fulfilling ‘an alarm function, reproduced along the boundaries of social systems’, which is activated in two instances. The first, echoing Teubner, can be described as limitative capacity, and relates the integrity and preservation of the social system: ‘when a social system sees itself as being the victim of asymmetries, crowding-out effects and colonizing tendencies emerging from its environment in the form of, for example, doping, corruption, prostitution, or pollution, that threaten the coherency of the system.’²¹³ The second, again echoing Teubner’s concept of the constitutive aspect of fundamental rights, relates to a ‘contrafactual’ striving for inclusion within the function systems of society, for example for the inclusion of all in the capitalist economy or in a global human rights agenda. Kjaer describes such normative communication as fulfilling ‘the function of pointing to an ‘untapped potential,’ which can be a source of further expansion of meaning production’.²¹⁴ But what exactly this ‘untapped potential’ might be is never fully explored. What is presented instead is the ‘gap’ between normative visions and their institutionalization, and the ‘central function’ of law in ‘bridging the gap’ through condensation and transfer of social components.²¹⁵

What is noteworthy about this is that its explicit statement that the differentiation of an internal and external dimension of law constitutes a revised *function* of law in world society.

²¹¹ Ibid., 78. Emphasis added.

²¹² Ibid.

²¹³ Ibid., 44.

²¹⁴ Ibid.

²¹⁵ Ibid., 45.

The cognitive primacy of law is not simply viewed as a matter of performance in terms of co-ordination between differentiated social systems, but is seen to relate to the stability and continued reproduction of society as a social system. Thus, Kjaer states, '[th]e constitutive function of transnational processes for world society as a whole is the facilitation of the transfer of social components from one context to another.'²¹⁶ This represents a clear shift in the grand scheme of the systems theoretical approach to the function of law; whereas Luhmann questions the degree to which law can continue to admit cognitive elements and even speculates that law may 'level off' with the increasing compulsion for such cognitivation in world society, Kjaer, building on Amstutz, envisions the cognitive primacy as revising the function of law and as therefore underwriting its continued expansion in world society.

This section has considered these lines of analysis as a potential qualification to the claim made in the previous section that the development of systems theoretical accounts of law has obscured the problem of general norms taken up in the present study. However, it must be concluded that neither Amstutz's nor Kjaer's development of the concept of the function of law at the global level in any way brings the problem of general norms back into perspective. Amstutz's argument that the function law in stabilizing normative expectations must be 'abandoned' appears excessively technocratic, and offers no view on the orientation of law to those norms which are generalized beyond the 'multiple worlds' of global society. Kjaer, on the other hand, does make some attempt to redress the balance and give more attention to the function of law in such a fragmented society. However, here too a certain tipping point is seen to have been reached whereby normativity has withdrawn into- and has become locked within the self-contained normative orders of world society. In this sense, the functional reference of the maintenance of normative expectations becomes as fragmented as the rest of society, and secondary to an overarching cognitive function that facilitates meaning transfer between the fragmented orders; relating the larger system only through the developed autonomy of the subsystem. This is still a rather 'thin' concept of function which affords little perspective on the function and operation of norms arising beyond highly differentiated 'political' and formalized normative orders.

This methodological parochialism is reflected in Kjaer's claim about a far higher level of 'judicial activism' at the global level.²¹⁷ Evidently, Kjaer means activism in terms of the normative expectations that find expression and limitation within the differentiated normative

²¹⁶ Kjaer (2014), 77.

²¹⁷ *Ibid.*, 78.

orders. However where is the judicial activism in respect of more general norms? In respect of the responsibility to protect the vulnerable locked within ‘independent’ normative orders, of protection of the natural environment in the global commons from the atomistic claims of established normative orders, of the prohibition of weapons of mass destruction which are claimed as an inherent right of self-defence for established normative orders, etc? It is no answer to say that the functional differentiation of normative orders is transcending these problems. In many cases the problems result from a complex of the functionally differentiated normative orders and segmentarily differentiated normative orders of nation-states; oil drilling in the Arctic, science and technology in nuclear arms, etc. There is scant evidence of ‘judicial activism’ of these complex problems within the functionally differentiated normative orders of world society, and, as will be explored in the fifth chapter, there is even little evidence of ‘judicial activism’ in international courts and tribunals in this respect.

From a systems theoretical perspective, the concept of the function of law always entailed some mixture of cognitive and normative expectations. That after all was the very focus of Luhmann’s earlier more open systems theory approach to law—the evolution of positive law.²¹⁸ However, even those socio-legal scholars that attempt to address the function of law are now mostly interested only in the external and cognitive-dominant function, and reduce the normative dimension to a secondary place within the fragments of world society.

2.6 Conclusion

Constructing the problem of general norms involves identifying the limits of law at the global level. This chapter has focused mostly on the model of law developed by Gunther Teubner as a robust ‘private’ global law which engages what would traditionally be deemed ‘public’ issues arising from the pathological side-effects of functional differentiation. It represents the important advances which socio-legal scholars have made in developing the concept of law in relation to high functional differentiation. However, the limits of this model of law have been located in its reliance on technocratic specialization within the differentiated spheres of world society and in its marginalization of the nation-state in addressing normative issues arising at the global level.

²¹⁸ Luhmann (1985a).

Appraising Teubner's model of global law beyond the state in the context of the present study, one is reminded of Jonathan Swift's famous aphorism: 'Laws are like cobwebs which may catch small flies, but let wasps and hornets break through.'²¹⁹ Reflexive global law has no doubt been important in building up the cobwebs in the corners of differentiated society to catch the small flies of globalization. However, the problems that arise from functional differentiation are not all 'small flies' of specialist discourse. To construct this problem further it is necessary to return to an earlier sociological theory of law that was more focused upon norms, and upon law's relationship with the larger social system.

²¹⁹ *Bartlett's Familiar Quotations: A Collection of Passages, Phrases, and Proverbs Traced to their Sources in Ancient and Modern Literature*, (1992), New York: Little Brown.

3 The function of law and norms revisited

3.1 Introduction

Normally the person who directs attention to the dissonance between the social recognition of a norm and its failure to find institutionalization in law does so in critique of the law or in projection of the norm itself. One might think of protesters outside the parliament building, or even the interpreting judge who in the absence of rules draws on principles to construe the law in such a way that it better fits with the norms of the community. However, this is not what is pursued here. Rather, what I am primarily interested in is gaining a better understanding of the problem of the dissonance between the formulation of norms at a general level and the failure of such to find realization in law. Again, this is why the method of functionalist analysis is employed. This approach is ‘formulated in the language of problems and their solutions’,¹ it sees problems only as ‘problem-systems’,² and it holds open the possibility that there can be ‘different, functionally equivalent solutions for specific problems.’³

As part of this it is necessary to look in more depth at the function of law, to better understand law’s functional reference to the problem of general norms, and even to better understand the function of the norm. As stated in the previous chapter, there has been a general move away from the concept of function in systems theoretical accounts of law at the global level, and it is thus necessary to revisit the very thorough analysis of the function of law contained in Luhmann’s earlier systems theoretical approach.

This functional reference point of law can be introduced in relatively simple terms as the norm. It is fair to say that such a functional reference point for law has become lost to some extent in the choppy waters of globalized society. That essentially was the basis of Luhmann’s ultimate skepticism about law. Nonetheless, it is still possible to find law’s anchor point in the norm at the general level above the ‘multiple worlds’ of global society. It may, in the grand scheme of things, be weaker than what might be expected, but it is strong enough to assert that the disparity between social norms and law at the global level is still a problem which law is functionally orientated to, and—more importantly—one which may prove the

¹ Luhmann (1995), 15.

² Ibid., 53, 116-117.

³ Ibid., 15.

basis for the emergence of social systems which ultimately prove relevant to the evolution of law as a social system even in a globalized society.

These themes will be explored in this chapter. The first section will examine the centrality of the norm to Luhmann's concept of the function of law. To do so, it is necessary to isolate this subject to a degree and address it as a stand-alone section, rather than simply subsuming it under the more general topic of the function of law, as might normally be the case. Once the relation of the norm to the larger social system has been clearly presented, the second section will consider the function of law according to Luhmann's earlier evolutionary approach to law. The reader may be aware that Luhmann devoted a chapter to the function of law in his last book on law, *Law as a Social System* (2004 [1993]).⁴ However, as will be shown, his focus there is somewhat different, and ultimately it is only in the earlier evolutionary approach that he develops the more 'concrete' concept of the function of law that forms the basis of much of his later theory of law.⁵ The third section, however, will attempt to clarify why Luhmann changed 'tracks' in his approach to the function of law in his later account of law as an autopoietic system, and to understand what this means for the earlier account of law as the congruent generalization of behavioural expectations. The aim here is to keep track of the thread of the basic functional reference of law in the norm through his autopoietic turn, and all the way through to his ultimate speculation that law as a functional system may 'level off with the evolution of global society'.⁶ Only then can the thesis progress to look at another (public) legal system as a solution to global problems, or even to other social systems that emerge beyond the law.

3.2 Norms as counterfactually stabilized behavioural expectations

It is a reflection of the complexity of Luhmann's sociological theory of law that some commentators find the 'central place' of norms in his theory to be 'striking',⁷ while others consider it to be substantially lacking a 'normative core'.⁸ Of course, those two positions do not necessarily contradict each other. One may, after all, give due consideration to the social phenomena of norms without pursuing a normative agenda oneself. This, admittedly, fits well

⁴ Luhmann (2004), 142-172.

⁵ Ibid., 148.

⁶ Ibid., 490.

⁷ Arato and Cohen (1992), 333.

⁸ Krisch (2012), 40.

with Luhmann's well-known 'political quietism',⁹ and his notoriety for proposing a concept of law as indifferent to morality, truth, and even the human being.¹⁰ However, on a more significant level, one cannot advance a concept of law that is so rooted in the dynamic and constitutive role of norms in social evolution, and at the same time completely sever oneself from the substantive content of normative expectations in society. Even if such a theory does present law as evolving towards higher autonomy, in so far as it locates the development and function of law in a more elementary basis of norms in society then it must retain perspective on a range of social norms and their relevance for social evolution. For this reason, this section aims to explore the so-called centrality of norms in Luhmann's theory of law. Though it may often be overlooked, this 'pre-legal' aspect of Luhmann's theory of law is an essential element of his concept of the function of law in as much as it provides a problem from which the system of law emerges, as well as environmental stimuli which it must select, and through which the system is able constitute itself.

Thus it is necessary to revisit the more functionalist approach which Luhmann developed in the early 1970s. Even though the advances made through the autopoietic turn came at the cost of a move away from a focus on the norm, the function of the norm remained part of the fabric of Luhmann's later theory of law. But the roots of the central place of the norm in Luhmann's legal theory must be traced back to his 1972 text *Rechtssoziologie*.¹¹ Although the primary thesis of the book is one of the 'function and unavoidability' of the positivization of law,¹² it explicitly rejects any idea that law 'originates from the quill of the legislator'.¹³ Rather, in pursuing an evolutionary approach, this thesis is only arrived at by embarking from a most elemental level of law as a social system; from an attempt, that is, to 'clarify what is to be understood by the norm and which function the normative ought fulfils in social life'.¹⁴

Luhmann begins this endeavour by pointing out the complexity and contingency of social life.¹⁵ The world is complex because it always offers more possibilities than can be actualized. It is contingent because things can always turn out differently from that which is expected. In such a world the individual is compelled to be selective and take risks. In order

⁹ van Loon (2002), 38.

¹⁰ See for a particularly American critique in this respect Diamond (1992), 1766, or Fletcher (1992), 1635.

¹¹ The English translation was first published by Routledge as *A Sociological Theory of Law* in 1985, and then again in 2014.

¹² Luhmann (1985a), 20.

¹³ *Ibid.*, 159.

¹⁴ *Ibid.*, 7.

¹⁵ *Ibid.*, 24.

that individuals are not to be paralyzed by such complexity and contingency however, expectations serve as inevitable crutches for necessary choice—‘even if one slips once’, as Luhmann says, one does not forgo an expectation of ‘solid, well-trodden ground’.¹⁶ Expectations, in this sense, are able to give ‘meaning’ to such a complex and contingent world.¹⁷

It is only when other people come into view, however, that the deeper complexity of social life becomes clear. Not only do the possibilities actualized by *alter* become possibilities for *ego*,¹⁸ but *alter* can also vary his behaviour in light of those possibilities, just as *ego* can. With this it becomes necessary ‘not simply to be able to expect behaviour, but also the expectations of others in order to find solutions to problems that can be integrated and tested.’¹⁹ This draws on Parsons’ concept of ‘double contingency’,²⁰ but then makes a subtle (but radical) development from it. Rather than simply assuming that the problem of double contingency must be resolved by actors internalising norms that already exist as culture,²¹ Luhmann recognizes a greater degree of contingency in such ‘expectations of expectations’.²² For him they serve as the basis of ‘conflict and discrepancies in reference to which norms have their function.’²³ In other words, Luhmann does not assume pre-existing cultural institutions to integrate expectations, but takes a closer look at the problem and ultimately comes to identify double contingency as the very basis on which norms, law, and indeed much of society, emerges.²⁴

¹⁶ *Ibid.*, 25.

¹⁷ *Ibid.*

¹⁸ Preceding Beck’s influential concept of ‘risk society’ by 20 years (Beck 1992), Luhmann recognized the price to pay for this immense increase in this kind of social awareness in modern society as ‘the potentialisation of risk’, *ibid.*, 26.

¹⁹ *Ibid.*

²⁰ Parsons et al. (1951).

²¹ *Ibid.*, 14-15. In so equating norms with macro social structure, Parsons, according to Luhmann, misses many nuances to expectations, including the difference between cognitive and normative expectations, Luhmann (1985a), 17.

²² Notice here another form of medial reflexivity.

²³ Luhmann (1985a), 26, n. 13.

²⁴ Luhmann: ‘It is the emergence of a social system which is made possible by a doubling of improbability, and which then facilitates the determination of its own behaviour.’ (1995: 117). See also Vanderstraeten (2002), 78ff; Reemstma (2012), 264. Reemstma criticizes the centrality of ‘double contingency’ to Luhmann’s theory as resulting in a sociological theory which ‘presupposes freedom’ and thereby neglects the important social phenomenon of physical violence: ‘[C]an a person dammed to the gas chamber be described as free, having the choice to either wait patiently in line or to break for it and face immediate death?’ (ibid.). But, this overlooks Luhmann’s concept of the relation of physical violence to the evolution of law, in which he considers a close proximity of law to violence as leading to an over-concreteness and lack of abstraction which hinders further evolution (Luhmann 1985a, 117), and as impeding ‘the refinement of juridical semantics, the condensation and confirmation of experiences with new cases, and juridical attention to conceptual and dogmatic consistency.’ (2004, 263). It is for this reason that, to evolve, law must restructure its relationship with physical violence, to externalize it to the political system (Luhmann 1985a, 88). This, however, is something that happens over long course of evolution, and still envisages a role for the symbolic power of violence in the emergence of modern

The fundamental problem of double contingency for Luhmann is that it introduces such a level of complexity and contingency that social action can only be coordinated through the integration of expectations. In this sense, expectations of others must replace coordination through ‘actual communication which is time-intensive and therefore scarce’.²⁵ Thus, where such complementary expectations can be established, they ultimately save time, increase possibilities, and allow for the evolution of further complexity.²⁶ A relatively simple hypothetical might demonstrate this. For example, someone standing on the side of the road on a dark rainy night with their thumb held out at passing cars may do so in expectation that someone will stop to give him a ride. However, it is only if he can adequately anticipate the expectations of drivers as they approach him that he might save himself time and increase his possibilities. For example, if he expects that drivers expect he could turn out to be an axe murderer (just like in the movies), then he can try to look less sinister, take shelter, or start walking. Of course, it is not always easy to have such *tact* in the complexity of everyday life. Indeed, even in this relatively straightforward example there will be a range of expectations that could reasonably be expected: the hitcher may equally expect that a driver will expect him to provide welcome company on the car journey, or expect him to be vulnerable and therefore to help him, etc. But in day-to-day life, with a ‘plurality of people and with continuously changing relevance of situation to situation’, the problem of double contingency becomes much more complex and the need for the integration of expectations becomes even more acute.²⁷

According to Luhmann then, the function of the norm (‘and therefore law’²⁸) is based on this problem of the complexity of expectations of expectations. In other words, through such integration of expectations, the full complexity of social life can be reduced in such a way as to allow evolution towards higher complexity. At this point, however, Luhmann makes another subtle but far reaching development of the concept of double contingency that

legal systems, which may be relevant today to questions about the emergence of an Islamic State which relies to a great deal on ‘lawfare’ as it arguably inches towards becoming a functioning nation-state, see Andrew F. March and Mara Revkin, ‘Caliphate of Law: ISIS’ Ground Rules’, in *Foreign Affairs*, April 15, 2015.

²⁵ Arato and Cohen (1992), 334. Cohen and Arato go on to criticize Luhmann for this, arguing that by making the validity of the norm so dependent on the impossibility of actual communication, Luhmann fails to ‘link mechanisms of real communication and consensus building’ to mechanisms of stabilization (334-336). This somewhat reflects Habermas’ discursive theory of law, but Habermas (as will be demonstrated below) also relies to a degree on the traction gained through expectations to provide starting points for discursive rationality, (1996), 4.

²⁶ This explains also the importance of ‘trust’ in Luhmann’s general sociological theory. As ‘confidence in one’s expectations’, trust is a communicative medium that reduces complexity and consequently allows for increased possibilities of action and experience, and therefore the increased complexity of the social system, Luhmann (1979), 4ff.

²⁷ Luhmann (1985a), 28.

²⁸ *Ibid.*, 26.

he inherited from Parsons. In developing the systems theoretical concept of structure through selection,²⁹ Luhmann argues that it is in the possibility of disappointment, and ‘not in the regularity of its fulfilment, that the reality reference of expectation proves itself.’³⁰ In this respect, he draws on Galtung’s insights regarding the important distinction between ‘cognitive’ and ‘normative’ expectations.³¹ Expectations are treated as cognitive, Luhmann argues, when they are ‘adapted to reality in the case of disappointment.’³² In contrast, normative expectations are not given up if someone acts against them. Instead they signify a determination not to learn from disappointment, and thus are ‘adhered to, even when frustrated’.³³ For Luhmann, it is ‘here that the meaning of the ‘ought’ resides’³⁴—thereby rejecting the traditional distinctions between facts and norms. The ‘guiding distinction’, he argues, ‘is not fact/norm but learning/not learning’.³⁵

Luhmann, therefore defines norms as ‘*counterfactually stabilised behavioural expectations*’.³⁶ They are in this sense, ‘time binding forms’ that ‘project an expectation on the future’.³⁷ Hence the function of the norm is the ‘absorption of uncertainty’³⁸ (and this concept will become important to arguments to be advanced later in the thesis). This allows individuals to give meaning to a world that may often turn out to be disappointing. To go back to the hypothetical given already, the hitcher at the side of the road may not be successful in his attempt to get a lift, but he can expect that there *ought* to be a sufficient degree of generalized kindness to help him out, and may stand out in the rain to prove his point or look for ways to express his contempt at the drivers who pass straight by him in cars that clearly have room for more passengers. This allows him to give meaning to a disappointing reality.

Such obstinacy points to another function of the norm that is even more important in the context of the present study. That is, the way in way in which the counterfactual aspect of the norm gives the individual or organization something to cling to and project against a

²⁹ Ibid.,31. See also, Luhmann (1988a), 27-28: ‘The prospect of the disappointment of an expectation and thus, if one clings to the expectation, of a conflict, serves as a principle of selection by means of which generalizations can be tested.’

³⁰ Ibid., 32.

³¹ See, Galtung, (1959). And in Galtung’s attribution of ‘clear time connotations’ to normative expectations (1959, 214), one can find the seed of the temporal dimension which proved ‘crucial’ to Luhmann’s theory of law (Chrsitodoulidis 2006, 125), and his general social theory (Kjaer, 2006, 67).

³² Luhmann (1985a), 33.

³³ Luhmann (2008a), 20; see also, Luhmann (1985a), 33; (2004), 149.

³⁴ Luhmann (1985a), 33; Luhmann, (1995), 333.

³⁵ Luhmann (2008a), 20.

³⁶ Luhmann (1985a), 33.

³⁷ Luhmann (1993), 54.

³⁸ Luhmann (1988a), 20.

disappointing reality effectively primes the expectation as a basis of social evolution. The full implications of this in Luhmann's general sociological theory will be explored in the fifth chapter,³⁹ but for now it is worth noting how the norm as a counterfactually stabilized expectation allows for a 'doubling of reality'.⁴⁰ That is, by projecting a reality that is different from the 'hard, factual reality', counterfactual expectations allow the beholder to distinguish that hard reality and 'observe it from the other side of the distinction',⁴¹ and with that to open up further possibilities for social evolution; in other words, it might be said, to 'imagine a better world'.

As will be demonstrated in the next section, Luhmann squarely bases the function of law on this concept of the norm. This must be seen to be the 'normative core' of Luhmann's sociological theory of law. While Luhmann's sociology certainly made no attempt to change the world, and while he ruled out the possibility of the 'mind participating in communication',⁴² or other forms of 'steering',⁴³ his concept of the norm at least recognizes the way in which disappointment 'stimulates activities',⁴⁴ and the way in which such counterfactual expectations provide an alternative structure that can be projected against a disappointing 'hard' reality. As such, even if things never turn out the way they are expected to, norms provide the basis of social evolution, and even in some cases 'revolution'.⁴⁵

Moreover, despite fundamental differences in their theory of law and the legitimacy thereof, Luhmann's concept of the norm as the basis of social evolution is also reflected in Habermas' theory of law. Although he rejected Luhmann's concept of the 'time binding' element of the norm and the function of law as 'erasing the deontological dimension of normative validity' that for him was guaranteed by discursive rationality,⁴⁶ Habermas nonetheless also conceives of counterfactual expectations as providing the "'must" of a weak transcendental necessity' which forms the basis of the complex negotiation between facts and validity,⁴⁷ and as therefore acquiring 'immediate relevance for the construction of social order'.⁴⁸

³⁹ See Luhmann (1995), 292ff.

⁴⁰ Luhmann (2008a), 21.

⁴¹ Ibid.

⁴² Luhmann (2002b).

⁴³ Luhmann (1997b).

⁴⁴ Luhmann (1985a), 41.

⁴⁵ Brunkhorst (2014), 15ff.

⁴⁶ Habermas (1996), 49-50. See also Luhmann's reply: 'The uncertainty of the future is the only real invariable of discourse theory', Luhmann (1996a), 886.

⁴⁷ Ibid., 4.

⁴⁸ Ibid., 17.

Let me recap on the salient points about this concept of the norm. At a basic level, expectations serve as structure related to the problem of meaning-oriented human coexistence; the potential conflict and discrepancies of double contingency marks the reference to which norms have their function; norms allow for the possibility of non-learning in the face of disappointment and the ‘doubling of reality’ in such a way as to provide the basis of social evolution. These considerations are all relevant to the question about general norms which at least find formulation and recognition at some level in world society. The connection may not be immediately clear, as much of the problem of double contingency has been presented in the context of dyadic interaction, while these norms are pitched at the global level and thereby relate to a much higher level of complexity. However, the fact that these problems arise at a global level above more concretely defined communities does not in any way exclude them from the issue of meaningful communication in society to which the norm functions. Today, as a direct result of functional differentiation we live in a world society of ‘connective communications’, an ‘overall horizon of meaningful communication’;⁴⁹ and ‘[m]ore communication’, as Sloterdijk points out, ‘means, first and foremost, more conflict.’⁵⁰

One of the most relevant aspects of such functional differentiation is the development of information and communications technology in the last thirty years, which can be said to have transformed ‘society as a whole’.⁵¹ In contrast to previous forms of communications technology, such as the telephone, radio or television, which supported only one-to-one, unidirectional communication, the development of the internet in particular exposes millions of people to an interactive medium, and gives them ‘a role to play’ on the global level.⁵² It is unclear whether Luhmann would have directed his attention to these developments had he lived longer,⁵³ but there is no doubt of their impact on the emergence of world society as one communicative system. Now, more than ever, world society is a social system based on

⁴⁹ Luhmann (2012), 86, 89. This of course is not to propose global equality or unity. According to systems theory, world society presents an incomprehensible unity that can only be observed in various ways. As such, to observe itself it must rely on communication distinctions at the level of second-order observation (ibid., 89-90).

⁵⁰ Sloterdijk, P. (2006): ‘Warten auf den Islam’, 10 *Focus*, 84.

⁵¹ Karavas (2009), 463.

⁵² Magnolo, Schultz and Verschraegen (2005), 351.

⁵³ Despite briefly addressing the subject towards the end of this life (Luhmann, 2012, 66), Luhmann generally viewed technology as the environment of communication, and thus not the proper subject for the sociologist. This is nicely summed up in his reported remark to Kittler: ‘Mr Kittler, it has always been like this since Babylon. When a messenger rides through the gate, people like you ask about the horse he is riding on and people like me about the message he is bringing with.’, translation [*sic*] provided by Karavas (2009, 465), with reference: Kittler, F. (1999): ‘Ein Herr namens Luhmann’, Bardmann, T.M. and Baecker, D. (eds.), *Gibt es eigentlich den Berliner Zoo noch?*, Konstanz: UVK, 183-185, at 185.

meaningful communication.⁵⁴ As such, the problem of meaning-oriented communication is as alive at the global level (perhaps even more so) as it is at the level of any other more clearly defined social community. This is not to claim that norms will arise from some Archimedean point to acquire transcendental status across society. Normativity ‘has to do with how an expectation is processed within a system.’⁵⁵ But, in world society as a social system, norms are often communicated at a more global level than the relatively closer social reference groups of nation-states or the self-contained regimes at the global level.

To bring this problem of general norms further into focus one need only remember that many of those norms—such as, for example, the prevention of oil drilling in the Arctic, stopping forestation for palm oil, fairer terms of trade for local producers, or the prohibition of nuclear weapons, etc.—can all be construed as relating to the ‘most urgent problems’ of functional differentiation.⁵⁶ It is in relation to the risks of functional differentiation that discrepancies and disappointments become apparent, and that counterfactually stabilized expectations arise. As stated by Luhmann, it is social contingency which is ‘indispensable’ to the formation of norms: ‘[w]ithin the domain of the self-evident (for instance, that it takes time to move through space), there is no formation of norms.’⁵⁷ It is for this reason that Luhmann sees the increasing identification of the decisions of other people and organizations as the root cause of the ‘deviant circumstances’ of functional differentiation (i.e., ‘risk’) as leading to the increasing formation of norms.⁵⁸ *Necessitas non habet legem*, as he says,⁵⁹ and as long as the side effects of functional differentiation can be construed as ‘unnecessary’, then ‘it makes sense to oppose’, to ‘communicate one’s opposition’, and to demand that such dangers are avoided.⁶⁰ Thus, for example, any deviant circumstances associated with nuclear weapons can be attributed to decision—Pakistan decides it needs them, while Norway decides it does not, etc.⁶¹ With this, the issue comes to be seen as a ‘world condition’,⁶² and

⁵⁴ Luhmann (1982), 131.

⁵⁵ Christodoulidis (1998), 122.

⁵⁶ Luhmann (1982), 134.

⁵⁷ Luhmann (1993), 54.

⁵⁸ *Ibid.*, xxix. Which only puts a tremendous strain on the modern legal system, *ibid.*, 60-62.

⁵⁹ *Ibid.*, 54.

⁶⁰ *Ibid.*, xxix.

⁶¹ Norway’s position on nuclear weapons has in fact become a little more complicated since the recent rise in tensions between Russia and NATO members, see ‘Norway Parliament Debate, March 12 2015’ (Unofficial translations of quotes on nuclear weapons policy and questions to the Foreign Minister), available at Parliamentarians for Nuclear Non-Proliferation and Disarmament (PNND) website, ‘UK, Norway and Japan parliaments – on a ban, the pledge and the role of nukes’, < <http://www.pnnd.org/articles> >, accessed 12 September 2015.

⁶² Anders (1962), 505.

the basis of normative expectations to be expressed by protest movements,⁶³ and in the applications for adjudication in the various legal systems of world society.⁶⁴

The formation of norms in response to such risks is only further compounded by the advent of world society as a communicative network spreading across the globe. Information and communications technology, which now includes everything from Twitter to the news media, allow for *scandalization* which in itself can ‘generate a norm’ that was not previously formulated at all.⁶⁵ Moreover, the way in which such norms are primed for social evolution through their doubling of reality is capitalized through the same means of information and communications technology. The internet becomes an ‘essential medium’ in which the expression of such norms can be manifested and collated in a ‘given time and space’ and thereby impact upon institutions and organizations and general public opinion.⁶⁶ Telecommunications and information technology in this sense are seen to constitute a ‘global public sphere’, in which protest movements can rely on a medium of open communication and flexible logics to affect change.⁶⁷

Many of these developments are reflected in the increasing focus on norms in international relations literature, which, in opting for a ‘sociological perspective’, have departed from the traditional focus of that discipline on international politics.⁶⁸ These approaches define norms as ‘shared expectations about the appropriate behaviour of actors with a given identity’,⁶⁹ or as the ‘standards for how different actors “ought” to behave.’⁷⁰ As such they are able to recognize the relevance of a wide range of norms, to be held by a range of actors, and to be projected at a range of actors.⁷¹ Furthermore they often focus on norms as reflecting an ‘attitude involving criticism of others’,⁷² and see them as particularly prevalent in response to perceived crises, such as in the areas of the environment and human rights.⁷³

⁶³ See for an overall qualitative survey of the period from 1945-2003, Wittner, (1995), (1998), (2003), and for protest data in the context of Germany see Prodat data collected by Rucht et al. that covers general protests in Germany from 1950 to 2002, available at WZB Berlin Social Science Centre website, ‘Documentation and analysis of protest events in the Federal Republic of Germany, 1950-1996 (PRODAT project)’, < www.wzb.eu/en/research/completed-research-programs/civil-society-and-political-mobilization/projects >, accessed 12 September, 2015.

⁶⁴ See for example, *The Republic of the Marshall Islands v. The United States of America*, et al. (*Complaint for Breach of the Treaty on the Nonproliferation of Nuclear Weapons*), filed 24/04/2014, United States District Court, Northern District Of California, San Francisco Division, Case No. 4:14-cv-01885-JSW.

⁶⁵ Luhmann (2008a), 33; see also Fischer-Lescano (2003).

⁶⁶ Castells (2003), 141.

⁶⁷ Magnolo, Schiltz and Verschraegen (2005), 351; see also, Van Aelst and Van Laer (2010).

⁶⁸ Katzenstein (1996), 2.

⁶⁹ Finnemore (1996a), 22-23; see also Katzenstein (1996), 2; Finnemore and Sikkink (1998), 891.

⁷⁰ Khagram, Rikker and Sikkink (2002), 13.

⁷¹ Ibid.

⁷² Hurrell (2002), 143.

⁷³ Khagram (2004), 11.

The reason international relations studies have focused on the importance of norms in social life at the global level is no doubt because their initial orientation is to the norm rather than law as such. That is, because they are not preoccupied with legal issues they are able to better abstract the norm from the legal process. However, the drawback of this approach is a lack of experience with the specific logics of the legal system that leads them to assume a relatively straightforward legalization of the social norms they identify as being so cogently formulated and recognized in other social systems or at the primary level.⁷⁴ (I will return to this issue at the close of the sixth chapter).

What is needed is an approach which is both orientated to the dynamic role of norms in society as well as the specific logics of the legal system. This delicate balance was struck in Luhmann's earlier evolutionary approach to the function of law. It is therefore necessary to turn now to the concept of the function of law that Luhmann developed from these elementary considerations of the norm.

3.3 The function of law as the congruent generalization of expectations

The last section presented the problem of double contingency and emergent structures of counterfactually stabilized expectations as the basic functional reference point of law. It has nonetheless kept the law at arm's-length in order to conceptually isolate the norm and to thereby better understand how it fits into Luhmann's sociological theory of law. Now I can introduce law's function in basic terms as providing 'social support for contra-factual expectations'.⁷⁵ A norm is 'initially only a projection'⁷⁶—this is exactly what is meant by its 'generality' in the present study; it is initially only formulated and recognised at a more primary social level. However, there must be some more specialised mechanism to 'supervise and channel the process of disappointments of expectation',⁷⁷ a 'second level' in which double contingency is absorbed into functional sub-systems.⁷⁸ This is not simply to enforce the expectation (this will not always be possible), but in order to foster counterfactual expectations in the first place. In other words, the expectant individual who arrives at a discrepant reality must be equipped with potential recourse to some social process of the norm; otherwise she would not have the courage to expect with sufficient conviction to begin

⁷⁴ Finnemore and Sikkink (1998), 901-907.

⁷⁵ Luhmann (2004), 270.

⁷⁶ Luhmann (1985a), 40.

⁷⁷ *Ibid.*, 41.

⁷⁸ Christodoulidis (1998), 120.

with. There may be a number of social systems that perform this supporting role, but, in so far as they do, they are all tied in with the elemental function of the norm in relation to the absorption of uncertainty in the interests of meaningful communication in society. This means that they not only fulfil a function for society—that they ‘serve society’—but that they participate in ‘society’s construction of reality.’⁷⁹

Law is exceptional in this sense (and, as will be seen, such exception is vital to its differentiation). It provides social support for contra-factual expectations ‘in a way that no other system does’.⁸⁰ This section will explore this function of law in further detail, not only to better map the dividing line between legal norms and more general social norms and to better understand what is gained and what is lost in the processing of norms through the legal system, but also to keep the thread of the basic functional reference point of law to normative expectations before moving on to explore the increasing differentiation of law in modern society.

Luhmann’s concept of the function of law changed somewhat over the course of his career. In his earlier more open-systems theory approach, the functional specification of law—that is, its ability provide social support for contra-factual expectations in a way that no other system does—was seen as the basis of its morphogenesis and differentiation in society.⁸¹ In other words, law’s functional specification provided the basis for a self-referential development of structure, and therefore the evolution of the legal system, albeit always as a structure of society and in tandem with society’s own evolving complexity. However, after Luhmann’s autopoietic turn law’s functional specification was deemed no longer sufficient to ensure the differentiation of the legal system (briefly stated, it always invites the search for functional equivalents, and cannot adequately determine legal communications—I will expand on this in the next section). Attention was shifted instead to the role of the ‘code’ of the legal system, as a system-specific form of communication.⁸² As I argued in the last chapter this has meant the concept of the function of law has receded into the background to some degree. It is therefore necessary to first section explore the earlier account of the function of law.

Particularly in his earlier account, Luhmann decomposes the function of law into the three meaning dimensions which ‘emphasize the universality of the claim to validity’.⁸³ That

⁷⁹ Luhmann (1989a), 138.

⁸⁰ Christodoulidis (1998), 122.

⁸¹ Luhmann (1985a).

⁸² Luhmann (2004), 93; Luhmann (1992a).

⁸³ Luhmann (1995), 76.

is, the *temporal*, *social* and *material* dimensions. The *temporal* dimension can be said to be the most basic aspect of the function of law. It essentially involves the institutionalization of the *time-binding form of normative expectations*. Just as the normative expectation is projected against a disappointing future, law, as a system that ‘operates through provisions that are binding for the future’, is able to provide a medium which will transfer this normativity through time.⁸⁴ Norms are thus stabilized against a disappointing future. This does not as yet, however, represent any substantial institutionalization of the norm. In this dimension, it simply involves *selection* of norms by the legal system. Not all normative expectations will make it into law of course, and Luhmann acknowledges that the sheer volume of normative projections in daily life goes beyond the capacity for integration into law as a social system.⁸⁵ However, it is exactly this overproduction of normative expectations which is deemed to be of ‘*fundamental relevance to the evolutionary theory of law*’.⁸⁶ It is only through the surplus of norms in society that law as a system is compelled to select, and selection is presented as ‘a mechanism by which law achieves structure and further differentiates itself as a system.’⁸⁷ Thus, in determining which disappointments it will learn from and which it will not, the legal system is forced to rely on its own internal basis of selection, and through this is able to achieve increasing structural indifference and a ‘narrowing of legal thought’.⁸⁸ In this sense law can be said to make a ‘specific use of the normativity for itself’.⁸⁹

At the same time, the work of law only really begins at this point. As Luhmann says, ‘[n]either consistency, nor freedom from conflict, nor even the functional specification of the normative structure’ are to be achieved through the temporal dimension.⁹⁰ The expectations must be given ‘definition’ and ‘form’, and this is where the social and material dimensions of the function of law come into play.⁹¹ The *social* dimension relates to the mechanisms by which certain normative expectations are selected by law and guided to success. Drawing on anthropological accounts recognising the role of third parties in the development of law, Luhmann introduces the concept of anonymised third parties into his previous dyadic model

⁸⁴ Christodoulidis (2006), 125.

⁸⁵ Luhmann (1985a), 48.

⁸⁶ *Ibid.*

⁸⁷ Stichweh (2011), 20.

⁸⁸ Luhmann (1985a), 163. And ‘selection of selection’ is another example of the way in which medial reflexivity leads to specialization and deviation from the general.

⁸⁹ Luhmann (1988), 27.

⁹⁰ Luhmann (1985a), 48.

⁹¹ Luhmann (1993), 55.

presented in relation to double contingency.⁹² Thus, with this development, rather than resorting to self-help, the disappointed party must look to the expected expectations of third-parties which come to be represented by the institution. To put it bluntly, what is meant by the generalization of expectations along the social dimension is that '[a]n expectation is legal only if third parties normatively expect it.'⁹³

This marks an important point of abstraction for the development of law. In abstracting expectations from their concrete interactional setting to 'the systemic context',⁹⁴ institutionalization allows for expectations 'to be generalised beyond the immediate interaction system and those who happen to be present.'⁹⁵ Norms are thus stabilized by the co-expectancy of anonymous third parties. This is not simply to be associated with the institutionalization of the role of the judge, but can be identified at various points in the evolution of society, and in a range of institutions and organizations as co-expecting third parties. Institutional reduction does not depend upon 'social coercion or even the determination of behaviour.'⁹⁶ Rather its function is located in the 'distribution of behavioural pressures and risks which makes maintenance of an accustomed social reduction likely and gives certain norm projections better chances in the short term than others.'⁹⁷ These behavioural pressures and risks easily accrue once accepted bases of behaviour are 'plainly agreed upon',⁹⁸ and institutional commitments are made beyond individual situations.⁹⁹

A final point to be made in relation to this *social* dimension is to point out that, according to Luhmann, the institutionalization for this dimension does not rest on factually realized consensus. Unlike Habermas, Luhmann considered factual consensus in functionally differentiated society as virtually impossible beyond the limits of small groups or other simple, short-term social systems. Thus, the institutionalization of norms is seen to require only an 'economy of consensus',¹⁰⁰ as long as there is 'an existing preparedness for consensus', and that such is presented in certain moments by the actual experience of some people, then institutions can be established on the common presumption that nearly everyone

⁹² Luhmann (1985a), 49.

⁹³ Christodoulidis (1998), 123.

⁹⁴ Ibid.

⁹⁵ Luhmann (1985a), 54.

⁹⁶ Ibid., 52.

⁹⁷ Ibid.

⁹⁸ For a full account of the burdens this places on the would-be 'rebel', see *ibid.* 53-54.

⁹⁹ Ibid., 54.

¹⁰⁰ Luhmann (2004), 247.

agrees—or even on the possibility that ‘nearly everyone presumes that nearly everyone presumes that nearly everyone agrees’.¹⁰¹

The abstraction achieved through the *social* dimension is furthered in the *material* dimension of the function of law. In order to find full stabilization in law, normative expectations must be ‘immunised against a certain measure of contradictory facts and have to be capable of being linked to plausible cognitive expectations of disappointments’.¹⁰² To appreciate what is concerned here it is necessary to briefly note Luhmann’s Husserlian concept of meaning as a ‘surplus of references to other possibilities of experience and action’.¹⁰³ This presents meaning as a thoroughly sociological concept, in so far that whatever is intended—that is, the focal point of intention—must ‘hold open’ the world as the horizon of possible experience so that the intentional reference can actualize itself as a selection, and thus as the ‘stand-point of reality.’¹⁰⁴ This translates into the problem of double contingency: since there is no possibility of directly sharing in the consciousness of another, ‘expectation of expectations is only possible through the mediation of a common world to which expectations are identically attached.’¹⁰⁵ Expectations in this sense are highly social; they do not appear individually, and they are not determined by nature.¹⁰⁶ Nonetheless, their counterfactual stability depends upon achieving higher abstraction. They must be able to be linked with some overarching meaning beyond the immediate interactional context. For Luhmann, this is achieved by law in its facility to provide ‘principles of meaning’ which bundle together expectations, revise them with experience and release them on demand for selective actualization.¹⁰⁷ Rather than seeking meaningful identification with every individual expectation, law provides ‘more abstract types which can be held constant and then *function as generative rules for individual expectations*.’¹⁰⁸ A new dishwasher machine that due to faulty internal wiring gives its owner a violent electric shock, a defective car tyre that blows out for no apparent reason causing the driver to crash into another vehicle, or the storage of hazardous waste that accidentally leaks into local wells and forces the municipality to spend

¹⁰¹ Luhmann (1985a), 55. Of course, such reliance on a ‘fiction’ of consensus abstracts law from ‘real social relevancies.’ (Christodoulidis 1998, 124). There is no doubt that the evolution of law in this respect has led to problems of excessive formalism and regulative exhaustion that reflexive law has emerged in response to. But this only highlights the necessity of reflexive law to rely on relatively narrower self-contained regimes, and their contractual networks.

¹⁰² Luhmann (1985a), 62.

¹⁰³ Luhmann (1995), 60.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Luhmann (1985a), 64.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

considerable money on a filtration system, are all very different fact patterns that may nonetheless garner expectations that attach to the same abstract principle of strict liability in tort. In this way, legal meaning can be said to provide the ‘context of expectations’.¹⁰⁹ This of course is a system specific reduction of factual experience, self-stipulated and internally selected by law. And again this has a strong evolutionary basis, allowing not only for the reduction of the complexity of social life, but also the evolved differentiation of the legal system through the ‘strengthening of a transmittable, cultural store of ideas.’¹¹⁰

It is not necessary for the purposes of the study to devote further attention to Luhmann’s very difficult concept of meaning.¹¹¹ What is more relevant about this material dimension in the context of the present study is the various levels of abstraction which can serve as the ‘externalised starting points for the expectation of expectations’.¹¹² Here Luhmann identifies a scheme of four societal levels of abstraction in which expectations can be ‘bundled together’ and can be ‘more or less standardized’ in the context of law.¹¹³ These are: *individuals*, *roles*, *programmes* and *values*. Initially, *individuals* (anyone in respect of whom expectations can be fulfilled ‘by her and her alone’) are rejected as proving too concrete for the abstract identification of expectational nexes beyond the intimate group.¹¹⁴ *Roles* are presented as much more successful in this respect. Because *roles* represent ‘unity that can be performed by many different human beings’, role-bound expectational identification is seen as securing the transferability of expectations from person to person, and thus allowing for a significant gain in abstraction.¹¹⁵ This works not only in the sense that we can expect from a role without knowing the person who fulfils the role, but also because disappointment in relation to performance will not spill over to discredit the role as a unity.

Luhmann locates further possibilities for abstraction in the development of law in this context in relation to *programmes*, which are described as a ‘complex of conditions for the correctness of behaviour’, for example in the case of a surgical operation or the reconstruction of an automobile engine.¹¹⁶ By employing if/then schemes, which necessarily determine certain actions or effects of actions, such programmes allow for highly concrete

¹⁰⁹ Ibid.

¹¹⁰ Ibid., 65.

¹¹¹ See, Luhmann (1995), 59-102.

¹¹² Ibid., 66.

¹¹³ Luhmann (1995), 315.

¹¹⁴ Luhmann (1985a), 67.

¹¹⁵ Ibid.

¹¹⁶ Luhmann (1995), 317.

expectational nexes to be fixed to them (and, obviously the bifurcate mechanism of such programmes becomes an important scheme in modern legal systems).¹¹⁷

Finally, there are *values*, which are ‘general, individually symbolized perspectives which allow one to prefer certain states or events.’¹¹⁸ Values appear at the other end of the spectrum from ‘persons’; they are seen as proving too indeterminate as a ‘starting point for the formation and integration of expectations.’¹¹⁹ As such, values cannot specify which actions should be preferred to others in conflicts with other values; they are therefore seen to face a ‘collision problem’ and as losing their ‘prescription value right at the moment it is needed.’¹²⁰ Examples are given which are interesting in the context of the present study: peace, justice, protection of the environment, expression of solidarity, etc.¹²¹ However, Luhmann admits that ‘values are not without importance for the way in which expectations are anticipated.’¹²² Thus in communication about programs, for example, values are important in alleviating the necessary contingency of programs by offering departure points that are difficult to dispute because of their abstraction and basis in morality.¹²³ But more importantly in the context of this study, values ‘serve in the communication process as a kind of probe in which one can test whether more concrete expectations are also at work.’¹²⁴ Thus, ‘peace’ as a value is far too abstract in itself to form the basis of normative expectations, but it might act as a probe for expectations about nuclear weapons for example, which may then even find a more definite starting point in a program, such as that ‘*if* nuclear weapons did cause disproportionate civilian casualties, *then* they would violate international humanitarian law.’¹²⁵

This points to the symbiosis of the different levels of abstraction in the increasing functional differentiation of society. A ‘developmental tendency becomes apparent’ in this respect when viewing each of the four levels of abstraction at once.¹²⁶ With the increasing complexity of society, the various levels of meaning presuppose and determine each other reciprocally. For example, as shown above, values may alleviate communication about

¹¹⁷ Not least the cognitive openness and normative closure they offer, Luhmann (1985a), 174ff.

¹¹⁸ Luhmann (1995), 317.

¹¹⁹ Luhmann (1985a), 69.

¹²⁰ Luhmann (2008a), 29.

¹²¹ Luhmann (1995), 318.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Something the International Court of Justice was ‘generally’ willing to admit in its otherwise ambivalent advisory opinion on nuclear weapons. See *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *ICJ Reports 1996, Dispositif*, para. 2(E).

¹²⁶ Luhmann (1995), 318.

programmes, and programmes may mediate the realization of values. Roles on the other hand become operational through programmes, and at the same time presume individuals who perform them. As society evolves towards higher complexity the symbioses between the various levels of meaning shift. Writing in 1972, Luhmann saw the move from hierarchical differentiation to increasingly complex modern society based upon functional differentiation as being structurally linked to a shift from the prominence of individuals and values to roles and programmes in the development of law. However, twelve years after that, in recognition of increasingly ‘emphasized individualism’, he imagines that values and individuals may ‘pursue new kinds of symbioses’.¹²⁷

Undoubtedly the more important symbiosis though is the one envisaged between the three meaning dimensions of the function of law. It is only after detailing the *temporal*, *social* and *material* dimensions of the function of law separately that Luhmann summarizes them into one concept and presents the function of law more definitively as the ‘*congruent generalisation of behavioural expectations*’.¹²⁸ The congruence here is between the selections made within the three dimensions. Thus, the function of law lies in the selection of behavioural expectations which can be generalised within all three dimensions at once. It is important to note how difficult this is to achieve. The different dimensions are of a heterogeneous kind, and there is no easy natural congruence of the *temporal*, *social*, and *material* mechanisms of generalisation.¹²⁹ The improbability of this achievement takes on a central importance in the modern systems theoretical concept of the function of law. What I said at the beginning of the section about law providing social support for contra-factual expectations in a way that no other system does can now be stated in more detail: it is in the congruent generalization of behavioural expectations along the three separate meaning dimensions that law finds its functional specification.

This has important consequences for the evolution of law as a social system in global society. The congruent generalization of normative expectations represents a ‘selection achievement for law’ that allows law to become increasingly self-referential and thereby furthers its differentiation and autonomy.¹³⁰ However, increasing societal complexity irritates

¹²⁷ Ibid., 319. Or as pointed out by Christodoulidis, the ‘uprooting of legal traditions from their *Gemeinschaft* context, as well as the reversal of this evolutionary trend in the area of Welfare State, is reflected in a mutually reinforcing renegotiation of values (certainty and justice), a shift in programmes (a retreat from conditional and an expanse of goal programming), and a re-materialisation of roles (from the all-inclusive legal personality to more concrete loci of attribution of rights and duties.)’, Christodoulidis (1998), 126.

¹²⁸ Luhmann (1985a), 77. Note here the subtle switch to ‘behavioural expectations’; in realizing this congruent generalization in the three dimensions, the function of law is differentiated from the function of the norm.

¹²⁹ Ibid., 74.

¹³⁰ Luhmann (1988), 27; see also Luhmann (2004), 268.

the further differentiation of law. Rapidly increasing complexity of society during the course of the modern age poses new kinds of problems and possibilities in all meaning spheres. This results in a constellation of ‘part-system-specific horizons of possibilities which cannot be integrated through common conceptions of belief or common external boundaries’:¹³¹ family life makes requirements that are incompatible with professional work, armies and hospitals are hardly justifiable in the economic sphere, etc.¹³² The dramatic increase in complexity stimulates the development of law which can cope with more possibilities, which is capable of absorbing them with selective procedures, and which both caters for the wealth of possibilities and their reduction.¹³³ The expanded horizon of possibilities of experience means that what was previously seen as sacred or constant is now viewed as an area of choice that must be justified by decision making.

Luhmann locates the structural change which establishes the ‘decision’ as the principle of law, or, in other words, ‘positive law’ in the advanced stages of functional differentiation in the nineteenth century.¹³⁴ The validity of positive law should not be seen as being based on the idea that higher norms permit it, but simply because it is recognised as a *selection*: ‘validity is in truth nothing other than the self-reference of law.’¹³⁵ Here we arrive at the state of evolution of legal mechanisms that Calliess refers to when he talks of how ‘[s]uddenly things are very easy’ for the formation of a legal system.¹³⁶ However it is also here where there is a clear shift in the symbiosis of the dimensions of the function of law. In the *temporal* dimension laws may be valid today which were not yesterday and which will possibly not be valid tomorrow. In the *social* dimension a diversely potentialised law becomes law for ‘many and different types of person’; it becomes more independent of the interactional context, and yet at the same time can be generally accepted.¹³⁷ In the *material* dimension, there is no longer any need for a normative history, and many new types of behaviour may come to be subject to legal regulation.¹³⁸

¹³¹ Ibid., 148.

¹³² Luhmann presents this constant under-fulfilment of goals as the real reason that modern society shows ‘anomic’ tendencies. The complexity and contingency of experience in the modern world is presented as reaching the stage that “all tangible meaning enters the shadow of other possibilities” (1985a), 148.

¹³³ Ibid., 157.

¹³⁴ Ibid., 160.

¹³⁵ Ibid., 284.

¹³⁶ Calliess (2002), 195.

¹³⁷ Ibid., 162-163.

¹³⁸ Luhmann (1985a), 162.

All of this necessitates a higher level of structural indifference for law, and this is what is achieved by reflexivity.¹³⁹ The development of reflexive mechanisms means law comes to be increasingly based on itself, indifferent to the ‘symbolic implications of deviance’, and indifferent to morality.¹⁴⁰ Nonetheless, the problems of legitimacy that arise in relation to such a high level of indifference require the increasing incorporation of cognitive mechanisms into what was primarily a normative orientated structure. Not only do participants have to learn to adapt to what has been decided and changed, but legitimacy requires that decision-makers must also be able to learn themselves.¹⁴¹ This is mainly achieved through the increased functional synthesis of law and politics.¹⁴²

Of course, this increasing incorporation of cognitive mechanisms into the basic normative structure of law becomes more pronounced with globalization according to Luhmann.¹⁴³ The fact that many of those fields of interaction which constitute themselves at the global level (e.g., technology, economy and communications, news broadcasting, etc.) are primarily based upon cognitive expectational attitudes has changed law itself. In a passage that anticipates Teubner’s theory of societal constitutionalism, Luhmann argues that many of the ‘worldwide structural formations’ are able now to ‘govern’ regionally validated positive law, not in the form of a supra-positive law, but because of the way ‘the dynamism of global society establishes stimuli for learning’ and exercises ‘pressures toward learning’.¹⁴⁴ This change toward in-built learning is seen as effecting ‘sublime shifts in the way in which law fulfils its function and is experienced as meaningful’.¹⁴⁵ This does not mean that cognitive expectations take the place of the normative, or make them unnecessary;¹⁴⁶ according to Luhmann, ‘the temporal security, normative and counterfactual stabilisation of expectation will remain a requirement of modern society’.¹⁴⁷ However, in consideration of the very narrow basis on which the congruent generalisation of normative expectations is established, Luhmann ends with a question as to ‘whether normativity with all its admitted relevance to behaviour can carry the contact with structural developments of global society.’¹⁴⁸

¹³⁹ Luhmann (1985a), 164.

¹⁴⁰ Luhmann (1985a), 163-164.

¹⁴¹ Luhmann (1985a), 201. This is where the essential function of legally regulated procedures resides. Procedure allows differentiation from the general societal role context, so that the other roles of participants are ‘neutralised’ and the decision can be classified as ‘freely chosen behaviour’, (1985a), 204.

¹⁴² Luhmann (1985a), 189.

¹⁴³ *Ibid.*, 261.

¹⁴⁴ *Ibid.*, 262.

¹⁴⁵ *Ibid.*, 263.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, 264.

¹⁴⁸ *Ibid.*

Later, in his conception of law as an autopoietic system, Luhmann came to see this paradox—normativity remaining a requirement of society, and the problem of law realizing this function at the global level—as perfectly appropriate for the ‘turbulent, global conditions of our times’ (i.e. in that it generates such a wealth of social activity in attempts to invisibilize it).¹⁴⁹ This is certainly an important point to note in moving forward with this analysis. However, first it is necessary to consider in more detail what the development of the theory of law as autopoiesis meant for the concept presented in this section of the function of law as the congruent generalization of normative expectations.

3.4 Function after the ‘autopoietic turn’

The preceding two sections of this chapter have highlighted the centrality of the norm to Luhmann’s theory of law and the functional specification of law in reference to the congruent generalization of expectations in the temporal, social and material dimensions. Questions remain as to how these concepts were affected by the autopoietic turn in Luhmann’s sociological theory. The chapter which Luhmann devoted to the topic of the function of law in his last book on law, *Law as a Social System* (2004 [1993]), has been noted for having ‘largely abandoned’ the earlier focus on the normative stabilization of expectations.¹⁵⁰ A more exact understanding needs to be developed about this now. This section will show that, while it is true that Luhmann later abandoned his earlier *focus* on the stabilization of normative expectations, the functional reference of law to such expectations remains nonetheless important in the overall architecture of his theory. What has happened is that the switch from structure to communication inherent in the move to a theory of law as an autopoietic system has put the focus more on the temporal dimension of the function of law, while the social and material dimensions have receded into the background to be replaced by ‘code’. With the autopoietic turn, function alone is no longer deemed sufficient to differentiate the legal system, as it only invites the search for functional equivalents. Thus, the differentiation of the legal system is only achieved completely with legal coding. However, this qualification only opens up other interesting aspects to the function of law. If law becomes conspicuously unable to further congruently generalize behavioural expectations, or if the social costs of law’s time-binding function can no longer be borne (and

¹⁴⁹ Luhmann (2004), 487.

¹⁵⁰ Christodoulidis (2006), 125.

both of these are speculated in Luhmann's later autopoietic account of law), then it invites the observer to look for functional equivalents. This section will examine the function of law in Luhmann's final treatise on the subject, before moving on in the next chapter to examining functional equivalents to global law beyond the nation-state in relation to the general norms presented in the introductory chapter.

Luhmann begins his account of the function of law in *Law as a Social System* by asserting that the 'question of the function of law is shunted onto two tracks depending on how the problem to which the question refers is defined.'¹⁵¹ The first, he presents as being at a more 'abstract' level, whereby law 'deals with the social costs of the time binding of expectations'. The second is presented as the more 'concrete' concept of the function of law outlined in his earlier evolutionary approach: 'the stabilization of normative expectations by regulating how they are generalized in relation to their temporal, factual, and social dimensions.'¹⁵² Luhmann therefore does not completely abandon his earlier concept of the function of law. At other points he considers it 'complementary' to his theory of law as an autopoietic system,¹⁵³ and declares that what was said about the function of law as systemic stabilization of counterfactual expectations 'does not need to be rephrased.'¹⁵⁴ Nonetheless, in this later account of law he devotes very little attention to this more concrete concept of the function of law, and instead decides to pursue the first 'track' to examine the more abstract concept of law as it 'deals with the social costs of the time binding of expectations.' Why does he do that? And what ultimately does it mean for the concept of law's functional reference to normative expectations that was so carefully explicated in the earlier account?

The first thing that needs to be considered is the way in which the shift to a theory of social autopoiesis reduces the importance of functional specification in terms of system differentiation. The functional reference in the structural relationship between system and environment implied by the earlier, more open systems theory was later seen to place the motor of evolution on the wrong side of the system/environment distinction. With the autopoietic turn references to function recede to the background, and the difference between system and environment becomes the '*departure point*' of a systems theoretical analysis.¹⁵⁵ Reflecting the implications of Maturana's concept of the circular and reflexive dynamics of biological systems and Spencer Brown's calculus of indication, systems are considered to be

¹⁵¹ Luhmann (2004), 147.

¹⁵² Luhmann (2004), 148, & n. 14.

¹⁵³ Ibid.

¹⁵⁴ Ibid., 467.

¹⁵⁵ Luhmann (1988a), 26.

structurally orientated to their environment in that they cannot exist without an environment.¹⁵⁶ In other words, they constitute and maintain themselves by differentiating themselves from their environment, and they use their boundaries to regulate this difference. The self-referential implications of this existence would later lead Luhmann to the conclusion that ‘a system *is* the difference between system and environment.’¹⁵⁷

In contrast to the conception of law differentiated solely on the basis of its function as a structure of society, systems theory switches to the question of how operations produce the difference between the legal system and the environment, and the recursive application of such operations to themselves.¹⁵⁸ On a conceptual level, the shift in focus from structure to process, and the identification of the communicative event as the basic element of society, reduces the importance of an incremental process of morphogenesis through self-reference on the basis of functional specification. Autopoietic systems, it is said, must perform their operations in the actual present and, with this the concept of structure is reduced to refer only to ‘how elements relate across temporal distance.’¹⁵⁹

Thus, a system is only concretized on the level of its elements. ‘Only there,’ says Luhmann ‘does it achieve a real temporal existence.’¹⁶⁰ Again, the root of this lies in his adaptation of Spencer Brown’s calculus of indication. The purpose of drawing a distinction ‘is to produce a difference, because only a difference between this and that makes possible the observation of this or that.’¹⁶¹ This drawing of the distinction is an operation that takes *time*. And because it is an operation that takes time, both sides of the distinction cannot be indicated at the *same* time.¹⁶² An important consequence of this conclusion is that systems operate in their own temporal horizon. Autopoietic systems constitute themselves through the recursive application of their operations to preceding operations. Thus, the recursive interconnection of operations ‘takes place in the present on the basis of currently available conditions and connectivity options.’¹⁶³ In other words, ‘a system only exists as an actually ongoing operation for the time period between the preceding and the following operation.’¹⁶⁴ For the operation then, Luhmann explains, ‘there is accordingly neither a beginning, because the system must always have already begun if it is to be able to reproduce its operations from

¹⁵⁶ Luhmann (1995), 17.

¹⁵⁷ Luhmann (2006), 38.

¹⁵⁸ Luhmann (2004), 78, ff.

¹⁵⁹ Luhmann (1995), 282.

¹⁶⁰ *Ibid.*, 291.

¹⁶¹ Kjaer (2006), 67.

¹⁶² *Ibid.*

¹⁶³ Luhmann (2012), 266.

¹⁶⁴ Kjaer (2006), 68.

its own products, nor an end, because every further operation is produced with an eye to further operations.’¹⁶⁵

In application of these abstract notions to law, the function of law thus comes to be seen as involving ‘time binding’, and attempts to ‘anticipate, at least on the level of expectations, a still unknown, genuinely uncertain future.’¹⁶⁶ In this sense, the reference to law as a ‘structure of *symbolically* generalized expectations’, which he developed earlier, is no longer simply about generalized instructions which are independent of given *situations*, but more explicitly relates to symbols representing something ‘which is invisible and cannot become visible’, i.e., the future.¹⁶⁷

Moreover, rather than rephrasing what was said about the temporal dimension in the earlier evolutionary account, attention is devoted instead to the ‘social costs’ which are a consequence of this time binding function. Here Luhmann briefly revisits the three meaning dimensions of law outlined in his evolutionary approach. ‘Law as a form’ he argues, ‘is related to the tensions between the temporal and social dimensions and which makes it possible to cope with them even under the conditions of an evolutionary rise of social complexity.’¹⁶⁸ This is much the same as what has already been said in relation to the congruent generalisation of the dimensions. However, he qualifies the relationship between the three dimensions in relation to the social costs of time binding. ‘All social adjustments of law’ he states, ‘vary the factual, the ‘contents’ of the values legal and illegal, in order to maintain time binding and the character of consensus/dissent in a realm of reciprocal compatibility.’¹⁶⁹ In other words, because the ‘factual dimension’¹⁷⁰ is in constant flux in administering this ‘balancing act’ there ‘is no factual definition of law’.¹⁷¹

To recap then, the autopoietic turn places emphasis on the system/environment distinction and the operational present, rather than any morphogenesis arising from functional specification, and this in turn leads to increased emphasis on the temporal dimension. Luhmann explains what much of this theoretical shift of focus means for the function of law:

¹⁶⁵ Luhmann (2012), 266. Thus it is only an observer who can make out a beginning and an end by adopting some basis for an arbitrary before/after construction: ‘Only when the system ... has built up sufficient complexity to describe itself in the temporal dimension can it “postcipate” its beginning.’ The determination of a ‘beginning’, an ‘origin’, or a ‘source’ therefore is only ‘a myth fabricated in the system itself — or an account by another observer.’ (ibid.).

¹⁶⁶ Luhmann (2004), 147.

¹⁶⁷ Ibid., 146.

¹⁶⁸ Ibid., 147.

¹⁶⁹ Ibid.

¹⁷⁰ Ziegert translated ‘*sachlich*’ as ‘factual’, whereas Albrow translated it as ‘material’, see for a note on this, Albrow (2014b), xxxv.

¹⁷¹ Ibid.

Contrary to the assumption of an earlier version of the theory of functional differentiation and specification, which was oriented around the advantages of the division of labour, orientation by function alone is not sufficient. This follows from the simple fact that the reference to a function is always an invitation to look for functionally equivalent alternatives, that is, to cross system boundaries.¹⁷²

Thus, function does not suffice for closing the legal system simply because it does not adequately differentiate the legal system from society. It is only the application of the code of legal/illegal as products of second-order observation of the legal system that secure the operative closure of the legal system in this sense.¹⁷³ Furthermore, only such coding provides for the self-reproduction and universality of the legal system, in so far as its binary code (the unity of a distinction) can apply to all matters and can be irritated by every communication, quite independent of the motives of first-order observers.¹⁷⁴ With the introduction of code the institutionalization and abstraction achieved by the social and material dimensions can recede into the background.

These advances do not, however, render function entirely irrelevant in terms of a systems theoretical perspective of law. Even in Luhmann's theory of law as an autopoietic system, functional specification remains 'part of the truth',¹⁷⁵ and, together with coding, is presented as a necessary 'achievement' of the differentiation of the legal system. In a later account Luhmann even states that systems achieve operational closure 'on the basis of their functional primacy'.¹⁷⁶ In this sense, functional specification provides 'distinctive point of self-reference' that the systems network of recursive operations orbit around.¹⁷⁷ Function and

¹⁷² Luhmann (2004), 93.

¹⁷³ It is here, in this focus upon the second-order of observation, that some small degree of similarity emerges between Luhmann's autopoietic theory of law and Hart's 'descriptive sociology' towards a concept of law based upon secondary rules of recognition, Hart, (1997), vi. This is of course not to equate the theories in any substantial sense. Luhmann distinguishes himself from the dogma of legal science by adopting a sociological position focused on the contingency of law, and rejecting as unacceptable the idea of a 'legal source' (this distinction is often overlooked in comparing the theories, see, for example, Arthur Jacobson, 'Autopoietic Law: The New Science of Niklas Luhmann', 87 *Michigan Law Review*, (1989), 1647, 1663). Nonetheless, the shift in focus on to the secondary observation of law can be said to represent some move away from a strict sociology of law towards the sociology of jurisprudence. What saves the broad sociological resonance of the theory in both respects is only the functional specification of law serving as a conceptual precondition of law's use of coding in operative closure.

¹⁷⁴ Luhmann (2004), 102.

¹⁷⁵ Luhmann (1992), 1426.

¹⁷⁶ Luhmann (2013a), 90.

¹⁷⁷ Ibid.

coding are therefore said to ‘stimulate’ each other.¹⁷⁸ Coding might provide a correlate for the universality of law, and may even generate its own conflict, but there still must be a projection of behavioural expectations on the legal system, and thus a specific engagement with a ‘legal’ problem. On the basis of normative expectations and ensuing controversies about the law, law is able to develop its ‘special instruments’.¹⁷⁹ On the other hand, functional specification is sharpened up as the function of law is separated, for example, from the function of morality ‘which operates on a basis of a good/bad distinction.’¹⁸⁰ Thus, just like before ‘law claims a specific use of normativity for itself’.¹⁸¹ However, this time, as an autopoietic system, it ‘not only regulates conflicts but also creates them’.¹⁸²

To repeat this important point: the shift to social autopoiesis does not render the concept of function irrelevant to social systems theory. This explains why when the function of law is discussed in the later *Law as a Social System*, for example, Luhmann refers the reader to the more ‘concrete’ concept he developed in this earlier book before moving quickly to determining what the function of law in the stabilization of normative expectations means for the differentiation of society and its legal system.¹⁸³ It becomes part of the fabric of this later account of law.

3.5 Conclusion

This chapter has focused on Luhmann’s earlier functionalist account of law as an approach which offers a perspective on both the dynamic role of norms in society, as well as the specific logics of the legal system. This was necessary in order to move forward with constructing the problem of general norms at the global level. The concept of the norm as a counterfactually stabilized expectation which opens possibilities of further evolution has been presented in the context of world society connected through communications technology and defined by increasing attribution of risk to decision. Law has been presented as being orientated to these developments through its function in the congruent generalization of behavioural expectations. While this concept of function has faded into background with the

¹⁷⁸ Luhmann (2004), 93. Furthermore, both function and coding are seen as offering different ‘contingency schema’. Function achieves this through inviting comparison with functional equivalents. Coding entails the contingency of evaluation on which the system bases its operations, Luhmann (2013a), 90-91.

¹⁷⁹ *Ibid.*, 153.

¹⁸⁰ Ladeur (1999), 14.

¹⁸¹ Luhmann (1988a), 27.

¹⁸² Luhmann (2004), 153.

¹⁸³ *Ibid.*, 148ff.

autopoietic turn and the general shift to the coding of law in world society, it has nonetheless remained part of the fabric of Luhmann's later theory of law. The functional reference of law is a necessary step in its differentiation through coding, providing the distinctive focal point for the self-reference of the legal system. This maintains the central place of the norm in the systems theoretical concept of law; the theory's 'normative core'.

If anything, the need for normativity only becomes more of a problem with the development of world society. As stated, Luhmann ended his earlier functionalist account of law by questioning whether normativity can maintain contact with the shift of evolutionary primacy to cognitive mechanisms in world society. Writing some twenty years later, in the 'new world order' of the early 1990s, Luhmann was in 'no doubt that the global society has a legal order, even if it does not have central legislation and decision-making.'¹⁸⁴ However, his prognosis for the function of law at the global level was more sceptical than it ever was. On top of the problem of the need for an increasing incorporation of cognitive mechanisms into the basic normative structure of law, Luhmann also identified the problem of law's functional incapacity to assume and process risk,¹⁸⁵ as well the function of law being undermined by a dominating meta-code of inclusion/exclusion in the fragmented nature of world society.¹⁸⁶

As stated in the second chapter, systems theoretical accounts of law have transcended these problems by constructing law in the rarefied spaces of world society. However, one can equally maintain the central focus on the norm and the functional of law and use them to test the limits of law in the face of the problems of globalization. Luhmann himself did not take up the invitation to search for functional equivalents in relation to the problems for law in world society. The question as to why he did not will have to be bracketed for now—however, it can be seen that his theory and method can be used to further construct the problem of norms which are formulated at a more primary level, but which go unrealized in law.

The second chapter has focused on the limits of a global 'private' law. It will now turn its attention to 'public' international law. As it will be shown, that legal system has also become increasingly functionally orientated to norms arising at the global level. However, it will also be shown that this aspiring function is hindered by another lingering functional reference of the international legal system: the stabilization of a sovereignty doctrine that

¹⁸⁴ Luhmann (2004), 481.

¹⁸⁵ Luhmann (1993), 59; Luhmann (2004), 473f.

¹⁸⁶ Luhmann (2004), 487ff.

continues to be structurally embedded in the functional differentiation and globalization of society.

4 General norms and the consensualism of international law

4.1 Introduction

Public international law has not been subject to the kind of functional analysis that Luhmann has conducted into law in the more general (or municipal) context. Luhmann himself argued that the primacy of the nation-state as a subject of international law has frustrated this kind of sociological analysis by obscuring the functional reference to the problem of double contingency and meaningful communication in world society.¹ Even international lawyers admit that the predominant concern for the practical interpretation of positive law in a legal system that is consensual to the will of nation-states often negates an interest in the function of international law.² Under such conditions, for example, the ‘real problem seems always to be less about whether international law should aim for ‘peace’, ‘security’, or ‘human rights’ than about how to resolve interpretative controversies’ that emerge between nation-states.³

Moreover, when international lawyers do directly address the subject of the function of international law, it is often conflated or included with other issues to such a degree that it has, in the end, little to do with the function of international law that one might expect coming from the sociological perspective. Thus, Brownlie devotes the first chapter of his classic textbook to ‘The Function of Law in the International Community’, however, rather than a functional analysis of international law, what is presented is a review of the various conceptions of the nature of international law in international legal scholarship.⁴ Kelsen, on the other hand, entitles the third part of his *Principles of International Law* (1952), ‘The Essential Function of International Law’, yet it contains only a very narrow functional analysis, and is taken up instead by a justification for applying positivist methodology to international law.⁵ One can even find monographs with titles such as ‘The Function of Public International Law’ that are in fact only about ‘the *effect* that rules of public international law

¹ Luhmann (1985a), 261, n. 101. There has been some limited structural-functionalist analysis of international law as a means of ‘social control’ and ‘integration’, see Landheer (1966), 27; Barkun and Gould (1970), 141-150; Hirsh (2005), 914-915. The limited sociological analysis of international law that is available though has not proved very useful for the present study as much of it has focused on ‘societal interests’ which influence nation-states and other international actors, and generally offers little depth of insight into the problem focused on here; see also Carty (2012); Blenk-Knocke (2000).

² Yasuaki (2003).

³ Koskenniemi (2003), 90.

⁴ Brownlie (1998).

⁵ Kelsen (1952), 203-300.

have on members of international society’ in either limiting or conferring the power to act of members of the international community⁶—something quite different from the function of law as stabilizing counterfactual expectations against an *invisible* future.⁷

There is, however, Hersch Lauterpacht’s *The Function of Law in the International Community* (1933), which is said to be the ‘most important English language book on international law in the 20th century’.⁸ Admittedly that is only about the *judicial* function; in rebutting the presumption that the political nature of certain international disputes renders them unsuitable for adjudication, Lauterpacht argues that international judges can and should develop international law at every point by recourse to general principles and the interpretation of the moral purpose of international law. This is obviously much narrower, and otherwise quite different to Luhmann’s concept of the function of law.⁹ Nonetheless, Lauterpacht’s classic text can be interpreted as an early sign of the chrysalis of a more *social* concept of international law that would become more prevalent with time. In justification of his ‘constructive idealism’ in relation to the problem, as he saw it, of an international legal framework that is so consensual towards the will of nation-states,¹⁰ Lauterpacht argues that ‘[n]o doubt it is true to say that international law is made for States, and not States for international law; but it is true only in the sense that the State is made for human beings, and not human beings for the State.’¹¹ A Luhmannian formula might replace ‘human being’ for ‘the problem of double contingency’, but it is clear that what is being grasped at here is the idea that the function of international law is no different from that of the law of any other society.¹²

This position has been echoed by Philip Allott’s ‘social idealism’.¹³ Allott is notable amongst international legal scholars for addressing the issue of the function of international law ‘most explicitly’.¹⁴ He first approaches the issue in the negative sense, by arguing that an international legal system that functions only in respect of the sovereign independence of nation-states is only the international law of ‘unsociety’; that is, in the sense that it negates

⁶ Vos (2013), 1ff. Emphasis added.

⁷ Luhmann (2004), 146. Luhmann’s functionalist approach to law must therefore be distinguished from other sociological approaches which ‘understand law as a social fact and usually define it by its effects.’ (Goldmann, 2012, 351).

⁸ Koskenniemi (2008), 366.

⁹ The convergence of Lauterpacht and Luhmann’s concept of law will be presented below in section 5.3.

¹⁰ McNair (1961), 378.

¹¹ Lauterpacht (1933), 430.

¹² Around the same time, Georges Scelle was also proposing the idea of international law as the ‘*droit des gens*’, with individuals as its true subjects and beneficiaries, see Scelle (1932), 42.

¹³ Allott (2002), x.

¹⁴ Vos (2013), 4.

‘the common interest of human beings in their collective survival and prospering’.¹⁵ The ‘true function of law in the international community,’ he argues, ‘is precisely the same as the true function of law in any human society’,¹⁶ which he reads, more on intuition rather than sociological analysis, as ‘the self-constituting of all forms of society.’¹⁷

These functional accounts of international law reflect the general development of international law since 1945. After the war, international lawyers began to expand the scope of law beyond the subjectivity of nation-states, not only in advancing concepts of ‘transnational law’ as encompassing the ‘actions or events that transcend national boundaries’,¹⁸ but in reimagining international law as the ‘common law of mankind’,¹⁹ as a legal framework of ‘co-existence’,²⁰ and in broadening the concept of ‘international community’ to posit a more primary subject of international law that is independent of the will of nation-states.²¹ Moreover, rather than being driven by purely utopian aspirations, this development of international law—in so far as it was seeking to overcome the formalism of classic international law and to address the evolving complexity of international and global society—was symptomatic of more general social trends which were equally reflected in the turn to reflexive law at the domestic level.²² The ‘sociological approach’ of the New Haven school, for example, which led the turn away from formal rules to focus instead on law as process, argued for the abandonment of the traditional approach to international legal personality and for the inclusion of a broader social category.²³ Ultimately these approaches led to increasingly broad statements of the function of international law as, for example, ‘identifying common interest, and providing a means for attaining these’,²⁴ or ‘the application of a conceptual apparatus or framework ... to the concrete problems faced in the international community.’²⁵

World society has changed radically in the past 100 years, and the developments appear increasingly taxing for classical international law. Within a relatively brief time period international law has gone from dealing with issues of interstate comity which could be easily answered with a Westphalian framework of sovereign equality and independence to issues

¹⁵ Allott (2009), 77.; see also, Allott (1998), 406.

¹⁶ Allott (1998), 393; Allott (1999), 31.

¹⁷ Allott (2002), 289.

¹⁸ Jessup (1956), 136.

¹⁹ Jenks (1958).

²⁰ Friedmann (1964).

²¹ Mosler (1974), 18.

²² Koh (1996), 189.

²³ See for example McDougal (1953); see also Higgins (1995).

²⁴ Higgins (1982), 43.

²⁵ Ratner and Slaughter (1999), 292.

involving the threat to the international community as a whole; to issues which simply cannot be left to the presumed independence of nation-states.²⁶ Thus, despite the classical foundations which predisposed the international legal system to consensualism towards the interests of independent nation-states, international lawyers have sought to reconfigure international law in such a way as to better answer the problems that present themselves with globalized society.²⁷ The high water-mark of this, as will be explored below, is the construction of an international constitution that, in response to the increased appearance of de-territorialized problems and global interdependence, asserts a withering of state sovereignty and a shift to an orientation instead to ‘fundamental’ global values and norms.²⁸

It is therefore a logical step to ‘cast a side-long glance’ at public international law as a functional equivalent to the problem of general norms at the global level. This also has the advantage of reflecting the ‘crucial’ role of the nation-state in the global normative order.²⁹ However, before I move in the next chapter to the more specific and empirical examination of international law’s performance in respect of certain general norms, I wish to use this chapter to introduce the international legal system in a more general and theoretical manner, and to discuss some of the underlying conditions which bear relevance on international law’s functional capacity in relation to general norms. Ultimately, what this chapter hopes to do is bring to the fore the paradox of international law: that although that legal system has been increasingly orientated to world society as a social system since the end of the Second World War, the historical foundations of the international legal system, nonetheless, continue to orientate international law towards a sovereignty doctrine which conflicts with the realization of generalized norms arising at the global level. This conclusion may appear pedestrian; little different, for example, from Koskinniemi’s argument that international law has become a dialectic between apology and utopia. However, using systems theory and functional method, the chapter hopes to show that the conflict is not one of ideologies, but rather functional references: that the original functional reference of international law to world society was established through its stabilization of the emerging sovereign nation-state *as a pillar supporting the shift to functional differentiation*, and that this entrenched structure continues to interfere with the realization of international law’s functional reference to generalized norms at the global level.

²⁶ See Declaration of President Bedjaoui, 268, para. 15, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, 1996; see also Krisch (2014), 4-5; Shaffer (2012), 670-671.

²⁷ Tomuschat (1993), 209; Simma (1994), 243; Charney (1993).

²⁸ Peters (2006).

²⁹ Verschraegen (2011); Thornhill (2012).

To reach this conclusion the chapter will employ a tripartite scheme to explore the underlying conditions of the international legal system. The first section will examine international law's relationship with politics. It will argue that international law's lack of structural coupling with a centralized political system is *a consequence of the successful functional synthesis of law and politics achieved within the nation-state*, and that this condition detracts from international law's legitimacy in positivizing general norms at the global level. The second section will look at a continued problematic relationship between international law and physical violence. This too will be presented as consequence of the sovereign independence of the nation-state which ultimately frustrates the development of the legal autonomy which is necessary for the positivization of general norms, and as a conspicuous invite of the search for functional equivalents for the realization of global norms. The third section will present the sovereignty doctrine which is central to international law as segmentary differentiation of the global political system that not only underwrites these conditions, but which remains structurally related to the functional differentiation of world society. This tripartite is completely arbitrary, and there will be inevitable conceptual overlap between each of the factors. Nonetheless, hopefully this reductive method will be enough to present a snapshot of the complex underlying conditions of the international legal system, before moving on to a more empirical analysis of international law in the next chapter.

4.2 The structural coupling between international law and politics

International law's 'antagonistic relation to politics'³⁰ has been a perennial theme for international legal scholars. The prevalent view that that international law has no autonomy from the power structures of international society stimulates much of international legal scholarship.³¹ Writing in 1989, for example, Koskenniemi presents the spectrum of scholastic concepts of international law under four categories in terms of 'how they differ in respect of their approach to the law/politics delimitation.'³² This includes a sceptical approach which doubts the law/politics distinction at the international level (but which therefore fails to take

³⁰ Luhmann (1985a), 261.

³¹ The view that the taming of political power through law is only possible *within* the boundaries of the sovereign nation-state is not simply limited to dated realist international theory, but is prevalent also in contemporary rational choice approaches to international law, see, for example, Goldsmith and Posner (2006); cf. Guzman (2008). For similar conclusions from the internal perspective historical legal positivism not therefore 'law so properly called', see Austin (1995), 18; Hart (1997), 214; cf. Waldron (2008, 68-69) for a critique of Hart's concept of international law as 'careless' and 'unhelpful'.

³² Koskenniemi (2005), 189.

account of law's normativity);³³ a rule-based approach which identifies law with formal rules and considers everything else 'politics' (but which fails to show why its own interpretation of the rule is 'unpolitical');³⁴ the policy-based approach which presents a more porous distinction between law and politics at the international level (but which must ultimately grasp at natural law principles to avoid uncritical apologism);³⁵ and an 'idealistic' approach which distinguishes law from politics on the basis that law is a 'scientific truth which is verifiable to the actual living conditions, needs and interests of peoples',³⁶ (but which, in doing so, inevitably appears 'political' itself).³⁷

In recent years international lawyers have reflected the increasing societal fragmentation at the primary level and developed a more nuanced approach which navigates all these pitfalls. First they have sought to adopt 'an intermediate position, one that maintains the distinctiveness of the legal order while managing to be responsive to the extra-legal setting of politics, history and morality.'³⁸ This has been postulated as a recognition, on one hand, that international law necessarily 'involves the pursuit of social ends through the exercise of legitimate power' and is thereby an 'aspect of the broader political process', and, on the other, that international law retains a sufficient degree of normativity that 'the rules must be accepted as a means of independent control or that effectively limits the conduct of the entities subject to law.'³⁹ Since then, however, international law is supposed to have entered its 'post-ontological era', whereby it has achieved the maturity to move beyond questions of whether international law is 'law' or simply 'politics', and to address what are seen as the pertinent questions as to the effectiveness or fairness of international law.⁴⁰ This can be seen to have provided the basis of a range of approaches which now embrace the conflation of international law and politics; for example, an approach that accepts, and even focuses on, the 'politics of international law' as a 'grammar' essential to the practice of international law. The politics of international law then becomes 'what competent international lawyers do.'⁴¹ In this professional milieu, even concepts of international legal positivism are reconstructed in a way that acknowledges that there can be no simple

³³ See for example, Morgenthau (1940).

³⁴ See for example, Schwarzenberg (1947).

³⁵ See for example, McDougal (1953).

³⁶ See for example Judge Alvarez's separate and dissenting opinions as a judge at the World Court: dissenting opinion, *Admission Case*, *ICJ Reports 1948*, 69–70; dissenting opinion, *Status of South West Africa Case*, *ICJ Reports 1950*, 177–178; dissenting opinion, the *Anglo-Norwegian Fisheries Case*, *ICJ Reports 1951*, 149.

³⁷ Koskeniemi, (2005), 189-215.

³⁸ Falk (1969), 34 – 35. See also Henkin (1979), 1 – 7; Casese (1986), 2.

³⁹ Schachter (1982), 26.

⁴⁰ Franck (1995), 6.

⁴¹ Koskeniemi (2005), 571.

distinction of law and politics, as the old ‘rule-based’ approach would have it, but which make attempts instead to ‘to celebrate the role of politics in international reality.’⁴²

Thus the observation of law’s antagonistic relation with politics hardly offers a refreshing insight into international law. There is, however, something new to be added in this respect by engaging a sociological perspective which views a ‘certain synthesis between the political and legal functions’ as being indispensable to the evolution of modern society.⁴³ The upshot of this functional synthesis for the legal system is an openness to the normative complexity of society and the provision of an external source of authority to support its legitimacy in accommodating a greater range of norms. While it is not possible to map in detail the co-evolution of law and politics at the national level it is nonetheless useful to briefly consider key aspects of this co-evolution and to juxtapose it with the evolution of the international legal system. This juxtaposition is important because it highlights how the entrenched coupling of the legal and political systems at the national level very much determined the character and shape of the modern international legal system. This section will therefore begin by briefly recounting Luhmann’s functionalist account of the co-evolution of law and politics at the national level, before considering the way in which the evolution of international law has been both different but connected to the co-evolution of the legal and political system at the national level. Rather than engaging in a lengthy analysis of the co-evolution of law and politics though, it will reduce analysis to the development of the function of law through various forms of societal differentiation.⁴⁴ Generally speaking these are: segmentary differentiation, stratificatory differentiation and functional differentiation.⁴⁵

Segmentary differentiation relates to the principle by which ‘society is structured into various equal, or at least similar, part systems’.⁴⁶ This is commonly associated with primitive society, and would include, for example, families, tribes, villages, etc. This ‘form of differentiation is the one most prone to be being organized in terms of territorial

⁴² d’Aspremont and Kammerhofer (2014), 7.

⁴³ Luhmann (2004), 165.

⁴⁴ Ibid.

⁴⁵ Luhmann (1977). Kjaer also adds another form of differentiation (apparently drawing upon Foucault, 2007), namely ‘territorial differentiation’ to imply a ‘construction of a limited and coherent geographical space which is clearly demarcated from other geographical spaces within the framework of the modern nation states’ (2014, 21). Whilst that may seem relevant to the present study, it only obfuscates matters unnecessarily; what is most relevant to international law is the sovereign equality of nation-states, and that is most adequately represented by the segmentary principle of differentiation.

⁴⁶ Ibid, 33.

delimitations',⁴⁷ or to be 'distinguished on the basis of either descent or residential communities, or a combination of the two.'⁴⁸

Stratifactory differentiation relates to differentiation in terms of rank and the creation of a hierarchical social order. As Luhmann puts it, it allows for 'dissimilarity in rank between subsystems'.⁴⁹ This form of differentiation enjoyed primacy in the period from Classical Antiquity to at least the early Middle Ages.⁵⁰ However, it is still reflected in aspects of society today, such as in the Indian caste system, in patriarchal society, and in those societies that are still largely stratified in terms of class. Moreover, hierarchical differentiation also remains instrumental to the productivity of modern organizations.⁵¹

Functional differentiation refers to the differentiation that occurs when specialized communications accrue around the 'special functions *to be fulfilled at the level of the society itself*.'⁵² On one hand, each system is differentiated out through its function and coding. On the other, the functions have to be fulfilled equally and society does not give primacy to any one system. Functional systems are therefore 'alike in their dissimilarity.'⁵³ We have seen already the example of the functional specification of the legal system in the stabilization of normative expectations. Other examples include an economic system that secures 'want satisfaction within enlarged time horizons',⁵⁴ a religious system that can give foundation to meaning 'whenever a detour is taken via paradox',⁵⁵ etc. The gradual change from segmentary to functional differentiation is generally seen as a basic feature of societal development.⁵⁶ According to Luhmann the primacy of this form of differentiation 'developed since the late Middle Ages and was recognized as disruptive only in the second half of the 18th century.'⁵⁷ The first date will prove significant to the argument presented below in this section.

These are the three forms of differentiation through which the co-evolution of law and politics can be read. Luhmann did later add centre/periphery differentiation⁵⁸ which allows for asymmetric relations between different social spheres, for example, centres within tribal

⁴⁷ Albert and Buzan (2010), 318.

⁴⁸ Luhmann (2013a), 13.

⁴⁹ Ibid.

⁵⁰ Luhmann (1985a), 131.

⁵¹ Luhmann (2964), 209; Luhmann (2013a), 146; Kuhl (2013), 68.

⁵² Luhmann (1977), 35.

⁵³ Luhmann (2013a), 13.

⁵⁴ Luhmann (1977), 35.

⁵⁵ Luhmann (2013b), 98. For a list of example of system functions, see Luhmann (2000b), 141.

⁵⁶ Luhmann (1985a), 110; Durkheim (1964); Eisenstadt (1964).

⁵⁷ Luhmann (1997a), 70; Stichweh (2013), 50.

⁵⁸ Luhmann (2013).

structure or the difference between cities and rural areas within the nation-state.⁵⁹ This also can be identified in relation to the early international relations in the form of citizen/foreigner, as well as international relations between the first and third world,⁶⁰ and is arguably also related to the ‘global city’ with all its attendant crises.⁶¹ This form of differentiation will be only presented as relevant to the present analysis in that it allows for the transcendence of the principle of segmentation,⁶² for example in the equal differentiation of sovereign nation-states which are also arranged in a first and third world basis.

As Luhmann says, there is no theoretical justification for this catalogue.⁶³ And, in so far as they do correspond to reality, the forms of differentiation do not hand over neatly with historical development but instead may overlap and at times even regress to earlier the primacy of earlier forms.⁶⁴ Moreover, while one form of differentiation may typically gain primacy once it is ‘tried and tested’ by societal evolution, various forms will always coexist and work in symbiosis. Thus, even in modern society which gives primacy to functional differentiation, segmentary differentiation plays a role, for example in the differentiation of families or nation-states, while stratification exists in class systems. As I explore below, the complex integration of the forms of differentiation in the constitution of world society bears and important relevance to the development of international law. Finally, the presentation of the co-evolution of the legal and political systems through the prism of these three forms of differentiation is admittedly reductive of the non-linear complexity of the evolution of the modern nation-state.⁶⁵ Nonetheless, the aim here is to present a basic picture of the structural relationship between law and politics in the context of this complex of differentiation.

To begin with, in primitive society which gave primacy to segmentary differentiation there was little functional synthesis between law and politics. Rather, the regulation of disputes under such a form of differentiation was so heavily conflated with the organization of power that the functional specification of either a legal or a political system could not develop properly. Here the dominating principle of kinship meant that in legal disputes adjudicators could rarely overlook who the direct and indirect participants were in relation to ancestors, property or reputation.⁶⁶ As such there was no real possibility of conceiving of law

⁵⁹ *Ibid.*, 13.

⁶⁰ Wallerstein (1974).

⁶¹ Sassen (2000), 139ff; Sassen (2014).

⁶² Luhmann (2013a), 13.

⁶³ Luhmann (2013a), 13.

⁶⁴ Albert, Buzan and Zurn (2013), 3.

⁶⁵ For a more detailed empirical study of this complex and non-linear co-evolution, see Thornhill (2011c).

⁶⁶ Luhmann (1985a), 117.

as a contingent normative structure, and therefore no concept of legal ‘validity’. Law could only move beyond this to forms of conciliation in the late phases of archaic societies which were ‘familiar with a certain extent of political organization’ and with the differentiation of political-administrative roles and the establishment of decision-making procedure.⁶⁷ However, as long as ‘the function of arbitration and satisfaction can only be realised in close dependence on the social structure and distribution of power contained within it’, the potential development of law towards higher complexity remained limited.⁶⁸

The problem was solved to some extent with the shift to stratifactory differentiation in pre-modern high cultures. The hierarchical ordering of society in terms of an ‘above’ and a ‘below’ allowed for the ‘societal primacy of the political function centre.’⁶⁹ The development of the political system in turn facilitated the increasing institutionalisation of procedure, tasks could be distributed in accordance with those ranks, and ‘an asymmetrical communication structure with directive capacity at the top’ could be established.⁷⁰ The establishment of an apex which was superior in power to all the individual forces of the city-state meant that normative decisions could be enforced, and with this courts and the role of the adjudicator developed beyond the supervision of the ritual and led to the increased abstraction of legal doctrine.⁷¹ The institutionalization of anonymised third parties guaranteed a certain degree of independence in adjudication and allowed for decisions based more through orientation to norms and encouraged a higher degree of verbalisation and reflection on the law. Furthermore, judicial semantics became more refined and condensed with increasing adjudication before the courts.⁷²

The church in particular provided a model of political and legal organization for European states in the high Middle Ages.⁷³ However, according to Luhmann, the continued dependence upon relatively concrete social reality and a dominating religious horizon endowed law with too many ‘symbolic and expressive functions’ and ultimately meant that political rule could not yet usurp responsibility for the establishment and change of law.⁷⁴ This changed again, however, in the late Middle Ages, with the Reformation and the

⁶⁷ Ibid., 122-127. See also Eisenstadt (1959).

⁶⁸ Luhmann (1985a), 117-127.

⁶⁹ Ibid., 131; Luhmann (2013a), 184.

⁷⁰ Luhmann (1985a), 132.

⁷¹ Ibid., 129.

⁷² Ibid., 144. Ultimately, under these conditions law appeared increasingly contingent, and therefore valid through institutionalization. And Luhmann locates the seeds of an idea of legal selectivity (positive law) in the classical distinction between invariant and variant law (*νόσει* and *νόμοι*). (ibid. 144-145).

⁷³ Thornhill (2011c), 32-39.

⁷⁴ Ibid., 143.

increased renouncement of political affiliation with the Holy Roman Empire. This marks a pivotal point in the emergence of the modern nation-state as a unity of law and politics.⁷⁵ However, it also must be read in the more general context of the shift from stratificatory to functional differentiation that was occurring around that time. The fragmentation of society into functional spheres, each different in their functional specification and yet alike in claiming universal authority, led to an explosion of possibilities of experience that could only be realized to a limited extent, and thus to ensuing problems of shared meaning and consensus.⁷⁶ Yet, at the same time, hierarchy came to be increasingly experienced as contingent and the legitimacy of representation was questioned.⁷⁷ Through some tumultuous evolution the political system—that is, parliamentarianism and ‘consensus by means of rationally ordered discussion’—emerges as the best equipped to deal with this problem.⁷⁸ Whether or not it remains so today, politics appeared the best solution under the conditions arising from the shift to functional differentiation. Although parliamentary representation could not take the place of hierarchy and its summit, Luhmann considers this development as the only means of creating the ‘the fiction of the general will’ in functionally differentiated society.⁷⁹

These developments necessitated a more entrenched form of functional synthesis between law and politics than was achieved in previous societies. The increased experience of contingency and dissolution of previous authority results in calls for either ‘rule of law’ or ‘right of resistance’, and ultimately leads to the unity of law and politics in the ‘state’.⁸⁰ On the one hand, the rule of law legitimates the administration of the political system. On the other, law is endowed with an authority to *change* and to respond to the increased societal complexity through its coupling with the political system. This arrangement manifests itself in legislation to an increasing extent. Thus, positive law develops when the political system ‘usurps the decision regarding law and then deals with the societal system as a whole as its environment and source of information, pressures, stimuli for norms, in short as an

⁷⁵ Thornhill (2011c), 88-95.

⁷⁶ Luhmann (1985a), 148.

⁷⁷ Luhmann (1987), 104.

⁷⁸ Luhmann (1987), 104. Thornhill shows that ‘invoking the authority of parliament’ to demonstrate the legitimacy of law was something that was achieved by different means and at different stages of the late Middle Ages within the various European states, (2011c), 83ff.

⁷⁹ Luhmann (1987), 103. This is another similarity between Habermas and Luhmann. While Luhmann does not share Habermas’ conviction in *actual* consensus through these arrangements, he nonetheless recognizes them as important to the illusion of such. Kjaer contends both Habermas and Luhmann ‘see the political and legal systems as characterised by Weberian organisational and Kelsenian legal hierarchy’, (2009), 533.

⁸⁰ Luhmann (2004), 360-361. See also Thornhill (2011c), 105.

excessively complex area of selection.’⁸¹ These lines of development led to the conditions for the full positivization of law: the channelling of normative projections which aim at legal validity along the political route; the centralization and regulation of political conflicts centres, where political fronts could organize themselves to ‘simultaneously mirror general societal contradictions’, without descending into violence, and; the variability of programmes that facilitates the opportunistic treatment of ‘values’.⁸²

According to Luhmann, these developments are perfected with advance of the constitution. It was not until the end of the eighteenth century, and notably ‘at the periphery of Europe’ (i.e., in North America), that the form was ‘invented which *guaranteed* the structural coupling between the legal and political systems.’⁸³ Constitutions both *restrict* the influences of law and politics on each other while at the same time *increasing* possibilities for both systems.⁸⁴ This arrangement allows for the exclusion of corrupting influences from the respective systems;⁸⁵ a filter through which external stimuli can be channelled into the system. On the other hand, it opens up more possibilities for the legal system to realize the varying normative decisions of the political system, while the legitimating effect of legalization opens up more possibilities for the political system.⁸⁶ These conditions are co-dependent: constitutions allow for an immense increase in mutual irritability by ‘limiting the corridors of contact to the respective systems.’⁸⁷

After the autopoietic turn, Luhmann came to define this arrangement whereby a ‘system presupposes certain features of its environment on an ongoing basis and relies on them structurally’, as *structural coupling*.⁸⁸ Structural coupling achieves a number of things for the system, beyond the externalization of the systems foundational paradox—as, for example, when law is able to acquire legitimacy through its structural coupling to politics through a constitution.⁸⁹ Structural coupling also allows the system to be open to the

⁸¹ Luhmann (1985a), 187.

⁸² Luhmann (1985a), 189-190.

⁸³ Luhmann (2004), 404. Emphasis added. Cf. Thornhill who argues that the criterion of the constitutional state—that political power can be applied across complexly differentiated societal domains—is not reached in most societies until the nineteenth century’, (2011c), 159; see also for a similar view, Grewe (2000), 165.

⁸⁴ Luhmann (2004), 404.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid., 382.

⁸⁹ According to Luhmann, the generalized media of all function systems are based on the paradox of self-reference, Luhmann (2012), 224. In the absence of any Archimedean point of foundational rationality, a system’s first distinction is based only on itself. This can be seen through the re-paradoxification of law with the simple question about the unity of its code (‘Is the distinction legal/illegal itself legal?’). Other generalized media of communication, such as truth or money, can be re-paradoxified in a similar manner. If exposed, such a foundational paradox would paralyze the system. But structural coupling facilitates the reciprocal

environment while, at the same time, maintaining the historical structures of the system. Rather than transforming the operatively closed system into an open, or ‘trivial’, system,⁹⁰ structural couplings are said to ‘trigger irritations’ within the system; that is, the recognition of environmental stimuli which depend on the ‘form of perception’ that is particular to the system.⁹¹ This makes it easier for the system to ‘focus irritability and prepare, in the ambit of possibilities, for what may happen.’⁹² But, this does not lead to the system merging with the environment in any way. Because self-reference depends upon the system being able to use the difference between itself and the environment within itself, the channel to environmental stimuli achieved with structural coupling only furthers the systems differentiation.⁹³

How has international law reflected the structural coupling that has been achieved by politics and law at the national level? The most direct answer to that question is contained in the statement that: ‘[t]he character of modern international law, and its transformations, depend upon the structure of the modern nation State system.’⁹⁴ However, this is a rather negative formulation; it states only what is lacking, and does not spell out what kind of structural relation international law has built with the political system. Obviously though international law has not been able to achieve a similar kind of structural coupling with a centralized political system that is capable of representing world society. If one looks at the history of international law,⁹⁵ one can obviously find a different evolution that is parallel to the co-evolution of law and politics within the modern-nation-state.

While there may be some evidence that relations between Greek city-states⁹⁶ were characterised by an early form of the law of nations,⁹⁷ or that such took hold with the concept

externalization of the foundational paradoxes of both systems, Luhmann (2004), 409-412; Luhmann (1990b). As each system provides a measure of constraint on the other, each can refer to a source of authority beyond itself—again, even if this reference is an illusion, it is enough to ‘invisibilize’ the paradox and allow for ensuing communications.

⁹⁰ von Foerster (1985).

⁹¹ Luhmann (2004), 383.

⁹² *Ibid.*

⁹³ Luhmann (1995), 9.

⁹⁴ Grewe (2000), 13.

⁹⁵ And it is noted that the historiography of international law is, like that of any other system, dependent on the construction of the observer, Yasuakai (2000), 2; Koskenniemi (2012), 958.

⁹⁶ Some trace the origins of international law to an even earlier point: ‘Evidence of interstate agreements can be traced back to Sumerians and Assyrians in the second millennium BCE.’ Bederman, (2001), 24ff.

⁹⁷ For those who argue that international law can be traced to ancient Greek society, see von Wilamowitz-Moellendorff (1905), 29; Ostwald (1986), 119. Greek society had reached such a degree of differentiation and social reflexivity as to institutionalise diplomacy and conceive of ‘laws common to all men’, Philipson (1911), 57-58. But things were still some way short of an international community binding the different city-states together and thereby forming the basis of international legal rights and duties, Grewe (2000), 9. What existed was generally limited to basic comity or the proxenia extended to foreigners by the citizens of ancient city states. Moreover, we know from Thucydides’ account of the Melian Dialogue that, despite the civilities and

of *jus gentium* developed by Roman jurists,⁹⁸ most agree that ‘only from the late Middle Ages is it possible to find consistent traces of international legal order.’⁹⁹ According to Grewe, the complex factors that led to the emergence of the modern international legal system can be located with a temporal triangulation of the emergence of Christendom as a ‘community of faith’ in Europe in the high Middle Ages, its subsequent dissolution in the Reformation in the late Middle Ages, and the demarcation of peace in Europe in 1648.¹⁰⁰ It is worth remembering here Luhmann’s argument about the shift to functional differentiation: ‘In the early seventeenth century the process starts’ and is ‘made visible by religious wars, by economic fluctuations, and geographic and scientific extensions of world views.’¹⁰¹

This reflects the popular view of the Peace of Westphalia as the ‘majestic portal’ through which modern international law emerged.¹⁰² Despite the complexity of the evolution of international law, and the ‘mythic’ status the Peace of Westphalia has acquired in the international legal system,¹⁰³ there is no doubt that the peace treaties of Münster and Osnabrück in 1648 which ended the Thirty Years War were a pivotal moment in the development of international law. The advent of sovereign and equal states, more than any other historical development, made international law a ‘necessity’.¹⁰⁴ But viewed through the prism of differentiation theory, this ‘necessity’ takes on a new colour and can no longer be simply explained as the necessity of regulation of inter-relations between newly emerged sovereign and independent nation-states. Rather, it can be construed as solution to the broader problems that emerge with the shift to functional differentiation that gave rise to nation-state.

Something that is often overlooked in this context is the link also between the development of international law by Spanish scholars in the sixteenth century and the global activities of Spanish conquistadors in the Age of Exploration. Many scholars credit Vitoria with first distinguishing international law as *ius inter gentes*: a concept of a universal

diplomatic cordialities, interstate relations were governed mostly by expediency rather than justice, Thucydides (1972), 400ff.

⁹⁸ Ago points to a ‘common international law as between all the peoples of the Mediterranean’ emanating from Rome in the 3rd century BCE, (1982, 227); see also Philipson (1911), 101; Walker (1899), 51. However, interstate relations were too often attended with violence for expectational nexes to crystallize, McCarthy, (1963), 68.

⁹⁹ Grewe (2000), 8; see also Wengler (1964), 107; Presier (1978).

¹⁰⁰ Grewe (2000), 51-160. Cf. the importance that Thornhill places on this period in the emergence of the modern nation-state, (2011c), 88-157.

¹⁰¹ Luhmann (1977), 45.

¹⁰² Gross (1948), 28; see also Spruyt (1994), 27; Morgenthau (1985), 294; Steinberger (2000), 501; Although as Grewe points out, the reasons for the emergence of international law are much more complex and may be seen equally in the period of ‘frontier politics’ pursued mostly in France throughout the early seventeenth century, (2000), 321ff.

¹⁰³ On the ‘myth of Westphalia’ see Osiander (2001); Teschke (2003).

¹⁰⁴ Oppenheim (1905), 44.

international legal community encompassing the globe.¹⁰⁵ Thus, notice, there is a definite move away from Greek distinctions of citizen and barbarian, and a move towards more inclusion. The relationship is not coincidental. Christian theology was instrumental here, but so too was another globalizing functional system. As Vitoria argued that human beings were sociable in nature,¹⁰⁶ Spanish conquistadors were held to be entitled to have dealings with the indigenous people of the Americas and to engage in commercial activities there.¹⁰⁷ And of course, it is not only Vitoria who can be connected to the expansion of the economic system reflecting the shift to functional differentiation; Grotius, the ‘father of international law’,¹⁰⁸ was quite literally in the employ of the Dutch East Indies Company,¹⁰⁹ and had developed his own concept of ‘societas humana’ to this end.¹¹⁰

This presents an alternative relationship between international law and the structural coupling of law and politics achieved within the nation-state. That is, the relationship between international law and the functional synthesis of law and politics within the nation-state is not simply to be explained as a necessary supra-legal framework to govern the relations between independent sovereign states, but rather can be related to *the shift to functional differentiation of society which stimulated that functional synthesis of law and politics within the nation-state*. What international law achieves here is the guarantee of the autonomy of the nation-state as a framework allowing for the differentiation and global expansion of functional areas (a national economy, national science, etc.). This would mean that international law is tied in with the functional differentiation of society through the sovereignty doctrine. What is problematic about this is that state sovereignty, as a ‘complex aggregate of practices’ remains a prevalent feature—and some would say it only ‘intensifies’—in globalized society.¹¹¹ This would suggest that, despite international law’s

¹⁰⁵ Scott (1934); Grewe (2000), 25.

¹⁰⁶ de Vitoria (1917); See also Grewe (2000), 145ff.

¹⁰⁷ Onuma: ‘If the ‘barbari’ hindered these activities, the Spaniards could resort to war and realize their rights. Furthermore, it was the right and the duty of Christians to propagate Christianity. If the barbari hindered this mission, they could resort to war, depose the Indian ruler and establish a new ruler.’ (Onuma, 2000, 25); see also, Anghie (2004), 13-28; Grewe (2000), 146; cf. Luhmann: ‘if every individual is acknowledged as choosing or not choosing a religious commitment; and if everybody can buy everything and pursue every occupation, given the necessary resources, then the whole system shifts in the direction of functional differentiation.’ (1977, 40); see also, Luhmann (2013a), 16-26.

¹⁰⁸ Cf. Haggemacher (1992).

¹⁰⁹ For a detailed and interesting exploration of Grotius’ involvement with the Dutch East Indies Company, see Borschberg (2011).

¹¹⁰ Grewe (2000), 149.

¹¹¹ Thornhill (2012), 408ff. This also resonates with Thornhill’s view that, rather than ‘marking a rupture with the legal or political system of the sovereign national state’, the intersection between national and international law in the contemporary global constitution constitutes an extension of the historical and sociological process of state formation.’ (ibid.), 409.

increasing functional reference to highly generalized norms at the global level since 1945, the legal system, nonetheless, retains another reference to the larger social system, i.e., a functional reference to the functional differentiation of the larger social system through providing a legal framework of state sovereignty.

As will be explored further in the third section of this chapter, these conflicting functional references—i.e., reference to the larger system through stabilization of global norms versus reference to the larger system through state sovereignty—result in a difficult paradox for the international legal system. For the remainder of this section, however, I wish to explore what it means for international law's relationship with politics, and ultimately what it means for the development of international law in respect of general norms. So far as international law maintains a functional reference through sovereignty doctrine, it cannot rely on any structural relationship with a political system over and above the political systems of sovereign nation-states. That is to say, it cannot achieve the kind of functional synthesis with politics that has been achieved at the national level. Its function has ossified in another direction. It therefore has not achieved the legitimacy that national law has achieved through its coupling with the political system, nor has it been able to open the channels to normative complexity in the way that domestic law has through this structural arrangement.

There are many ways in which modern international law has reflected this tension between the lack of structural coupling to a political system at the global level and the increasing need for the stabilization of norms arising at the global level. I would like to focus on one very recent example of this in international legal scholarship and practice, namely international constitutionalism. This development not only demonstrates how international legal scholarship has sought to overcome this lack of functional synthesis with the political system to represent general norms that emerge in a globalized society, but it also reflects the paradox of the conflicting functional references in international law to world society as a social system and to the sovereign independent nation-state. I will call it 'international constitutionalism' in contrast to 'global constitutionalism',¹¹² because although it shares with latter a concern with the constitutionalization of a 'global, polyarchic, and multilevel governance',¹¹³ it must be distinguished on the grounds that it pays less attention to the legitimacy problem in a functionally differentiated society. This is important because it allows international constitutionalists to reach for even more general norms than are typically included in Teubner's model of the self-contained regime.

¹¹² Often the terms are used interchangeably, Peters (2006), 583.

¹¹³ Peters (2009b), 404.

International constitutionalists cite globalization and the subsequent ‘hollowing out’ of national constitutions as necessitating a ‘compensatory constitutionalism on the international plane’.¹¹⁴ As the nation-state struggles to guarantee public goods in the way had traditionally done so, sovereignty is eroded and it becomes necessary to provide full constitutional protection on the various levels of governance in global society and for international law to move much further in the ‘direction of an individual-centred humanized system’.¹¹⁵ On one hand such ‘constitutionalization’ is seen to be already taking place, on the other ‘constitutionalism’ is presented as the framework for further normative debate in response to the problems of global society.¹¹⁶ But the pivotal question is, considering the lack a centralized political system at the global level, on what framework is such an international constitution to be configured?

Some have drawn on the United Nations Charter in this respect as the constitutional document of international law, as ‘a constitution of the international community at large’.¹¹⁷ However, this no longer enjoys wide support. The UN Charter can easily be seen to reflect the ‘distribution of power after the Second World War’,¹¹⁸ and hardly allows for the ‘disciplining of politics’ in the way that is required for the successful structural coupling of the political and legal system.¹¹⁹ More to the point for many international constitutionalists who wish to see the incorporation of highly generalized norms of global society, the UN Charter does not adequately codify ‘enough of what is fundamental for the functioning of the international legal order’.¹²⁰ But, with no other possible institutional representation of the global community in sight it becomes ‘preferable and inevitable’ to draw instead upon the ‘most fundamental’ norms and values of global society themselves to represent the international constitution.¹²¹

¹¹⁴ Ibid.

¹¹⁵ Peters (2009c), 514.

¹¹⁶ Klabbers (2009c), 4, 10.

¹¹⁷ Fassbender (2009), 170; see also Tomuschat (2009), 248ff; Frowein (1994), 355; Fassbender (1998); Habermas (2006), 135-161. Although Habermas must be distinguished from more utopian approaches here in that he proposes this only as a ‘weak’ form of constitutionalization in that it remains reliant on the ‘continual provision of legitimacy from within state-centred systems’, and that the UN is viewed as the only potential framework for securing ‘indirect backing from the kinds of democratic processes of opinion- and will-formation that can only be fully institutionalized within constitutional states’, *ibid.*, 141.

¹¹⁸ Krisch (2010), 255; see also Koskinnemi (1995).

¹¹⁹ Luhmann (2004), 404.

¹²⁰ Peters (2006), 598.

¹²¹ *Ibid.*, 588.; see also Mosler (1974); Simma (1993); Tomuschat (1999); Fassbender (1998); de Wet (2007); Schrijver (2006); Kleinlein (2012). This is often seen as a predominantly ‘German constitutionalist school’, d’Aspremont (2007), 3; see also for speculation as to why, Schwöbel (2012), 14; von Bogdandy (2006), 224.

Thus, many international constitutionalists point to the ‘fundamental structural and substantive norms’ of the international legal order as a whole,¹²² and ‘public interest norms’,¹²³ such as ‘international human rights’,¹²⁴ ‘climate protection’,¹²⁵ and global ‘sustainable development’¹²⁶ as the *ratione materiae* of an international constitution.¹²⁷ Whether these are global *values* or global *norms* does not seem to matter much.¹²⁸ If they can be seen to ‘relate to global goods’ and ‘reflect the common assumptions and shared attitudes’ of global society, then they can, and should, form the basis of the international constitution.¹²⁹ Nor are international constitutionalists deterred much by apparent ‘anti-constitutionalist trends’ such as the fragmentation or the relativization of normativity.¹³⁰ Rather, they are prepared to draw relevant ‘normative conclusions’ from such trends.¹³¹ The existing law is seen to be ‘far from fragmented’, and even where it is international constitutionalists recognize potential in ‘partial constitutions’ for the constitutionalization of more general norms.¹³² Soft law, on the other hand, is seen as potentially allowing non-state actors to ‘intervene’ in the international legal system and as possibly paving the way for ‘hard commitments on the level of international constitutional law.’¹³³

As a necessary consequence, international constitutionalists present a normative hierarchy as existing within a hitherto horizontal international legal system and within the increasingly polycentric global society. Thus, the norms that they point to as the *ratione materiae* of the international constitution are seen to have a ‘special hierarchical standing’ within international law.¹³⁴ Not only are the norms enshrined in multilateral treaties considered to empower third parties because they serve ‘global community interests’,¹³⁵ but international constitutionalists point to the recognition of peremptory norms as trumping

¹²² de Wet (2006), 611.

¹²³ Peters (2006), 589.

¹²⁴ Peters (2009a), 165.

¹²⁵ Peters (2009b), 399.

¹²⁶ Peters (2006), 589.

¹²⁷ Tomuschat (1999), 86-87.

¹²⁸ See Schrijver (2006); Spijkers (2009), 71ff; de Wet (2006), 612; Peters (2006), 589.

¹²⁹ Peters (2006), 589.

¹³⁰ *Ibid.*, 602.

¹³¹ Kleinlein (2012), 86.

¹³² Peters (2006), 602-603.

¹³³ *Ibid.*, 603.

¹³⁴ de Wet (2006), 612.

¹³⁵ Peters (2006), 588.

conflicting treaty¹³⁶ and customary norms,¹³⁷ and thereby define those norms as ‘constitutional law in the formal sense’.¹³⁸

Thus, not only do international constitutionalists imagine that international law is able to realize highly generalized norms of global society, but they actually *base the authority of the international legal system to do so on such norms themselves*. This represents one of the most ambitious attempts to overcome international law’s consensualism and its lack of structural coupling with a centralized parliamentary representation to thereby accommodate general norms reflecting a global public interest.¹³⁹ It can be presented as constitutionalization because law’s structural reliance on norms is seen as a way of bolstering law’s legitimacy; law acquires its legitimacy from representing interests of the global community, global public goods such as international human rights, climate protection and sustainable development. In systems theoretical terms international law’s paradox is externalized to the norms which are recognized and formulated at some more general social level beyond law and the consensualist framework of the international system. In the absence of centralized parliamentary representation at the global level, international law structurally relies on another source of ‘general will’.

However, the problem with this schema is that it does not adequately confer legitimacy on international law in the way that international constitutionalists suppose. Effectively what is proposed by international constitutionalists is the paradox that the legitimacy of international law in positivizing general norms lies in its positivization of those norms. But this is a difficult paradox to unfold. Thus, the legitimacy of such a proposed international constitution has been widely questioned, for example, in terms of a perceived erosion of the ‘interests and cultural values of the third world’,¹⁴⁰ as promoting an ‘image of a European nation-state’,¹⁴¹ as bestowing an ‘aura of legitimacy on global governance’,¹⁴² or as in more pointed terms as relying ‘conditions not given’,¹⁴³ or as a project that can ‘no longer be fulfilled by means of a legitimacy chain’.¹⁴⁴ As Krisch points out, it was already questioned

¹³⁶ Article 63 of the Vienna Convention on the Law of Treaties 1964.

¹³⁷ See for example ICTY, Case No. IT-95-17/1-T, *Prosecutor v. Furundzija* (1999) 38 ILM 317, para. 153.

¹³⁸ Peters (2006, 598), citing Fischer-Lescano (2003), 743-748; see also, Byers (1997), 220; Fassbender (1998), 553; de Wet (2007), 3ff.

¹³⁹ And none of this is overcome by Peters misreading of Luhmann’s concept of structural coupling as proposing that ‘law and politics should not be viewed as distinct realms’, and that law is ‘both the product of political activity and an organizer of ... political action’, Peters (2009b), 407, n. 35.

¹⁴⁰ Harlow (2006), 189.

¹⁴¹ Koskenniemi (2007), 18.

¹⁴² Kumm (2009), 166; see also Klabbers (2004), 48.

¹⁴³ Grimm (2010), 22.

¹⁴⁴ Dobner (2010), 148.

on the national plane, whether ‘foundational constitutionalism is a fitting vision for diverse societies in which consensus is elusive even on the most basic, procedural level’, and further points out that, with the ‘more diverse and contested the social space is, the less attractive seems the idea of freezing the political order in a seemingly neutral consensus.’¹⁴⁵ Despite then the increasing generalization of norms and values at the global level, the norms, by themselves, cannot seem to confer the legitimacy the legal system needs to realize them.¹⁴⁶

Ultimately, international constitutionalists continue the trend of Lauterpacht, who as a natural lawyer committed to overcoming the consensualism of sovereignty doctrine, and with no political system to which he could rely on as authority for a more general normative framework, effectively proposed that international lawyers ‘should rule the world’.¹⁴⁷ But more than this, it reflects the general condition of the international legal system being caught between remaining open to a functionally differentiated society with all its normative consequences, while at the same time having no mandate or even a spectre of illusion by which it can legitimately answer those normative questions. Try as they might, international constitutionalists are unable to overcome the limits of state sovereignty and its central place in international law.

These problems arise because of the lack of the kind of structural coupling between international law and the political system at the national level. There are no sustainable institutional equivalents at the global level and general norms in themselves do not provide the solid grounding that is needed for such an arrangement. International law remains structurally coupled to an international political system that is made up of the units of independent sovereign nation-states and the function of this coupling is not to accommodate general norms but to provide a legal framework allowing to maintain that sovereignty. Now I will turn to another condition, and to another form of differentiation in world society: the hierarchical ordering of nation-states on the basis of symbolic power of armed force.

¹⁴⁵ Krisch (2010), 254.

¹⁴⁶ See also Kjaer (2011b), 23: ‘[I]t seems a common feature of global structures is that the functional synthesis between law and politics is even weaker. What we are witnessing is an evolutionary development in which the attempt to channel communication-flows into democratic procedures have become increasingly marginalized because such procedures are not complex and flexible enough to handle the massive increases in social complexity which characterise radical modernity.’

¹⁴⁷ Koskinniemi (2008), 366.

4.3 International law and the threat or use of armed force

Another aspect of the structural coupling of law and politics is also relevant here. Law's structural coupling to the political system helped to domesticate and externalize its necessary relationship with physical violence. This bears directly upon international law's relationship with armed force. It may appear excessively 'realist' to abstract international law's relationship with armed force to an elemental relationship between law and physical violence. International lawyers generally rebut any claims about the unenforceability of international legal norms leading to its irrelevance, by pointing to the growing recognition that law cannot be defined by sanctions.¹⁴⁸ But the aim of this section is not to address issues of behaviour and enforceability. The functionalist perspective shifts 'the centre of gravity of the problem of law enforcement from behaviour to expectations.'¹⁴⁹ Again 'the function of the norm is not aimed at guiding motives', and norms 'do not promise conduct that conforms to norms'.¹⁵⁰ However, norms do 'protect all those who are expecting such conduct',¹⁵¹ and, as seen, the function of law is one of providing a 'precondition for the stable projection of norms.'¹⁵² This is part of the reason why the domestication of physical violence is widely considered to be essential to the development of law in society.¹⁵³ Law's failure to domesticate physical violence means that 'normative expectations cannot be practised without a side-glance at their enforceability'.¹⁵⁴ This is not to say that normative expectations will automatically cease under such conditions. Rather it needs to be emphasized that the statement about the 'side-glance at enforceability' should be placed next to Luhmann's other statement about the search for functional equivalence involving a 'sidelong glance at other possibilities'.¹⁵⁵ In other words, if law's proximity to violence undermines the accommodation of general norms, then this only invites the search for functional equivalents. Moreover, the discussion of international law's relation to the threat or use of armed force will be relevant to the discussion of nuclear weapons in later chapters.

¹⁴⁸ D'Amato (1982), 84; d'Aspremont (2011a), 36-37.

¹⁴⁹ Luhmann (2004), 164.

¹⁵⁰ *Ibid.*, 150.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, 151.

¹⁵³ And this became increasingly clear with the problem of right of resistance, see Hobbes (1996); Rousseau (1997); Hume (1988); Kant (1974).

¹⁵⁴ Luhmann (2004), 386.

¹⁵⁵ Luhmann (1995), 54.

At an abstract level, the problem for law, and much of society, relates to the 'high structural independence of physical violence' as a power basis.¹⁵⁶ Physical violence merely depends on superior strength, and not 'status, role contexts, group memberships, distribution of information or concepts of value.'¹⁵⁷ Through such indifference, and coupled with the physical nature of the human being, violence is always universeably useable and can hardly be eliminated as a possibility in communal life. Law thus has to domesticate violence and then externalize it, and again this is only achieved with the co-evolution of the legal and political systems.

According to Luhmann's evolutionary account, law's proximity to violence in primitive society was such that arbitration and satisfaction could 'only be realized in close dependence on the social structure and the distribution of power contained within it.'¹⁵⁸ At this stage of societal development law was about self-help, and according to Luhmann, this 'necessarily impeded the refinement of juridical semantics, the condensation and confirmation of experience with new cases, and juridical attention to conceptual and dogmatic consistency.'¹⁵⁹ It only became possible to overcome this barrier to further development once 'politics took control of physical force and promised peace.'¹⁶⁰ Again this progressed through stratificatory differentiation. The shift to unity perceived in the difference of ranks and the establishment of a competition-free position for the description of the world at the apex of the hierarchy meant administrative institutions could be differentiated out and enforcement measures could be easily supposed to be the will of the whole.¹⁶¹ The problem of physical violence, however, could only be fully solved with the shift to functional differentiation and the structural coupling of law and politics which placed the political concentration of decision-making regarding the use of force in the hands of the state. Once violence exercised in the name of law could be referred to the will of the political sovereign then it was sufficiently externalized from legal communications, while at the same time the political

¹⁵⁶ Luhmann (1985a), 87.

¹⁵⁷ Ibid.

¹⁵⁸ Luhmann (1985a), 117; cf. Barton, R.F. (1919): 'Ifugao Law', 15 *University of California Publications in American Archaeology and Ethnology*, 1-186; Gluckman, M. (1955): *Judicial Process among the Baroste of Northern Rhodesia*, Glencoe IL: The free Press, 263; Bohannan, P. (1957): *Justice and Judgment among the Tiv*, Oxford: Oxford University Press, 112; Pospisil, L. (1971): *Anthropology of Law: A Comparative Theory*, London: Harper and Row, 1-11;

¹⁵⁹ Luhmann (2004), 263. This problem persisted in to feudal societies in the early Middle Ages, Thornhill (2011c), 22.

¹⁶⁰ Luhmann (2004), 263.

¹⁶¹ Luhmann (1985a), 83-90.

system could refer to due process of law so that the nation-state's use of violence did not appear arbitrary.¹⁶²

This is an admittedly brief treatment of the topic of violence as it figures in Luhmann's evolutionary theory of law,¹⁶³ but hopefully enough to bring into focus the problem international law's relationship with physical violence. Physical violence is formally permitted under international law in two circumstances. The first relates to when the United Nations Security Council exercises its right to use force under its 'Chapter VII' powers.¹⁶⁴ Under the Charter the Security Council is charged with 'primary responsibility for the maintenance of international peace and security',¹⁶⁵ and endowed with authority to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression'. On determining such a breach of the peace, and after pacific measures proving inadequate, the Council may take 'such action by air, sea or land forces as may be necessary to restore international peace and security.'¹⁶⁶

Despite this formalization though, the problem is that since 1945 there have been many instances of force being used in flagrant violation of the Charter. While these typically do not reach the scale of international wars witnessed in earlier modernity, the use of force with impunity in the international sphere hangs over and dilutes the legality of those instances where the use of force can be effected through the Security Council and the UN Charter. Nation-states, if they are powerful enough, can always threaten to act unilaterally¹⁶⁷ (as was the case in relation to Iraq in 2002).¹⁶⁸ This puts the Security Council in a difficult position. If it acquiesces and rubber stamps what it cannot stop it keeps law shackled to the power structures in the international society which block its further development. If it seeks to express its disapproval it will fall asunder the likely veto of the powerful state, or even worse may simply be ignored. If it declines to take any action and turns its back on the problem the law will appear either irrelevant or arbitrary. Under these conditions the most appealing option may well be to hammer out a compromise resolution and attempt to cast any subsequent disagreement as a question of semantics thereby preserving the façade of

¹⁶² Luhmann (2004), 264.

¹⁶³ See Luhmann (1985a), 83-90; Luhmann (2004), 262-265.

¹⁶⁴ Referring to Chapter VII of the United Nations Charter 1945, where the relevant provisions are contained.

¹⁶⁵ Article 2(1).

¹⁶⁶ Article 41 & 42.

¹⁶⁷ Krisch (1999).

¹⁶⁸ See Johnstone (2004).

legality—which is what eventually happened in 2002 with UNSC Resolution 1441 determining Saddam Hussein’s failure to comply with disarmament obligations.¹⁶⁹

It is difficult to overlook the influence of the power structures of international society upon the Security Council’s deliberation on the use of force under international law,¹⁷⁰ and this undoubtedly undermines the prospect of expectations being practised without a ‘side-glance’ at their enforceability. The analogy of the ‘police in the temple of justice’ is a fitting one.¹⁷¹ Even in those instances where there has been sufficient international consensus to exercise the use of force under Chapter VII—for example, Afghanistan,¹⁷² Haiti,¹⁷³ Iraq,¹⁷⁴ Libya,¹⁷⁵ Rwanda,¹⁷⁶ Somalia,¹⁷⁷ The Former Yugoslavia¹⁷⁸—there is little evidence of due process of law.¹⁷⁹ With scant provision for due process in the Council’s ‘provisional’ rules of procedure¹⁸⁰ (more definite rules cannot be agreed upon) international law has been unable to expunge the reference to violence and thus achieve a higher degree of self-reference of legal communication. Under these conditions the indeterminacy of Security Council Resolutions can be such that one nation-state can read it as authorizing ‘regime change’ for example, while others read it as authorizing only much more limited basis of intervention.¹⁸¹

However, it is undoubtedly in those instances where there is an omission to resort to the use of force under the Chapter VII *when there is consensus* in the ‘international community as a whole’ to do so that international law’s failure to domesticate physical violence is most evident.¹⁸² The classic case is now one in which the actions of one state constitute a threat to international peace and security and thereby become the subject of a *colère publique* of the international community, yet the Security Council fails to take action because the offending state enjoys power of veto on the Council, or is sufficiently connected to ensure such a veto.

¹⁶⁹ UNSC Res. 1441, UN Doc. S/Res/1441 (8 November 2002). Regarding the resolutions ambiguity, see Byers (2004); see also Scott (2010) on the ‘serious consequences of the word games’ that were played in the Resolution.

¹⁷⁰ Alvarez (2005), 211-217.

¹⁷¹ Koskenniemi (1995).

¹⁷² UNSC Res. 1368.

¹⁷³ UNSC Res. 940.

¹⁷⁴ UNSC Res. 678; and arguably UNSC Res. 1441.

¹⁷⁵ UNSC Res. 1973.

¹⁷⁶ UNSC Res. 929 (humanitarian intervention); see Gray (2008), 331.

¹⁷⁷ UNSC Res. 794 (humanitarian intervention).

¹⁷⁸ UNSC Res. 1244; see Gray (2008, 353) for complexities.

¹⁷⁹ Eitel (2000), 60.

¹⁸⁰ Koskenniemi (1995), 326; Higgins (1970), 5ff. After significant criticism from the academy, there has in recent years been some effort to improve due process in relation to targeted sanctions (see S/RES/1904, S/RES/1989, S/RES/2082, S/RES/2083), however, on examination, the process, it is said, still ‘does not pass muster.’, Barth and Genser (2014), 201; see also Fassbender (2006).

¹⁸¹ See, for example, the fate of S/RES/1441.

¹⁸² The 1945 San Francisco Conference gave little attention to whether the Security Council should treat ‘like cases alike’, Lepard (2002), 312.

In such cases facts can always be questioned and appeals can always be made to further peaceful measures and mediation so that political interests underlying the veto do not have to be declared before the Council. Nonetheless, the failure of international law to domesticate physical violence is only made all the more conspicuous in such cases when they are preceded by instances of a similar fact pattern (i.e., actions of one state constituting a threat to international peace and security and a *colère publique* of the international community), and yet the Security Council is still unable to take action under Chapter VII; the case of Libya¹⁸³ and Syria provides a recent example of this contradictory practice.¹⁸⁴ Such instances highlight the problem that like cases cannot be treated alike, and that the application of law depends not on the legal system, but upon power structures that lie beyond it. It is perhaps an exaggeration to argue, as Glennon does, that contrary state practice in this respect amounting to an instance of *non liquet* for the international legal system (a non-decision of law).¹⁸⁵ However, the inconsistency certainly points to the problems that are revealed with non-*liquet*—that law cannot be understood as a closed universe that ‘refers to itself’, and in which ‘pure juridical argumentation can be practiced even under extreme social tensions’;¹⁸⁶ that law cannot manage the paradox of the system.¹⁸⁷

I will return to this problem in a more poignant form in the next chapter. Suffice to say at this point that the Chapter VII provisions entitling the Security Council to resort to the use of force in the interests of international peace and security clearly do not represent a domestication of physical violence by international law. The general impunity of states resorting to violence outside the framework of the Security Council and the selective and inconsistent manner in which the Security Council has exercised its right under the Charter to use force in response to breaches of international peace and security poses a problem for the differentiation and further evolution of international law.

Self-defence, as the second means by which use of force is permitted under international law, provides little further hope in this respect. Article 51 of the Charter declares the ‘inherent right of individual or collective self-defence if an armed attack occurs.’ The *essence* of this provision, as Dinstein says, is ‘self-help.’¹⁸⁸ In other words, a state has an ‘inherent right’ under international law to act unilaterally in responding to unlawful force.¹⁸⁹

¹⁸³ UNSC Res. 1973, 26 February 2011.

¹⁸⁴ Webb (2014), 486.

¹⁸⁵ Glennon (2003), 22.

¹⁸⁶ Luhmann (2004), 290.

¹⁸⁷ *Ibid.*, 292.

¹⁸⁸ Dinstein (2011), 187.

¹⁸⁹ *Ibid.*

This ‘essence’ of self-help in the inherent right to self-defence suggests comparisons between international law and the law of archaic societies.¹⁹⁰ Thus, Kelsen points out that ‘in primitive law the individual whose legally protected interests have been violated is himself authorized to proceed against the wrongdoer with all the conceivable means provided by the legal order.’¹⁹¹ Under such an arrangement every individual effectively takes the law into their own hands,¹⁹² and because ‘[n]either the establishment of the delict nor the execution of the sanction is conferred upon an authority distinct from the parties involved or interested’, Kelsen viewed the legal order as ‘entirely decentralized.’¹⁹³ As such, writing at the end of the Second World War, Kelsen remained unconvinced by the ‘just war’ thesis, i.e., that international law had successfully domesticated physical violence. Instead he emphasized that what is forbidden now is a war of aggression rather than a counterwar ‘waged by the state defending itself against the aggressor.’¹⁹⁴ From this he concluded that ‘general international law can be interpreted in the same manner as a primitive legal order characterized by the restitution of blood revenge (*vendetta*).’¹⁹⁵

Of course self-help has not been entirely eliminated from highly differentiated legal systems at the national level either. It exists there as a right for an individual to use such force as they believe necessary to protect themselves from imminent use of unlawful force upon them. As Malanczuk points out, however, it has ‘become the exception rather than the rule, whereas in international law it has remained the rule.’¹⁹⁶ One might even say that, in international law, self-help ‘has been honed to an art form.’¹⁹⁷

The fact that self-defence constitutes a failure to replace an external reference to violence with the self-reference of law is signposted by the positive reference in Article 51 to the ‘*inherent* right’ of self-defence in response to an armed attack. The concept of self-

¹⁹⁰ See for example Dinstein (1986), Kelsen (1945), 338ff.

¹⁹¹ Kelsen (1945), 338.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Kelsen (1952), 28-29.

¹⁹⁵ Kelsen (1945), 339. This points to a broader condemnation of international law as comparing to ‘a primitive legal system’. Most notably it was Hart who conceived of international law as being analogous to primitive law, on account of what he perceived as a lack of a rule of recognition in that system. Indeed he seems to use the terms interchangeably at times. See Hart (1997), 3, 4, 213-232; see also Henkin (1979), 32. In the political and social sciences: see Barkun (1968); Bull (1977), 62-65. For a critique of the analogy of international law to primitive law see Lauterpacht (1933), 399ff; Nardin (1983), 150-166. After reviewing the various factors which are usually cited in making such a comparison of international law and primitive law, Dinstein concludes that it is only really the importance of custom and retaliation which can be said to be common to both systems, Dinstein (1986). This theme will return in relation to the segmentary differentiation of the political system at the global level in the next section.

¹⁹⁶ Malanczuk (2002), 4.

¹⁹⁷ Dinstein (2011), 187.

defence, as Anghie says, is thus something that ‘precedes the law’.¹⁹⁸ It is a right which is antecedent and exterior to law, and in practice this has meant that ‘whatever self-defence requires’ is impervious to law.¹⁹⁹ Koskenniemi too makes this point—though somewhat inadvertently and in contradiction to his claimed preference for legal formalism—when he argues in support of the World Court’s ambivalent decision in *Nuclear Weapons Opinion* that ‘[t]he same reason that justifies the rule about self-defence also justifies setting aside its wording if this is needed by the very rationale of the rule – the need to protect the state.’²⁰⁰ But from a systems theoretical perspective this is to admit a third value into binary coding of the legal system, and therefore something that undermines the legal system’s closure.

There of course have been advances in ‘legalizing’ the concept of self-defence in recent years. The World Court, for example, has made some attempt to prescribe what an ‘armed attack’ is (or rather, what it is not) under international law, and has developed the rule that resort to self-defence must be ‘necessary’ and ‘proportionate’.²⁰¹ However, the Court has equally avoided many questions regarding the scope and nature of self-defence under international law, such as whether armed attack can be committed by non-state actors,²⁰² or whether there is a right to pre-emptive self-defence under the Charter or customary law.²⁰³ Moreover, as Kennedy points out the ‘international legal standards of self-defence of ‘proportionality’ and ‘necessity’ are so broad that they are routinely invoked to refer to the zone of discretion rather than limitation.’²⁰⁴ Ultimately, a ‘fundamental disagreement’ regarding the scope of self-defence persists.²⁰⁵

The overly broad, and ultimately consensualist, nature of the right to self-defence under international law is particularly problematic from the functionalist perspective which shifts the focus from behaviour to expectations. To see this one need only compare the situation at the international level to a more elemental social basis within the autonomous and operatively closed legal system at the nation-state level. Thus, the victim of an unprovoked assault on a

¹⁹⁸ Anghie (2004), 292. As it does for natural rights theorists, see, for example Hobbes (1996); Locke (1986). Furthermore, the consolidation of the monopoly of violence in a centralized state apparatus was part of the ‘civilizing process’ for Elias, Elias (2001), 63.

¹⁹⁹ Ibid.

²⁰⁰ Koskenniemi (2005), 593.

²⁰¹ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, ICJ Reports 2003, 161.

²⁰² See *Legal Consequences of the Construction of a Wall, Advisory Opinion*, ICJ Reports 2004, para. 139; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, paras. 146, 160.

²⁰³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, para. 194; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, para. 143.

²⁰⁴ Kennedy (2006), 106.

²⁰⁵ Gray (2014), 626.

London street, for example, is hardly going to look foolish if they fail to take the law into their own hands (in fact they might look foolish if, after a ‘cooling-off’ period, they do so take the law into their own hands). While the victim of such an attack can hardly expect that the perpetrator will in fact be apprehended and punished for the offence, they can, nonetheless, look to others to have their expectation that such *ought* to be the case confirmed. They can look to a range of institutions to find such co-expecting third-parties—from those bystanders who bear witness to the assault, to police who receive the complaint of the crime, to government agencies such as the Criminal Injuries Compensation Authority, to courts and other legal institutions if a defendant is ever identified, etc. This is the achievement of a sufficiently autonomous legal system that has adequately domesticated physical violence.

Now compare this with the international level. The nation-state that does not take the law into their own hands and reply with at least equal force to an armed attack, but waits instead for justice will certainly look foolish—and dangerously so. It is not only that the lack of a supreme authority and a centrally organized penal mechanism necessitates self-help, but that segmentary differentiation of the international system amounts to a prisoner’s dilemma where one must display a show of force to avoid appearing weak or like a ‘sitting duck’.²⁰⁶

Finally, the argument may be made by some that there has been significant domestication of violence with the evolution of international criminal law and the establishment of international criminal tribunals in recent years. Admittedly the emerging distinction between civil and criminal law in the late eleventh century²⁰⁷ was an important moment in the evolution of law at the municipal level.²⁰⁸ Similarly, the morphogenesis of international criminal law at the end of the Cold War is obviously an important moment in the evolution of international law.²⁰⁹ However, the development of international criminal law cannot be said to reflect the degree of domestication of violence that has been achieved within the boundaries of the nation-state. The first two international criminal tribunals—the International Criminal Tribunal of the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—were after all established by the Security Council under the very Chapter VII provisions which deal with the use of force.²¹⁰ Their jurisdiction is thus limited by the Security Council, and can be said to heavily reflect the ‘reality of

²⁰⁶ Glennon (2003), 28.

²⁰⁷ Berman (1983), 68-73.

²⁰⁸ Luhmann (2004), 264.

²⁰⁹ Anderson (2009), 331.

²¹⁰ The two later tribunals (for Sierra Leone and Cambodia) were established jointly by the UN and the respective nation-states concerned, and their jurisdiction is limited to those states.

international politics'.²¹¹ Furthermore, although the International Criminal Court (ICC) was created by multi-lateral treaty, it too has been unable to transcend the reality of international politics.²¹² The limited ratification of the Rome Statute,²¹³ together with its reliance on the problematic principle of complementarity,²¹⁴ means the ICC also suffers a 'crippled' jurisdiction.²¹⁵

International law's problematic relationship with physical violence is probably nowhere more conspicuous than it is in the *Nuclear Weapons* Advisory Opinion of the International Court of Justice.²¹⁶ Although the Court could not make a decision on the illegality of nuclear weapons, it was aware that nuclear weapons constitute the apex of physical violence in world society; it acknowledged the 'profound risks' associated with such weapons,²¹⁷ that the 'destructive power of nuclear weapons cannot be contained in either space or time';²¹⁸ that the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area';²¹⁹ that nuclear weapons therefore 'would generally be contrary' to humanitarian law.²²⁰ Still the Court could not come to a more definite decision on the illegality of such weapons. It should not be overlooked in this respect that the five permanent members of the Security Council (P5) are the five largest stock-pilers of nuclear weapons.²²¹ As Luhmann says, 'the power of physical violence is not based on the effects which it has evoked and their subsequent effect, but the opposite is true: it is based upon generalisation as a symbol which facilitates the avoidance of further use.'²²² Ultimately this is what the framework of 'mutually assured destruction' rests upon, but international law has not been able to domesticate this symbol of violence and it has achieved relatively little autonomy from the underlying power structures it represents. From here one can see the full problem of the arrangement which places the 'police in the temple of justice.'²²³ It means that arbitration and satisfaction can only be realised in close dependence on the distribution of

²¹¹ Tallgren (2002), 564.

²¹² Nouwen and Werner (2011), 943.

²¹³ Of the P5, only the UK and France have ratified.

²¹⁴ Paragraph 10 of the Preamble and Articles 1 and 17 of the Rome Statute, 1998.

²¹⁵ Tallgren (2002), 592.

²¹⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*. (Hereafter *Nuclear Weapons*).

²¹⁷ *Ibid.*, para. 43.

²¹⁸ *Ibid.*, para. 35.

²¹⁹ *Ibid.*

²²⁰ *Ibid.* Dispositive 2(E).

²²¹ *SIPRI Yearbook 2014*.

²²² Luhmann (1985a), 85. See also Harste (2004), 161.

²²³ Koskinniemi (1995).

power within society and in frustration of the further development of juridical semantics and juridical self-reference.

4.4 State sovereignty as segmentary differentiation

I can now turn attention to a third factor that had to be bracketed in the previous discussion of international law's structural coupling: the centrality of the doctrine of state sovereignty to international law. The doctrine of the equality of sovereign nation-states can be said to be 'one of the central postulates in the theory and practice of international law.'²²⁴ Writing in 1758 Vattel declared, '[a] dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom'.²²⁵ Today, the doctrine finds positive formulation in Article 2(1) of the United Nations Charter: 'the Organization is based on the principle of the sovereign equality of all its members.' It is repeatedly expressed in the declarations and resolutions of the General Assembly²²⁶ and in the judgments of the International Court of Justice.²²⁷

From the perspective of international law, what is important is not simply sovereignty as the exercise of authority over dominion, but also the equality of nation-states. Nation-states are 'political entities equal in law, similar in form'.²²⁸ Thus both qualities, sovereignty and equality, are connected for international lawyers; the equality of nation-states is 'explained as a consequence of or as implied by their sovereignty.'²²⁹ However, what once may have been essential in establishing the peace in Europe in the late Middle Ages, and which may have facilitated the expansion of the international legal system in the post-colonial era,²³⁰ now frustrates the realization in international law of many general norms which arise in a globalized society. In this respect, sovereign equality is not simply about power over dominion or parity of esteem, but also the presumption of the independence and the impunity of the nation-state. It found its high water mark with the formulation in the

²²⁴ Suganami (1992), 221

²²⁵ de Vattel (2008), 75.

²²⁶ See, for example, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/RES/25/2625.

²²⁷ Most recently, for example, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, *ICJ Reports 2012*, para. 57.

²²⁸ *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, *ICJ Reports 1949*, 174, 177-178.

²²⁹ Kelsen (2000), 34.

²³⁰ Anghie (2004), 37ff.

Lotus case of a residual negative principle, that nation-states are free to do whatever is not expressly prohibited by international law.²³¹ However, it still operates today, and where it does it may conflict with the realization of any norm more general than the interest of the independent sovereign nation-state. As Kennedy says: [w]hen UNHCR knocks on the door of a sovereign and asks that a refugee be admitted, the response will be not only rooted in sovereign power but also in legal privilege—the privilege to exclude, to define those one will admit, to defend and fence the national territory. Despoiling the rainforest is not only an economic decision; it is also the exercise of legal privilege.²³²

It is for this reason that international constitutionalists argue the ‘erosion of sovereignty’,²³³ that they redefine sovereignty as ‘responsibility’,²³⁴ and perceive a shift from ‘states’ rights to states’ obligations’.²³⁵ They strive to reinterpret sovereignty as subsidiary to general norms and values,²³⁶ and rely on constitutionalism as a limit to the sovereignty of nation-states,²³⁷ because they perceive sharply what a challenge it will be for international law to incorporate the general norms of globalized society within the classic doctrine of sovereignty intact.

The problem with this approach, however, is not simply that the turn away from consensualism may cause international law to lose its appeal for many nation-states,²³⁸ but that sovereignty doctrine may be more entrenched than many realize. There is plenty of evidence that ‘[d]espite repeated suggestions of the ‘death’ of sovereignty—or its irrelevance—its normative basis within international law remains.’²³⁹ This only fits with more general sociological conclusion that ‘the emergent order after 1945 did not result in a diminution of sovereign power’.²⁴⁰ But from the perspective of differentiation theory, it may

²³¹ *S.S. Lotus, (France v Turkey), Judgment, PCIJ Series A no 10, ICJ 248 (PCIJ 1927)*, Permanent Court of International Justice (hereafter the 1927 *Lotus* case).

²³² Kennedy (2008), 849. See also Nordhaus (2006, 92ff) and Krisch (2014) on the problems sovereignty doctrine causes for the attainment of global public goods.

²³³ Peters (2009a), 182.

²³⁴ Peters (2011), 5; see also for similar view Etzioni (2005); Feinstein and Slaughter (2004).

²³⁵ Peters (2009b), 398.

²³⁶ Peters (2006), 587.

²³⁷ Kleinlein (2012), 90.

²³⁸ Krisch (2014), 39-40.

²³⁹ Crawford (2012), 13.

²⁴⁰ Thornhill (2012), 426, 410; see also Kjaer (2013, 782). Building on the previous comment on Thornhill’s concept here, Thornhill argues that far from restricting national sovereignty, transformative absorption of international norms formed a vital cornerstone in the rise of the power of the nation-state (2012, 421). But it is important to point out that, as is clear from the examples he gives, what is being asserted here is only international law as it is understood in the nation state (see his *Murray v Schooner* example). Reading the evolution of international and transnational law from the perspective of the sovereign nation state and focused on questioning ‘the idea that transnational law is a phenomenon of recent advent’ (2012, 426), Thornhill misses some of the important ramifications of globalization on international and transnational law, such as moving

be that sovereignty doctrine has played a functional role in supporting the shift to functional differentiation on the primary level.

Sovereignty can be recognized as a form of segmentary differentiation.²⁴¹ This is what Luhmann means when he speaks of ‘the segmentary differentiation of the political subsystem of the global society’.²⁴² The global political system is differentiated into ‘units, which are equal and functionally similar to one another.’²⁴³ This clearly reflects the doctrine of sovereignty in international law, and is an example of segmentary differentiation that has not been replaced by the shift to functional differentiation.²⁴⁴ In fact international law can be said to reflect an example of the noted possibility of ‘all three types of differentiation in simultaneous operation’.²⁴⁵ Not only is there segmentary differentiation through sovereign equality, but there is stratifactory differentiation in terms of permanent membership and veto power in the Security Council, nuclear weapons stockpiles or economic might, and this all takes place in a normative universe driven by functional differentiation.²⁴⁶ Much like the rest of the global world, it is thus ‘characterized by a plural level of structure formation with several indistinct, but interwoven logics all of which operate simultaneously.’²⁴⁷

It was suggested in the first section of this chapter that there is a structural relationship between this segmentary differentiation and the primacy of functional differentiation. As stated, sovereignty can be explained in functionalist terms as a means of underwriting the concrete territorial boundaries to provide the framework for the confidence and consensus necessary for the shift to functional differentiation.²⁴⁸ This form of segmentation then is a way of protecting this, ensuring those concrete boundaries are not violated. However, there appears to be much broader structural relation between the forms of differentiation than this.²⁴⁹ Sovereign equality not only provided the concrete boundaries within which the political system could emerge, but also provided a foundational framework for other functional systems which, unlike the political system, have been able to explode their

from relatively less challenging questions about jurisdiction issue arising from incidents on the high seas to the legality of a potential threat to society as a whole.

²⁴¹ Albert and Buzan (2010), 318ff; Albert, Buzan and Zurn (2013), 14; Munch (2013), 71; Luhmann (2013a), 96; Waltz, (1979), 95; Krasner (1988).

²⁴² Luhmann (1997a), 72.

²⁴³ Viola (2013), 113.

²⁴⁴ Luhmann (2012), 96; see also Kjaer (2011b), 3

²⁴⁵ Albert and Buzan (2010), 319; Albert, Buzan and Zurn (2013), 3, 6.

²⁴⁶ And this is not to mention all the various forms of internal differentiation (Stetter, 2013, 139) in international organizations, including the nation-state.

²⁴⁷ Kjaer (2014), 1.

²⁴⁸ Luhmann (1977), 44; Luhmann (1985a), 259.

²⁴⁹ It is a wonder that Luhmann, fully aware of the coexistence of these two forms of differentiation, did not devote more attention to exploring their symbiosis. Munch has a valid point when says that ‘Luhmann deals too little with this tension between functional and segmentary differentiation’ (Munch 2013, 76).

territorial boundaries and expand to the global level. As Kjaer argues, functional systems, such as the economy, science, the mass media, sports and education, ‘gradually free themselves from their internal reliance on stabilisation mechanisms which rely on territorial and stratifactory forms of differentiation’.²⁵⁰ Moreover, one might add that this also reflects Polanyi’s argument, for example, about the role of the nation-state in the expansion of the market economy.²⁵¹

This builds upon the argument about the emergence of international law with the shift to functional differentiation. The point, however, is that it is not simply international law that emerges with the shift to functional differentiation, but rather that sovereignty as a form of segmentary differentiation on the global level emerges with functional differentiation. Again, the Peace of Westphalia is significant, but may be just a convenient marker for the development. Grewe claims the modern usage of the term first appeared in Bodin’s *Les Six livres de la République* of 1576 to denote ‘an essential element of the modern theory of sovereignty’.²⁵² Anghie, on the other hand, argues that sovereignty doctrine emerged through Vitoria’s attempts to address the problem of ‘cultural difference’ as the basis of a ‘just war’ against any aboriginal Indians hostile to Spanish presence.²⁵³ Others credit Grotius with being the first to substantially develop the principle of sovereign equality.²⁵⁴ Thirty years before the Peace, Grotius became renowned for his treatise *de Mare Liberum* which presented the territorial limitation of sovereignty as the positive law of nations, and thereby rejected English and Spanish claims over the oceans²⁵⁵—again this can be tied to the functional differentiation of the economic system.²⁵⁶ Subsequently this very idea ‘was given concrete expression in the Peace of Westphalia’.²⁵⁷ Furthermore, just three years before the Peace, Hobbes published *Leviathan* suggesting the nation-state as an ‘artificial man’, a thesis that also proved hugely influential to jurists at the time.²⁵⁸

Wherever the emergence of sovereignty doctrine is to exactly located in the complex factors occurring in the late Middle Ages, it is clear that sovereignty doctrine represents a

²⁵⁰ Kjaer (2011b), 4.

²⁵¹ Polanyi even locates the Peace of Westphalia at the base of this, Polanyi (2001), 7.

²⁵² Grewe (2000), 166. Cf. Thornhill (2011c), 94: ‘It was only around 1600.... that jurists began even tentatively to define German princes as possessing ‘universal and superior’ powers in a territory.’

²⁵³ Anghie (2004), 16, 24.

²⁵⁴ Grewe (2000), 119; Efraim (1999), 64.

²⁵⁵ Steinberger (2000), 504.

²⁵⁶ Grewe (2000), 260. This territorial limitation of sovereignty was perfectly in the interests of the Dutch Republic which had relatively little natural resources or territory, but depended instead on global commerce. Indeed, Grotius’ influence proved to have an ‘astonishing’ effect on the development of the global economic system, see Luhmann (2013a), 76.

²⁵⁷ Bull (1992), 75.

²⁵⁸ Viola (2013), 114.

segmentary form of differentiation that emerged parallel to the more primary form of functional differentiation. From this perspective the continued relevance of sovereignty in transnational society is hardly surprising. Either the functional relation between the segmentary differentiation of the global political system to the functional differentiation of the larger social system became so entrenched in the shift to modernity that it remains a flawed specialization of the social system, or—more likely—that such segmentary differentiation continues to maintain a functional relationship with the primary form of differentiation in world society. A more precise statement would require significant empirical research, which, though important, is not necessary for constructing the problem further for the present study. This section comes to a rest with the conclusion that although state sovereignty frustrates the greater accommodation of highly generalized norms in international law, such segmentary differentiation must be seen as part of a complex of forms of differentiation that today constitutes world society.

4.5 Conclusion

According to Luhmann, ‘[i]t is the form of differentiation that clearly determines which structural couplings are established by a society for linking its functioning systems’, and it is for that reason that the structural coupling which link the legal system with the political system, for example, does not develop until an advanced stage of functional differentiation on the primary level.²⁵⁹ Luhmann’s further observation about this brings this chapter into perspective: ‘As long as societies are differentiated segmentally (e.g. tribally), there seems to exist only the general mechanism of structural coupling of law and violence’.²⁶⁰ International law cannot be simply compared to primitive law, however. It is a thoroughly modern legal system of immense structural complexity. International law appears primitive because of its clear functional reference to the segmentary differentiation of nation-states and because of its proximity to the symbolic power of physical violence in international relations. Yet, the legal system is deeply structurally embedded with the functional differentiation which propels the globalization of society. Moreover, international lawyers increasingly strive to develop the legal system in functional reference to highly generalized norms which arise at the global level.

²⁵⁹ Luhmann (2004), 385.

²⁶⁰ Luhmann (2004), 386.

Whether international law will ever be able to cut through this Gordian knot remains to be seen. However, this chapter has countered the idea that globalization involves a necessary ‘erosion’ of state sovereignty. Sovereignty doctrine must be seen as a persisting ingredient of the complex of world society. Moreover, it cannot be assumed that the problems arising from the tension between sovereignty and global public goods arise from a purely ideological basis, and that it will therefore be subject to change with a shift in attitude in a globalized society. Instead the structural relationship between sovereignty as segmentary differentiation and the primary functional differentiation of society suggests that those problems will only be overcome when evolution replaces functional differentiation with another primary form of differentiation.

This chapter has aimed to present, on the theoretical level, the underlying structural challenges that international law faces in positivizing highly generalized norms. Within this, it has strived to bring to the fore the paradox of relating to the larger social system through two conflicting mediums: direct accommodation of highly generalized norms and support of functional differentiation through sovereignty doctrine. This theoretical premise is useful to keep in mind as the next chapter will turn to a more empirical investigation of international law’s accommodation of general norms.

5 International law as a solution to the problem of general norms?

5.1 Introduction

The usual starting place for measuring the scope of international law is the established sources listed in Article 38 of the 1945 Statute of the International Court of Justice:¹ treaties as ‘international conventions establishing rules expressly recognized by the states’; international custom, ‘as evidence of a general practice accepted as law’, and; ‘the general principles of law recognized by civilized nations’.² The wording of the article reflects a considered attempt to make an international judiciary acceptable—even appealing—to nation-states,³ and it can therefore be said to endorse, to some extent at least, ‘an exclusively state-centred understanding of public international law, based in the principle of a consensus driven commitment to peaceful relationships among states.’⁴ To mitigate this consensualism, and to accommodate the norms arising at a more general level, international lawyers have strived, through various means, to ‘develop the boundaries’ of these established sources.⁵ As this introductory section will show, however, these efforts have been exhausted in recent years by the scale of the proliferation and generalization of norms at the global level. To keep up with these developments, international lawyers have been forced to introduce new sources to international law, new internal distinctions of the legal system. It will be argued, however, that these developments cannot adequately dissolve the paradox that is exposed in the hard cases where general norms are in acute tension with state sovereignty. In order to zero-in on the limits of international law in respect of general norms, this chapter will therefore be taken up with empirical analysis of some of those hard cases of international law.

¹ Waldock (1962); Virally (1968); Brownlie (2008).

² Article 38 of the Statute of the International Court of Justice 1945 also includes as a ‘subsidiary means’ of law ascertainment, ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’. However, this subsidiary means has had little use in practice, Golmann (2012), 336. Nonetheless, there seems to be widespread agreement that Article 38 is not exhaustive, but ‘only reflects the state of international legal doctrine at the time of its creation’, (Fastenrath, 1993, 322). The ICJ itself confirmed this view by recognizing unilateral acts as sources of international law not mentioned in Article 38, *Nuclear Tests Case (Australia v France)*, *ICJ Reports 1974*, 253, para. 46.

³ They were originally established by the Permanent Court of International Justice (PCIJ), the ‘first standing international tribunal to decide disputes between nation-states’, and were readopted after the Second War when the Permanent Court was wound up and replaced by the International Court of Justice (Thirlway 2014, 120).

⁴ Zumbansen and Calliess (2010), 262.

⁵ Kennedy (1987), 3.

The consensualism of the legal order is reflected in the privity of contracting parties which underpins the primary source of treaties for international law. Treaties are based on the principle that international conventions establishing the rules are ‘binding upon the parties and must be performed in good faith’,⁶ otherwise known as *pacta sunt servanda*.⁷ They cannot bind any nation-state other than the signatories.⁸ Ultimately, *pacta sunt servanda* is the legal institutionalization of nothing more than the ‘freedom to choose obligations’.⁹ Thus, as Onuma argues, the *pacta sunt servanda* rule itself is ‘vague’ and ‘does not guarantee that normative expectations of each party will be realized through this rule in a stable and reliable manner.’¹⁰ From a Luhmannian perspective, the achievement of this form of legal institution in fact relies upon restriction to a relatively narrow reference group (‘not at the level of the whole society’), and upon the exclusion of a large realm of third parties ‘whose expectation have no institutionalising relevance and can, therefore, be ignored.’¹¹ Indeed, this has been the problem which many international lawyers—especially those concerned with the legal recognition of general human rights norms—have expressed in respect of treaties as a source of law.¹² Treaty law, as Lijnzaad argues, is unsuitable for such purposes ‘because of the liberty it traditionally leaves states and the consequences this has for the quest for universality.’¹³

International lawyers have nonetheless developed the use of multilateral treaties to overcome these problems and to expand the basis of this established source of law in tandem with societal developments. As a multiplication of the contractual network, multilateral

⁶ Vienna Convention on the Law of Treaties, Article 26.

⁷ The principle that all promises, regardless of the formalities, are binding was something which was developed in twelfth century cannon law (Berman, 1983, 245-250) and was introduced into the modern law of nations as a means of as means of facilitating the collapse of the surpanational authority of Christendom and the emergence of the sovereign nation-state (Turori, 2012, 1027). However, the cannonists were aware of the dangers of unlimited consensualism and therefore introduced the concept of *causa*: ‘in order that morality might be safeguarded, it was not only necessary that the promissor should have an object, but that this should be reasonable and equitable.’ (Söllner, A. (1960): ‘Die Causa im Konditionen- und Vertragsrecht bei den Glossatoren, Kommentatoren und Kanonisten’, 77 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 212-247, cited in Berman (1983), 247). It might be argued that *jus cogens* is a separate attempt to introduce similar *causa* in the context of international treaty law, see Articles 53, 64 and 66(a) of the 1969 Vienna Convention of the Law of Treaties and below, next section).

⁸ See *German Interests in Polish Upper Silesia*, PCIJ Series A., No. 7, 28; see for further nuances of the rule, Fitzmaurice (2002).

⁹ Luhmann (1985a), 58.

¹⁰ Yasuaki (2002), 315.

¹¹ *Ibid.*, 59. Indeed it could be argued that while such legal institutionalization adequately achieves generalization along the *temporal* dimension, it does not do so on any significant scale along the *social* (in the sense of achieving generalization beyond a narrow class of expecting individuals), or in the *material* dimensions (in the sense of achieving a ‘context of expectations’ that can be generalized beyond a broad range of given situations).

¹² See, for example, Fitzmaurice (1953); Redgwood (1993).

¹³ Lijnzaad (1994), 109.

treaties have proved effective for creating ‘regimes’ on the basis of focal points of cooperation,¹⁴ and a number of general norms have been realized in law through this mechanism, including the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the four Geneva Conventions (1949), the International Covenant on Economics, Social and Cultural Rights (1966), the Treaty on the Non-Proliferation of Nuclear Weapons (1970) (‘NPT’), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), the Rome Statute of the International Criminal Court (1998), amongst others.

The source of customary international law, on the other hand, is generally defined as being comprised of two elements: a ‘material element’ of nation-state practice and a ‘psychological’ or ‘subjective’ element—often referred to as ‘*opinio juris*’—as acceptance of such practice as obligatory.¹⁵ The dependence on usage here (the source has been compared to the ‘gradual formation of a road across vacant land’¹⁶) is problematic from the perspective of the function of norms: the conceptual proximity to factual reality hardly supports the virtual reality of normative projection.¹⁷ This is not mitigated by the subjective element. Attempts to identify the presence of *opinio juris* will inevitably draw inferences from the practice of nation-states.¹⁸ Thus, custom has been criticized for being conservative of rules already in force and apologetic of existing power structures in international society,¹⁹ as a façade for political²⁰ or cultural bias.²¹ More importantly though, the failure of this source of international law to adequately separate facts and norms has made it ‘not very attractive’ to those concerned with securing the greater legal institutionalization of human rights norms.²²

¹⁴ Keohane (1984). See also, Krisch (2005), 378.

¹⁵ Lauterpacht (1996), 193; Thirlway (1972), 46; Brownlie (2006), 6. The approach of the International Court of Justice in the *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)*, *ICJ Reports 1969*, is commonly pointed to as an example of textbook methodology, emphasizing the emergence of customary norms from State practice and *opinio juris*, where the latter is conceived as psychological concomitant of that practice, see, for example, Meron (2005), 819; Schlütter, (2010), 126.

¹⁶ de Visscher (1957), 149.

¹⁷ Indeed it is for this reason that, in modern national legal systems, it has typically become subordinate to a centralized legislature which ‘may by statute deprive customary rules of legal status’, Hart (1997), 45. See also Guzman and Meyer (2008), 197. Of course, according to the functionalist perspective adopted in this study, the function of law cannot be made directly contingent on facts in the way is formulated in customary international law. Indeed, this goes to the heart of Luhmann’s disagreement with Habermas regarding the function of law, see Luhmann (1996a).

¹⁸ Koskenniemi (2005), 441; D’Amato (2009), 907.

¹⁹ Byers (1999), 37-131.

²⁰ Koskenniemi (2005), 442-449.

²¹ Yasuakai (2002), 24; Anghie (2005), 36.

²² van Hoof (1974), 114.

Again though, international lawyers have worked hard from the inside to mitigate these problems with custom. In this respect they have sought to develop a ‘deductive approach’ which downgrades the state practice element, and instead deduces *opinio juris* from ‘general principles’,²³ or ‘fundamental values of the international community as a whole’.²⁴ This approach has even been reflected to some extent in the practice of international courts,²⁵ and particularly international criminal courts and tribunals.²⁶

Despite these advances, however, the pace at which globalization is altering the normative landscape in world society is increasingly exhausting the potential that can be gained from stretching the traditional sources. The use of multilateral treaties in securing human rights or environmental protection, for example, has been limited by the common practice of nation-states making reservations to multilateral treaties. Thus, even when reservations conflict with the object and purpose of the treaty, the only options are either for the reserving nation-state to remain bound to the treaty except for the provisions relating to the reservation, or that the attempted reservation nullifies the reserving nation-states assent on the whole, so that it is no longer party to the agreement.²⁷ The use of a deductive approach to customary international law, on the other hand, seems to have reached its limits within the bounded jurisdiction of the international criminal tribunals. The approach has come in for criticism for diverting ‘attention away from rigorous tests of pedigree to uncertain and controversial moral principles’,²⁸ and as leading to a ‘naturalism’ that is ‘unable to reflect the

²³ Meron (1989), 68.

²⁴ Tomuschat (1993), 303; (1999), 334; Schlütter (2010), 39. See also Kirgis who argues that the twin elements of custom are not to be regarded ‘as fixed and mutually exclusive but as interchangeable’ (1987, 149). According to his model, the question of how much practice will substitute an affirmative showing of *opinio juris*, and vice versa, will depend upon the nature of the customary rule being asserted. The more that it involves fundamental norms, the more the practice element is downgraded and *opinio juris* elevated. For a similar perspective adopting Kirgis’ sliding scale to Dworkin’s interpretivist concept of law, see Tasioulas (1996); Cf. Beckett (2001), for a critique of this approach.

²⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, ICJ Reports 1986, para. 185; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, ICJ Reports 1984, para. 111; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, para. 157.

²⁶ *Tadic* (1995), IT-94-1-AR72, paras. 96-99; see also, *Furundzija* (1995), IT-95-17/I-T; *Celebici* (1996), IT-96-21-T; *Kurunac* (1996), IT-96-23-T; *Kupreskic* (2000), IT-95-16-T 14, para. 527; see Schlütter (2010), 220.

²⁷ The Vienna Convention on the Law of Treaties, 1969, Article 19; see also Report of the International Law Commission on the Work of its Forty-ninth Session (1997). For a discussion of the problems of reservations on multilateral treaties in respect of human rights norms, see Goodman (2002). These difficulties have led some to suggest that multinational treaties do not work in contentious areas of ‘international public goods such as the protection of fisheries, the reduction of atmospheric pollution, and peace.’ According to Goldsmith and Posner, for example, these are ‘multilateral prisoner’s dilemmas’ rather than coordination exercises, in which nation-states cooperate only on a bilateral basis, watch what their partners do, and negotiate for ‘alternative terms’ when they perceive the agreements as undermining their parochial interests, (2006), 84.

²⁸ Koskenniemi (1990), 1949.

realities of international relations'.²⁹ Certainly it has been undermined by general contradictory practice in international courts.³⁰

Moreover, general principles—the source listed in Article 38 which appears ideal for realization of general norms—has not lived up to the promise of realizing 'fundamental or suprapositive norms which lie at the basis of the whole human society'.³¹ Nor have they become the 'most important and influential source of international law' in a globalized society where the 'world's interdependence increases'.³² General principles remain of 'limited scope' in international law.³³ In the narrow application they have enjoyed, the principles involved are invariably drawn from municipal jurisprudence',³⁴ and are restricted to principles which are *trivial* in nature, i.e, those principles which are 'so universal and well established that the judge relying upon them does not think it necessary to adduce precedents for their proof';³⁵ thus, for example, the principle of 'reparation',³⁶ the 'right of passage',³⁷ or the 'freedom of maritime communication'.³⁸ Again, they constitute another source of international law that fails to reflect the virtual reality of the counterfactual expectations which are pitched against 'hard reality', and which have been seen to form the functional reference point of law from the sociological view point.³⁹

These problems must be located at the basis of the emergence of 'soft law' as a source of international law.⁴⁰ The term is open to various interpretations,⁴¹ but generally refers to

²⁹ See Simma & Alston (1992), 96.

³⁰ As will be seen in the final section of this chapter, elementary considerations of humanity and other general norms did not negate the requirement of state-practice in the Nuclear Weapons Advisory Opinion even in the light of *opinio juris* that dwarfed the 'inconclusive' references relied upon by the international criminal tribunals in their deductive approach to customary law (Schlüter, 2010, 233).

³¹ van Boven (1982), 107; Mosler (1995), 516.

³² Bassioni (1990), 769. . Indeed it was apparently the intention of the drafters of the Statute of the Permanent Court of International Justice that the inclusion of such a source of international law would help to avoid a *non liquet* in the event that treaty and custom provide no answer, Thirlway (2014), 111; Schlütter (2010), 75; Mosler (1999), 516. This of course was Lauterpacht's hope for the role that general principles as 'obvious maxims of jurisprudence of a general and fundamental character' would play in the development of international law which is otherwise constrained by consensualism towards the will of nation-states, Lauterpacht (1970), 69. General principles did not however allow the court to avoid *non liquet* in the *Nuclear Weapons* opinion, see below section 5.3.

³³ Schlütter (2010), 74; Koskenniemi (1990), 1948; Shaw (2014), 94.

³⁴ Koskenniemi (1990), 1950.

³⁵ Virally (1968), 145. However, see the separate opinion of Judge Cançado Trindade, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010. ('*Pulp Mills*' hereafter).

³⁶ *Case Concerning the Factory at Chorzow, jurisdiction*, PCIJ, Reports, Series A. No. 9, July 26th, 1927.

³⁷ *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, merits, ICJ Reports 1960.

³⁸ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, merits, ICJ Reports 1949.

³⁹ General principles can be said to be more reflective of values than norms. And this again underlines what has been said about values being 'so abstractly formulated that the relationship between different values cannot be fixed permanently', Luhmann (1985a), 69; (1995), 317-318.

⁴⁰ Many textbooks now list soft law under the heading of 'other possible sources', see Malanczuk (2007); Cassese (2005); Shaw (2014); cf. Crawford (2012).

any non-binding instrument or provision that is not of itself ‘law’, but which proves so instrumental in the framework of international legal development ‘that particular attention requires to be paid to it.’⁴² Although the concept is not without its critics,⁴³ it has undeniably become increasingly prevalent in international legal communications.⁴⁴ Soft law instruments may be ‘formative of the *opinio juris* or State practice that generates new customary law.’⁴⁵ At the same time, soft law may prove foundational to the adoption of important multi-lateral treaties, as is the purported case with the 1948 Universal Declaration of Human Rights which preceded the 1966 Conventions.⁴⁶ Moreover, international courts have referred to the ‘guidelines and recommendations of international technical bodies’ in determining the proper standards to be observed by parities in implementing obligations.⁴⁷ Indeed the extent to which the development of international law now relies on soft law has led some to present it as ‘functionally equivalent to hard law’—although this is not taken up from a sociological perspective.⁴⁸

The question of soft law as a functional equivalent to international law is an interesting one,⁴⁹ however, rather than assuming soft law to be a functional substitute to hard law in reference to the basic problem of the stabilization of normative expectations, it may be more useful to consider whether it’s function lies in a distinction and second-order internal coding of the legal system that allows it to unfold the paradox of increased reference to general norms and persisting consensualism towards the atomistic interests of sovereign states. In this sense the distinction soft law/hard law could be seen as another binary code, another *internal* boundary which the legal system can transgress.⁵⁰

Much more could be said about that, yet, whatever the reasons behind its emergence, soft law has proved of little use in hard cases—those cases where an acute need for the

⁴¹ Boyle (2014), 119.

⁴² Shaw (2014), 83.

⁴³ The inclusion of such non-binding instruments within the framework of international law has been criticized by those of a more positivist bent, who view it as amounting to nothing but ‘non-law’ (Weil, 1983, 413), as being ‘redundant’ (Klabbers, 1996, 167), or as ‘incoherent’ (D’Amato, 2009, 899).

⁴⁴ According to Cassese, the concept was first introduced by diplomats for ‘reasons of expediency’, and have only since slowly been adopted by jurists, Cassese (1988), 172.

⁴⁵ Boyle (2014), 119. See, for example, the ICJ’s reliance on General Assembly resolutions to this effect in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, *ICJ Reports 1986*, para. 188

⁴⁶ Boyle (2014), 120.

⁴⁷ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* *ICJ Reports 2010*, para. 62.

⁴⁸ Rather the point seems to be whether soft law should be included as ‘law’ if it ‘looks like international law and basically functions like international law’, Goldmann (2012), 346-348.

⁴⁹ Although the soft law’s primary virtue—its flexibility and ‘the promise of constant revision and update’ (Calliess and Zumbansen 2010, 274)—may prove problematic for generalization along the temporal dimension.

⁵⁰ Luhmann, (2004), 284.

accommodation of general norms is in direct contention with the sovereignty and independence of the nation-state. In those cases, international law will be seen to reach for another internal distinction. This chapter will look at the plight of general norms in two notorious hard cases of international law: expectations of the peremptory status of human rights vis-à-vis the sovereign immunity of nation-states, and expectations of the prohibition of the threat or use of nuclear weapons vis-à-vis the security interests of independent nation-states and the precarious scaffolding of mutually assured destruction. These are the cases that test the limits of the public international legal system.

5.2 The peremptory status of human rights norms

Towards the end of *Law as a Social System*, in addressing the increasing ‘normative institutionalization of value commitments’, Luhmann points to a trend whereby ‘one not only has to extend one’s own values to include the values of other (in the interests of the poor, the disadvantaged, the hungry, the ‘third world’), but one must also join in these demands in order that others commit themselves to these values as well.’⁵¹ Such a normative expectation of normative expectations, he argues, ‘lies largely beyond the established juridical world of forms and is also directed against the law.’⁵² However, this phenomenon of a highly globalized society is reflected in international law like it is in no other place. Despite its consensualist foundations, the ‘Messianic structure’⁵³ of contemporary international law makes a bold announcement of such normative expectations of normative expectations while at the same time presenting them as something that remains nonetheless eternally postponed. The doctrine of peremptory norms, or *jus cogens* as many international lawyers refer to them, is a definite symptom of the paradox of the international system. Thus, it can be claimed, on the one hand, that human rights ‘surely’ belong to the *jus cogens*,⁵⁴ while, on the other, no one can say exactly which human rights norms enjoy such peremptory status;⁵⁵ thus one can, for example, say without fear of contradiction, ‘You are not really an international lawyer if

⁵¹ Luhmann (2004), 468.

⁵² *Ibid.*, 469.

⁵³ Koskenniemi (2003), 111.

⁵⁴ See the Dissenting Opinion of Judge Tanaka in the *South West Africa case (Ethiopia v. South Africa; Liberia v. South Africa)*, *Second Phase, Judgment, ICJ Reports 1966*, 298. For the claim that all human rights are *jus cogens* see Neylon and Parker (1989), 441ff.

⁵⁵ Bianchi (2008), 492. Although see, the Restatement of the Law (Third) of the Foreign Relations Law of the United States 167 § 702 (1987), which includes only as *jus cogens* prohibitions against genocide, slavery, murder, torture, inhuman or degrading punishment, prolonged arbitrary detention, and systematic racial discrimination.

you do not understand, and cannot deploy and make use of the doctrine of *jus cogens*⁵⁶, while others can equally describe it as an ‘empty box’,⁵⁷ a vehicle that ‘does not often leave the garage very often’,⁵⁸ or as ‘an insubstantial image of a norm, lacking flesh and blood’.⁵⁹

From a doctrinal position at least, it can be said that normative expectations of the universal peremptory status of human rights represent a conspicuous example of highly generalized norms which are adequately formulated and recognized on some primary level, but which are inadequately realized in law. This section will therefore examine how international law has dealt with this concept in practice to gain a better understanding to what extent this norm has found positivization in the international legal system. It will be shown that while national and regional courts acknowledge the theoretical concept of such a normative hierarchy, they invariably rely upon their own internal legal order in adjudication, rather than relying upon or developing *jus cogens* in any practical sense. Where courts are not able to avoid the issue through reliance upon such an internal and autonomous legal order—and this includes international courts—they will be shown to rely upon a distinction between substantive and procedural law to filter off the paradoxical question of *jus cogens*. This practice will be analysed from a systems theoretical perspective.

The doctrine of *jus cogens* in international law has its antecedents in the natural law of pre-modern world of course, and classical publicists such as Grotius, Vattel and Wolff drew on the concept of *jus scriptum* in Roman law to posit that certain norms permitted no derogation because they were derived from a ‘higher source’.⁶⁰ It was not until the inter-war period of the twentieth century, however, that the concept really began to gain importance in international law, and found its way into positive legal reference. In this context, the notion of peremptory norms was first discussed as an option in positive law by Verdross, purely in the context of operating as a limitation on the freedom of contract which nation-states enjoy in making treaties.⁶¹ Sixteen years later, Lauterpacht, acting as Special Rapporteur to the International Law Commission in its preparation of the Convention on the Law of Treaties, submitted to a draft provision suggesting that a treaty is void if its performance involves any violation of the ‘overriding principles of international law’, the ‘*ordre public international*’.⁶²

⁵⁶ See ‘*Jus cogens*: a social construct without pedigree (“If judges say so then it must be true”)', Dr. Jean d'Aspremont, Professor of International Law, University of Manchester, video available at <http://law.mc.edu/law-centers/international/calendar/spring-2015>

⁵⁷ Abi-Saab (1973), 53.

⁵⁸ Brownlie (1988), 110.

⁵⁹ D'Amato (1990), 1.

⁶⁰ Criddle and Fox-Decent (2009), 335.

⁶¹ Verdross (1937).

⁶² Lauterpacht (1953), 93.

This was reflected in the adopted Convention, which now constitutes the only existing positive reference to *jus cogens* in international law: ‘a treaty is void if it conflicts with a peremptory norm of general international law’, which is defined as a ‘norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’.⁶³ However, the adopted provision gives little substance to the original suggestion of a normative hierarchy in international law, and has been of limited application in practice (how likely is it for nation-states to conclude treaties which explicitly commit to obligations to torture, commit genocide, institutionalize slavery, and occupy a foreign nation-state, for example?).⁶⁴ Since the 1960s, however, this positive reference to peremptory norms has become the basis of more far-reaching claims for *jus cogens*. The concept really began to gather more substance with developing countries arguing for decolonization, claiming norms of self-determination, or the prohibition of racial discrimination and apartheid as such peremptory norms.⁶⁵ It was not long after this that the concept began to emerge that human rights in general ‘belong to *jus cogens*’.⁶⁶ This idea has been developed, with many holding human rights,⁶⁷ and environmental protection,⁶⁸ to fall into such a category of peremptory norms today.

The concept has been developed in a substantial manner in some of special jurisdictions at the international level. The Inter-American Commission on Human Rights, for example, has referred to the concept in its jurisprudence several times.⁶⁹ Moreover, a robust concept of *jus cogens* has proved important to international courts and tribunals in carrying out their mandate in punishing the ‘most serious crimes of concern to the international community’.⁷⁰ Perhaps the most generous judicial exposition of *jus cogens* to date is that contained in the judgment of the ICTY in the *Furundžija* case, where the tribunal held that held that “as a consequence of the *jus cogens* character of the prohibition of torture, every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”⁷¹

⁶³ See Articles 53, 64 and 66(a) of the 1969 Vienna Convention of the Law of Treaties.

⁶⁴ Bianchi (2008), 491; Vidmar (2013), 2.

⁶⁵ Cassese (2005), 199. And in this sense, *jus cogens* also became part of a ‘global political economy’, see Stephan (2011).

⁶⁶ *Supra*, n. 54.

⁶⁷ See for example, Orekhelashvili, (2006), 53-54; Shelton, (2007) 167-173.

⁶⁸ Kornicker-Ulmann (1998).

⁶⁹ See for example the case of *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, InterAmerican Court of Human Rights (ser. A) No. 18 (2003).

⁷⁰ Preamble of the 1998 Rome Statute of the International Criminal Court.

⁷¹ *Prosecutor v. Furundžija*, IT-95-17/I-T (1999), para. 156.

Beyond this, however, one has to be careful in describing the international legal system as having successfully institutionalized *jus cogens*. Many of the examples which are commonly cited by scholars as evidence of such a development often need to be qualified for having limited application. In respect of national and regional courts that are called upon to decide a case involving *jus cogens*, for example, what one typically finds on analysis is that the court will pay lip service to the concept of such a normative hierarchy in international law, yet ultimately rely on the central authority (e.g., parliament) of the more local and autonomous legal system.

Thus, for example, in a case that brought the hierarchy of norms in the international legal order sharply into focus, the European Court of First Instance (CFI) declared that it would, in principle, be empowered to review the lawfulness of the resolutions of the United Nations Security Council in regard to its observance of *jus cogens*.⁷² On the face of it, this seems a bold assertion of the hierarchy of norms in the international legal order, but it should not be exaggerated. Firstly, the court did not in fact apply such a qualification, as *jus cogens* were determined not to have been in issue in the case.⁷³ Secondly, the CFI also came to the conclusion that *jus cogens* could in fact be derogated from by the Security Council when that body establishes that a global state of emergency exists and when the measures were proportionate—a level of policy overriding those peremptory norms—from which no derogation is possible.⁷⁴ Most importantly, however, the decision of the CFI was reversed by the ECJ, who deftly avoided the complexities of peremptory norms in the international legal system by limiting their jurisdiction to the ‘internal and autonomous legal order of the Community’.⁷⁵ The ECJ concluded that it had exclusive jurisdiction to review only the lawfulness of the Community act, in light of ‘fundamental rights and the rule of law deemed integral to the general principles of Community law’.⁷⁶ As a corollary, it was, in the words of the Court, ‘not, therefore, for the Community judicature, under the exclusive jurisdiction provided for it by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*’.⁷⁷

⁷² Case T-315/01, *Kadi v. Council and Commission* 2005, ECR II-3649, para. 226.

⁷³ *Ibid.*, para. 286.

⁷⁴ *Ibid.*, paras. 274, 284, 289.

⁷⁵ Case C-402/05 P, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 3 Sept. 2008.

⁷⁶ *Ibid.*, paras. 281-283.

⁷⁷ *Ibid.*, para. 287.

This approach of retreating into the autonomy of a ‘municipal’⁷⁸ jurisdiction when faced with this question of *jus cogens* has also been relied upon by national courts—and this is what happens even in those cases which are commonly held up as examples of national courts referring to such peremptory norms. The decision of the House of Lords in the case of *Pinochet (No.3)*,⁷⁹ for instance, is often cited as an example of a national court reaching out for the supra-national principle of *jus cogens* in its adjudication of an international legal question.⁸⁰ Admittedly, references to *jus cogens* do pepper the separate opinions of several of the Law Lords.⁸¹ None of this throws much light on how peremptory norms should operate in the case, however.⁸² In fact, the discussion of *jus cogens* ultimately plays no real part in the *ratio* of the decision.⁸³ Although the Lords agreed that the prohibition of torture constituted a peremptory norm of international law allowing for no derogation, the mainspring of the decision not to grant immunity to the former head-of-state was provided by the incorporation of the 1984 UN Convention on Torture into English national law, by way of the 1988 Criminal Justice Act.⁸⁴ In a subsequent case, the Supreme Court has dispelled much of the controversy surrounding the effect of peremptory norms in English law; while recognizing that torture is prohibited by *jus cogens*, the House of Lords explicitly denied that such could operate to remove the immunity granted to foreign officials, except where as in *Pinochet* the authority to deny such immunity stems from an Act of Parliament.⁸⁵

In the United States, on the other hand, the issue has been brought into contention through the Alien Tort Statute (ATS), which grants U.S. courts jurisdiction over causes where a foreign national sues for a tort ‘in violation of the law of nations’.⁸⁶ It is generally presumed by members of the academy that norms belonging to *jus cogens* will automatically qualify it as a norm of the ‘law of nations’ for the purposes of ATS.⁸⁷ However, the practice of courts

⁷⁸ The term ‘municipal’ was used by the Advocate-General to describe the Community legal order vis-à-vis the international system in his submitted opinion. See Advocate-General (AG) Maduro’s opinion: Case C-402/05 P, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 16 Jan. 2008, para. 21

⁷⁹ *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* (1999) 2 All E.R. 97 (hereafter *Pinochet*).

⁸⁰ See, for example, Kadelbach (2006), 23.

⁸¹ See Lord Browne-Wilkinson, *Pinochet (3)*, 198; Lord Millett, *Pinochet (3)*, 275.

⁸² For a criticism of the Lord’s employment of *jus cogens* in the case see Bianchi (1999), 237; Fox (1999), 688.

⁸³ Shelton (2006), 316.

⁸⁴ *Pinochet*, 692. In a subsequent case, the Supreme Court has dispelled much of the controversy surrounding the effect of peremptory norms in English law, see *Jones v Saudi Arabia* 2006 WLR below.

⁸⁵ *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* 2006 WL 1546647 (hereafter, *Jones v Saudi Arabia*), para. 31.

⁸⁶ Federal Judiciary Act of 1789, now codified in the U.S. Code § 1350.

⁸⁷ Orakhelashvili (2008), 123; Swan (2001), 91; Goodman and Jinks (1997), 495.

has done little to confirm this, and, in fact, the U.S. Court of Appeals for the Ninth Circuit in the case of *Sosa* expressly rejected the concept of *jus cogens* as criterion for application of the ATS.⁸⁸ Moreover, although it has had numerous opportunities to do so, the U.S. Supreme Court has failed to mention *jus cogens* in its adjudication on ATS, and has in this context consistently presented a dualist international legal order, suggesting at all points that it would defer such authority to Congress.⁸⁹

These cases at the regional and national level show how the courts are able to avoid developing *jus cogens* in any substantive legal sense by retreating into more adequately differentiated legal system. In recent years, however, there have been a number of cases which have brought the preemptory status of the norm into contention in such a way as to expose the fundamental problems of the institutionalization of the doctrine. The basic format of these cases typically involves litigation on the basis that a nation-state has violated preemptory norms, but in answer to which it relies on the customary law of sovereign immunity to avoid such a suit. It is important to note that the violation of human rights norms in these cases has already occurred, and that it is no longer a question of preventing such specific violations. The tension thus lies in a conflict between norms taking precedence as *jus cogens* over the customary law of according immunity to a sovereign nation-state.

Invariably what happens in such cases of a direct conflict of *jus cogens* with a fundamental principle of the consensualist legal order is that the claim based on the superiority of *jus cogens* is denied on the basis of procedure. In 2002, the ICJ avoided adjudication of *jus cogens* in the Arrest Warrant case, stepping over the Respondent's preliminary argument that the preemptory character of crimes against humanity should prevail over a plea of diplomatic immunity.⁹⁰ The same year, this question was further explored in the *Armed Activities* case.⁹¹ When the Democratic Republic of the Congo

⁸⁸ *Alvarez-Machain v United States*, 266 F3d 1045 (9th Cir. 2001), 1050. In another case the Circuit court held: 'If violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so.' *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), 719.

⁸⁹ Most recently in the *Kiobel* case, the Supreme Court failed to make reference to *jus cogens* and asserted a presumption against extraterritorial jurisdiction, claiming: 'If Congress were to determine otherwise, a statute more specific than the ATS would be required.' *Kiobel v Royal Dutch Petroleum*, 1659, 135 S. Ct. (2013), 1669. See also *Argentine Republic v Amerada Hess Shipping Co.*, 488 U.S. 428, 109 S. Ct. (1989), 435-38; and the decision of the Supreme Court in *Sosa v Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. (2004), which argued that federal courts should be careful not to open the door to any violation of international law that was not strictly conceived by the eighteenth century framers of the statute. See also for an astute reading of adjudication in this area, Adams (2001), 268-270.

⁹⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3. That may however have been a result of the parties having narrowed the Court's jurisdiction on the merits. See however for criticism Diss. Op. Judge ad hoc van den Wyngaert, para. 28.

⁹¹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, ICJ Reports 2006. (Hereafter *Armed Activities*)

instituted proceedings against Rwanda citing grave violations of human rights and international humanitarian law, Rwanda contested the Court's jurisdiction on the basis of its reservation to Article IX of the 1948 Genocide Convention.⁹² The Democratic Republic of the Congo reached for *jus cogens* to argue that such a reservation was null and void. The Court, however, rejected the argument, stating that the rule of state immunity is procedural, and that the status of *jus cogens* 'cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute.'⁹³ A year later, the Court again availed itself of the same procedural mechanism in a similar case of conflict between *jus cogens* and state sovereignty, citing a 'fundamental distinction between existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations.'⁹⁴

This practice of distinguishing between substantive and procedural rules and denying *jus cogens* on the basis of the latter has culminated in the recent decision of the ICJ in the *Jurisdictional Immunities* case.⁹⁵ There, in dealing with an Italian claim that Germany was subject to the civil jurisdiction of Italian courts for violation of peremptory norms committed during the Second World War, the Court appeared to take the opportunity to 'push *jus cogens* back to the realm of Article 53 of the VCLT', where it has only a narrow application in respect of treaties.⁹⁶ Thus, it was noticeable that the Court was not even prepared to state that the prohibition against the murder or enslavement of civilian non-combatants in occupied territory constituted rules of *jus cogens*.⁹⁷ Instead, the Court held that, even 'assuming' such norms were *jus cogens*, there would be no conflict between them and the rules of state immunity.⁹⁸ 'The rules of state immunity,' it declared, 'are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another.'⁹⁹

This approach has also been reflected in the jurisprudence of courts at both the regional and municipal levels. In respect to the former, the *Al-Adsani* judgment of the European Court

⁹² Article IX provides: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

⁹³ *Armed Activities*, para. 64.

⁹⁴ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, supra, n. 75, para. 148.

⁹⁵ *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, ICJ Reports 2012. (Hereafter *Jurisdictional Immunities*).

⁹⁶ Vidmar (2013), 3.

⁹⁷ *Jurisdictional Immunities*, at para. 93.

⁹⁸ *Ibid.* Emphasis added.

⁹⁹ *Ibid.*

of Human Rights, for example, employs this distinction of procedural and substantive rules to resolve the contention of *jus cogens* and sovereign immunity.¹⁰⁰ Whilst the Court noted the growing recognition of the overriding importance of the prohibition of torture, it could not from that deduce ‘acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State’.¹⁰¹ In the absence of any contrasting, formal authority for such an exception to jurisdictional immunity, the Court said that it was not prepared to deduce such a procedural effect from vague provisions of *jus cogens* in international law.¹⁰²

National courts have also relied upon this practice of drawing a distinction between procedural and substantive law to avoid the conflict between state sovereignty and *jus cogens*. The distinction was employed by the House of Lords in *Jones v Saudi Arabia* in 2006, holding that state immunity is a procedural rule and that to ‘produce a conflict with state immunity, it is therefore necessary to show the prohibition of torture has generated an ancillary procedural rule by way of exception to state immunity.’¹⁰³ Lacking the kind of parliamentary statute that was present in *Pinochet*, their Lordships found no such ancillary procedural exception to state immunity.¹⁰⁴ This approach of rejecting the ‘procedural effect’ of *jus cogens* to displace the law of state immunity has furthermore been followed in the judgements of other national courts including Canada,¹⁰⁵ Poland,¹⁰⁶ New Zealand,¹⁰⁷ and Greece.¹⁰⁸

This way of dealing with *jus cogens* has, nonetheless, divided legal scholars. Many accept as unproblematic the argument that there is ‘no logical conflict’ between substantive and procedural rules.¹⁰⁹ Hazel Fox, for example, argues that ‘[r]ules pertaining to jurisdiction are procedural and do not go to substantive law, and therefore any denial of the capacity of peremptory norms to confer jurisdiction do not then contradict the substance of such norms,

¹⁰⁰ *Al-Adsani v United Kingdom*, EC-R App. 35763/97 (Merits), 123 ILR 24, 147.

¹⁰¹ *Ibid.*, para. 66. The *Al-Adsani* decision was reiterated by the European Court of Human Rights in the decision of inadmissibility of 12 December 2002 in the *Kalogeropoulou v. Greece and Germany* case, No. 59021/00.

¹⁰² The contradiction was not lost on the dissenting judges: ‘[t]he majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance’, *Al-Adsani v United Kingdom*, Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 4.

¹⁰³ *Jones v Saudi Arabia*, Lord Bingham, paras. 24-34; Lord Hoffman, para. 45.

¹⁰⁴ *Ibid.*, Lord Hoffman para. 64;

¹⁰⁵ *Bouzari v Islamic Republic of Iran* (2004), Court of Appeal of Ontario, DLR, 4th Series, Vol. 243, p. 406 ; ILR, Vol. 128, p. 586

¹⁰⁶ *Natoniewski*, Supreme Court, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299.

¹⁰⁷ *Fang v. Jiang*, High Court, [2007] NZAR, p. 420 ; ILR, Vol. 141, p. 702.

¹⁰⁸ *Margellos v Germany*, Special Supreme Court, ILR, Vol. 129, p. 525.

¹⁰⁹ Talmon (2012), 10.

but merely diverts any breach of it to a different method of settlement.’¹¹⁰ Others, meanwhile, are prepared to accept the greater relevance of such a practice of denying *jus cogens* on procedural grounds, but accept the distinction as necessary in the international legal system. Dugard, for example, argues that denying jurisdictional immunities in such cases would involve the court in ‘molecular law-making that goes beyond the legitimate judicial function.’ Only states, he added, can undertake such ‘law-making’ in the international legal system.¹¹¹

Many others disagree with the practice entirely, and see it as detrimental to function of international law. In his dissenting opinion in the *Jurisdictional Immunities* case, Judge Cançado Trindade expresses his firm opposition to, what he terms, the ‘posture of stagnation in respect of *jus cogens* whenever claims of State immunity are at stake’.¹¹² State immunity, he argues, is not a right but a privilege which should not be upheld in a way that leads to manifest injustice. He therefore dismisses the ‘widespread’ practice of distinguishing between procedural and substantive rules in this regard as an ‘undue methodology’.¹¹³ For him, it constitutes an avoidance of the representation of fundamental ‘values’ in law.¹¹⁴ Others have also expressed their dissatisfaction with the distinction between substantive and procedural rules employed in the cases to rule out *jus cogens*, as ‘unsatisfying’,¹¹⁵ ‘utterly theoretical’,¹¹⁶ as ‘excessive formalism’,¹¹⁷ or as being ‘illusory and lacking any real meaning’¹¹⁸. Common to all these complaints is a frustration with the lack of any avenue of redress in the international legal system for violations of the most fundamental norms.¹¹⁹

It is not necessary to enter into this debate. From the systems theoretical perspective other more interesting insights come to the fore. First, what the application of the procedural/substantive distinction by courts to the *jus cogens* question achieves is an invisibilization or unfolding of the paradox that *jus cogens* is a symbol of: that such a general norm is a problem that is to be solved by law and yet that cannot be solved by law in a consensualist legal order. According to Luhmann, the paradox is ‘made invisible by generating criteria.’¹²⁰ But more than this, not only is this distinction procedural/substantive

¹¹⁰ Fox (2004), 525. Indeed, Lady Fox’s opinion was cited in the *Jones* judgment, Lord Bingham, para. 24.

¹¹¹ *Armed Activities 2006*, Separate Opinion of Judge *ad hoc* Dugard, para. 13.

¹¹² *Jurisdictional Immunities*, Dissenting Opinion of Judge Cançado Trindade, paras. 224-227.

¹¹³ *Ibid.* para. 294.

¹¹⁴ *Ibid.*, paras. 288-295.

¹¹⁵ Di Ciaccio (2008), 557.

¹¹⁶ Orakhelashvili (2010), 165.

¹¹⁷ McGregor (2007), 911.

¹¹⁸ Attaran and Besner (2008), 164.

¹¹⁹ Pavoni (2012), 75.

¹²⁰ Luhmann (2013b), 99.

more ‘utterable’¹²¹ than the legality/illegality of *jus cogens*, but it allows for the application of *another binary code* ‘to be applied to the proceedings themselves.’¹²² Legal procedure is well known to provide the ‘vanishing point of the analysis of the legal system’.¹²³ It constitutes an important evolutionary achievement which allows an escape from the introduction of further ‘values or supervalues’, and thereby to maintain the basic binary code ‘intact’.¹²⁴ As a binary code itself, it does not need external references; it already contains such as the ‘other side’ of the distinction, and thus gives itself ‘permission to operate without having to take recourse to higher values.’¹²⁵ Thus, through the application of this binary code of substantive/procedural law to the problem of *jus cogens*, law is able to unfold the paradox and thereby continue reproducing itself as a ‘never-ending story, an autopoietic system that produces elements only in order to be able to produce further elements.’¹²⁶

Secondly, it might be said that the way in which international and regional courts have relied upon procedure in response to the *jus cogens* question has achieved a certain degree of *uncertainty* that may nonetheless help law to fulfil its function in respect of such normative expectations of the peremptory status of human rights norms. The necessary generalization of such norms along the *social* and *material* dimensions of the function of law is not so problematic here. In respect of the former, the limitation of exclusion to procedural grounds means the court, as institutionalized third parties, still bears witness to- and co-expects such norms (or at least provides the illusion of such consensus). In respect of the latter, in excluding claims on procedural grounds, courts do not deny, and at points explicitly recognize, that norms, like the prohibition of torture or genocide, belong to the category of *jus cogens*.¹²⁷ Of course, the generalization of those normative expectations along the *temporal* dimension appears somewhat more challenging, as critics of the practice of the procedural/substantive distinction in respect of *jus cogens* clearly view it as ‘unsatisfying’.¹²⁸ However, it must be recognized that the uncertainty introduced here through the use of procedure may be enough to stabilize those normative expectations in the temporal

¹²¹ Philippopoulos-Mihalopoulos (2010), 74.

¹²² Luhmann (2004), 207.

¹²³ Luhmann’s translation of ›Weil alle Rechtskommunikationen auf einklagbare Ansprüche verweisen, bildet das Gerichtsverfahren den Fluchtpunkt für die Analyse des Rechtssystems‹, in Habermas, *Faktizität und Geltung - Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt, 1992), 241; Luhmann (2004), 294. McCarthy’s translation of ‘Fluchtpunkt’ as ‘perspective’ does not convey the same meaning (Habermas, 1996, 196).

¹²⁴ Luhmann (2004), 207.

¹²⁵ Luhmann (2012), 26, 221.

¹²⁶ Luhmann (2004), 184.

¹²⁷ Although the ICJ’s approach in *Jurisdictional Immunities* represents an inauspicious reversal of this trend.

¹²⁸ Di Ciaccio, see above, n. 115.

dimension. The use of procedure, as Luhmann says, augments the basic binary code of the legal system with an internally generated third value, ‘namely the value of uncertainty of the value attribution’ of the basic binary code.¹²⁹ And this is exactly what has been achieved by courts applying the procedural/substantive distinction to the *jus cogens* question. Some see it as a denial of justice; others see it as merely diverting the question to a different means of settlement—and both are right. What this achieves is the presentation of a ‘not yet’ finding.¹³⁰ The court holds itself out as *possibly*—under different circumstances *in the future*—upholding the peremptory status of those norms. *So far as this works*, it not only fulfils law’s function in respect of those norms, but it also feeds the autopoiesis of the legal system (again, function and coding are connected¹³¹). The law uses uncertainty in this way to avoid a *cul-de-sac*, to offer further opportunities and to encourage further participation.¹³²

There is no doubt, however, that those courts which rely on procedure in this manner to unfold the paradox presented by *jus cogens* are ‘skating on thin ice’. Observations that the court’s approach to *jus cogens* is ‘utterly theoretical’ or ‘illusory’ can always be painted as coming from an outmoded natural law position, and so on, but they do, nonetheless, highlight the danger of the court incorporating an external rejection value in adjudicating the issue of *jus cogens*. This points to an issue with procedure that Luhmann raises; when the use of procedure reaches a point where lawyers begin to question whether it does not in fact constitute a ‘violation of the prohibition of the denial of justice.’¹³³ This is not to say that such a point has been reached by courts in dealing with the hard cases of *jus cogens*. The above points demonstrated how sophisticated law can be in maintaining a functional reference to general norms within a consensualist international framework (which only highlights how difficult it is to construct the problem of general norms). It may be worth empirical examination to determine, in fact, how much the uncertainty generated by the procedural/substantive code in respect of *jus cogens* adequately stabilizes normative expectations of such peremptory norms. However, such a laborious task need not be undertaken here, for there is one case where the World Court explicitly violated the prohibition of the denial of justice in reference to a general norm, and thus, where the problem clearly invites the search for functional equivalents beyond law. It is to that which I now turn.

¹²⁹ Luhmann (2004), 207.

¹³⁰ Cf. Luhmann (ibid.), who claims all norms and measures which support legal proceedings ‘serve the presentation of a ‘not yet’.’

¹³¹ Luhmann (2013a), 90.

¹³² Luhmann (2004), 206.

¹³³ Ibid., 286.

5.3 The prohibition of the threat or use of nuclear weapons

The principle of *non liquet* (literally ‘its not clear’) has undergone ‘long evolutionary process’ to emerge in modern legal systems as an absolute a prohibition of the denial of justice.¹³⁴ Its point of origin is said to lie in Roman law, where, in the face of either factual or judicial doubt, the magistrate was entitled to defer the decision until further information was available or to refer the decision to the emperor.¹³⁵ It was only with the developed autonomy of law and complexity of society that more pressure came to bear on the court itself to provide a decision in response to each action brought before it. In the Middle Ages this often necessitated recourse to ‘God’s judgment’, as the divination of the judge, or even trial by ordeal.¹³⁶ With the progressive rationalization of society from the thirteenth through the sixteenth centuries, the judge, as a removed institutionalized third party with technical expertise in the law, increasingly assumed responsibility for determining what the law should be. This need for a legal decision only became more pronounced with the development of legislative authority and crystallized as an absolute rule with the positivization of law in the nineteenth century.¹³⁷

Today these developments are codified in the Swiss legal code, for example, which provides: ‘In the absence of suitable legal dispositions, the judge pronounces according to custom, and, in the absence thereof, according to such norms as the judge himself would lay down, were he called to act as a legislator.’¹³⁸ The French Civil Code goes even further, declaring that ‘a judge who refuses to decide a case, on the pretext that the law is silent, obscure, or insufficient, may be prosecuted as being guilty of denial of justice.’¹³⁹ Likewise such a principle is widely reflected in common law systems, which have accommodated, as Reisman says, ‘the extremes of both Blackstone and the institution of “judge-made” law.’¹⁴⁰

Traditionally, international law was able to reflect this general evolution of law and present itself as a complete legal order by relying on the ‘residual negative principal’ that found its classical statement in the *Lotus* case: ‘whatever is not expressly prohibited by

¹³⁴ Rabello (2004), 2ff.

¹³⁵ Ibid., 14-15; Luhmann (2004), 284; Stone (1954), 153; Reisman (1969), 770.

¹³⁶ Rabello (2004), 2.

¹³⁷ Ibid., 3-4.

¹³⁸ See Article 1(20) of the Swiss civil codes; translation provided by Rabello (2004), 4; see also Article 1(7) of the Spanish Civil Code; Foundations of Law, 5740-1980, 34 Laws of Israel.

¹³⁹ Article 4 of the *Code Civil des Français*, translation provided by Rabello (2004), 2; see also Article 4 of the Belgian civil code for a similar provision.

¹⁴⁰ Reisman (1969), 770; see also Rabello (2004), 5.

international law is permitted'.¹⁴¹ This bolstered Kelsen's conviction that *non liquet* in international law was 'logically not possible'. For him, so long as there is 'no norm of conventional or customary international law imposing upon the state (or any subject of international law) the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases.'¹⁴²

This line of thinking may have staved off questions about the completeness of the international legal system for some years. However the advent of global society and the consequential explosion of transnational normative expectations quickly called this residual negative principle into question. Things came to a head in the early 1990s when the question as to the illegality of the threat or use of nuclear weapons in international law was put to the World Court in The Hague by the World Health Organization (WHO) and the United Nations General Assembly (UNGA). The case involved, on the one hand, the expansionist tendencies of the political, scientific, and military systems ossifying in a precocious scaffolding of 'mutually assured destruction' that no would choose to interfere with lightly.¹⁴³ On the other, it involved global expectations (that are highly resistant to disappointment) that an indiscriminate class of civilian non-combatants should not become the victims of armed conflict.

After some procedural difficulties involving the specialized nature of organs of the United Nations,¹⁴⁴ the Court, in recognition of the 'fundamental importance' of the issue, admitted the request by the UNGA for an advisory opinion.¹⁴⁵ The case was subject from the outset to a great degree of public interest. Fifty-nine nation-states submitted statements to the Court, and it estimated that the Court received well over three million signatures from people around the world voicing their expectations as to the inherent illegality of nuclear weapons. The extent of this is expressed by judge Weeramantry in his dissenting opinion: 'Strong protests against nuclear weapons have come from learned societies, professional groups, religious denominations, women's organizations, political parties, student federations, trade

¹⁴¹ The 1927 *Lotus* case, 18-19.

¹⁴² Kelsen (1966), 438-40.

¹⁴³ See Shue, H. (1985): 'Conflicting Concepts of Deterrence', 3 *Social Philosophy & Policy* 1, 43-73.

¹⁴⁴ The ICJ held that the matter did not fall within the competence of the WHO, according to the organization's constitution, see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports 1996* (hereafter *WHA Opinion*); see also, Klabbers (2009a), 6-14.

¹⁴⁵ Article 65 of the ICJ Statute provides: 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'. Presently, the five principal organs of the UN and sixteen of its specialized agencies are entitled to request an advisory opinion from the Court.

unions, NGOs and practically every group in which public opinion is expressed. Hundreds of such groups exist across the world.’¹⁴⁶

The Court determined at the outset that its ‘real objective is clear: to determine the legality or illegality of the threat.’¹⁴⁷ It gave consideration in this respect to the view that nuclear weapons could not be compatible with international humanitarian law, due to the range of destruction of such weapons being unable to discriminate between combatants and civilians. ‘Such weapons’, they noted, ‘would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced’.¹⁴⁸ The court also noted that none of the nuclear weapons states had even argued that nuclear weapons could be employed in a tactical fashion to avoid civilian casualties and therefore avoid breaching a fundamental rule of international humanitarian law. Despite declaring for those reasons that nuclear weapons ‘seem scarcely reconcilable’ with the law of armed conflict for, the Court did not however feel that it had ‘a sufficient basis for a determination’ on the question of whether such weapons could in fact be deployed tactically in such a way as to avoid running afoul of international law.¹⁴⁹ The Court furthermore felt constrained by the ‘fundamental right’ of every nation-state to resort self-defence that is contained in Article 51 of the United Nations Charter. This also led them could to note that ‘the policy of deterrence’ had been adhered to for many years by ‘appreciable section of the international community’.¹⁵⁰ That was obviously something the Court felt uneasy in tempering with.¹⁵¹

All of these factors, however, led the Court to observe that it ‘could not reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons’.¹⁵² In the end, the Court, by seven votes to seven with the President’s casting vote, declined a legal decision:

¹⁴⁶ *Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, p. 533.

¹⁴⁷ *Nuclear Weapons*, para. 20.

¹⁴⁸ *Ibid.* para. 92.

¹⁴⁹ In 2003 the National Academy of Sciences, on request of the U.S. Congress, conducted a study into military claims of the ‘tactical use’ of nuclear weapons through the development of robust nuclear earth-penetrating weapons (RNEP). The National Academy of Sciences concluded that such ‘tactical use’ could kill anywhere from 100,000 to 1 million people if detonated near a metropolitan area. The development of RNEP weapons was subsequently denied funding by Congress, see *Effects of Nuclear Earth-Penetrator and Other Weapons* (2005), Committee on the Effects of Nuclear Earth-Penetrator and Other Weapons, Division on Engineering and Physical Sciences, National Research Council, Washington, DC: The National Academic Press.

¹⁵⁰ *Nuclear Weapons*, para. 96.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, para. 97.

[I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the survival of a state would be at stake.¹⁵³

This emphasizes much of what was said about the centrality of state sovereignty and the extra-legal and ambivalent character of self-defence. But more importantly, it was a *non-liquet*.¹⁵⁴ It was up to the judges in their separate and dissenting opinions to explain the lacuna. President Bedjaoui considered it to be such an ‘exceptional event’ that he abandoned his usual reticence to issue declarations or separate or dissenting opinions.¹⁵⁵ He remarked in this respect about how the world had changed since the *Lotus* case; about how ‘globalization’ had necessitated a move away from an international law of cooperation to one of ‘co-existence’.¹⁵⁶ Moreover, Judge Bedjaoui explicitly connected ‘the emergence of the concept of international community’ and the development of *jus cogens* with ‘progress in the technological sphere, which now makes possible the total and virtually instantaneous eradication of the human race’.¹⁵⁷ Thus, for him the ICJ was in a much more difficult position than the Permanent Court that decided the *Lotus* case in 1927. The ICJ, he argued, was confronted with a much more important question, and was thus ‘far more circumspect than its predecessor’ in its judgment. Therefore, he felt, the Court could not follow the residual negative principle in the *Lotus* case, but instead had to assert a new counter principle that ‘what is not expressly prohibited by international law is not therefore authorized.’¹⁵⁸

Others commented more directly on the issue *non liquet*. Vice President Schwebel considered it ‘an astounding conclusion to be reached by the International Court of Justice.’¹⁵⁹ Neither ‘predominant legal theory’, nor the precedent of the Court admitted such a holding of *non liquet*, he argued.¹⁶⁰ Judge Higgins was in no doubt that the ‘formula chosen is a *non liquet*’, and reminded the court that there are ‘useful devices’ which ‘preclude the Court from pleading *non liquet* in any given case’.¹⁶¹ Lauterpacht’s ghost evidently haunted the

¹⁵³ *Nuclear Weapons*, para. 105(2)(e).

¹⁵⁴ Bodansky (1999), 153; Koskinniemi (1999), 489; see also *Nuclear Weapons*, Declaration of President Bedjaoui, paras. 14; Declaration of Judge Vereschetin, 279; Dissenting Opinion of Vice President Schwebel, 322; Dissenting Opinion of Judge Higgins, para. 30.

¹⁵⁵ Declaration of President Bedjaoui, 268, para. 1.

¹⁵⁶ *Ibid.*, 270, para. 13.

¹⁵⁷ *Ibid.*, 270-271.

¹⁵⁸ *Ibid.*, para. 15.

¹⁵⁹ Dissenting Opinion of Vice-President Schwebel, 322.

¹⁶⁰ *Ibid.*

¹⁶¹ Dissenting Opinion of Judge Higgins, 590, para. 30; 592, para. 38.

members of bench.¹⁶² Several of the judges clearly had in mind his view that the necessity for courts to decide every case submitted to them is not imposed on them by any ‘express provision of positive law’, but comes instead from ‘an *a priori* assumption of every legal system.’¹⁶³ As stated, Lauterpacht relied on customary international law and general principles to establish an internal legal basis compelling adjudication,¹⁶⁴ and argued that the ‘prohibition of *non liquet* constitutes one of the most undisputedly established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice.’¹⁶⁵

Lauterpacht’s position has not enjoyed universal acceptance amongst international lawyers, however. Julius Stone, for example, disagrees with the proposition that the concept of modern law logically demands the prohibition of the denial of justice.¹⁶⁶ For him there is no ‘ontological’ necessity for such a rule, but that it only results from its formal inclusion in positive law.¹⁶⁷ He also questioned whether there was in fact a customary basis for the prohibition of *non liquet* in international law as Lauterpacht contended,¹⁶⁸ and argued such a rule was unsuitable for international law ‘in the existing conditions of the world’ as it would confer a ‘law creating competence of the court over states’.¹⁶⁹

Indeed, this position could be said to be reflected in the plenary opinion of the Court, and is certainly reflected in some of the separate opinions of judges who either did not view the opinion as a *non liquet*, or argued that the opinion was the most acceptable solution in light of the circumstances. Thus, Judge Shahabuddeen, adopting the residual negative principle of the 1927 *Lotus* court, argued that in order to amount to a *non liquet*, it would have to be shown that there is a ‘gap’ in the applicable law, but as there was no applicable law, as he saw it, to the case of nuclear of weapons, he concluded that ‘[t]here is no *non liquet*.’¹⁷⁰ Finally, Judge Vereshchetin saw it as necessary to admit such a ‘grey area’ into the law in light of the circumstances.¹⁷¹ For him, the prohibition of *non liquet* was not so pressing in an advisory opinion, and in his view the case presented a ‘good example of an instance

¹⁶² Dissenting Opinion of Vice President Schwebel, 322.

¹⁶³ Lauterpacht (1933), 63f.

¹⁶⁴ Lauterpacht (1958), 200.

¹⁶⁵ *Ibid.*, 195; (1975), 217.

¹⁶⁶ Stone (1959), 158. See also, Tammelo who argues that there is ‘logical space for *non liquet* in positive law’, and that therefore the impossibility of a *non liquet* ‘cannot be asserted on a priori grounds’ (1959, 202). Cf. Luhmann’s counter-argument that the world does not provide ‘any guarantee for logical order and consistency of deductions’ in the way Tammelo contends, (2004), 286.

¹⁶⁷ Stone (1959), 158.

¹⁶⁸ *Ibid.*, 146.

¹⁶⁹ *Ibid.*, 127-132.

¹⁷⁰ Dissenting Opinion of Judge Shahabuddeen, 389f.

¹⁷¹ Declaration of Judge Vereshchetin, 279.

where the absolute clarity of the Opinion would be ‘deceptive’ and where, on the other hand, its ‘partial indecision’ may prove useful.’¹⁷²

Though widely viewed as controversial, the Court’s non-decision has generally been well received. Most admit that it amounted to a *non liquet*, but consider the Court’s silence as prudent. In defence of the opinion, Bodansky, for example, considers the Court’s *failure* to provide a decision as something that would ‘over time build confidence in the Court’s judicial role.’¹⁷³ Thus, it is the ‘law-creation’ aspect of a prohibition of the denial of justice in an international legal system with neither compulsory jurisdiction nor accountability of the judiciary that Bodansky worries about. Nor does he see the *non liquet* as especially problematic. He questions, for example, if one cannot ‘self-consistently claim that an action is neither prohibited nor permitted?’¹⁷⁴ To demonstrate his meaning he presents the hypothetical of a tennis game where ‘rules defining when a ball is ‘in’ or ‘out’ need not make one term the negation of the other, and thus may leave open the third possibility, namely that a ball is neither in nor out.’¹⁷⁵

Koskenniemi also considers the Court’s opinion to be appropriate in respect of the circumstance, presenting the ‘silence of law’ as the ‘voice of justice’.¹⁷⁶ He argues that the application of the harsh binary legal code in this case is too blunt in relation to both the complex military and political implications of nuclear weapons as well as the emotional and moral dilemmas involved.¹⁷⁷ Pointing to the complexities of the self-defence nuclear umbrellas, Koskenniemi argues that reducing the issue to either a binary position of legal or illegal would be tantamount to expecting ‘a politician to commit suicide together with large parts of the population in deference to this kind of absolute rule?’¹⁷⁸ On another level, he defends the Court’s silence in the *Nuclear Weapons Opinion* as ‘leaving room for the workings of the moral impulse ... against the killing of the innocents.’¹⁷⁹ Application of the harsh either/or character of the binary legal code in this instance, he argues, would have ‘instituted a public, technical discourse for the defence of the killing of the innocent’, and would thereby ‘have broken the taboo against the use of any nuclear weapons.’¹⁸⁰ For him, the languages of ‘the passions and fears that are involved in a dispute’ can hardly be reduced

¹⁷² Ibid., 280.

¹⁷³ Bodansky (1999), 170.

¹⁷⁴ Ibid., 163.

¹⁷⁵ Ibid.

¹⁷⁶ Koskenniemi (1999).

¹⁷⁷ Ibid., 489.

¹⁷⁸ Ibid., 493.

¹⁷⁹ Ibid., 497.

¹⁸⁰ Ibid., 496.

into juridical language without something fundamental being ‘lost’,¹⁸¹ and he even goes so far as to castigate the attempt at litigation of such a prodigious issue as ‘European attempts to discipline what is not European’.¹⁸²

A very different conclusion is reached if one applies Luhmann’s functionalist account of law to the opinion. From this perspective, one can see that Bodansky’s analogy to a tennis game where the ball can be ‘neither in nor out’ is inappropriate. Whilst the potential difficulties might well be borne in respect of a game of tennis, they cannot be so easily taken on with law. Expectations, as explained in the third chapter, are a crutch for meaning in a world of double contingency, and their stabilization is at the very basis of the evolution of social systems. The formulation is crude, but using his analogy, if law was to become such a game of tennis with ambivalent rules, it would simply lead to the evolution of a new game, a *functional substitute* in respect of the ‘players’ expectations.

Likewise Koskinniemi’s conclusions about the silence of law being the voice of justice in this case are equally problematic from a functionalist perspective. His argument that law would be reductive of the complexities involved and would ultimately result in an abomination of the lifeworld is thoroughly unsociological, anti-Luhmannian, even anti-Habermasian. It is the function of law to reduce complexity, and this is not to claim anything essential about law. If law does not achieve this, alternative social structures will emerge as a result.¹⁸³ Moreover, it may well be that a legal decision on the issue would have broken the taboo against the use of any nuclear weapons and that something would have been lost in translating the language of emotions into the language of law, but this says nothing about the more general problem of meaningful communication in world society, and law’s functional reference thereto.

The problem with the World Court’s advisory opinion in the *Nuclear Weapons* case, however, is much more serious from the viewpoint of the theory of social autopoiesis. For Luhmann, the necessity for courts to decide every case that is admitted before them is not

¹⁸¹ Ibid., 501.

¹⁸² A criticism that is still quite stinging for international lawyers. Several East Asian states are still reluctant for widespread application of ‘harsh’ legal code in settlement of certain international disputes (Yasuaki 2003, 132). Indeed, just as Luhmann identifies that it was within the European tradition that the evolutionary achievement of the legal code prevailed (2004, 175), and that it was only in Medieval Europe that the risk of legal coding was accepted (2004, 193), so too can the push for the application of the harsh either/or binary scheme of the legal code in international dispute settlement be traced to a European effort. Indeed it is this that has led to accusations that the whole structure of international law can be understood historically as a European effort to discipline what is not European and to exclude any understanding of colonialism from the perspective of the colonised (Anghie 1996).

¹⁸³ Arguably ‘mutually assured destruction’ has become a functional equivalent of law in respect of normative expectations of the inherent right of self-defence (but certainly not those expectations of the prohibition of nuclear weapons).

simply an ontological one of the perfection of a gapless legal system—that is much too static. Rather, it is a necessity of autopoietic differentiation, and ultimately of the function of the legal system. For Luhmann the prohibition of the denial of justice is a necessary consequence of the ‘operative closure of the system and its detachment from any direct participation in the environment.’¹⁸⁴ Because ‘systems are real’—in the sense that they cannot observe their own blindness, and in the sense that they thus differentiate themselves out through the continuous re-entry of the difference between system and environment¹⁸⁵—the ‘state of the system cannot be treated in the way in which it appears as a state of the world.’¹⁸⁶ Thus, the system puts itself under the pressure of reducing environmental complexity; under the pressure of having to decide.¹⁸⁷

For Luhmann it is the law itself that prohibits the denial justice, and not the rules of particular jurisdictions.¹⁸⁸ Of course, because legal system must be ‘arranged as universally competent and at the same time capable of making decisions’, this necessarily results in a positive rules within particular jurisdictions.¹⁸⁹ Thus, the provision of the French civil code, for example, is a result of the evolution of law as an autopoietic system. Moreover, it is the courts which are seen to bear a special responsibility for this. As Luhmann repeatedly states, ‘[c]ontracts need not be concluded and statutes need not be passed, but courts have to decide every case submitted to them.’¹⁹⁰ In practice this means that courts operate within a triangulation of *obligation*, *freedom* and *limitation*.¹⁹¹ Courts are obligated to decide every case admitted before them, and this includes even ‘hard cases’ where it is impossible to state

¹⁸⁴ Luhmann (2004), 281.

¹⁸⁵ Luhmann (1995), 12ff.

¹⁸⁶ Luhmann (2004), 281.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid. There is some comparison between Lauterpacht’s and Luhmann’s view of *non liquet*. Like Luhmann, Lauterpacht also argues that it is law itself that prohibits the denial of justice. However, the key difference between the two is that, first, for Lauterpacht the issue of *non liquet* is an ontological one (the legal system should be a perfect system). For Luhmann it is an issue of law’s autopoiesis, and therefore operational, with a clear temporal aspect. Secondly, Lauterpacht believes the gaps in the system should be plugged by the law-making capacity of judges (lawyer), while Luhmann believes that it is the reflexivity and the operative closure of the legal system which secures this (communication). No comparison between the two exists in the literature, however see Koskenniemi’s comparison of Lauterpacht and Dworkin (Koskenniemi, 2005, 53-57) together with Noble and Schiff’s comparison of Luhmann and Dworkin (Nobles and Schiff, 2006, 97-100).

¹⁸⁹ Luhmann (2004), 286.

¹⁹⁰ Ibid., 284, 291.

¹⁹¹ Ibid., 279.

who is in a legal or illegal position.¹⁹² According to Luhmann, if the law cannot be found in such cases, ‘it must be invented.’¹⁹³

This only points to the ‘paradox of decision’, however, and the freedom courts have in making decisions. Here Luhmann draws upon von Foerster’s statement that ‘[o]nly those questions which are in principle undecidable, can we decide’,¹⁹⁴ and Shackle’s observation that, for choice to be real, the future must be changeable within limits—that is, it must be both sufficiently open to be subject to change over time, and yet, at the same time, it must be sufficiently closed that actions in the present will have a determined effect in the future.¹⁹⁵ This leads Luhmann to a radical conclusion from the perspective of traditional jurisprudence. The obligation to decide, together with the paradox of decision, results in significant freedom for the judge. Because the decision is ‘not determined by the past’, and because it instead ‘operates within its own construction, which is only possible in the present’, the decision ‘assumes the past as immutable and the future as changeable and it, therefore, turns around the relationship of determination.’¹⁹⁶ According to Luhmann, much of the ritual and decorum of judicial proceedings, right down to the ‘pomp of entries and exits of judges’, is to invisibilize this paradox of the decision.¹⁹⁷

Finally, limitation of this freedom is achieved through ‘organization and the professionalization of judicial competence.’¹⁹⁸ Organization represents an evolutionary achievement in its unique ability to carve out a zone of hierarchy in a functionally differentiated society—I will return to this in the next chapter. In respect of the judiciary, organization and professional collegiality means that ‘judges deal with their caseloads’, and that any errors they make ‘must be kept within the limits of what is ‘juridically passable’.’¹⁹⁹

This is what Luhmann means when he speaks of the ‘triad of obligation, freedom and limitation’, that ‘produces law’.²⁰⁰ But why did this triad not operate in the World Court’s opinion on the nuclear weapons question? There was an *obligation* for the Court to decide the question, so far as it must, like any other social system, reproduce itself as an autonomous

¹⁹² And this is represented also in Dworkin’s concept of hard cases, such as that of *Riggs v Palmer*, in which the court had to either, depending on how you look at it, engage in a Herculean feat of interpretative practice or exercise judicial discretion to find the relevant principles to counteract the unjust rules, Dworkin (1977), 23.

¹⁹³ Luhmann (2004), 289.

¹⁹⁴ Otherwise they would already be decided, von Foerster (1992), 14.

¹⁹⁵ Schackle (1992). Derrida also makes similar observations specifically in respect of law (see Derrida, 1990, 133), which may have inspired Luhmann’s use of the concept in his later autopoietic theory of law.

¹⁹⁶ Luhmann (2004), 298.

¹⁹⁷ *Ibid.*, 283-284.

¹⁹⁸ *Ibid.*, 298.

¹⁹⁹ *Ibid.*, 299.

²⁰⁰ *Ibid.*, 279.

system, distinct from its environment. There was the *freedom* conferred by any decision paradox, and the typical ‘useful devices’, as Judge Higgins pointed out,²⁰¹ to invisibilize the paradox. And there was the *limitation* imposed by the professional organization; the ICJ itself is an international organization, with a constitution, hierarchy, judges with careers and salaries, etc.

However, the reasons the triad of obligation, freedom and limitation did not ‘produce law’ in this case must be located in the structural problems of international law that were pointed out in the last chapter. Ultimately, international law’s entrenched structural connection with sovereignty doctrine, and thus with the deeper structural relationship between segmentary and functional differentiation in modern society, means that the triad of obligation, freedom and limitation is somewhat skewed for international law. While the *obligation* may have been operationalized by globalization and the Court’s increasing functional orientation to general norms—here the admitted question about the illegality of nuclear weapons—the *freedom* of the Court was severely limited by underlying conditions of the international legal system. First, sovereignty doctrine not only meant the Court was unable to draw on the legitimacy of structural coupling with a centralized political system at the global level, but also that the Court was unable to deny the ‘inherent’ right of self-defence that, in all its characteristic ambiguity, was so heavily implied in the nuclear weapons question. Moreover, the problems with international law’s failed domestication of physical violence were also insurmountable here, as the Court was faced with the apex of physical violence in world society, with all its symbolic value in international relations. Beyond this, the precocious scaffolding of mutually assured destruction and the complexity of technical, military and scientific communications also restricted the Court’s freedom.²⁰² Finally, even the aspect of *limitation* was particularly acute in this case, as the Court was limited not only by the autonomous organization of the Court, but also pressure put on judges from their respective nation-states organizations—particularly problematic for those judges from nuclear weapon states.²⁰³

²⁰¹ *Nuclear Weapons*, Dissenting Opinion of Judge Higgins, para. 38.

²⁰² The Court has been criticized for the limited use it has made of scientific evidence, Plant and Riddell (2009), 5; White (1996), 534-537. However, the Court has recently begun to make more use of court-appointed experts in this respect, see, for example, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, *ICJ Reports 2014*. See also on tentative signs of a ‘new practice’ on the part of the Court in attributing more weight to factual evidence gained through intra-Institutional fact-finding, *Del Mar* (2011).

²⁰³ See, Judge Mohammed Bedjaoui, ‘Good Faith, International Law, and Elimination of Nuclear Weapons: Keynote Address’, May 1, 2008, at p. 6, available at LNCP website, ‘World Court Project’, < <http://lncp.org/wcourt/> >, accessed 19 September 2015.

These factors underpin the Court's failure to decide the question admitted about the illegality of nuclear weapons, and thus, led to the violation of the prohibition of *non liquet*. What are the ramifications of this from the systems theoretical and, more importantly, from the functional-structuralist perspective? In one sense it seems the Court has failed to manage the paradox of the system, whether one defines this as the paradox of the undecidable decision or as the foundational paradox of the self-referential system. The paradox as Luhmann says is the 'holy shrine of the system', a 'deity in many forms: as *unitas multiplex* and as re-entry of the form into the form, as the sameness of difference, as the determinacy of indeterminacy, as self-legitimation'.²⁰⁴ In another sense, it constitutes a failure of the international legal system to secure its operative closure, and thus its differentiation out from the environment. Whereas in the case of the *jus cogens* question, the Court was able to employ a second-order *internal code* on the basis of a substantive/procedural distinction, the difficulties of the nuclear weapons opinion were such that the court was forced to introduce an exterior value. It was, in other words, forced to rely on conditions from the environment, and not from other operations and structures generated within the legal system. However, the problem of *non liquet* is not simply one of the admittance of an external value such as *raison d'état* or conditions of expediency, for example. Rather, it is the admission of a 'rejection value', that is a 'third value that *negates* the binary code as the basis of choice.'²⁰⁵ This not only exposes the paradox of the system and leads to its 'disintegration',²⁰⁶ but—and this is the important point for the thesis—it negates the *function of law in reference to the problem of the norm in question*.

By incorporating an external rejection value into law through the *non liquet*, the World Court failed to maintain the uncertainty about the norm of the prohibition of nuclear weapons it had thrived on before. The *non liquet* answered a definite 'no' to the normative question about nuclear weapons. But this was not the kind of 'no' that would cause expectations of the prohibition of nuclear weapons to learn in the face of disappointment—that is, an attribution of the value 'legal' to nuclear weapons. Rather, it answered 'no' in the sense that international law would not, indeed cannot, apply its code to this question. It is this definite 'no' that blocks the stabilization of those norms in law along the temporal dimension.

How can we know that the social system will 'look' for a functional substitute at this point?

²⁰⁴ Luhmann (2004), 292.

²⁰⁵ Philippopoulos-Mihalopoulos (2004), 84, n. 65, citing Luhmann (1992c). Emphasis added.

²⁰⁶ *Ibid.*

Coding obviously depends on functional specification. That is, the code must correspond to the system's function, 'it must be able to translate the viewpoint of the function into a guiding distinction.'²⁰⁷ Codes, in other words, are 'in so far-as-abstractions'.²⁰⁸ They are only valid in so far as 'communication chooses their domain of application'.²⁰⁹ For the legal system this means that a need for a distinction between legal and illegal must be communicated—the system can generate its own conflicts but it needs irritation from the environment also. The differentiation of the legal system depends upon the 'specification of expectations which maintain the autopoietic process of reproduction.'²¹⁰ However, the relationship between coding and function is reciprocal. Function also depends upon coding. Function requires coding to safeguard the 'continuation of autopoiesis' and to prevent the system from 'running aground'.²¹¹ This is no longer simply about the autopoiesis of the function system. Rather it is about the autopoiesis of society. Thus, function systems only acquire 'universal relevance' for certain problem-references in society when they are 'specialized according to the operations of a determinate code'.²¹² In terms of norms as a problem-reference, this means that the legal system acquires universal relevance for the problem-reference of the stabilization normative expectations because it is specialized according to the operations of the determinate code it constructs internally. This may be legal/illegal, it may be substantive/procedural; from society's perspective the form is contingent—in relationship to society, the 'various codes of various function systems are functional equivalents', in that they each 'serve as guiding distinctions for the recursive reproduction of special (social) function systems.'²¹³ Thus, the communicated failure of the World Court²¹⁴ to apply the code to the question of nuclear weapons leads to the loss of law's *universal* relevance to the problem-reference of normative expectations of the prohibition of nuclear weapons. This is the proper invite to the observer to begin looking beyond law for functional equivalents to the problem.

The case is unique because it did not apply the residual negative principle of the *Lotus* judgment. It did not, in other words, stabilize normative expectations of the independence of the sovereign nation-state. In that sense it left room for, even promoted, the formulation and

²⁰⁷ Luhmann (2000b), 186.

²⁰⁸ Luhmann (1989b), 38.

²⁰⁹ Ibid.

²¹⁰ Luhmann (1985b), 117.

²¹¹ Luhmann (2013a), 91.

²¹² Luhmann (1989b), 38-39.

²¹³ Luhmann (2013b), 88.

²¹⁴ The communication here is something else that is secured by the Court's organizational form, see below, section 6.3.

recognition of the more general norm of the prohibition of the threat or use of nuclear weapons at the primary level. However, law did not provide the ‘second level’, the channel through which the disappointment of that expectation could be processed either. The norm was left intact as a generalized formulation by the opinion.

5.4 Conclusion

The concept of the ‘shift of evolutionary primacy from normative to cognitive mechanisms’, which was proposed by Luhmann, does not suggest that cognitive expectations take the place of normative expectations in world society.²¹⁵ Claims of a ‘historical shift’ to a ‘knowledge society’ in which cognitive decision-making premises replace pre-existing normative premises are often exaggerated.²¹⁶ Clearly increased functional differentiation at the global level also leads to increased normativity.²¹⁷ Moreover, if the norms proliferating at the global level are to be cognitivized, the mechanisms must be in place to subject them to ‘learning pressures’.²¹⁸ Otherwise, they continue to emerge in the social structure as norms.

This is relevant to the appraisal of the *Nuclear Weapons* opinion. The requests by the WHO and the UNGA for an advisory opinion by the Court gave form and recognition to expectations of the prohibition of nuclear weapons, as did the Court’s decision to admit the request for such an advisory opinion. The failure of the Court to decide the illegality of nuclear weapons in no way revoked or muted the recognition that the norm had received in the process leading up to the conclusion of the opinion. Nor was the norm subject to any cognitivization that forced it to adapt to learning in the face of disappointment. Without such, it can be reasonably assumed that the antinuclear norm continued to function as a counterfactually stabilized behavioural expectation; that the *Realitätsverdopplung* of the normative projection continued its course, stimulating possibilities for further social evolution.

The employment of a distinction of private/public law at the transnational level has proved useful for generating insights. It can be stated with confidence that the kind of ambitious model of global law beyond the state which Teubner proposes will not accommodate the antinuclear norm. There is no provision for the positivization of such a

²¹⁵ Luhmann (1985a), 262.

²¹⁶ Wilke (2007), 93-94. And Wilke is particularly guilty of losing track of the functional reference of law, see Rogowski (2013), 11.

²¹⁷ Sand (2008), 49.

²¹⁸ Teubner (2012), 94.

prodigious norm within the framework of such a model of law, and this is certainly an example where the critique about societal law and constitutionalism's marginalization of the nation-state is most relevant. Locked within a *complex* of an international hierarchy of the symbolic power nation-states, the inherent right of segmentarily differentiated political units, and the dark-side of functional differentiation, any solution to the problem of this general norm must be more inclusive of international entities. Nonetheless, the accommodation of this norm is clearly beyond the limits of public international law also. Had the International Court of Justice availed itself of the devices it typically relies on in the face of paradox, such a conclusion would not be so evident. But the Court could not do so. This was a case where globalization (here meaning not only functional, but segmentary and stratifactory differentiation) outpaced law.

Neither private nor public law provides a solution of the problem of such a general norm. Now the problem can be constructed as the dissonance between the formulation and recognition of an antinuclear norm in world society and the failure to accommodate such a norm in *law*. This is the proper invite for the observer to look for functional equivalents beyond the law.

6 Social movement organizations and general norms

6.1 Introduction

Having properly constructed the problem of generalized norms in reference to law, and having found that law fails to accommodate at least one such generalized norm, the thesis will shift its focus to a search for functional equivalents beyond law. It should be stressed again that the purpose of the functional method of analysis is not to establish cause and effect relationships, but rather to gain insights through comparing causalities.¹ The reader should also be reminded that the aim of the functional method is not necessarily one of setting out a blue print for possible solutions to the problem, but, assuming that the problem has already been solved, can also aim to identify existing problem-solutions that lie buried beneath the ‘illusion of normality’.² In this way the functional method aims to explain the normal as an achievement of social evolution.

Before thus identifying functional equivalents beyond law for antinuclear norms, however, it is worth briefly revisiting the topic of the role of expectations in the social system. In the second chapter it was stated that double contingency and the need for the integration of expectations prove instrumental to the emergence of social systems. After Luhmann’s autopoietic turn, expectations come to play a role at an even more elemental level: they structure communication. Communication, as a tripartite unity of *information*, *utterance* and *understanding*,³ is only ‘made possible, so to speak, from behind, contrary to the temporal course of the process.’⁴ That is, because each of the three stages of communication involves selection,⁵ communication is ‘bidirectional’⁶ and thus only ever really takes place when ego distinguishes between the information and utterance as selections. For example, if alter says to ego even the simplest statement, such as, ‘It’s a full moon tonight!’, then, to understand, ego must make a distinction between what has been

¹ Luhmann (1995), 53.

² Ibid., 114.

³ Ibid., 43.

⁴ Ibid., 41.

⁵ Luhmann conceived of communication instead as a ‘selective occurrence’, (1995), 140. First, every communication must involve a selection of information, as a cleaving out of ‘the world of things’, that which is seen as relevant to the interaction, Luhmann (1995), 139. Secondly, there has to be some utterance of the information, and this too involves a selection from a repertoire of possibilities in terms of both the reason for imparting the information, and the form of expression to be adopted. Finally, for communication to take place there must be a further selection in understanding, Luhmann (1995), 142.

⁶ Stichweh (2000b), 10.

selected as information and the reason and manner for its utterance. It can be seen from this simple example that understanding is ego's selection; he might conclude that alter is making small talk, suggesting it might be a good night to hunt, or aiming to drive without headlights. Further, the example shows how, even though all communication necessarily involves consciousness, the selection at each stage depends on existing social structures. Thus, alter's comment to ego would be quite different if it was made, say, between nurses in a psychiatric hospital than between lovers setting out on an evening stroll.

Communication then only takes place when ego projects her distinction between information and utterance to alter (*e.g.*, 'I thought the "lunar effect" was bunkum?'). It is here that expectation plays its most elementary role in social structure. Because communication runs counter to temporality, 'one must attend to anticipation and the anticipation of anticipations', and it is this which, according to Luhmann, 'gives the concept of expectation a central place in all sociological analyses.'⁷ Expectations are therefore not purely located in the realm of consciousness, but form the basis of social systems.⁸ In the flash-point of anticipation and event, they provide both a learning capacity for system behaviour and condense and stabilize operations. As Luhmann says, '[e]xpectations come into being by constraining ranges of possibilities. Finally, they are this constraint themselves.'⁹ For example, expectations may cause colleagues to sit in different positions around the table at a board meeting, and with practice this becomes a fixed expectation. This then is the elemental basis from which expectations support the differentiation of social systems. Social systems 'use expectation as structures which control the process of reproduction of communications by communications.'¹⁰

Moreover, this brings another important sociological aspect of expectations into view—which is relevant to the social structure that will be identified as a functional substitute in reference to the problem of general norms. Luhmann presents *decision* as 'equivalent in meaning to an expectation.'¹¹ That is, one can only speak of a decision '*if and insofar as the*

⁷ Luhmann (1995), 143. Beyond Weber, for whom instrumentally rational action is 'determined by expectations' (Weber, 1968, 24) and Galtung who developed the role of expectations in his peace research (see Galtung, 1959 and Galtung, 1996, 62), other sociological approaches have focused on expectations as social structure. For accounts of expectations leading to 'inequitable power and prestige' structures, see Moore (1985); Correll and Ridgeway (2006). For accounts focused on how performance evaluations are influenced by expectations, see Berger, Cohen and Zelditch (1966); Foschi (1972).

⁸ Luhmann (1995), 289.

⁹ *Ibid.*, 292.

¹⁰ Luhmann (1985b), 117.

¹¹ Luhmann (1995), 295.

*slant of meaning an action has is in reaction to an expectation directed to that action.*¹² In other words, an action can only be construed as a decision if it is directed towards an expectation and can be identified by means of that expectation. In this way expectations can be incorporated into the meaning of undecidable decisions as a contextual reference. In the case of conflict or deviation, the expectational reference can be ‘reactivated’ to give meaning to a decision. Luhmann gives the comic example that, ‘[o]ne skips brushing his teeth after dinner because the taxi has already arrived and he does not want to keep it waiting or pay for being late.’¹³

Expectations thus reveal themselves through conflict and give meaning to decisions. This is particularly so in the case of normative expectations. It is this type of expectation in particular which leads to the differentiation of social systems.¹⁴ Normative expectations must be retained counterfactually; they require confirmation even when ‘the damage cannot be undone’, and they must therefore be ‘modalized’.¹⁵ Thus, not only must normative expectations which fail to find stabilization through law look to functional equivalents, but, they can be construed as being primed with a certain social force in communication which stimulates the emergence of facilitating social structures.

This invites a search then for other emerging structures that may provide a solution to the problem of normative expectations arising at the global level which fail to find stabilization in law. Before taking such a ‘sidelong glance’ at the other possibilities, however, I will briefly summarise the conclusions made so far in identifying the problem.

This thesis has addressed the problem of generalized norms which are formulated in global society, yet which fail to find realization in law. Such norms have been identified as arising in response to the ‘dark side’ of functional differentiation and the increasing attribution of risk to decision-makers. A systems theoretical concept of global law beyond the nation-state engages this problem by identifying ways in which the dynamics of functional differentiation can be harnessed to construct a system of law that is reflexive of the specialized issues arising in world society. In reliance on functional differentiation, however, such a model is over-determined to some extent by the special logics of functional systems, at the exclusion of certain norms arising at a more general level of global society. In particular, it is unlikely to accommodate the class of norms arising at the global level which communicate a need for action also within the sovereign boundaries of the nation-state. This

¹² Ibid., 294.

¹³ Ibid., 295.

¹⁴ Ibid., 306.

¹⁵ Ibid., 324.

issue has been somewhat obscured by the prevailing shift of theoretical focus from function and norms to code. Thus, to understand the problem better it has been necessary to return to an earlier functionalist account and to thereby distinguish norms as counterfactually stabilized expectations that arise in support of meaningful communication. The function of law, on the other hand, has been presented as the congruent generalization of expectations in the temporal, social and material dimensions. With this, attention shifted to the public international legal system. In recent years, that legal system has increasingly orientated itself to generalized normative expectations of global public goods. However, attempts in this direction continue to be hampered by underlying structural conditions of the international legal system: the centrality of state sovereignty, the failure to domesticate physical violence, and lack of structural coupling with a centralized political system at the global level. Rather than appearing as relics of a past age, however, these conditions can be seen as a symptom of a complex of forms of societal differentiation which constitute contemporary world society. This leads to a paradoxical arrangement, whereby international law increasingly refers to the larger social system by two contradictory means; increasingly referring directly to the problem of general norms arising at the global level, while, at the same time, referring to the primary differentiation of the larger system through sovereignty doctrine. International courts have, nonetheless, shown themselves to be very resourceful in developing second order coding to manage this paradox. The case of nuclear weapons is very special though. It entailed such a poignant expression of the tension between global public goods and state sovereignty that the Court could not decide the issue. As neither global private law nor international law can differentiate itself and maintain functional reference in reference to the antinuclear norm, it is concluded that law cannot be said to have universal relevance for such normative expectations.

6.2 General norms, social movements and organization

At this point one can start to look for functional equivalents beyond the law. But where should one start looking? It is useful to bear in mind two key points here about the functional method: first, the problem observed will probably have been already resolved;¹⁶ and second, that the functional method is ‘as much about analyzing the problem that something is a

¹⁶ Luhmann (2013b), 82.

solution to, as it is about analyzing how problems are solved'.¹⁷ In the present context this suggests turning back to the nuclear weapons opinion, which provided such a crystallization of the problem constructed. It is there that the norm has found both its most concrete formulation and recognition in society and its most concrete expression of failed legalization. If one revisits the case through this lens, then other social systems that are orientated to the problem clearly come into view.

I quote again Judge Weeramantry, this time at more length, who in detailing the 'overwhelming majorities' who expressed their expectation of the prohibition of the threat or use of nuclear weapons to the Court, stated:

Added to all these official views, there is also a vast preponderance of public opinion across the globe. Strong protests against nuclear weapons have come from learned societies, professional groups, religious denominations, women's organizations, political parties, student federations, trade unions, NGOs and practically every group in which public opinion is expressed. Hundreds of such groups exist across the world. The names that follow are merely illustrative of the broad spread of such organizations: International Physicians for the Prevention of Nuclear War (IPPNW); Medical Campaign Against Nuclear Weapons; Scientists Against Nuclear Arms; People for Nuclear Disarmament; International Association of Lawyers against Nuclear Arms (IALANA); Performers and Artists for Nuclear Disarmament International; Social Scientists Against Nuclear War; Society for a Nuclear Free Future; European Federation against Nuclear Arms; The Nuclear Age Peace Foundation; Campaign for Nuclear Disarmament; Children's Campaign for Nuclear Disarmament. They come from all countries, cover all walks of life, and straddle the globe.¹⁸

Indeed, the influence of such 'powerful pressure groups' on the WHO's and UNGA's decisions to request the opinion was so evident that Judge Oda had the clear 'impression that the request for an advisory opinion which was made by the General Assembly in 1994 originated in ideas developed by some NGOs.'¹⁹ Judge Guillaume, on the other hand, wondered in hindsight if it would not have been better for the Court to have considered 'piercing the veil' to dismiss the request as inadmissible on the grounds that it was so

¹⁷ Knudsen (2010), 7.

¹⁸ *Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, 533.

¹⁹ *Nuclear Weapons*, Dissenting Opinion of Judge Oda, 335-336.

influenced by transnational civil society.²⁰ Ultimately, the *Nuclear Weapons* opinion has become a ‘famous example’ of a civil society campaign for the recognition of a norm in international law.²¹

I will return in the third section of this chapter to exploring in more detail the involvement of civil society groups in the *Nuclear Weapons* opinion,²² but first it is worth flagging something that becomes apparent when we bring such protests movements into view as a possible solution to the problem of generalized norms. Luhmann’s answer to his own question that was cited at the very outset of this study (‘what happens if generalized values can no longer be accommodated in differentiated society?’²³) was that ‘social’ or ‘protest movements’ emerge as a solution to the problem.²⁴ This is not exactly what I am proposing here as a solution to the issue of general norms, because social movements in themselves are a little too diffuse to provide a functional substitute to law in this respect. Nonetheless, it brings us closer to the conclusion, and therefore must be understood fully.

Addressing the issue of the ‘conflict’ which arises when ‘expectations are communicated and the non-acceptance of the communications is communicated in return’,²⁵ Luhmann presents the idea of an ‘immune system’ as representing ‘forms of meaning that enable autopoietic reproduction in absence of agreement’.²⁶ Of course, rejection will be commonplace in any complex society, but there must be mechanisms for selecting the ‘truly important contradictions’, the ‘promising ‘no’s’ that will stimulate autopoiesis.²⁷ Law is the principal means of achieving this, Luhmann argues.²⁸ However, since the latter half of the eighteenth century—that is, with advanced shift to functional differentiation²⁹—another form of immune system that operates ‘independently of official structures’ becomes apparent in the

²⁰ *Nuclear Weapons*, Separate Opinion of Judge Guillaume, 288. Of course, the involvement of civil society was regarded as relevant by opposing NWS, arguing the request for the advisory opinion was ‘the result of a sustained campaign by a group of non-governmental organizations’, *Written Statement of the Government of the United Kingdom*, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, June 1995, para. 1.2.

²¹ Lindblom (2005), 219; see also Sands (2000), 103; Higgins (1997), 103.

²² The term ‘civil society’ refers to a rather broad category. Cohen and Arato thus define civil society ‘as a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication’, Arato and Cohen (1992), ix. Indeed, the fact that no agreed definition exists reflects ‘what civil society is about.’, Peters (2009d), 313.

²³ Luhmann (2013a), 154.

²⁴ *Ibid.*, 155.

²⁵ Luhmann (1995), 388.

²⁶ *Ibid.*, 397.

²⁷ *Ibid.*, 397.

²⁸ *Ibid.*, 397.

²⁹ Luhmann (2013a), 154.

form of social movements.³⁰ Protest communication reacts to the ‘perturbations’³¹ caused by the ‘side effects’ of functional differentiation which cannot be adequately addressed by other functional subsystems,³² and thereby ‘compensates for modern society’s manifest inadequacies in reflection’.³³

Of course, this is not to say that these problems must be solved for society to survive.³⁴ The immune system is not concerned with the prevention of conflicts or with re-establishing the *status quo ante*.³⁵ Rather, the idea is to ‘redirect the energy of conflict into communication channels that that can tolerate both sides of the argument’ (‘yes’ and ‘no’),³⁶ so that autopoiesis may avoid running into ‘evolutionary cul-de-sacs’.³⁷ In other words, the tendency of protest communication to abandon pre-existing institutionalized structures provides the rupture through which there is a chance to ‘rescue communication’s self-reproduction’³⁸ and to open ‘perspectives for new sequences of communication’.³⁹

This form of immune system has also become increasingly pronounced with the increased awareness of ‘risk’ in modern society. With an increase of risky decisions being taken there is an increased probability of protest ensuing as social movements are able to ‘play off affected involvement against decision making’ and to take up ‘varying observer stances’ in response.⁴⁰ Under these developments, the form of protest is very much one of ‘us versus them’, with the protesters on one side and what they protest against on the other. It is important to note, however, that this is not like a political opposition where one side wishes to take over responsibility from the other. Rather, protest, ‘negates overall responsibility’.⁴¹ It is addressed instead ‘to *others* calling on *their* sense of responsibility’,⁴² and assumes there are others to carry out what is demanded. Nonetheless, this form of differentiation—protest/what is protested against—becomes increasingly important according to Luhmann, in

³⁰ Luhmann (1995), 398. And Luhmann argues a ‘complementary significance’ in the relationship between the increased positions for rejection provided by law and the articulation of criticism and protest provided by social movements, (ibid.), 403.

³¹ Ibid., 403.

³² Blühdorn (2007), 8.

³³ Luhmann (1996b), 142f. Translation provided by Blühdorn (2007), 8.

³⁴ Luhmann (1995), 477.

³⁵ Ibid., 369.

³⁶ Mingers (2002), 106f.

³⁷ Blühdorn (2000), 137.

³⁸ Luhmann (1995), 403.

³⁹ Blühdorn (2000), 137.

⁴⁰ Luhmann (1993), 138. And beyond ‘the ecological movement’, Luhmann points out that this also holds true for ‘peace movements, which for many good reasons consider armaments alone—and not just war—too risky.’ (ibid.).

⁴¹ Luhmann (2013a), 158.

⁴² Luhmann (1993), 125.

that it ‘does for protest movements what functional systems achieve through their code’.⁴³ That is, it achieves closure, allows for reproduction, and ultimately enables protest movements to emerge as autopoietic systems.⁴⁴

For Luhmann, of course, this is not to suggest that protest movements ‘know it better’ or can judge things better than other social systems.⁴⁵ However, what is important about the emergence of such an autopoietic system is that the ‘very illusion’ that protest movements do ‘know it better’, provides ‘the blind spot that enables them to stage resistance of communication to communication and thus to provide society with a reality that it could not otherwise construct.’⁴⁶ Society needs an ‘internal boundary in order to be able to think about itself’, and the only possibility of this in a functionally differentiated society is through the projection of a ‘fictitious external standpoint’.⁴⁷ This is what protest movements achieve. Blühdorn argues that Luhmann never settles on what he considers to be the true function of protest movements. On the one hand, he can be seen to suggest that the function of protest communication is to actually ‘include what up to now has been excluded’, through the provision of a simulated external perspective that can draw attention to the ‘adverse effects of functional differentiation’.⁴⁸ On the other hand, he can be seen to suggest that the function of protest communication is merely to ‘externalize issues that cannot be included’ by creating a communication space which serves as a ‘realm of simulation’ for those issues.⁴⁹ Blühdorn considers the latter ‘simulation’ thesis to be more ‘evident’; that through such simulation, protest communication reconciles the tension between the *exclusion* that inevitably results from functional differentiation and the ‘non-existent *inclusive* alternative’ on which functional differentiation now relies.⁵⁰

The connection here to what has been said already about the political system as the only system that can carry the illusion of legitimacy in functionally differentiated society should be immediately obvious,⁵¹ and there is now a burgeoning field of research on the possibilities, even *necessity*, of locating constitutionalism in global civil society as a ‘constitutionalism

⁴³ Luhmann (2013a), 158.

⁴⁴ Luhmann (1993), 127. There is thus potential for structural coupling between this autopoietic system and others, although Luhmann only gives consideration here to the structural coupling between protest movements and the mass media, see Luhmann (2013a, 163), (1993, 141).

⁴⁵ Luhmann (2013a), 165. Indeed, that is the point; the protest/what is protested against code is an internal distinction of the social movement.

⁴⁶ *Ibid.*, 165.

⁴⁷ Luhmann (1993), 140.

⁴⁸ Blühdorn (2007), 11.

⁴⁹ *Ibid.*, 11-12.

⁵⁰ *Ibid.*, 14. Emphasis added.

⁵¹ See above, section 4.2. And it should also be clear that this connection is more complex than Beck, for example, suggested in his concept of civil society becoming the new centre of politics.

from below'.⁵² These issues are not altogether extraneous to the present study, but in the interests of space I want to move directly to identifying a possible solution to the problem of general norms which go unrealized in law within the context of protest movements. Luhmann never explored this relationship in any depth, and this can be attributed to two factors. The first is general and relates to Luhmann's attitude to protest movements. It is perhaps an exaggeration to say that Luhmann aimed to 'discredit' protests movements,⁵³ however, it is clear that he was not very sympathetic towards them.⁵⁴ This may have obscured from view the ways in which his own theory provided the basis for constructing a greater role for protest movements in modern society than he was prepared to admit. Although he defies stereotype, Luhmann may have been somewhat defined in this respect by notoriety in post-war Germany as a foil to Habermas and the Frankfurt school and for his reputation for technocratic functionalism.⁵⁵

Secondly, although Luhmann's organizational theory departed from Weber's concept of instrumentally rational bureaucracies,⁵⁶ he still tended to associate 'organization' exclusively with the firm or the bureaucracies of the modern nation-state for example,⁵⁷ even appearing to some to present a concept of organization that was 'quite old-fashioned'.⁵⁸ Thus, Luhmann was only prepared to admit that protest movements 'secrete' organization for 'residual purposes'.⁵⁹ He argues that if we were to understand protests movements as organizations, 'they would display a long list of deficient characteristics: they are heterarchical not hierarchical, polycentric, structured networks, and above all they have no control over the process of their own change.'⁶⁰

This needs refinement however. While it is undoubtedly true that protest movements *in general* do not display the characteristics of organization, it is undeniable that, within at least some of those broader social systems, *there is often an organized core*. Already in the mid-1960s social scientists were beginning to examine social unrest in terms of 'collective

⁵² Anderson (2013), 902. See also, for example, Christodoulidis (2003), (2007); Tully (2007); and most recently Teubner, who has come to see protest movements as one of four societal developments allowing for law to increasingly externalize its foundational paradox, Teubner (2015), 7-8.

⁵³ Fuchs (2006), 1254; Fuchs and Hofkirchner also suggest that Luhmann argues that social movements are 'made up by a notoriously mentally instable public', (2005, 112), citing Luhmann (1996b), 204.

⁵⁴ Blühdorn (2000), 126.

⁵⁵ Social movements play a greater role in Habermas' concept of law, as modern liberal constitutions are essentially composed of both law and civil society as 'those nongovernmental and noneconomic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld.', Habermas (1996), 366-367.

⁵⁶ Luhmann (1964).

⁵⁷ See also Kjaer (2009), 533.

⁵⁸ Mingers (2003), 114. Mingers view, as will be seen below, is a little short sighted, however.

⁵⁹ Luhmann (2013), 156.

⁶⁰ Luhmann (2013a), 156.

action'⁶¹ and 'social movement organization' (SMO).⁶² These approaches argued that, in order to be sustained over time and have maximum effect, social movements increasingly relied upon at least some minimal form of organization for administration, leadership, collecting resources and encouraging participation. Since then, the proliferation of SMOs in world society in the last thirty years has been well documented.⁶³ Smith, for example, presents empirical evidence of the number of transnational SMOs⁶⁴ rising from less than two hundred in the 1970s to almost one thousand by the year 2000.⁶⁵ Furthermore, in distinction to the Weberian assumption that increased organization would cause social movements to replace charismatic leadership and protest with bureaucracy and a more general conformity with society,⁶⁶ research has shown such organizations to successfully balance bureaucratization with the ideological commitments of the social movement.⁶⁷ Institutional scholars like Boli and Lechner, for example, point to what they call the 'disinterested' and 'irresponsible' character of transnational civil society organizations.⁶⁸ They are 'disinterested', they argue, in the sense of being relatively unconcerned with their own parochial interests as an organization. This allows them to function instead as 'nonprofit organizations promoting collective benefits, public good, the common weal, or the welfare of diffuse categories'.⁶⁹ At the same time, they are 'irresponsible' in the sense that they do not have to answer to shareholders or an electorate, and are absolved from responsibility for broader political objectives, allowing them to focus on the promotion and proposal of specific legislative and regulatory changes.⁷⁰

⁶¹ Gamson (1968).

⁶² Ash and Zald (1966); McCarthy and Zald (1977), 1218ff.

⁶³ Boli and Thomas (1999); Drori, Hwang and Meyer (2006).

⁶⁴ Smith uses the term 'TSMO' to distinguish transnational social movement organization from their national associates. The distinction is not necessary here as reference is mostly to such organizations at the transnational level. Where otherwise it will be made clear that reference is being made to national SMOs.

⁶⁵ Smith (2005), 232.

⁶⁶ Weber (1968), 297ff; Michels (1949).

⁶⁷ Ash and Zald (1966); McCarty and Zald (1977).

⁶⁸ Boli and Lechner (2005), 123.

⁶⁹ Boli and Lechner (2005), 123.

⁷⁰ Boli and Lechner (2005), 124; see also Gaer (1995), 395; Meyer (1996). Thus, for example, Greenpeace believe that their effectiveness as an organization lies in their 'unique independence from government and corporate funding', Greenpeace Annual Report 2013: 'To maintain absolute independence Greenpeace does not accept money from companies, governments or political parties. We're serious about that, and we screen for and actually send checks back when they're drawn on a corporate account. We depend on the donations of our supporters to carry on our nonviolent campaigns to protect the environment.'

Even if we were to take Luhmann's defining criteria for 'organization', which Kuhl presents as goals, hierarchies, and membership,⁷¹ then it becomes clear that many SMOs are not so deficient in the characteristics of formal organization after all.

Goals have long been identified as an important character of organizations.⁷² This explains the importance of organization in functionally differentiated society. With the loss of authority that accompanied the shift from stratification to functional differentiation, organizations are a way of establishing superordinate goals, that is, at least within their boundaries as a social system.⁷³ Thus, social movements can thus be commonly seen to rely on organization to achieve their normative goals. McCarthy and Zald define the SMO as 'a complex, or formal, organization which identifies its goals with the preferences of a social movement or a countermovement and attempts to implement those goals.'⁷⁴ The goals of the International Peace Bureau (IPB), for example, include 'disarmament for development',⁷⁵ those of the Centre for Socio-Eco-Nomic Development (CSEND) include 'sustainable and integrated development through multistakeholder dialogues, institutional learning and free flow of information',⁷⁶ Fairtrade aim for 'fairer terms of trade for farmers and workers', etc. Moreover, there has been a noted development in the increasing number of SMOs adopting 'multi-issue' goals, rather than the more traditional focus on single issues.⁷⁷ Thus the 'goals' of World Wildlife Fund (WWF) include the 'protection and restoration of species and their habitats', 'the conservation of natural resources that local communities depend on', etc.,⁷⁸ the 'goals' of Oxfam include the 'right for poor people to adequate and sustainable livelihoods', 'placing specific obligations on states to protect the rights of those who are displaced, at risk or in need of assistance as a result of conflict, disaster and insecurity', 'fair sharing of natural resources', 'financing for development and universal essential services', etc.;⁷⁹ the 'goals' of Greenpeace include 'stopping forestation for palm oil', 'stopping overfishing in the high

⁷¹ Kuhl (2013), 10. It is more precise to say that Luhmann's only defining characteristic for organization is that it achieves operative closure though its decisions (which will be explained further below), although membership, goals and hierarchies can be seen to reflect such decided orders, see Ahrne and Brunsson (2008, 45) and (2011, 85).

⁷² Blau and Scott (1962), 5; Etzioni (1964), 3.

⁷³ Drepper (2005), 180.

⁷⁴ McCarthy and Zald (1977), 1218.

⁷⁵ IPB website, 'IPB Constitution', <<http://www.ipb.org/web/>>, accessed 4 September 2015.

⁷⁶ CSEND website, 'Vision, Mission and Objectives', <<http://www.csend.org/aboutcsend/vision-mission-objectives>>, accessed 4 September 2015.

⁷⁷ Smith (2005), 233.

⁷⁸ WWF website, 'About Us', <<http://www.worldwildlife.org/about>>, accessed 4 September 2015.

⁷⁹ Oxfam Strategic Plan, 2013-2019.

seas’,⁸⁰ ending the use of hazardous chemical globally’, etc.⁸¹ The list could go on and on with the vast number of civil society organizations proliferating at the global level. Moreover, these goals are not couched in the general terms of values, but, as can be seen from the examples, more often reflect norms and are often set out in highly detailed strategic plans for their achievement.

The hierarchy that can be established with organization also reflects the importance of this form of social system within functionally differentiated society. Hierarchy symbolizes the apex of ‘constantly available official potential for collective action’.⁸² Again, even social movements must rely on hierarchy in so far as they want to organize attempts for the realization of their normative goals. Thus, Greenpeace International has a Council which acts as the supervisory body for the whole organization, and an International Board which is elected by and accountable to the Council, and which ratifies and carries out the Council decisions.⁸³ Amnesty International has a similar structure with an International Council with ‘ultimate authority’ for the conduct of the organization, and an International Board to provide ‘leadership and stewardship for the whole of the Amnesty International movement.’⁸⁴ This organizational hierarchy is reflected in many other SMOs, as will be seen in the case of antinuclear SMOs. Even those organizations which seek to establish a more consensual participation will have to rely on some measure of hierarchy. Thus, for example, CARE international not only has a secretariat based in Geneva which ‘provides coordination and support to a number of governance-, membership-, and strategic planning-related functions’, but also an International Board which oversees membership and pursues action in accordance with the CARE International Strategic Plan.⁸⁵

Finally, many of those organizations do have membership. The capacity of organizations to establish who may be referred to as a member of the system and to generally determine how this membership may be exercised is another important aspect of the

⁸⁰ Another general norm the law has had difficulty realizing—a thus a candidate for further research into SMOs in functional relation to the norm, see *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, *Provisional Measures*, (27 August 1999), *Award on Jurisdiction* (4 August 2000), Arbitral Tribunal constituted under Annex VII of the United Nations Convention for the Law of the Sea; and on its aftermath, Schiffman, H.S. and MacPhee, B.P. (2014): ‘The Southern Bluefin Tuna Dispute Revisited: How Far Have We Come?’, 3 *Transnational Environmental Law* 2, 391-406.

⁸¹ Greenpeace 2013 Annual Report.

⁸² Luhmann (1995), 200.

⁸³ Stichting Greenpeace Council Rules of Procedure, sections 4 and 5.

⁸⁴ Statute of Amnesty International, section 6 and 7.

⁸⁵ CARE International website, ‘Governance’, <<http://www.care-international.org/about-us/governance.aspx>>, accessed 4 September 2015.

organization in a functionally differentiated society.⁸⁶ The shift from stratification to functional differentiation meant a general loss of authority and the increasing inclusion of the lifeworld in functional systems. However, organizations exclude everyone except members chosen *on the basis of their consent to the goals of the organization*.⁸⁷ Through this they are able to create the ‘zone of indifference’⁸⁸ within which they can secure acceptance of the organization’s purposes and hierarchy.⁸⁹ As Luhmann says, ‘soldiers march, secretaries type, professors publish, and political leaders govern—whether it happens, in this situation, to please them or not.’⁹⁰ All expectations beyond the terms of membership (for example, that colleagues should take care of their personal hygiene or that they should say ‘hello’ to each other in the morning) are part of the informal organization.⁹¹

Many transnational civil society organizations use membership in a very specific way. First, operating on a global scale, they are often ‘meta-organizations’ in that they have as their members other organizations (or both organizations and individuals).⁹² Secondly, they want to include as many members as possible, because the more inclusive they are, the more likely they are to achieve their normative programme. But at the same time they usually have some formal recognition of membership that will depend on agreement with the core norms and values they represent. Thus, for example, Greenpeace International stipulates that any candidate organization ‘must be established to pursue objectives compatible with the mission of Stichting Greenpeace Council.’⁹³ Amnesty International stipulates that any affiliated group ‘shall act in accordance with the core values and methods of Amnesty International, as well as any strategic goals, working rules and guidelines that are adopted from time to time by the International Council’, and that an individual member is ‘any person who contributes to the advancement of the mission of Amnesty International’, and ‘who acts in accordance with the core values and policies’ of the organization.⁹⁴ Obviously these are two major SMOs that one

⁸⁶ Luhmann (2003), 38.

⁸⁷ Luhmann (2013a), 151. See also Nassehi (2005, 189) in terms of inclusion/exclusion; and Baecker (2005, 191): ‘Organization means loss of autonomy for the individual employee and a gain in autonomy for the organization.’

⁸⁸ Barnard (1938).

⁸⁹ Luhmann (2005a), 97; (2003), 38.

⁹⁰ Luhmann (1982), 75.

⁹¹ Kuhl (2013), 116; see also Selznick (1948), 27-33. Kuhl (ibid.) explains the distinction between formal and informal organization through an analogy with the formal rules of soccer and the unwritten rule that ‘a team will voluntarily send the ball out of bounds when a player on the opposing team is injured.’ If a player breaks this rule, it is not the referee who enforces the informal expectation, but the whistles and boos of spectators.

⁹² Ahrne and Brunsson (2008) argue that meta-organization has become increasingly important in structuring and organizing global society.

⁹³ Stichting Greenpeace Council Rules of Procedure, as approved at the AGM 2014, section. 2.3.

⁹⁴ Statute of Amnesty International, as amended by the 31st International Council, meeting in Berlin, Germany 18 to 22 August 2013, sections 16 and 17.

might expect to have formal membership criteria, but, as will be shown in the fourth section, even smaller SMOs that are devoted to more specific goals like the prohibition of nuclear weapons have similar terms of membership on the basis of the organizations core norms and objectives.

The final point to be made about membership is that while membership in the firm or the bureau may typically be secured by salary or ascribed status, membership of the SMO is secured on another basis. In fact, members often pay the SMO for membership, but what they get in return for their money, time or resource is the better chance of securing their own normative expectations.

There may be a question here from a systems theoretical perspective about closure and whether these organizations are selective enough to differentiate themselves out to the degree that one would expect of an organization. In Luhmann's early theory of organizations the boundaries of organizations were constituted by expectations—that is, the expectational nexus established by membership.⁹⁵ The expectational nexus established between the SMO and its members (i.e., co-expectancy of the generalized norm) would prove too diffuse for this, however. The assured congruence of members' expectations with the expectations which the SMO has established as its goals is a little thin in this respect; there is not the same sense of certainty here. The partner of an international law firm in London can call the New York office during normal business hours and expect an answer.⁹⁶ SMOs do not have that kind of control over their members' lives.

On the other hand, SMOs cannot simply rely on the binary form of protest for closure in the same way as the general social movements does. This would not differentiate them out much as organizations within those systems.

So how does the SMO differentiate itself out?

Luhmann revised his concept of the differentiation of organizations at some point around his autopoietic turn. From that point, he developed the concept that organizations are 'autopoietic systems on the operational basis of the communication of decisions',⁹⁷ that they 'produce decisions from decisions, and in this sense are operationally closed systems.'⁹⁸ This is something Luhmann developed from Herbert Simon's idea that every decision serves as a

⁹⁵ Luhmann (1964), 71.

⁹⁶ And law firms as *organizations* have their own special relevance in transnational law making and economic governance, see Morgan and Quack (2005); Quack (2007), 650.

⁹⁷ Luhmann (2013), 143.

⁹⁸ *Ibid.*, 143.

premise for later decisions in the organization.⁹⁹ The decision premise is not re-opened, to be decided again—this would only paralyze the organization.¹⁰⁰ Rather it is taken as given, as decided, and thereby provides a structural precondition of further decisions.¹⁰¹ The decided decision premise becomes the organization's *formal* structure.¹⁰² But it is important also for Luhmann that the decision premise is a decision itself, and does not therefore indicate the broader category of everything that may influence a decision.¹⁰³ On this more reflexive basis (i.e., processual self-reference), organizations 'generate possibilities for decision-making that would not otherwise exist' and 'deploy decisions as contexts for decisions'.¹⁰⁴ Thus, for example, the SMO may decide that the United Nations Universal Declaration of Human Rights should be a 'reality for the world's people',¹⁰⁵ or that there should be an 'inviolable'¹⁰⁶ guarantee of the 'basic worth and welfare of individuals in distress in conflict situations'.¹⁰⁷ Thereafter, all decisions on membership, on funding, on future projects, etc., will grow out of this original decision premise. This is the basis of the autopoiesis of the organization. Organizations 'produce decisions from decisions, and in this sense are operationally closed systems.'¹⁰⁸ This is why Luhmann describes organizations as 'systems made up of decisions'.¹⁰⁹ The organizations cannot make decisions outside of itself,¹¹⁰ and, at the same time, every formal decision, from the founding of the organization, to the occupation of membership roles by persons, must be 'treated recursively in the organization as its own decisions'.¹¹¹

I will return to this concept of the organization's recursive decision-making in the next section when I take a closer look at spontaneous organization as functional equivalent to law

⁹⁹ Simon (1957), 34ff.

¹⁰⁰ As demonstrated above, the decision is also a paradox, and this only makes it more necessary for the organization to avoid revisiting the decision (something that no doubt leads to bureaucracy). The decision is the unity of a selected alternative and the excluded alternatives, i.e., to present the chosen alternative as a decision one has to retain the options that were excluded. 'The decision has to inform about itself, but also about its alternatives, thus about the paradox' that the alternative is an alternative and at the same time is not an alternative, (Luhmann, 2000, 185, translation provided by Seidl and Becker, 2006, 26). Organizations are seen to develop various means of 'displacing' or 'invisiblizing' this paradox, see Knudsen (2005, 119-122); Nassehi (2005, 186f); Mormann and Seidl (2014, 139f).

¹⁰¹ Seidl (2006), 41.

¹⁰² Kuhl (2013), 98.

¹⁰³ Luhmann (2003), 96, n. 34.

¹⁰⁴ Luhmann (2013), 143.

¹⁰⁵ Peter Benenson, founder of Amnesty International, '40th Anniversary Peter Benenson Quote', AI Index ACT30/009/20001.

¹⁰⁶ Dunant's original goal that formed the basis of the International Committee of the Red Cross (ICRC), Dunant (1986), 126.

¹⁰⁷ The central principle of the ICRC, Forsythe (2005), 162.

¹⁰⁸ Luhmann (2013a), 143.

¹⁰⁹ Luhmann (2005), 32.

¹¹⁰ Knudsen (2005), 108.

¹¹¹ Luhmann (2013a), 145.

in respect of the problem of general norms. For now, it can be simply noted from the examples given that many civil society organizations do make decisions; that their original decision premise is often the decision to organize the realization of a normative expectation; and that every decision after this within the formal organization can be reinterpreted in accordance with that decision premise.

6.3 SMOs as a solution to the problem of general norms?

Now it is possible to compare the organization of social movements more exactly to law in respect of the highly generalized norms of global society. This is clearest in respect of the *social* and *material* dimensions of meaning. Normative expectations will be generalized in the social dimension when they are co-expected by anonymous third parties represented by the organization. As demonstrated, normative expectations are often part of the formal structure of many of those organizations, forming the basis of their goals and criteria for membership. These organizations ‘stand’ for certain normative expectations. They are collective action on the basis of such a norm. They therefore automatically entail a generalization of the expectation among anonymized co-expectant third parties beyond the immediate interaction context in which such norms might arise. This faculty is well documented by constructivist international relations scholars¹¹² who present empirical evidence of transnational nongovernmental organizations as key ‘promoters of norms’ in global society.¹¹³ Thus, for example, the normative expectations of people living in the Ecuadorean Amazon that foreign oil companies should be prohibited from polluting local land and water can easily find generalization in the social dimension if they are congruent to the expectations of anonymized third parties represented by the SMO. And this generalization is all the more pronounced if the SMO is based as far away as Amsterdam or Geneva for example.¹¹⁴

¹¹² Finnemore and Sikkink (2001), 392.

¹¹³ Sikkink (2002), 301. Finnemore and Sikkink, for example, consider NGOs to offer the organizational platforms for the second of what they see as a three stage ‘norm life cycle’ that may eventually lead to a norm ‘cascade’ into hard law (1998), 899-902. However, this approach adopts a much less elemental sociological perspective than Luhmann’s functionalism, and therefore cannot fully construct the theoretical link between highly generalized norms and civil society organizations. ¹¹³ Finnemore and Sikkink only locate the emergence with ‘norm entrepreneurs’, and therefore ignore more elemental bases of norms—that normal people also expect normatively. Their approach may have the advantage that it is more amenable to empirical research, but this comes at the cost of focusing on the normative expectations of elites. For a similar approach that also succumbs to this problem, see Wiener (2008).

¹¹⁴ A common criticism of transnational social movement organizations is that they tend to be disproportionately based in the Global North. Sikkink and Smith present evidence to support this, but point out

In terms of the material dimension, it is clear that that as long as SMO's always reflect normative expectations in their decision premises and publicize their goals on this basis, the norms are abstracted to a context to which congruent expectations can attach. In this way, the normative expectations can be imbued with a deeper meaning and can be linked to expectations arising in various specific interactional contexts. Thus, for example, normative expectations of the prohibition of the threat or use of nuclear weapons may arise in different ways, e.g., the inhabitants of a small Pacific island state may develop such expectations in relation to any serious health and environmental problems they suffer as a consequence of the testing of nuclear weapons in their region, the citizens of a European city may develop similar expectations when they come to see nuclear weapons as an unjustifiable risk. Even the officials of a nation-state may develop such expectations if they reject the mutually assured destruction doctrine and oppose nuclear weapons as a threat to the peace. Nonetheless, all of those expectations can attach to the more abstract decision premise of the organization devoted to the elimination of nuclear weapons.

Granted, there is not the same scale of the cultural store of ideas that we should expect from law. Things are much more fragmented than this, with SMOs necessarily devoting themselves to several or even just one general norm. However, it must be recognized that law was only able to achieve its vast cultural store through evolution. Even though the SMO as a social system is a relatively recent development, one can see already how many have strengthened and expanded the basis of their transmittable, cultural store of normative ideas. Thus, within a relatively short time frame, Amnesty International has gone from a limited basis of expectations of 'freedom of opinion', 'fair and public trial' and 'rights of asylum for political refugees'¹¹⁵ to a much broader normative programme that includes, amongst other things, 'rights of health, housing decent livelihood and education', the 'protection and empowerment of civilians during conflict', and the 'elimination of gender and sexuality based violence and discrimination'.¹¹⁶ This is not to suggest that the SMO will ever achieve the scale of modern law in the *material* dimension. The development of SMOs themselves suggest instead that society is evolving towards a much more fragmented institutionalization of norms. Indeed, this is the key insight here: functional differentiation not only involves the

the logistical reasons for locating the secretariat of those organizations near the political targets they seek to influence, (2002, 35-36).

¹¹⁵ 'The Forgotten Prisoners', by Peter Benenson, *The Observer*, 28 May 1961.

¹¹⁶ See for the full list, 'Amnesty International's Integrated Strategic Plan 2010 to 2016', available at <www.amnesty.org.uk/sites/default/files/plan_2011_16_0.pdf>, accessed 4 September 2015.

increasing fragmentation of legal institutions and dispute settlement fora, but the increasing fragmentation of *normative* institutionalization.

The functional equivalence of SMOs to law is not so obvious in the temporal dimension. How can those organizations institutionalize the time-binding form of normative expectations and present the possibility of ‘carrying’ normative expectations through time the way that law does? To see this it is necessary to go deeper into Luhmann’s organizational theory, and to explore the ways that organizations ‘absorb uncertainty’ and their unique ‘communicative capacity’ in society. Both of these factors play different roles in carrying normative expectations through time. One diffracts the tension that is built up when normative expectations go unrealized in law. The other keeps these norms in circulation and holds out the possibility of them eventually finding realization in law—and it does so by communicating the norms at nation-states and international organizations, as something that *appears* necessary to the realization of those norms in differentiated society.

As stated in the previous section, organizations are social systems that reproduce themselves on the basis of their decisions. They are ‘decision machines’.¹¹⁷ This not only allows them to differentiate themselves out from their environment, but it also enables them to absorb a considerable degree of societal complexity. Here again, Luhmann builds on the theory of March and Simon: ‘[u]ncertainty absorption takes place when inferences are drawn from a body of evidence and the inferences, instead of the evidence itself, are then communicated.’¹¹⁸ Because the decision premise does not need to be re-decided, it does not pass on the uncertainty in such a way that it can become an aggregated condition of the organization.¹¹⁹ Instead the information is ‘condensed at each stage and conclusions are drawn that are no longer checked at the next stage’.¹²⁰ Prior to the decision there is uncertainty because of the open possibilities; after the decision, the ‘same contingency exists in a fixed form’¹²¹—the possibilities remain, but the uncertainty is reduced since one of the options has been chosen.¹²² This is how organizations compensate for the ‘uncertainty and complexity of the societal level.’¹²³

¹¹⁷ Nassehi (2005), 185.

¹¹⁸ March and Simon (1958), 165.

¹¹⁹ Baecker (2005), 203.

¹²⁰ Luhmann (2013a), 147; Luhmann (2013b), 169. And, thus, the uncertainty absorption can lead to the ‘irrational organization’, Brunsson (1985).

¹²¹ Luhmann (2003), 37.

¹²² Mingers (2003), 109.

¹²³ Drepper (2005), 180.

This is basically March and Simon's concept of uncertainty absorption. However, Luhmann makes an important conceptual innovation in finding that it is not the decision operation itself that absorbs the uncertainty, 'but a process that connects decisions.'¹²⁴ Uncertainty absorption cannot be the content of decisions because such is never the aim of decision-making.¹²⁵ Rather, it is something that 'happens automatically whenever decisions are taken in a communication system.'¹²⁶ The whole point is that uncertainty is absorbed at each successive connection between decision premise and decision. What is important about this in the present context is that it means the concept of the decision premise is expanded from the structural level to the processual level,¹²⁷ and it is this which brings the *temporal* dimension into play. As Knudsen says it is in the 'time-dimension that decisions fixate contingency and absorb uncertainty.'¹²⁸ Because the autopoiesis of decisions 'follows real time',¹²⁹ the absorption of uncertainty can be said to take the form of the 'stabilization of expectations'.¹³⁰ Drepper even argues that organization may offer a possible functionally equivalent structure for 'expectations that cannot be generalized permanently on the level of *symbolic generalized media*'.¹³¹

The problem presented in the last chapter about law failing to decide on the illegality of nuclear weapons was also presented as a problem of normative expectations failing to find realization in law and a problem of persisting uncertainty at the societal level. However, as stated by Judge Weeramantry in the Court's opinion, there are a significant number of organizations which *do decide* this normative question. The decision-premise of SMOs like the IPPNW and IALANA is to engage in collective organization to secure the realization of that norm, and every decision those formal organizations take after that absorbs the societal complexity in relation to the norm. In other words it stabilizes the expectations of the prohibition of nuclear weapons. This is how the norm is generalized in the *temporal* dimension. For this, it does not matter if those expectations are never realized in law. What is important is that the expectations are stabilized in time through the decisions of the relevant SMO. The SMO becomes a channel, or more like a firing chamber, into which all of the

¹²⁴ Luhmann (2005), 96; Seidl (2005), 41. And here Luhmann makes a clear break with the Parsonian notion of the organization as the instrument of rational domination, Drepper (2005), 177.

¹²⁵ Luhmann (2005), 98.

¹²⁶ Ibid.

¹²⁷ Ibid., 96. This reflects Weick's concept of organization as process, see Weick (1979), 142-3: 'The communication activity *is* the organization', Weick (1995), 75.

¹²⁸ Knudsen (2005), 115.

¹²⁹ Luhmann (2003), 37.

¹³⁰ Knudsen (2005, 116), citing Luhmann (2000a, 151); Drepper (2005), 179.

¹³¹ Drepper (2005), 188.

uncertainty arising from the problem of general norms can be dissipated and diffracted. It becomes a field into which those norms can expand endlessly without conflict, even without realization in the general social system, and it therefore allows for the absorption of the complexity that ensues in the mismatch of generalized norms and the traditional differentiation of society. Organizations ‘as decision machines’ are perfectly able to retain the normativity of those expectations, confirming them and absorbing the complexity that surrounds them at every stage of decision.

Even if this is the main aspect of the function of SMOs in relation to general norms, however, there must be something else. The stabilization of expectations through recursive decision-making where the expectation can be confirmed with infinite regress is not concrete enough to attract normative expectations. The need for a decision on the norm must be communicated, and the organization must acquire relevance for the problem reference of the normative expectation in society. Moreover, as the critique of Teubner’s model of law showed, there must be some engagement of the international system for the stabilization of many general norms. There must be something to give notice of the potential successful realization of the normative expectation in differentiated society, including the nation-state. This is what is achieved through the organization’s communicative capacity.

Luhmann argues that ‘organizations are the only social systems that can communicate with systems in their environment.’¹³² That is, they are the only systems that can engage in ‘communication on behalf of the collective’.¹³³ Interaction systems can only communicate within the boundary of present participants, and can only relate to their environment by ‘internalizing the difference between present and absent’.¹³⁴ Functional systems, on the other hand, cannot enter into outward communication as entities.¹³⁵ However, organizations can both communicate outward on behalf of the collective, and they are the ‘only social systems in modern society that can be addressed as collective actors.’¹³⁶ It is for this reason that organizations are necessary to ‘install forms of reflexivity into the function systems’,¹³⁷ and

¹³² Luhmann (2013a), 151.

¹³³ *Ibid.*, 145, n. 428. Luhmann argues this was an improbable achievement in functionally differentiated society that required either hierarchy as an apex that ‘symbolizes the constantly available official potential’ for collective action, or decision premises which include such collective action ‘in the meaning of the system’s other actions and in this way limits possibilities.’, Luhmann (1995), 199-200.

¹³⁴ Luhmann (2013a), 145.

¹³⁵ *Ibid.*, 151.

¹³⁶ Drepper (2005), 182. Indeed, this is the reason that Teubner argues that global constitutionalism should be directed at organizations ‘beneath’ the functional subsystems, Teubner (2012), 54.

¹³⁷ Nassehi (2005), 188. This has led to a prevailing concept that organizations must therefore ‘belong’ in some way to specific functional subsystems (Francot, 2008, 85). Luhmann’s position on this was ‘somewhat ambiguous’ (Mormann and Seidl, 2014, 137), although he seems to have given a conclusive answer in his final

why modern society is now ‘flooded by representational communication’ that is directed at other organizations, ‘but never to the function-systems or to the entire society.’¹³⁸

The necessity of organization to anyone who wishes to communicate with their environment has of course not gone unnoticed by social movements. As Drepper points out, the ‘process of becoming a communication address’ through organizational structures and standards ‘can often be noticed in cases of social movements aiming at political goals.’¹³⁹ In this sense, the social movement is ‘forced to become a visible body in the world-wide system of political communication.’¹⁴⁰ Again, this is well demonstrated in empirical evidence of the proliferation of SMOs in the past thirty years.¹⁴¹

This communicative capacity of SMOs is very important in the context of general norms which goes unrealized in law. First of all, the reflection of the norm in the decision premise of the SMO, and thus the autopoeisis of the SMO on the basis of its decisions, keeps the norm ‘live’ within the system for further application. Secondly, the communicative capacity afforded by the organizational form means that the norm can be kept in circulation within its social environment as a proto-legal communication and, more specifically, can be continuously projected at the legal system (i.e., the legal system’s organizations), as well as international organizations and the organizations of national political systems.

Again, the solution to the problem here does not depend on the success of the SMO in ensuring the norm cascade into law. However, research has consistently pointed out how such organizations have become increasingly effective in this respect.¹⁴² Many now point to the role of transnational civil society organizations in securing ‘norm cascades’ into the international public sphere,¹⁴³ as the ‘engines of the global expansion of human rights’,¹⁴⁴ and as ‘socializing’ governments into codification of human rights and general welfare norms.¹⁴⁵ Well-known examples include the influence of civil society organizations in the establishment of the Universal Declaration of Human Rights,¹⁴⁶ in the prohibition of land

point on the issue, arguing that organizations ‘can form free of any “systemic constraints”, and there are innumerable organizations (often deceptively referred to as “voluntary” associations), that cannot be attributed to any functional system.’, (2013a), 149.

¹³⁸ Drepper (2005), 182.

¹³⁹ Ibid., 183.

¹⁴⁰ Ibid.

¹⁴¹ Sikkink and Smith (2002); Smith (2005).

¹⁴² Often empirical research in this area refers to ‘INGOs’ (international nongovernmental organizations) (e.g., Boli and Thomas, 1997) or HRINGOs (human rights international nongovernmental organizations) (e.g., Tsutsui and Wotipka, 2004).

¹⁴³ Finnemore and Sikkink (1998).

¹⁴⁴ Tsutsui and Wotipka (2004), 587; Hafner-Burton, Meyer and Tsutsui (2008), 116.

¹⁴⁵ Hafner-Burton and Tsutsui (2005), 1385.

¹⁴⁶ Gaer (1995), 389.

mines,¹⁴⁷ or in the establishment of the International Criminal Court.¹⁴⁸ Not only do such successes help secure the universal relevance of the SMO for the problem-reference of general norms, and highlight their capacity to communicate with nation-states, they also highlight the limited negative side-effects of the stabilization of norms through this functional system.

Finally, the communicative capacity of the SMO to keep norms in circulation as proto-legal communications in society is important in that it presents a *potential* ‘norm cascade’ in the traditional public sphere; in other words it also helps to present a ‘not yet’ finding which further supports the stabilization of the normative expectations along the *temporal* dimension through the recursivity of decision-making in the organization. The SMO cannot guarantee the norm will be realized—it has not got the power to do so—but it can successfully externalize it into the future if it can, through decision, keep it circulating within the environment, primed for realization within differentiated functional subsystems.

Thus the SMO can be said to achieve congruent generalization of the normative expectations in the *temporal*, *social* and *material* dimension. If the SMO can achieve relevance for the problem-reference of general norms, then it offers a functional substitute to law that cannot accommodate such norms. According to Luhmann’s functional method ‘[o]nly on the underpinnings of a scaffolding composed of such statements does it seem worthwhile to investigate underlying causalities empirically.’¹⁴⁹ That, however, would no doubt take up the space of another thesis at least. This thesis has been engaged instead with the problem with a view to indicating functional equivalents. Nonetheless, in order to further refine the theory through method, and to gain better understanding of what is involved in larger scale empirical analysis of this question, the following section will briefly engage in some limited degree of empirical investigation of SMOs as functional equivalents in respect of the antinuclear norm.

6.4 Antinuclear SMOs and international law

The focus of empirical analysis here should be on the decision chains of SMOs in relation to the general norm and the communication of the norm by the SMO to the social environment (and particularly to the political and legal systems, in so far as such supports stabilization in

¹⁴⁷ Finnemore and Sikkink (1998), 901; Short (1999); Price (1998).

¹⁴⁸ Glassius (2006); Pearson (2006); Çakmak (2011).

¹⁴⁹ Luhmann (1995), 54.

the temporal dimension). For the reasons stated above, this will help identify the functional equivalence to law in respect of normative expectations of the prohibition of nuclear weapons. Both of these aspects can be empirically observed through interviews with relevant organizational members, content analysis and secondary analysis of empirical studies.¹⁵⁰ As such, this section relies upon a select number of interviews with executive officers of key organizations and upon analysis of official documents of decisional and organizational structure of key antinuclear SMOs. However, rather than engaging in relatively large scale participant observation, what is undertaken here is only a rudimentary historical analysis of the antinuclear SMOs in the period from the early 1980s until March 2015. Even this brief empirical study, however, will provide some refinement of the theory and sound out issues for future research.

The antinuclear protest movement was born in the immediate wake of the use of atomic weapons against the people of Hiroshima and Nagasaki in 1945¹⁵¹ and, in reflection of the truly global nature of the threat, the peace movement was of a transnational character from the outset.¹⁵² Within a month of the bombing of Nagasaki the International Committee of the Red Cross (ICRC)¹⁵³ was challenging the legality of the use of such weapons and calling for their elimination.¹⁵⁴ Since then the protest movement has grown in reflection of the increasing risk of the use of such weapons throughout the Cold War. During this period, and particularly in the 1980s, it proliferated through numerous organizations at both the transnational and national level and manifested in antinuclear demonstrations in cities around the world. Since the end of the Cold War, however, there has been some decline in public interest¹⁵⁵; by the late 1990s, for example, the Campaign for Nuclear Disarmament (CND) which had been the primary SMO throughout the latter half of the Cold War, no longer had a youth wing and had only a fraction of the members it did during the early 1980s.¹⁵⁶ Nonetheless, rather than pointing to a complete cessation of the antinuclear protest movement—of a hopping from one protest topic to the next, as Luhmann might say¹⁵⁷—it

¹⁵⁰ Besio and Pronzini (2010), paras. 14-15.

¹⁵¹ Wittner (2009), 9.

¹⁵² Carter (2014), 40.

¹⁵³ Now known as the International Committee of the Red Cross Red Crescent.

¹⁵⁴ 'The end of hostilities and the future tasks of the Red Cross,' Circular Letter No. 370 to the Central Committees of the Red Cross Societies, 5 September 1945, Report of the International Committee of the Red Cross on its Activities during the Second World War, ICRC, Geneva, May 1948, Vol. I, pp. 688–690.

¹⁵⁵ Apart from in Japan, which continues to have a very active antinuclear civil society organization, Wittner (2009), 216; see also recent IALANA newsletters, available at IALANA website, <<http://en.ialana.de/>>.

¹⁵⁶ Wittner (2009), 205.

¹⁵⁷ Luhmann (2013a), 161.

might be said that, rather than disappearing, the movement, like much of the rest of society, became more fragmented and specialized.

There are now so many civil society organizations and bodies in the world that prescribe to the antinuclear norm that they are difficult to quantify. Some are of a purely transnational nature, others are based only at the regional and national level. Some are devoted to the elimination of nuclear weapons, many others include this within a broad range of protest goals. The Abolition 2000 network, which started in 1995 in response to perceived failure of nation-states to negotiate for disarmament according the Non-proliferation Treaty (NPT),¹⁵⁸ now includes over two thousand organizations from more than ninety different countries.¹⁵⁹ However, the thirty-nine organizations which the U.S. based antinuclear organization, the Nuclear Age Peace Foundation (NAPF) lists on its website as its ‘partner organizations’ can be considered to present a reliable picture of the core organizations involved in the antinuclear movement today.¹⁶⁰ For the purpose of exploring the relationship between law and antinuclear SMOs it is only necessary to introduce in any detail a few of these organizations.

Firstly, the IPB is the largest global peace movement organization. Founded in 1891 and recipient of the Nobel Peace Prize in 1910, it lay dormant through the first and second world wars only to reassert itself again in the 1960s. As a more general peace movement organization, the IPB goals are somewhat broader than those organizations that are dedicated specifically to the nuclear weapons issue. The IPB ‘exists to serve the cause of peace by the promotion of disarmament, the non-violent prevention and resolution of conflicts and international cooperation’ and membership is open to any organization or individual who supports those aims.¹⁶¹ It has a parliamentary organizational structure with an Assembly (its ‘highest policy-making body’) that meets once every three years, as well as a Council to oversee the implementation of the policies decided by the Assembly, and a Steering

¹⁵⁸ Article VI of the Treaty on the Non-Proliferation Of Nuclear Weapons provides that ‘Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.’ Article VIII provides that every five years after the entry into force of the treaty a review conference is to be held ‘with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised’.

¹⁵⁹ See Abolition 2000 website, ‘2000 Organizations’, < <http://www.abolition2000.org> >, accessed 12 September 2015.

¹⁶⁰ NAPF website, ‘Links’, < <https://www.wagingpeace.org/resources/links/> >, accessed 12 September, 2015.

¹⁶¹ IPB website, ‘IPB Constitution’, < www.ipb.org >, accessed 12 September 2015.

Committee which is responsible for the practical management of the organization between meetings of the Council.¹⁶²

The second organization worth mentioning, and arguably the most important in this respect, is the IPPNW. Founded in 1980 by physicians from Russia and the United States on the basis that ‘physicians in all countries must work toward the prevention of nuclear war and the elimination of nuclear weapons’,¹⁶³ it quickly established itself as a leading organization in the field and was awarded the Nobel peace Prize in 1985 for its ‘considerable service to mankind by creating an awareness of the catastrophic consequences of atomic warfare.’¹⁶⁴ The success of the IPPNW has been attributed to the way in which it has ‘medicalized’ the issue of nuclear weapons, ‘framing the disarmament issue in concerns for health, disease, societal survival, and the ultimate universal value of life.’¹⁶⁵ However, its success must also be attributed to the extent to which it relies upon formal organization. The IPPNW describes itself as a ‘non-partisan international federation’ made up of affiliate national physician organizations and individuals as its members.¹⁶⁶ However, it would be more apt to describe it as a hybrid meta-organization, composed mostly of organizations, but also of individuals.¹⁶⁷ Membership is only for those national or regional medical organizations or individuals who are judged to be ‘working for’ the established goal of the organization in ‘the prevention of nuclear war’.¹⁶⁸ And this is overseen by a hierarchical structure, with an International Council which meets at least once every other year, and a Board of Directors which is appointed by the Council to implement IPPNW’s policies.¹⁶⁹

Another principal organization in terms of the social movement’s functional equivalence to law is the International Association of Lawyers against Nuclear Arms (IALANA). IALANA is also best described as a hybrid meta-organization, although it is

¹⁶² IPB website, ‘IPB Constitution’, < <http://www.ipb.org/web/> >, accessed 12 September 2015.

¹⁶³ Preamble of Proceedings of the First Congress of International Physicians for the Prevention of Nuclear War, Arlie, Virginia, March 1981.

¹⁶⁴ Nobel Prize website, ‘The Nobel Prize for 1985’,

< http://www.nobelprize.org/nobel_prizes/peace/laureates/ >, accessed 12 September 2015.

¹⁶⁵ DiIorio and Nusbaumer (1985), 63ff.

¹⁶⁶ Constitution of the International Physicians for the Prevention of Nuclear War, amended as of 26 August 2014, section 2.1 and 31 (on file with the author). The IPPNW now has some 57,000 members in 63 countries, see <http://www.ippnw.org>.

¹⁶⁷ A more complex form of organization that is quite common to professionally organized SMOs, yet which is not adequately covered in Ahrne and Brunsson’s (2008) text.

¹⁶⁸ Constitution of the International Physicians for the Prevention of Nuclear War, section 2.1. And national and regional affiliates are liable for minimum dues to the organization, section 8.2. Beyond this the ‘financial resources of IPPNW shall include contributions from its affiliates (including dues), individual members, and persons and organizations interested in supporting IPPNW’s activities’, section 8.1 (and ‘persons and organizations’ here, in practice, includes diplomats and nation-states.)

¹⁶⁹ Constitution of the International Physicians for the Prevention of Nuclear War, sections 4.0, 4.1, 4.2.

mostly composed of national affiliate organizations as its members.¹⁷⁰ It is, nonetheless, something of an anomaly in this respect as it was first established in 1988 by, what is now its subsidiary, the U.S. based Lawyers Committee on Nuclear Policy (LCNP).¹⁷¹ The ‘overriding goals of IALANA are the complete elimination of nuclear arms and the prevention of nuclear war.’¹⁷² As a professional legal organization it also aims for the ‘strengthening of international law’ in this area,¹⁷³ and the IALANA Statute explicitly provides that the organization will ‘promote norms and institutions that will produce an effective peace system for the world community.’¹⁷⁴ IALANA does not boast the same degree of transparency of organization as IPPNW,¹⁷⁵ but nonetheless clearly has adequate characteristics of organization. The organization has a hierarchy represented by a General Assembly as its ‘supreme body’,¹⁷⁶ and a Board of Directors who ‘support and supervise’ an Executive Committee which is charged with implementing the policy of the organization.¹⁷⁷ Membership is on the basis of agreement and conduct in accordance with IALANA’s goals.¹⁷⁸

Finally, mention must be made of the ICRC. In general, the ICRC has not had the same degree of involvement with the antinuclear movement that these other organizations have. After its reaction to the bombing of Hiroshima and Nagasaki, the organization has been consumed in the broader task of providing humanitarian relief in armed conflict around the world, and beyond its involvement with the antinuclear movement during the Cuban missile crisis in the early 1960s, it has tended to leave the nuclear weapons issue to the many SMOs that emerged with that more specific aim in the 1980s.¹⁷⁹ Nonetheless, the ICRC has become increasingly involved again in the antinuclear movement in recent years, starting with (then) president Jakob Kellenberger’s appeal for an elimination of nuclear weapons before the NPT

¹⁷⁰ IALANA is open for individual membership in ‘appropriate circumstances.’ Article III(2) of the Statute for IALANA, as amended by the General Assembly of 18 January, 1992, Amsterdam, The Netherlands (hereafter IALANA Statute) (on file with the author).

¹⁷¹ Interview with Dr. John Burroughs, Director of IALANA UN Office, Executive director LCNP, 17 March 2015 (see Appendix for further details). Although was established when lawyers from Sweden, the Soviet Union, Germany, the Netherlands, Belgium, Finland, Denmark, Norway, Great Britain met at the Swedish Parliament in Stockholm in April 1988.

¹⁷² IALANA Statute, Article II(1).

¹⁷³ See IALANA website, ‘About us’, < <http://en.ialana.de/> >, accessed 4 September, 2015.

¹⁷⁴ IALANA Statute, Article II(3).

¹⁷⁵ At the Annual Meeting in Sczerzin, Poland in 2012, it was decided that IALANA should be headquartered in Germany because ‘there was a belief that the organizational structure and power in Germany was so strong that they could handle it.’ Interview with Reiner Braun, Executive Director of International IALANA (Executive Director of IALANA Deutsche Sektion), 11 March 2015 (see Appendix for further details).

¹⁷⁶ IALANA Statute, Article V(1).

¹⁷⁷ IALANA Statute, Articles VII(2) and VIII(2).

¹⁷⁸ IALANA Statute, Article III(1).

¹⁷⁹ Forsythe (2005), 61.

review conference in 2010, and further in the organization's adoption of a resolution on the issue in 2011,¹⁸⁰ and their adoption in 2013 of a four year plan to advance negotiations on disarmament.¹⁸¹ What is particularly noteworthy about the ICRC's involvement is that it is known to have a high level of organization and to be very effective in influencing national governments on issues of concern. In fact, as will be explained below, the primary role the ICRC played in securing the treaty to ban land mines¹⁸² can be seen as one of the principal reasons the organization has been drawn into the antinuclear campaign in the last few years.

Before examining how these SMOs have stabilized normative expectations of the prohibition of nuclear weapons in the last thirty years, two brief points need to be made. First it is worth noting that two of the principal organizations presented above are established around the institution of professional roles. This has been a prevalent trend in respect of the antinuclear movement.¹⁸³ It is not only doctors (IPPNW, Physicians for Social Responsibility) and lawyers (IALANA) in this respect, but also scientists (Pugwash), engineers (INESAP), parliamentarians (PNND), mayors (Mayors for Peace), and even models (Universal Models for Peace) that organize themselves on the antinuclear issue. Beyond the relation this bears to what Luhmann has said about *roles* serving as more concrete 'expectational nexes',¹⁸⁴ organization around professional roles has been instrumental in the antinuclear weapons movement, either as a way of rising above the emotive nature of general protest and to engage the nuclear weapons issue instead as a highly technical and complex problem (as in the case, for example, of the IPPNW), or bolstering the communicative capacity of the organization (as in the case, for example, of Models for Peace). Thus, according to the executive director of IALANA, the importance of the representation of the issue by professional groups lies in its ability to 'convince international institutions', and to show that 'it is not just emotional feeling, not just reaction', but that there is a distinctive professional argument to be contributed.¹⁸⁵

Secondly, an important point needs to be made at the outset about the distinctive roles of networks and organizations in the antinuclear movement. The antinuclear organizations

¹⁸⁰ Council of Delegates of the International Red Cross and Red Crescent Movement 2011: Resolution 1, 26-11-2011 Resolution CD/11/R1, available at < <https://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm> >, accessed 4 September 2015.

¹⁸¹ Council of Delegates of the International Red Cross and Red Crescent Movement, Sydney, Australia 17-18 November 2013, 'Working towards the elimination of nuclear weapons: Four-year action plan Resolution', CD/13/R1.

¹⁸² Short (1999), 483.

¹⁸³ See 'Professional Groups Flocking To Antinuclear Drive', by Fox Butterfield, New York Times, March 27, 1982.

¹⁸⁴ Luhmann (1995), 316.

¹⁸⁵ Interview with Reiner Braun, 11/03/2015.

have formed a number of loose coalitions and networks over the years for the purposes of different campaigns addressing the nuclear weapons issue. It has apparently been necessary for them to do so at points simply in order to break stalemates and to bring the right people together.¹⁸⁶ However, these informal networks have not proved very irritating for entrenched political and legal institutions. In terms of what has been said already about the functions of organizations, it seems that without any hierarchy, and without any consistent recursive decision-making on the basis of decision premises,¹⁸⁷ the informal networks relied upon by the antinuclear movement have not been able to engage in the kind of outward communication with their environment that is necessary to stimulate political action, or even to sufficiently provide the illusion of doing so. Thus, for example, despite amassing the support of two thousand organizations from around the world, the Abolition 2000 network which was set up to irritate nuclear weapon states into negotiating for disarmament under the terms of the NPT has not proved particularly effective, and has been described as a ‘very loose, largely unstructured network without much focus or common direction for the activities of participating organizations’.¹⁸⁸ Moreover, while the networks established through the Middle Powers Initiative (MPI),¹⁸⁹ and the Mayors for Peace ‘2020 Vision campaign’,¹⁹⁰ have perhaps been more successful in focusing resources, they have not proved as irritating as the more tightly organized campaigns. As it will be seen, it is for this reason that the antinuclear movement has in recent years generally decided to move away from the network model and the further proliferation of organizations and to move instead towards the formation of a meta-organization campaign.

The important departure point for the evolution of the function of antinuclear SMOs in terms of the norm can be located in the mid-1980s. From that point in time through to the years following the end of the Cold War much of the antinuclear movement was engaged in securing a comprehensive test-ban treaty. Even in the years after the Cold War, public opinion was still focused enough on the nuclear issue that the antinuclear movement could rely on the mass media and consumers to bring massive pressure to bear on those nation-

¹⁸⁶ Ibid.

¹⁸⁷ Luhmann (1995), 200.

¹⁸⁸ Wittner (2010), 5.

¹⁸⁹ The MPI was established in 1998 as a collaboration between eight antinuclear organizations and ‘middle power’ governments for the purpose of persuading NWS to negotiate for elimination, see MPI website, ‘About MPI’, < <http://www.middlepowers.org/> >, accessed 12 September 2015.

¹⁹⁰ The Vision campaign was established by Mayors for Peace in 2003 to rally support for the goal of eliminating nuclear weapons by 2020, see Mayors for Peace website, < <http://www.2020visioncampaign.org/> >, accessed 12 September.

states that were still conducting explosive testing.¹⁹¹ When the Australian government tabled a resolution at the UNGA for a test-ban treaty, civil society organizations around the world pressed their respective governments to support the resolution.¹⁹² After the Comprehensive Test-Ban Treaty (CTBT) was adopted by the Assembly in September 1996,¹⁹³ it was immediately signed by the P5—something that was initially seen as a major achievement for global civil society.¹⁹⁴

From the mid-1980s, while efforts were being made towards securing the CTBT, factions of the antinuclear movement were developing other lines to securing the prohibition of nuclear weapons in law. In 1985 the London Nuclear Warfare Tribunal was established by, amongst others, Sean MacBride (then president of the IPB) and Professor Richard Falk of Princeton University to examine the legality of nuclear weapons.¹⁹⁵ On declaring nuclear weapons to be illegal under customary international law, the tribunal recommended ‘the initiation of an effort to obtain an advisory opinion of the International Court of Justice on the status of nuclear weapons, strategic doctrines and war plans.’¹⁹⁶ However, it was not until a year later that civil society really began to mobilize in this direction. Richard Falk had visited New Zealand in 1986 for discussion with civil society groups there, and in 1988 retired New Zealand judge Harold Evans addressed the IPPNW meeting in Australia on the issue.¹⁹⁷ Later that year the IPPNW adopted a resolution approving the initiative,¹⁹⁸ and the following year the newly established IALANA adopted its Hague Declaration on the Illegality of Nuclear Weapons backing the initiative and calling upon nation-states to take ‘immediate steps towards obtaining a resolution by the United Nations General Assembly under Article 96 of the United Nations Charter requesting the International Court of Justice to render an advisory opinion on the illegality of the use of nuclear weapons.’¹⁹⁹

¹⁹¹ Wittner (2009), 209-210. In response to continued French testing in the South Pacific, and the call for boycott by antinuclear groups, French wine sales plummeted in Australia, New Zealand and Sweden, *ibid.*

¹⁹² Wittner (2009), 211.

¹⁹³ A/RES/50/245, 10 September 1996.

¹⁹⁴ However, the initial euphoria for the apparent power of civil society soon subsided when it became clear that most the P5 and other nuclear weapons states had already by the point of signature perfected laboratory scale subcritical testing which enabled them to continue developing nuclear weapons without explosive testing, Interview with Professor Tilman Ruff (Co-president IPPNW, Australian chair of ICAN), 19 March 2015 (see Appendix for further details). See DeVolpi, Minkov, Simonenko and Stanford (2004), VI-63; Jones and von Hippel (1998).

¹⁹⁵ *London Nuclear Warfare Tribunal, Evidence, Commentary, and Judgment*, published 1989 and available at <http://nuclearwarfaretribunal.org>

¹⁹⁶ *Ibid.*, Recommendations, Section 7.3, para. 5. Under the ICJ Statute, the Court enjoys jurisdiction either in disputes between nation-states or in advisory opinions.

¹⁹⁷ Dewes and Green (2002), 498.

¹⁹⁸ *Ibid.* See also Grief (1992), 53.

¹⁹⁹ *Written Statement of the Government of the United Kingdom*, International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, June 1995, para. 2.2, citing *The World Court Project on Nuclear Weapons*

In 1992 ‘The World Court Project’ was officially launched through collaboration of the IPPNW, IALANA and the IPB.²⁰⁰ Work began immediately towards a WHO resolution for a request for an advisory opinion of the Court. The IPPNW began with a ‘coordinated intensive campaign’ in every country in which it had members, visiting national health ministers to persuade them to argue for the resolution and making further ‘soundings’ within the WHO bureaucracy as to the viability of the resolution.²⁰¹ The real turning point came in 1993 at the World Health Assembly (WHA), as the forum where national health ministers meet every year in Geneva to set to WHO policy. The IPPNW had sent a strong lobbying team headed by the Swedish neurologist, Ann Marie Jansen and former New Zealand Director-General of Health, George Salmond, to persuade the Assembly to adopt a resolution requesting an advisory opinion from the World Court²⁰² on a question that was drafted by IALANA lawyers.²⁰³ Both had considerable experience with WHA procedure and both had well established relationships with many of the delegates at the Assembly.²⁰⁴ Beyond this, the IPPNW had prepared and distributed at the Assembly ‘readable and well referenced papers’ so that key delegates could make strong presentations within committee meetings.²⁰⁵ Despite intense lobbying by nuclear weapons states to block the resolution, the WHA adopted a resolution on 14 May 1993 requesting an advisory opinion from the World Court on the following question: ‘In view of the health and environmental effects, would the use of nuclear weapons by a state in a war or other armed conflict be a breach of its obligations under international law including the WHO constitution.’²⁰⁶

At the same time the three antinuclear organizations were engaging the broader international peace movement and civil society, drumming up support and collecting the two million signatures that they would eventually submit to the Court before the opinion. In addition, before the WHO had even adopted the resolution requesting an advisory opinion the organizations had also embarked upon lobbying campaign at the United Nations in the interests of securing a similar resolution from the UNGA requesting an advisory opinion on

and International Law (1993), xiii. In its written statement to the Court, the UK government described the WHO’s request for an opinion as ‘the result of a sustained campaign’ by NGOs in the hope of persuading the Court that the request was inadmissible for the lack of standing of such civil society groups.

²⁰⁰ Burroughs (1997), 9; Wittner (2009), 207; Krieger and Nanda (1998), 69ff; Lindblom (2005), 219; *Written Statement of the Government of the United Kingdom*, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, June 1995, para. 2.3.

²⁰¹ Dewes and Green (2002), 501.

²⁰² *Ibid.*; Interview with Tilman Ruff, 19/03/2015.

²⁰³ Interview with Reiner Braun, 11.03.2015.

²⁰⁴ Dewes and Green (2002), 501.

²⁰⁵ *Ibid.*, 502.

²⁰⁶ Forty Sixth World Health Assembly, Geneva 3-14 May 1993, Resolutions and Decisions, WHA46.40. Adopted by seventy-three votes to forty, with ten abstentions.

the issue from the Court.²⁰⁷ IALANA was aware from the outset that there was a possibility that the ICJ may have concluded that it was beyond the scope of the WHO's function to request such an opinion from the Court, and the UNGA request was pursued as a more robust alternative. Again, the movement faced fierce opposition from the nuclear weapons states, but through working with the nonaligned movement within the Assembly the movement was able to secure a UNGA resolution in December 1994 requesting an advisory opinion on the question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'.²⁰⁸

Once the UNGA resolution had been secured for the request of an advisory opinion, the antinuclear organizations became heavily involved in preparing submissions for the case. Although civil society groups have no right of representation before the Court in advisory opinions, both IALANA and IPPNW drafted model submissions for the case, and even directly helped draft the submissions of smaller nation-states to the Court.²⁰⁹ Moreover, a team from IALANA offered 'on the spot' legal advice to any supportive government deputations.²¹⁰

Despite the fact the Court avoided a pronouncement on the question of whether nuclear weapons were illegal under circumstances of 'self-defence', the World Court Project represented a significant achievement for the antinuclear movement. IALANA in particular took some comfort in the Court's reiteration of nuclear weapons states' obligation under international law to negotiate in good faith for disarmament.²¹¹ The Project has also helped to develop relationships between civil society and national governments on the nuclear weapons issue.²¹² But, most importantly, the Project played an important part in verbalizing and formulating normative expectations of the prohibition of nuclear weapons within a legal forum—something which condensed the formulation and recognition of the norm.

Despite these advances, however, in many respects the Court's ambiguity on the illegality of nuclear weapons marked the beginning of a period of frustration for the antinuclear movement.²¹³ It soon became obvious that nuclear weapons states paid little attention to the Court's stipulation of an obligation under international law to negotiate in

²⁰⁷ Interview with Reiner Braun, 11/03/2015.

²⁰⁸ A/RES/49/75k, Request for an advisory opinion, 15 December, 1994. Adopted with seventy-seven votes to thirty-three, with twenty-one abstentions and fifty-three not voting.

²⁰⁹ Interview with Reiner Braun, 11.03.2015; Interview with Tilman Ruff, 19.03.2015.

²¹⁰ Dewes and Green (2002), 505.

²¹¹ Advisory opinion, ICJ Reports, para. 105(2)(f).

²¹² Dewes and Green (2002), 505.

²¹³ Wittner (2009), 205.

good faith for disarmament. After the 2005 NPT review conference was concluded without a single line devoted to the disarmament issue a sense of despair began to creep into the antinuclear movement.²¹⁴ The problems of the NPT were becoming all too clear; it fails to provide any organization to oversee Article VI obligations to disarm, it lacks verification provisions, a time frame for disarmament, and many other relevant details.²¹⁵ Without further instruments it was clear that it would only ensure the lowest common denominator in terms of disarmament.²¹⁶

It was on this basis that the antinuclear organizations began to develop different approaches to moving forward with the goal of eliminating nuclear weapons. IALANA for its part has recommended, on the one hand, a ‘Return to the Court’ project which would put the question of the illegality of nuclear weapons before the World Court again, and, on the other, has advocated the drafting of a detailed and highly comprehensive ‘Model Nuclear Weapons Convention’.

In respect of the ‘Back to Court’ project, IALANA had initially worked to secure another UNGA resolution requesting an advisory opinion on disarmament.²¹⁷ However, this has not as yet been successful (it seems that without the political will that existed in mid-1990s and without the full engagement of the IPPNW on the Back to Court project, the request for an advisory opinion is not as easy to organize as it was in the early 1990s). Thus, IALANA have focused instead on supporting litigation in contentious cases brought by the Marshall Islands (RMI) against nuclear weapons states. Together with the NAPF, IALANA has worked in this respect with the government of the RMI, a small pacific island state that has suffered serious health and environmental problems for a number of years because of explosive testing of nuclear weapons in the South Pacific. The project has culminated in legal actions being pursued both at the national and the international level. First the RMI filed a lawsuit against the United States government in a Federal US District Court in San Francisco in April of 2014 for failing to comply with its obligations under the NPT.²¹⁸ The motion was dismissed for lack of standing, on the basis that the Court could not order specific performance of the United States government’s obligations under the treaty, and because it

²¹⁴ Interview with Tilman Ruff, 19/03/2015.

²¹⁵ See, for example, Nobuyasu Abe (2010): ‘The Current Problems of the NPT: How to Strengthen the Non-Proliferation Regime’, 34 *Strategic Analysis* 2, 213-224.

²¹⁶ *Ibid.*

²¹⁷ See ‘Return to the International Court of Justice: A Strategy to Break the Stalemate’, August 2007, available at <http://www.lcnp.org/wcourt/memoreturnICJhead.pdf>

²¹⁸ See Complaint for Breach of the Treaty on the Non-Proliferation of Nuclear Weapons, *The Republic of the Marshall Islands v The United States of America*, 24 April 2014, available at Nuclear Zero website, < <http://www.nuclearzero.org/in-the-courts> >, accessed 22 September 2015.

raised a ‘fundamentally non-justiciable political question’.²¹⁹ In that case a number of transnational and US based SMOs were able to file *amicus briefs*, including the IPPNW who were asked to do so by the NAPF and IALANA on the basis of its medical expertise.²²⁰ Secondly, the RMI filed at the same time an application with the ICJ against nine nuclear weapons states on the basis of their failure to comply with disarmament obligations under the NPT.²²¹ The case is now pending before the ICJ. In both cases, IALANA has been actively involved in the RMI’s applications. The organization’s vice president, Peter Wiess, is chair of the lawyer’s committee of the RMI government, and IALANA lawyers are reported to be working a lot on the case ‘behind the scenes’.²²²

The other line being pursued by IALANA at present is the Model Nuclear Weapons Convention. After the ICJ’s opinion in 1997, IALANA, along with the IPPNW and INESAP, decided to draft a Model Nuclear Weapons Convention. The objective of the Model Convention has been not so much to provide a blue print on a take-it-or-leave it basis for nuclear weapons states, but rather to develop a comprehensive package that clearly addresses all the crucial issues, including for example, rights and obligations, agency, phases for implementation, national implementation measures, verification processes, dispute settlement measures, and financing amongst other things. Furthermore, the aim of the Model Convention has been to build upon existing treaty law, including the 1997 Chemical Weapons Convention, and successful nuclear weapons conventions, such as the 1987 Intermediate-Range Nuclear Forces Treaty and the 1991 Strategic Arms Reduction Treaty. The Model Convention is now available in the six official languages of the United Nations, as well as German and Japanese.²²³ It was submitted to the UNGA by the Costa Rican government, and has subsequently been circulated by the UN Secretary-General.²²⁴ In 2008 Secretary-General Ban Ki-moon proposed the Model Convention as a ‘good point of

²¹⁹ Order Granting Motion to Dismiss, *The Republic of the Marshall Islands v The United States of America*, 3 February 2015, available at Nuclear Zero website, ‘In the Courts’, < <http://www.nuclearzero.org/in-the-courts> >, accessed 12 September, 2015.

²²⁰ Also available at < <http://www.nuclearzero.org/in-the-courts> >, accessed 12 September, 2015.

²²¹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. The respondent nation-states are The United States, Russia, The United Kingdom, China, France, Israel, India, Pakistan, the Democratic People’s Republic of Korea, all applications available at: < <http://www.nuclearzero.org/in-the-courts> >, accessed 12 September, 2015.

²²² Interview with Reiner Braun, 11/03/2015.

²²³ It can be found at INESAP website, ‘Nuclear Weapons Convention’, < <http://www.inesap.org/publications/nuclear-weapons-convention> >, accessed 12 September, 2015.

²²⁴ November 1997 as United Nations document A/C.1/52/7. See: < http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf >, accessed 12 September 2015.

departure' for future negotiations.²²⁵ However, as yet, has the Model Convention has had little impact beyond this so far. Judging by the scant attention it has received at the NPT Review Conference in New York of May 2015, it does not seem likely that nuclear weapons states are going to take inspiration from the Model Convention any time soon. It may be that the relative complexity of the Convention, together with the current international security climate and the lack of will on the part of nuclear weapons states, are frustrating efforts in this direction.

In light of these difficulties, a number of antinuclear organizations—led principally by the IPPNW—have decided to pursue an alternative approach of a shorter and relatively less complex ban treaty to be ratified by the majority of non-nuclear weapons states in the hope of eventually pressuring nuclear weapons states into compliance. Thus, in April 2007 the IPPNW decided to establish the International Campaign to Abolish Nuclear Weapons (ICAN), as the 'the next stage of doctors, mayors and citizens joining with governments to work for a Nuclear Weapons Convention'.²²⁶ On analysis, the genesis of ICAN can be said to be two-fold. On the one hand, the campaign was borne out of frustration with the lack of progress that was evident at the 2005 NPT Review Conference, and the limited impact of the Model Convention. But more so, it was influenced by the notorious success of the International Campaign to Ban Landmines, as a well-organized, cohesive civil society campaign which led to the adoption of the Ottawa Treaty banning landmines.²²⁷

Thus, in reflection of the landmines campaign, ICAN has aimed to work through an organized coalition of civil society partner organizations, select national governments and international organizations. Ultimately, ICAN was established to consolidate the loose networks of antinuclear SMOs and to be as 'nimble and lean' as possible in this respect.²²⁸ The proliferation of further organizations and the expansion of a disparate network of antinuclear organizations has been viewed as counterproductive to the prohibition of nuclear weapons. In fact, the national governments who were liaising with civil society on this issue—and, importantly, who were contributing funding to the campaign—made it clear to

²²⁵ See UN News Service, 'Secretary-General Ban Ki-moon, New York (USA), 24 October 2008, Address to the East-West Institute: "The United Nations and Security in a Nuclear-Weapon-Free world", available at < http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351 >, accessed 4 September, 2015.

²²⁶ 'IPPNW Launches International Campaign to Abolish Nuclear Weapons', available at IPPNW website, 'Official IPPNW Statements', < <http://www.ippnw.org/statements.html> >, accessed 12 September, 2015. IPPNW has described itself as 'ICAN's midwife', IPPNW Board of Directors Meeting, May 29-30, 2013, on file with the author.

²²⁷ Interview with Tilman Ruff 19/03/2015; Wittner (2010), 5.

²²⁸ Interview with Tilman Ruff 19/03/2015.

the IPPNW that they did not want an expanding network of civil society organizations to work with, but rather wanted a consolidated movement with government structure and with ‘one coordinating go-to partner to work with’.²²⁹

These expectations are very much reflected in the ICAN structure that has emerged. Although ICAN describes itself as an ‘inclusive campaign’, rather than an organization, analysis clearly reveals hallmarks of a meta-organization. To begin with, while ICAN seeks to be as inclusive as possible, the criteria for membership for partner organizations involves ‘pledging to: (1) promote the campaign’s objective of a treaty banning nuclear weapons; (2) identify publicly with the campaign; and (3) operate non-violently’.²³⁰ Furthermore, ICAN clearly has an internal hierarchy, with its apex represented in the International Steering Group (ISG), which oversees the strategic planning, campaign building, fundraising, policy formulation, information sharing, and coordination of international events. The operative closure of the organization is located in the decisions of the ISG, which meets regularly to take decisions on its decision-premise of securing a treaty banning nuclear weapons.²³¹

This structural arrangement has proved effective in terms of balancing inclusivity with organizational properties of closed decision-making and communication of collective action to the environment. ICAN has now over 424 partner organizations in 95 countries. The campaign has been noted for its capacity to build interest among younger people and for ‘re-energizing’ national governments on the issue.²³² ICAN was heavily involved with the organization of the 2014 Vienna Conference on the Humanitarian Impact of Nuclear Weapons, where the Austrian government made a ‘national pledge’ to identify and pursue effective measures to ‘fill the legal gap’ for the prohibition and elimination of nuclear weapons.²³³ Although the Vienna Convention did not result in a norm cascade the way in which the Ottawa Convention did for landmines, it was nonetheless notable for ICAN’s coordination with Amnesty International and the ICRC on the issue of nuclear weapons. The involvement of the ICRC on this issue, in particular, is said to be ‘one of the most significant

²²⁹ Ibid.

²³⁰ ICAN International Structure, available at ICAN website, ‘Structure and People’, < <http://www.icanw.org/campaign/structure-and-people/> >, accessed 4 September, 2015.

²³¹ Ibid. As of March 2015, the ISG is made of up ten partner organizations: Acronym Institute for Disarmament Diplomacy; Article 36; IPPNW; Norwegian People’s Aid; PAX; Peace Boat; Swedish Physicians against Nuclear Weapons; Latin America Human Security Network; Zambian Health Workers for Social Responsibility; Women’s International League for Peace and Freedom.

²³² IALANA paper, Nuclear Disarmament: The Road Ahead, April 2015, p. 4, available at <http://en.ialana.de/>.

²³³ ‘The Vienna Convention on the Humanitarian Impact of Nuclear Weapons, 8-9 December 2014’, available at BMEIA, Außenministerium Österreich website, ‘HINW14Vienna –Statements’, < <http://www.bmeia.gv.at/> >, accessed 12 September, 2015. See also, ‘A Pledge to Fill the Legal Gap: Vienna Conference 2014’, available at ICAN website, ‘Publications’, < <http://www.icanw.org/resources/publications/> >, accessed 12 September 2015.

developments in decades in relation to civil society advocacy for nuclear disarmament'.²³⁴ As stated, the ICRC was particularly influential in securing the mine ban treaty. Moreover, its evolved structural relationship with national governments is such that it is one of the very few civil society organizations that has been granted observer status at the UNGA²³⁵ (which is only reflected in the fact that it has a budget greater than that of some nation-states²³⁶). Ultimately, if nothing else, the Vienna Convention demonstrates the effectiveness of ICAN in establishing structural relations with national governments, international organizations and key transnational civil society organizations.

Discussion

The above facts represent the relevant developments of transnational antinuclear SMOs in relation to the general norm of the prohibition of nuclear weapons. If one reconstructs these facts through the theoretical lens developed in the thesis, then it is relatively easy to see how the antinuclear SMOs involved maintain a functional reference to the problem-reference of that general norm. These organizations clearly reflect the norm in their decision-premises—already here they have made a decision that law cannot. However, it is through the recursive decision-making on the basis of that premise, and thus in the evolution of the formal organization, that norm is stabilized along the *temporal* dimension. Thus, the IPPNW has decided to organize on the basis of the elimination of nuclear weapons, and then on that basis decides to pursue its objectives through the CTBT, through the World Court Project, then through the Model Convention, then through ICAN, and so on. Of course, this is just the tip of the iceberg—just a select few of the decisions made by just one antinuclear organization—but it shows how with each decision the norm is carried along the *temporal* dimension, and how at every stage uncertainty surrounding the norm is absorbed.

Furthermore, the membership within these organizations aims to be inclusive as possible, but merely requires agreement and conduct in accordance with the objectives of the organization. In other words, it only requires co-expectancy of the norm represented by the decision-premise. In this way the SMO provides the institutionalization of anonymized third-parties who co-expect the prohibition of nuclear weapons. And stated already, such SMOs can provide a sufficiently abstract context of expectations for the prohibition of nuclear

²³⁴ Interview with Tilman Ruff 19/03/2015.

²³⁵ See below, section 7.3.

²³⁶ Lindblom (2005), 20.

weapons. Thus, for example, ICAN's decision-premise for the elimination of nuclear weapons may equally reflect the expectations that arise for the Austrian government, as it may do for those small civil society organizations who represent the concerns of citizens of a small south pacific island state.

Moreover, one can see how important the communicative capacity of SMOs is here. The way in which those organizations have been able to keep the antinuclear norm in circulation in world society as a proto-legal communication is important for stimulating further communication of needs for the stabilization of such normative expectations, and thus for stimulating their own functional specification and autopoiesis. This suggests that what is communicated as a need with the emergence of a normative expectation, is not a specific need for a decision between legal or illegal, but rather is a need for decision as an autopoietic operation. This accords with Luhmann's thesis about expectations being equated with decisions, and about expectations giving meaning to decisions.²³⁷ Thus SMOs, as decision-machines, which adopt general norms as their decision-premise, must be recognized as a highly functional development in response to the increasing problem of general norms arising with globalization.

In addition, it is clear that the communicative capacity of the antinuclear SMOs engages the nation-state and international organizations. That was seen to be an issue with the global private law model in marginalizing the role of the nation-state in the global normative order. However, SMOs are clearly set up to communicate with the international system. Again, this is not to claim that there must be a 'norm cascade' within the traditional public sphere, but clearly there are a class of norms, such as the antinuclear norm, which can only be stabilized by the *prospect* of international political and legal action. Thus, the communicative capacity of SMOs to project the norm as a proto-legal communication at the public sphere can be seen to be very important.

If one were to appraise the function of organizations involved in the antinuclear movement in this respect, it would seem that the approach adopted by the IPPNW represents the most functional development in the general movement (this is not to say anything about which approach is more likely to secure a norm cascade, but rather which proves more functional in relation to the reference-problem). The high degree of formal organization adopted by the IPPNW absorbs a significant degree of uncertainty around the antinuclear norm, and its decision to pursue a public campaign for a relatively simple ban treaty along

²³⁷ Luhmann (1995), 294-295.

with its developed communicative network with national governments, supports the stabilization of the norm, and stimulates the autopoiesis of the organization, and the general social movement. This can be seen as somewhat more functional than the approach being pursued by IALANA. The nuclear weapons states are evidently little interested in adopting the Model Convention, and its complexities further undermine its communication to the broader social environment. Moreover, the Return to Court Project is unlikely to draw a decision by the legal system on the illegality of nuclear weapons and is even unlikely to provoke a *non liquet* this time. First, the Court only has jurisdiction in respect of three of the nine respondent nuclear weapons states (India, Pakistan and the UK).²³⁸ According to procedure, the Court has communicated the Royal Marshall Islands application to the remaining six nation-states, yet it remains to be seen whether they will accept the Court's jurisdiction. More importantly though, whereas with the 1996 request for an advisory opinion, the Court was confronted with a clear question on the illegality of nuclear weapons by the UNGA, this time it is a contentious case, that merely asks the Court to restate disarmament obligations under the NPT. The question about whether such an obligation exists under customary international law is an interesting one (regarding India and Pakistan who have not ratified the NPT), however, it does not ask the direct question on the illegality of nuclear weapons that the UNGA's request did, but only if there is *opinio juris* and state practice to support the obligation to fulfil the terms of what is admittedly a flawed treaty. It should be remembered how sophisticated the Court can be in developing code to avoid directly adjudicating on the legality of general norms. Moreover, there is even a possibility that the Court will side-step the issue in such a way as to detract from the poignant statement of the problem of general norms that was achieved with the *non liquet* in 1996.

Possibly the greatest refinement of the theory offered by this brief empirical analysis, however, lies in what it suggests about the need for meta-organization over loose networks, and for periodic consolidation over the endless proliferation of organizations. The development of ICAN, the increasing reliance on meta-organization and the move away from proliferation and loose networks, suggests that the function of SMOs in relation to general norms lies not simply in the diffraction of the problem through increasing fragmentation of normative institutionalization. Of course, it was primarily national governments who expressed a desire for consolidated and organized civil society—and essentially what was

²³⁸ Only these nation-states have, pursuant to the ICJ Statute, made a declaration accepting the Court's compulsory jurisdiction. For the individual declarations, and their reservations, see ICJ website, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory', < <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> >, accessed 4 September 2015.

expressed to the IPPNW, and which the IPPNW agreed with, was the need for an apex in civil society, ‘symbolizing the constantly available potential for collective action’²³⁹—but there is something here that corresponds with Ahrne and Brunsson’s thesis of the increasing importance of meta-organization in world society²⁴⁰ (although they do not devote any attention there to SMOs, nor even to the use of meta-organizations in global civil society). It suggests that, rather than a relatively simple trend towards increasing diffraction of norms through fragmented institutionalization, what is actually happening—with norms in civil society at least—is a to and fro movement between diffraction and consolidation; a massaging of the normative tension through social structure, so to speak.

The to and fro between diffraction and consolidation also accords with the systems theoretical analysis. While the proliferation of institutionalized normative decision-making helps to stabilize the norm, optimal communication of normative decision-making requires an apex for collective action amongst the networks of organizations. That is, because the communicative capacity is also important to the stabilization of the norm, there must be periodic consolidation and meta-organization of the loose association of SMOs.

Of course, these conclusions must be refined through further empirical analysis. Nonetheless, the hypothesis is clear: transnational social movement organizations operate as a functional equivalent in reference to norms which are recognized and formulated in global society, but which are inadequately realized in law.

6.5 Conclusion

Systems theory is increasingly compared to new institutionalism, in the hope that overlap between the sociological paradigms might provide scope for ‘important developments’ in theoretical and empirical research.²⁴¹ Both approaches develop a theory of ‘world society’ and importantly both view the organization as a ‘core unit’ in processes of structure formation in world society.²⁴² New institutionalists, for their part, draw on a wealth of

²³⁹ Luhmann (1995), 200.

²⁴⁰ Ahrne and Brunsson (2008).

²⁴¹ Drori and Krücken (2010), 24; see also Hasse (2005), 249; Krücken and Hasse (2007), and the range of contributions in Holzer, B., Krastner, F. and Werron, T. (eds.), *From Globalization to World Society: Neo-Institutional and Systems-Theoretical Perspectives* (2014), Oxford: Routledge.

²⁴² Stichweh (2014), 29.

empirical data to construct a theory of ‘continued expansion and penetration of formal organization throughout the world.’²⁴³

For this reason, new institutionalists would seem a valid approach for developing the systems theoretical insights offered here. However, there is one significant difference between the theories that would need to be reconciled first. In short, new institutionalists reject functionalist interpretations of the proliferation of organizations in world society. According to them, functionalist arguments cannot explain empirical evidence of organizational expansion in areas and social sectors that ‘seem not to have changed in complexity’.²⁴⁴ Organizations proliferate, they argue, regardless of ‘GDP or population size’, and the ‘rate of change in organization is higher than the rate of social change in modernization- or complexity related functions.’²⁴⁵

New institutionalists point instead to concepts of ‘legitimacy’ and ‘culture’. Legitimacy here does not refer to the Luhmannian concept of self-legitimacy or the legitimacy conferred through external reference, but rather to Weberian notions of Western socio-cultural rationalization, and of rational formal structures as a source of legitimacy in modern society.²⁴⁶ ‘Culture’ here refers to the main tenets of ‘Occidental rationalization’ (belief in progress, justice, spread of means/end rationality, etc.),²⁴⁷ which become ‘cultural scripts’ or ‘myths’ that legitimate some forms of organization over others.²⁴⁸ This, in their view, leads to ‘isomorphism’ and standardization across organizational forms in world society.²⁴⁹

These aspects of new institutionalism undermine any synthesis of the theory with the systems-theoretical approach developed here. From this perspective new institutionalism appears to operate ‘on a very high level of generalization’.²⁵⁰ For example, the fact that there are more university students today in a country with low GDP and societal complexity than

²⁴³ Drori, Hwang and Meyer (2006), 2ff.

²⁴⁴ *Ibid.*; Bromley and Meyer (2013), 366.

²⁴⁵ Drori, Hwang and Meyer (2006), 9.

²⁴⁶ Meyer and Rowan (1977), 343. Luhmann admittedly shared Weber’s concern with the empirical meaning and explanation of legitimacy, but explicitly rejects his concept of rational-legal legitimacy, (1985, 199, n. 107). Nonetheless, the overlap between systems theory and new institutionalism on the aspect of organizational legitimacy may be a useful avenue for future research.

²⁴⁷ Drori and Krücken (2010), 22. Luhmann was critical of the overuse of, what he saw as, the vague term ‘culture’. For him culture was an invention of the eighteenth century, a ‘special mode of observation’ that came about with the dissolution of the stratificatory ordering of society, Luhmann (2008b). Thus, culture denotes exposure to ‘self-reference and other reference’, for example, ‘one sort of pottery among many, one religion among others’, Luhmann (2013a), 266. From a functionalist perspective it fosters ‘critical self-reflection, nostalgic reminiscence, or the articulation of problems that occupy the future’, (*ibid.*).

²⁴⁸ Abrutyn (2013), 4.

²⁴⁹ DiMaggio and Powell (1991).

²⁵⁰ Stichweh (2014), 30.

there was in the entire world a century ago²⁵¹ in no way denies functional differentiation, but only confirms the globalizing nature of functional subsystems like the education system. More to the point, new institutionalism is unable to offer much insight into the relationship between law and the proliferation of organizations in world society. In terms of law, the failure of new institutionalism to investigate the specific logics of functional specializations, has led the approach to reflect a ‘naive legal formalism’²⁵² in which ‘rules are clear, enforcement is firm, and legal effects are substantive.’²⁵³

It is therefore unfortunate that new institutionalism has proved so influential amongst international relations scholars who focus specifically on the development of norms at the transnational level.²⁵⁴ They have thus, to some extent, carried over the naive legal formalism of new institutionalism,²⁵⁵ and this is reflected, for example, in the freely admitted incapacity of constructivist international legal scholars to distinguish ‘legal norms from other norms’,²⁵⁶ and in the prevailing assumption there that weak law is always something of a ‘normative failure’.²⁵⁷

It is suggested that the important empirical based research being carried out by constructivist international legal scholars would be better informed by the conjunction of functional analysis and systems theory developed here, which does make a clear distinction between social and legal norms, and which reveals a much broader picture of the role of norms in the evolution of world society than is observable through the lens of new institutionalist theory. Furthermore, the theory of SMOs as a functional substitute in reference to norms which are formulated at a general level of world society, but which cannot be accommodated in law, could be greatly enhanced by drawing on the empirical research which constructivist international relations scholars have carried out in relation to normative influence at the transnational level. Ultimately, it is suggested that a combination of both approaches is likely to prove productive in research terms.

²⁵¹ Drori, Hwang and Meyer (2006), 9.

²⁵² Black (1997), 81.

²⁵³ Edelman and Suchman (1996), 905.

²⁵⁴ Finnemore (1996b).

²⁵⁵ Brunnée and Toope (2003), 35ff.

²⁵⁶ Finnemore (2000), 703.

²⁵⁷ Percy (2007), 286.

7 International law and civil society organizations

7.1 Introduction

A number of potential avenues for further research open up once the possibility of the SMO is presented as a functional solution to the problem of general norms. As stated in the conclusion of the previous chapter, one could, for example, draw upon elements of the constructivist international relations research to examine how such functional subsystems are involved in ‘norm cascades’ in the traditional public sphere. On the other hand, one could stay more squarely within the systems theoretical paradigm to catalogue, for example, all of those norms that are most problematic in respect of their general character, before identifying the organizations that absorb that norm in their decision premise and then looking at the decisions the SMO takes. That would allow one to get a better picture of the structural relationship between the norm and SMO. Or one could examine the distinctions such an SMO uses in its self-description in order to understand how the SMO maintains its boundaries, what that means for its evolution, and what it might mean for society as a social system. Another possible avenue of research is to look at the structural couplings that are achieved by social movements through the emergence of such organizations. Organizations are said to ‘condense structural couplings and contribute to the structural couplings between subsystems.’¹ At the same time, it is said that ‘[i]f there is autopoiesis, there is also structural coupling’.² One then could envisage all sorts of structural couplings; between social movements and the mass media, between social movements and the political system, etc. In this chapter I want to turn back to look at law and examine what kind of structural coupling is achieved by law through social movement organizations. However, this is not so ambitious as to engage in analysis of the kind of coupling that Teubner is addressing with his concept of social movements as a means through which law can externalize its paradox and thereby achieve legitimation.³ That is a good question, but not one that can be adequately engaged in the space left here. Instead this chapter will look at structural coupling in a more modest way.

¹ Drepper (2005, 187), citing Luhmann. Emphasis removed. See also Francot (2008), 87.

² Luhmann (2013a), 163. Luhmann also stresses another precondition for structural coupling in the internal production of surplus possibilities by the system, Luhmann (2012), 55.

³ Teubner (2015).

Luhmann defined structural coupling as when a ‘system presupposes certain features of its environment on an ongoing basis and relies on them structurally’,⁴ and it is in this more basic sense of structural coupling—as structural reliance on other social systems—that this chapter will engage by focusing on how law has come to structurally rely on social movements through orientation to SMOs. Even this limited concept of structural coupling shows how law has evolved in relation to social movements, but, more to the point, it also brings issues of the legitimacy of law into focus in its own way.

International law might be seen as slow to recognize the importance of social movements in the global normative order. International law, even international human rights law, is said to have remained ‘virtually isolated’ from the emergence of social movements.⁵ However, one should not look for a direct relationship between law and social movements themselves. As stated in the last chapter about the communicative capacity of organizations, any structural relationship must be directed at organizations ‘beneath’ the functional subsystems. From this perspective, what is more interesting is that international law has not been able to build more refined structured relationships with SMOs or other civil society organizations. The closest international law has got in this respect is a conceptual orientation to the ‘NGO’, which of course is a lot more vague and ambiguous than SMO.⁶ This lack of conceptual refinement is obviously problematic from the perspective of the functional specification of the SMO, whereby SMOs can be seen to have functionally differentiated in reference to general norms, and even appear to maintain structural relationships with international law through their communicative capacity. Nonetheless, in examining international law’s construction of this relationship with SMOs, this chapter cannot go further than what the legal system has achieved, and will therefore use the broader terms ‘civil society organization’ or ‘NGO’ that international law uses to denote a category of organizations that obviously includes the SMO. Of course, the ultimate aim of the section is to draw conclusions specifically about SMOs and international law.

Whether this failure to perceive SMOs is problematic for international law itself is another question. But what we can see already is that when international law orientates itself to ‘NGOs’, issues of legitimacy soon come to the fore; not just the legitimacy of civil society organizations acting beyond the public accountability mechanisms, but the legitimacy of

⁴ Luhmann (2004), 382.

⁵ Rajagopal (2003), 246.

⁶ On this subject, see, for example, Lewis, D. (2010): ‘Nongovernmental Organizations, Definition and History’, in Anheier, H.K. and Toepler, S. (eds.), *Encyclopedia of Civil Society*, New York: Springer, 1056-1062, 1056-1058; or Martens, K. (2002): ‘Mission Impossible? Defining Nongovernmental Organizations’, 13 *Voluntas: International Journal of Voluntary Nonprofit Organizations*, 271-285.

international law itself.⁷ This chapter will address this under two headings. First it will look at the way that law has expanded through questions about the legitimacy of NGOs, principally through concepts of international constitutionalism and global administrative law. The interesting thing about law's attempts to construct accountability mechanisms for civil society organizations is the way it always rebounds back to questions of the legitimacy law itself. Of course, that must be expected if civil society organizations do operate as functional equivalents to problems that law cannot solve. But, as it will be seen, because the problem of legitimacy keeps reflecting back on law when it tries to construct accountability of global civil society organizations, the only way this can be achieved is through measures that are not only sensitive to such organizations' unique opposition function, but which also reflect law's own problems of legitimacy in this respect.

In the second part the chapter will look at the way in which law aims to further include global civil society organizations in order to bolster its own legitimacy. This approach is more sensitive to the special function that civil society organizations may have acquired in global society, and the greater inclusion of civil society organizations in the public law-making sphere is ostensibly recommended in light of the increasingly important role they play in the global normative order. However, this chapter will end by questioning whether it is functionally necessary (i.e., for society as a social system) to further include civil society organizations in the international legal system, considering the function they have achieved outside the formal public sphere. In a way this is to question the motivation of law in attempting to further include civil society organizations. Legitimacy is a scarce resource in functionally differentiated society, and yet—however one defines it—legitimacy is obviously an important ingredient for satisfying the growth compulsion of media steered systems. From the perspective of the theory developed in this thesis of the SMO as providing a functional solution to the problem of general norms in a way that is completely independent of the politico-legal structures that would traditionally have provided solutions to such problems—indeed, of the SMO as a 'functional substitute' to law—it would seem that a high degree of caution is necessary on the part of lawyers in constructing any structural relations with SMOs, and perhaps even 'NGOs' in general. Otherwise, there is a danger that law's

⁷ Reflecting the functionalist account of law, which has been adopted throughout the thesis, and which generates insights through a distinction between cognitive and normative expectations, 'legitimacy' here will refer to: when one can expect normatively that directly affected persons cognitively adapt to what decision-makers communicate as norms, Luhmann (1985a), 201. This basic formulation is not far removed from a basic Weberian concept of legitimacy, Weber (1968). Nor does it enter into the debate about the mechanisms of securing such legitimacy, reflected in the Habermas/Luhmann exchange about discursive rationality and procedural legitimacy, Habermas and Luhmann (1971).

incorporation of such civil society organizations may lead to a co-option and over-determination of those organizations in such a way as to undermine the very function they have achieved in respect of general norms.

7.2 International law and the legitimacy of civil society organizations

The proliferation of organizations at the transnational level has long been recognized as having potentially important ramifications for the development of law.⁸ One need hardly accept Weber's concept of legitimation through rational-legal administration and bureaucratic procedures⁹ to see that the proliferation of formal organizations at the transnational level will likely be attended by increasing legalization. Even things like leasing premises for a secretariat, handling of donations or adopting a constitution laying down substantive objectives of the organization may require some form of legal entity.¹⁰ Certainly, the definition of an organization adopted in the previous chapter—i.e., of organization as a social system that remains operationally closed on the basis of its decisions—must recognize the potential for such a closed system to even develop the reflexive mechanisms to constitute a partial legal order in itself, even if such a legal order can only extend as far as the boundaries of the organization and achieve no broader societal function.

In reflection of the way in which such operational closure can lead to the emergence of such partial legal orders, a considerable body of international legal scholarship has evolved to systematically map out the institutional rules that govern the legal status, structure and functioning of *international* organizations.¹¹ Such approaches generally depart from observations on the proliferation of international organizations since the Second World War as a 'response to an evident need arising from international intercourse', and a growing need for nation-states to cooperate in the form of international organizations.¹² Moreover, in reflection of the trend towards isomorphism highlighted by new institutionalist scholars,¹³

⁸ Jenks (1958), 175ff.

⁹ Weber (1968).

¹⁰ Especially if such a right of collective action is supported by a more general constitutional instrument. For example, Article 11 of the European Convention of Human Rights necessitates the contracting nation-state to offer potential legal entity to NGOs, see *Sidiropoulos and Others v. Greece* (57/1997/841/1047), European Court of Human Rights, 10 July 1998, paras. 32-47.

¹¹ See for example, Blokker and Schermers (2011); Klabbers (2009); White (2005); Klein and Sands (2001); Amerasinghe (2005).

¹² Klein and Sands (2001), 1.

¹³ Meyer and Rowen (1977); DiMaggio and Powell (1983); Boyle and Meyer (1998); Meyer et al. 1997; Meyer (2009); see also Ahrne and Brunsson's concept of 'meta-organization': (2008), 2: 'we argue that

international institutional lawyers have perceived institutional problems and rules of different organizations to be ‘more or less the same’,¹⁴ and with that have undertaken the task of ‘extracting common principles which address the concerns and hopes that give rise to this field’.¹⁵ Under this schema a vast and complex body of rules open up (*e.g.*, rules on membership, rules pertaining to the legal constitution of organizations, rules relating to internal structures, the delegation of powers, policy-making organs, etc.),¹⁶ in such a way as to allow for the expansion of a robust form of law that both constitutes and limits the proliferation of organizations at the transnational level.¹⁷ However, despite the way in which this international institutional approach has proved the basis of a very successful expansion of law in recent years,¹⁸ its exclusive focus on international organizations created between nation-states on the basis of treaty appears limited in respect of the growing importance of SMOs. In fact, international institutional law generally neglects the growing participation of *nongovernmental* organizations in international law making and law enforcement all together.¹⁹

Including civil society organizations in international law is admittedly not an easy task. It requires a bold reconfiguration of the existing framework of international law, a complete ‘paradigm shift’.²⁰ Projects that have been launched to address the increased relativization and fragmentation of public authority in world society have faced serious difficulties in establishing a basis of law capable of capturing the diffuse and heterogenous nature of global civil society organizations. Thus, for example, the international ‘public’ law

organizations such as the EU, IATA or FIFA do not constitute unique cases, but that they exhibit strong similarities to each other and to many other organizations.’

¹⁴ Blokker and Shermers (2011), 27.

¹⁵ von Bogdandy, Dann and Goldmann (2009), 25.

¹⁶ For a comprehensive account, see Blokker and Shermers (2011).

¹⁷ In so far as it is constitutive, however, international institutional law generally takes a much more modest approach to constitutionalism than that of global constitutionalists, limiting it to the provisions relating to the organs of the organizations and their interrelationship, and the legal framework for any operation exercising power in the context of the organization’s established function, Blokkers and Schermers, (*ibid.*), 12-13. On the other hand, and for similar reasons, established approaches in both international institutional legal scholarship and in the jurisprudence of international courts subscribe to the doctrine of ‘functional necessity’ to limit the autonomy of the organization to the degree to which it is ‘functional’ to achieving the aims stipulated by the contracting nation-states in the founding treaty of the international organization, see for this approach Blokker and Schermers, (*ibid.*). This is increasingly subject to criticism, however; see, for example, Klabbers (2006), 37.

¹⁸ International relations scholars have also presented the increased role of international organizations in transnational life as elevating them to effective ‘law-makers’, according to the ‘normative ripples’ they are seen to create in global society, see Alvarez (2005). This, however, has not been particularly influential on positive minded lawyers (Klabbers 2006, 154), and it is somewhat at odds with a the ‘external’ perspective of law pursued in the present study, so far as it develops a sociological concept which identifies law by its own functional specification and coding rather than the ‘ripple’ effects it may have society.

¹⁹ Klabbers (2002), 9-12; Peters (2006), 593ff. See also Michaels (2005), 1234.

²⁰ Peters (2009a), 221.

approach suggested by the ‘Heidelberg group’,²¹ which set out with the ‘ambitious agenda’ of developing a ‘new way of ‘understanding, framing and taming the growing jungle of international law and global governance’,²² is forced to admit that, in the sea of global governance, ‘it is very difficult to construe a meaningful argument regarding the legality of an exercise of international public authority’.²³ In the interests of ‘legal positivism’²⁴ that approach focused instead on standardized instruments by which public authority is exercised—a move which not only puts civil society organizations out of reach (they typically do not operate on the basis of such standardized instruments of public authority), but also reduces the legal basis for scrutiny to such a narrow basis that, conceptually, it requires the lawyer to ‘dance on the head of a pin’.²⁵

International lawyers have not ignored the increasing role of civil society organizations in the global normative order, however. Not only does the legitimacy of international law require that they are included within the international legal system, but also their growing importance at the global level poses questions about the legitimacy of the organizations themselves which law has traditionally been orientated to. The position is well summed up by Klabbers:

‘As soon as organizations become more than debating clubs, as soon as they exercise public authority, it becomes possible and plausible to wonder whether they do a good job, or whether someone else would have done better. They operate, so to speak, on the market of legitimacy, and legitimacy, however precisely conceptualized, is a scarce resource.’²⁶

This is not only based upon the protection of vested interests of a consensualist state-based legal framework that was reflected in Judge Guillaume’s criticism of the involvement of civil society organizations in the *Nuclear Weapons* advisory opinion at the ICJ,²⁷ or in Serge Sur’s concern that the ‘excessive’ role played by NGOs at the Rome Conference that adopted the

²¹ See von Bogdandy, Dann, Goldman (2009)

²² Leibfried, (2009), 52.

²³ von Bogdandy, Dann and Goldmann *ibid.*, 20.

²⁴ Goldman (2009), 666. Klabbers’ commendation of Goldmann’s positivism on the basis that sociology cannot appreciate the ‘internal’ approach to law (Klabbers, 2009, 717) reflects a serious lack of sophistication in respect of the development of the sociology of law in the last thirty years. One of the key virtues of systems theoretical accounts of law in particular is in how it accommodates both an external and internal approach to law (Nobles and Schiff, 2004, 44).

²⁵ See for example Matthias Goldmann’s approach, Goldmann (2009).

²⁶ Klabbers, (2008), 20.

²⁷ *Nuclear Weapons*, Separate Opinion, Judge Guillame, 288.

Statute of the International Criminal Court amounted to a ‘risk’ of the Court becoming a ‘people’s tribunal’.²⁸ Rather it is based on a more basic recognition ‘that public authority is now exercised at the international level in a growing number of informal ways which are estranged from the classical international law-making processes’,²⁹ and thus of the need for the development of an ‘international legal framework in order to provide some form of accountability in cases of possible NGO irresponsibility.’³⁰

These issues have been most squarely addressed by international constitutionalists and global administrative lawyers. International constitutionalists devote significant attention to the fact that civil society organizations ‘play an increasingly important role in the international legal process.’³¹ As such constitutionalists like Peters see international law as having both a constitutive and limitative role in relation to ‘NGOs’, that is, as ‘steering’ as well as ‘containing’ such a development.³² In terms of the latter, constitutionalism is seen to require the ‘accountability of all actors participating in the fulfilment of constitutional functions, including NGOs themselves.’³³ NGOs are thus identified as having insufficient accountability to the ‘oppressed’ and ‘excluded’ constituencies they commonly speak on behalf of,³⁴ and international constitutionalism is presented as a means of establishing transparency, participation and an evaluation of those organizations is a comprehensive legal framework. Although this introduces a ‘high degree of formalism into the legal process’ and a ‘formalization’ of the legal status of civil society organizations,³⁵ it is worth noting that international constitutionalism is relatively sensitive to the necessary flexibility and independence of global civil society organization. Thus, while Peters recognizes that the accountability and transparency of civil society organizations must be subject to some scrutiny in the international constitutional framework, she also argues that they should also be

²⁸ Sur (1999), 35. Citation and translation provided by Kamminga (2002), 388.

²⁹ d’Aspremont (2011b), 4.

³⁰ Nowrot (1999), 598. Even social scientists who identify SMOs as increasingly important to the global normative order argue that their efficiency in questioning the legitimacy of nation-states is tied up in questions about their own legitimacy. Sikkink (2002), for example, argues that protest and advocacy NGOs must be seen to be impartial and independent of political or economic interests (especially because many do rely upon nation-states and other interest groups for funding) (313), that they must be reliable in the quality of information they provide (314), and that they must establish some form of internal democracy to sustain this claim to representativity (ibid.). Certain NGOs have for example come in for criticism on the basis that they often pursue a short-term, donor-led and ultimately neo-liberal agendas that are not representative of the *demos* they are said to represent, Shivji, I.G. (2007): *Silences in NGO Discourse: The Role and Future of NGOs in Africa*, Nairobi and Oxford: Fahamu.

³¹ Peters (2009a), 219.

³² Ibid.

³³ Ibid., 237.

³⁴ Ibid.

³⁵ Ibid., 156.

kept at a distance from the political and legal process ‘in order to fulfil their watchdog and opposition function’.³⁶ Moreover, Peters recognizes that the level of review is not dictated by a democratic mandate by the global citizenry; civil society organizations do not need such ‘because they are in functional terms the global opposition.’³⁷ Thus, the limitative approach advocated can be seen to be relatively sophisticated in terms of being sensitive to the function of civil society organizations that was presented in the last chapter.

Despite this sophistication, however, the international constitutional approach still faces the problem that was pointed out in the fourth chapter about the difficulty of establishing such a comprehensive international and global constitution in absence of a centralized political system at the global level. Thus, when Peters argues that ‘NGOs deserve a constitutional role in law-making only if contributions enhance the legitimacy of these of these processes and their outcome’,³⁸ one wonders to who’s ‘legitimacy’ she is referring. Who’s legitimacy is legitimate in global society? Who is specially authorized to speak on behalf of global society?³⁹ This question exposes the shaky foundations on which international constitutionalization aims to ensure the accountability of all actors participating in the fulfilment of constitutional functions, including NGOs themselves.

Global administrative lawyers have also sought to address the role of accountability of the range of actors engaged in global governance. Indeed, global administrative lawyers recognize that just as ‘thick’ forms of legitimacy have withered for national law, international law can no longer draw on the consent of sovereign states the way that it once could.⁴⁰ For them this means legitimacy questions have to re-framed for the ‘entirety of order’.⁴¹ However, global administrative lawyers have strived to achieve this on a more limited basis than constitutionalists, and thus to avoid problems of legitimacy such an expansion of law itself might face. Thus global administrative law (GAL) is presented as being ‘more limited in scope’ and ‘with a more modest reach’ than constitutionalist approaches to the accountability of global governance.⁴² It does not aim at a full account of the conditions under which global governance would be legitimate, but instead adopts a more modest ‘normative ambition’ in the hope that it can ‘bracket some of the more intractable’ normative

³⁶ Peters (2009a), 156-157.

³⁷ *Ibid.*, 236.

³⁸ *Ibid.*, 235.

³⁹ Luhmann (1987), 103.

⁴⁰ Krisch (2012), 13.

⁴¹ *Ibid.*

⁴² Krisch (2010), 245.

issues, and thereby to focus better on practical accountability mechanisms in global regulatory governance.⁴³

On this basis, global administrative lawyers scan the vast sectors of social life at the global level to identify, what they term, a ‘multifaceted global administrative space’,⁴⁴ and the way in which many institutions within that space can be said to perform functions that traditionally (i.e., at the municipal level) would be observed as having an ‘administrative character’.⁴⁵ Importantly, a range of private and hybrid public-private bodies are thus drawn into their net as part of this ‘global administrative space’, including ‘NGOs’.⁴⁶ What NGOs potentially have in common with this more general category of transnational bodies, according to global administrative law, is that they perform administrative functions, without being ‘directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty.’⁴⁷ With this, the ground is primed for an expansion of municipal administrative law to the transnational level as a global administrative law which is defined as: the ‘mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality’ that are commonly imposed upon administrative bodies at the municipal level.⁴⁸ By observing⁴⁹ all such organizational activity falling within this schema as ‘administration’, the GAL project expands the established principles and framework of domestic administrative law to apply to the problem of accountability at the global level.⁵⁰

A problem should become immediately obvious at this point with GAL in terms of civil society organizations in general, and SMOs in particular. Under the GAL approach ‘NGOs’ are lumped together with a broad range of other ‘regulatory regimes’, including the ICANN,

⁴³ *Ibid.*, 257.

⁴⁴ Kingsbury, Krisch and Stewart (2005), 18.

⁴⁵ *Ibid.*, 17.

⁴⁶ *Ibid.*, 16.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 17.

⁴⁹ Or as Dyzenhaus says, by operating with the ‘implicit assumption’ that global bodies are public legal authorities, GAL can turn to the question of how to make the bodies accountable, Dyzenhaus (2009), 5.

⁵⁰ Krisch, (2012), 976, 977. However, this is not to say that proponents of global administrative law seek to directly transplant domestic administrative law to the global level: ‘Direct analogies between national and transnational administrative law must be viewed with great caution’ they admit, Kingsbury, Krisch and Stewart (2005), 17. And instead municipal administrative law is seen to serve only as a ‘framework for identifying converging and diverging developments’, Krisch (2010), 256. However, they do generally seek to ‘identify, design, and help build transnational and global structures to fulfil functions at least somewhat comparable to those administrative law fulfils domestically, and to reform domestic administrative law to enable it to deal with the increasingly global character of regulation’, Kingsbury, Krisch and Stewart (2005), 17.

the World Anti- Doping Agency, the WHO, International Organization for Standardization, the Basle Committee, and even the committees of regulatory bodies like the WTO, the IMF.⁵¹ Not only does GAL fail to distinguish the more specialized genera of ‘NGOs’, there is no attention to the special characteristics of civil society organizations in general, nor even of the possible function SMOs in general may fulfil in terms of a ‘global opposition’ in the way international constitutionalism perceive. Of course, that may not be such a serious a problem if GAL does adopt a much more limited normative scope and more modest reach than constitutionalism, and whether it does so escape the problematic questions of legitimacy that international constitutionalism succumbs to.

Kingsbury, Krisch and Stewart, on their joint paper on the topic, present three different possibilities in this respect: ‘international administrative accountability, protection of private rights or the rights of states, and promotion of democracy.’⁵² The first option is viewed the ‘normatively least demanding of the three’.⁵³ It merely involves ensuring ‘agents within the order perform their appointed role and conform with the internal law of the regime.’⁵⁴ The second makes ‘stronger normative presuppositions’,⁵⁵ as in a pluralist international society ‘the social basis for a global administrative law based on individual rights is largely absent.’⁵⁶ In this case it might be better to defer to nation-state concepts of rights in the assumption that ‘states’ rights might be useful in organizing the representation of individuals or of social and economic group interests on the global level.’⁵⁷ (Although, this is a problematic assumption in respect of what global administrative lawyers admit as the issues international law now faces in drawing its legitimacy from the consent of sovereign states.⁵⁸) The third option, the democratic strand, they consider to be the ‘normatively most demanding’,⁵⁹ and ultimately suggest that the goal of democratizing global administration should be set aside and that the focus should instead be placed on the less demanding normative basis of controlling the periphery to ensure the integral function of a regime, protecting rights, and building

⁵¹ Ibid.,22.

⁵² Kingsbury, Krisch and Stewart (2005), 43.

⁵³ Ibid., 44.

⁵⁴ Ibid., 44.

⁵⁵ Ibid., 45.

⁵⁶ Ibid., 46. As Kingsbury, Krisch and Stewart acknowledge, treaties rarely directly address issues of administrative law, whilst the state practice element of customary international law precludes it from fully incorporating the relevant practice of many global administrative bodies, and the ‘general principles of law’ cited in Article 38 of the Statute of the International Court of Justice have been limited. Ibid., 29

⁵⁷ Ibid., 47.

⁵⁸ Krisch (2012), 13.

⁵⁹ Ibid., 48.

meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values.⁶⁰

It is left up to the authors individually to develop this further. Kingsbury, for his part, engages the dilemma directly by asserting that global governance entities implicitly embrace normative commitments which are inherent to public law. Nonetheless, he admits that any claim to ‘law’ made by the global administrative legal project, will likely need to diverge from, and be sharply in tension with, the ‘classical models of consent based inter-state international law and most models of national law.’⁶¹ To resolve the tension, Kingsbury proposes that global administrative law involves ‘not only questions of ‘validity’, but also questions of ‘weight’.⁶² Thus, whereas positivist law within a unified legal system is able to establish itself on the binary code of validity/invalidity, the ‘absence of a very organized hierarchy of norms and institutions in global governance, and the dearth of institutions with authority and power to determine such questions in most cases, means the actual issues in global administrative law often go to the weight to be given to a norm or decision.’⁶³ However, to not fall into the trap of natural law, Kingsbury grasps for some kind of ‘rule of recognition’ so that the ‘internal rules actually held by leading participants and those dealing with and critically evaluating them’ could be observed as an essential a condition of law.⁶⁴ It is in this respect that he turns to the ‘qualities immanent in public law’ as a rule of recognition.⁶⁵ Essentially, the key idea here is that any entity which effectively engages in administrative action at the global level should be seen to embrace- and therefore be assessed by reference to ‘the attributes, constraints and normative commitments that are immanent in public law.’⁶⁶ Thus, the more positivist concept of law is maintained in a ‘loose sense’, he argues, if the rule of recognition includes a ‘stipulation that only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law.’⁶⁷

This arguably represents the most ambitious attempt to expand administrative law in relation the increasing influence of non-state actors on international law. Nonetheless, despite Kingsbury’s manoeuvring, this only exposes the need to engage the ‘intractable normative

⁶⁰ *Ibid.*, 50.

⁶¹ Kingsbury, (2009), 26.

⁶² *Ibid.*

⁶³ *Ibid.*, 27.

⁶⁴ *Ibid.*, 30.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

issues' and ultimately assert some concept of the political, and with that of the legitimacy of GAL. One 'cannot have rule by law without rule of law', as Dyzenhaus argues.⁶⁸ Kingsbury's concept of 'publicness' in relation to 'qualities immanent to public law', for example, is proposed as meaning that law has been 'wrought by the whole society', and that it 'addresses matters of concern to the society as such'.⁶⁹ Although he admits that the overarching principle of 'publicness' does not yet have anything like the significance in global administrative law that it does at the level of domestic administrative law, he nonetheless, proposes that 'it is an idea that is likely to be carried forward as mechanisms and modalities develop for specifying public entities meeting requirements of publicness in GAL'.⁷⁰ In this respect Kingsbury lists a number of principles (and note, not norms) which he sees as providing 'some content and specificity to abstract requirements of publicness in law',⁷¹ including the principle of legality, the rule of law, rationality, proportionality and human rights.

This problem with GAL has been highlighted by Susan Marks as a danger 'of treating as technical or cultural that which needs rather to be considered as political'.⁷² Marks' concern is ultimately about the 'public turn' in the global administrative project leading to 'co-option' in so far as it forestalls 'emancipatory change' and 'sustains exploitation with a fresh legitimating ideology'.⁷³ Nonetheless, what is more interesting than any ideological bias, is that by calling out the 'political' nature of the global administrative project, Marks reveals the very illusory basis of such a model of law. As stated in chapter four, the legitimate representation of society within society can no longer be achieved as it was under hierarchical forms of differentiation.⁷⁴ Under the conditions of high modernity the fiction of a general will could only be sustained through representative democracy; something that is obviously lacking at the global level. The extent to which this is still achieved at the national level today is only due to the successful structural coupling between the legal and political system.⁷⁵ Thus, from a sociological perspective, it is clear that no concept of 'publicness' exists at the global level as it does at the national level. This is the reason that such a concept of GAL can become immediately subject to critical analysis which reads it as surreptitiously promoting a

⁶⁸ Dyzenhaus (2009), 6.

⁶⁹ *Ibid.*, 31.

⁷⁰ *Ibid.*, 32.

⁷¹ *Ibid.*, 32.

⁷² Marks (2006), 996.

⁷³ *Ibid.*, 998.

⁷⁴ Luhmann (1987).

⁷⁵ And in such a way as to invisibilize their respective paradoxes, see Luhmann (2013a); c.f. Teubner (2015) who now argues this structural coupling is now achieved at the societal level.

‘global north’,⁷⁶ or as ‘sustaining exploitation’.⁷⁷ From this perspective, it seems indeed that the ‘iterations of administrative governance in the global realm cannot permanently exclude a more thorough engagement with the parallel constitutional debates.’⁷⁸

Ultimately, it must be recognized as very difficult to expand law on the basis of a global administrative or public law to effectively scrutinize the accountability and legitimacy of civil society organizations as they have evolved at the global level. Any attempt to cast the net of law so wide as to capture such a global administrative space, including civil society organizations, will always require doing so from such an Archimedean point that it will inevitably be subject to critical analysis itself in terms of legitimacy, and will thereby be forced into a more contextualized concept of GAL.

It is in this sense that Nico Krisch’s concept of GAL must be preferred. Krisch has more fully engaged the legitimacy problems that beset concepts of GAL. In the fragmented nature of global society, he acknowledges, the problem of transnational institutions performing administrative functions is not so much their accountability deficit itself, but rather that these institutions may be accountable to the wrong constituencies.⁷⁹ In this sense Krisch identifies three competing constituencies in global administrative law: the national, international and cosmopolitan.⁸⁰ In global administrative law, according to Krisch, no such order prevails, but rather the ‘contest between the different constituencies’ shapes the constitutional framework of global administrative law.⁸¹ This is what Krisch calls ‘pluralist administrative law’, the ‘fundamental contestation over the question of to whom global governance should be accountable.’⁸² Thus, with the ultimate reference points of the law ‘in flux’⁸³ and in a constitutional order where ‘coherence’ is to be replaced by ‘compatibility’,⁸⁴ GAL should adopt a more ‘limited ambition’ by a ‘deliberate narrowness of focus and provisionality of claims.’⁸⁵ In this respect Krisch envisages a kind of reflexive administrative law, one that in focusing on global accountability mechanisms retains an ‘awareness of the

⁷⁶ Harlow (2006). And GAL has largely relied upon the model of US administrative law, Krisch (2010), 257; Stewart (2005), 104.

⁷⁷ Marks (2006), 998.

⁷⁸ Zumbansen (2013b), 521.

⁷⁹ Krisch (2006), 250; Krisch (2010), 261.

⁸⁰ Krisch (2006), 253ff.

⁸¹ *Ibid.*, 256.

⁸² *Ibid.*, 248.

⁸³ Krisch (2012), 12.

⁸⁴ *Ibid.*, 296.

⁸⁵ Krisch (2010), 261.

institutional context in which those mechanisms are embedded and the broader normative questions they raise.’⁸⁶

Although this may only amount to an ‘administrative law lite’,⁸⁷ this kind of scaled back approach may provide the only credible form of global administrative law to ensure the accountability and transparency of NGOs, and more specifically of SMOs, which after all may be better suited to representing general norms than law is. Nonetheless, so far as Krisch comes close to the ideal in terms of the limitative approach, he has given little specific thought to the special character of civil society organizations vis-à-vis international law, and even less to that of SMOs. Thus, as part of its awareness of the institutional context in which the accountability mechanisms are to be embedded, Krisch’s concept of a less imposing global administrative law must reflect at least the sensibility towards the ‘opposition’ function of civil society organizations that international constitutionalists have achieved.

That international constitutionalists have achieved this sensibility can be attributed to some extent to the fact that they take both a limitative *and* constitutive approach to the development of international law in respect of civil society organizations. A combination of both a ‘lite’ and reflexive limitative approach, as well as a constitutive approach, represents a step closer to a more sophisticated structural relationship between law and civil society organizations, and particularly SMOs. Nonetheless, as it will be seen, the constitutive approach itself is in need of refinement in light of the apparent functional specification of SMOs.

7.3 Civil society organizations and the legitimacy of international law

Just as the construction of a limitative approach on the basis of the legitimacy of civil society organizations as global governance structures often rebounds to questions of the legitimacy of such a basis of law, the increasing importance of such organizations in the global normative order has also brought issues of the legitimacy of international law into focus in a more direct way. It has already been shown in relation to the antinuclear movement that the ICJ remains relatively closed in respect of the standing and participation of SMOs. Only nation-states may be parties before the Court, and the Court may invite ‘public international organizations’

⁸⁶ Krisch (2010), 261.

⁸⁷ Stewart (2005), 105.

to furnish information in contentious cases.⁸⁸ Moreover, as seen, this obstacle applies even in advisory proceedings,⁸⁹ with the Court, for example, declining the IPPNW's request for leave to submit information in the form of written or oral statement in the 1996 advisory opinion.⁹⁰ At the same time, it has also been shown that the role of NGOs in the global normative order is such that often what happens in practice is that NGOs work behind the scenes to influence submissions before the Court.⁹¹

The limited approach to subjectivity reflected in the Court's statute can therefore be seen to be out of step with the development of transnational society. That was already an issue pointed out by the policy-orientated perspective of the New Haven school, principally associated with the work of Myers McDougal in the 1960s, which advanced a theory of international law as a comprehensive process of decision-making influenced by a variety of actors rather than as a defined set of formal rules and obligations.⁹² Although the reliance of that approach on the notion that the social process was steered by basic values of human dignity proved problematic,⁹³ it nonetheless proved ahead of its time in so far as it introduced to international legal scholarship the idea that the subjects of international law and the social structure of the legal system were 'mutually-constitutive'.⁹⁴ This led to a well-noted critique of the formal limitation of the subjects of international law to nation-states and international organizations as having 'no functional purpose', and as comprising 'an intellectual prison of our own choosing'.⁹⁵ By the late 1980s this was increasingly identified as problematic in respect of transnational civil society. Philippe Sands, at that time addressing the transnational problems of global problems such as climate change, argued that 'to describe international society as comprising a community of states is to ignore reality.'⁹⁶

Nonetheless, beyond the International Court of Justice, there has been evidence in the last thirty years of the international legal system evolving towards more inclusiveness of civil

⁸⁸ Art 34(1); Art. 34(2), ICJ Statute. Art 69(4) of the Rules of Court provides that a 'public international organization' is an 'international organization of states'. In the *Asylum Case (Colombian v Peru)*, *ICJ Reports 1950*, the ICJ denied a request by the International League for the Rights of Man to submit information to the Court on the grounds that it was not a 'public international organization' under the Statute (at p. 228).

⁸⁹ Any unsolicited briefs that are submitted to the Courts by NGOs are treated as mere 'factual information' which may or may not be read by the judges in their personal deliberations, Valencia-Ospina (2005), 231.

⁹⁰ Letter from the Registrar to Dr Barry and Dr Levy, 28 March 1994. Art 66(2), of the ICJ Statute provides that an 'international organization' may submit an *amicus* brief in advisory proceedings.

⁹¹ See also the case of *Gabcíkovo-Nagymaros (Hungary v Slovakia)*, *ICJ Reports 1994*, in which Hungary attached a number of environmental NGO reports to its submission about the environmental impact of the proposed dam.

⁹² McDougal (1953); McDougal et al. (1960); Chenn, Laswell, McDougal (1974).

⁹³ Koskinniemi (2005), 205-206.

⁹⁴ Bianchi (2009), xv.

⁹⁵ Higgins (1995) 49.

⁹⁶ Sands (1989), 400.

society organizations. Much of this is owed to the broader effects of the functional differentiation which has led to the proliferation of dispute settlement mechanisms at the global level.⁹⁷ The fragmentation of the international legal system in this respect can be said to have been accompanied by a ‘*ratione personae* pluralization of international law-making’⁹⁸ which has led to increasing calls for ‘a re-assessment of the interrelationship between international judicial bodies and that part of civil society which is represented by NGOs.’⁹⁹

This is reflected in the standing civil society organizations now enjoy before a wide range of international bodies. While those organizations cannot refer cases to the prosecutor of the International Criminal Court, the prosecutor may seek information from ‘non-governmental organizations, or other reliable sources that he or she deems appropriate’, once an investigation has been initiated by a state party or by the prosecutor *proprio muto*.¹⁰⁰ Similar provisions apply for the participation of civil society organizations in investigation of the prosecutor of the ICTY¹⁰¹ and the ICTR¹⁰². The European Court of Human Rights, on the other hand, is open to receiving applications ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties’.¹⁰³ The Inter-American Commission of Human Rights allows ‘any non-governmental entity legally recognized in one or more member states’ to lodge a petition with the Commission.¹⁰⁴ The Inter-American Court makes no explicit provision for civil society organizations, but in practice petitions by NGOs have been accepted by the Court.¹⁰⁵ The Protocol of the African Court of Human Rights provides that the Court may entitle ‘relevant’ NGOs to institute cases if the state parties have made a declaration accepting the competence of the Court to receive such cases.¹⁰⁶ Furthermore, NGOs have also gained participation in

⁹⁷ de Brabandere (2011b).

⁹⁸ d’Aspremont (2011b), 4. Although d’Aspremont, in his dedication to formalism in international law, does not assert that these new actors have turned into new legal subjects or formal law-makers, see d’Aspremont (2010).

⁹⁹ Vierucci (2008), 155.

¹⁰⁰ Art 15(2), Rome Statute of the ICC, 1998.

¹⁰¹ Art 18, Statute of the ICTY, May 1993.

¹⁰² Art 18, Statute of the ICTR, November 1994.

¹⁰³ Art 34 ECHR. Although regional European courts have generally adopted a ‘restrictive’ approach to the standing of NGOs, Vierucci (2008), 158. The ECJ is open to any applicant who can show ‘direct and individual concern’, Art 230(4) EC TFEU. Although this seems to be given a rather narrow reading at the exclusion of NGOs, see *Plauman and Co. v Commission* case 25/62, 15 July 1963, and *Stichting Greenpeace Council v EC Commission* T-585/93, ECR 1995 11-2218 (2230).

¹⁰⁴ Art 44 of the American Convention of Human Rights.

¹⁰⁵ Lindblom (2005), 278-279.

¹⁰⁶ Arts 5(3) and 34(6) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

dispute settlement procedures in the area of environmental law through the relevant articles of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to justice in Environmental Matters.¹⁰⁷ Concerned with protecting ‘the right of every person of present and future generations to live in an environment adequate to his or her health and well-being’, the Convention aims to grant the ‘public concerned’ the right to access to court of law.¹⁰⁸ While this only guarantees the right of access of civil society organizations to domestic courts,¹⁰⁹ it has proved influential in opening the door for their standing before regional courts such as the ECJ.¹¹⁰

At the same time many point to the increasing number of *amicus curiae* briefs submitted before international judicial proceedings as an avenue for growing role of civil society in the international legal system.¹¹¹ Thus, *amicus* briefs are seen to have ‘proved to be a good substitute for direct intervention given the many limitations that international law still imposes upon non-state actors in terms of legal standing’.¹¹² The ICC, for example, may grant leave to ‘any organization to submit any observation on any issue the Chamber deems appropriate.’¹¹³ The Intern-American Court of Human Rights has also been willing in practice to receive *amicus* briefs from civil society organizations. Furthermore, the WTO hand has also accepted *amicus* briefs from NGOs,¹¹⁴ at least where it considers it ‘pertinent and useful to do so’.¹¹⁵

¹⁰⁷ Available at UNECE website, ‘Environmental Policy’, < <http://www.unece.org/env/pp/treatytext.html> >, accessed 12 September, 2015.

¹⁰⁸ Article 9. According to Art. 2 (5), of the Convention: ‘the “public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirement under national law shall be deemed to have an interest’.

¹⁰⁹ de Brabandere (2011b).

¹¹⁰ Crossen and Nielssen (2008). In addition a number of new quasi-judicial mechanisms have been established, including the World Bank Inspection Panel and a collective complaints procedure within the Council of Europe, which allows civil society organizations to lodge complaints regarding alleged non-compliance with the European Social Charter. Some of these procedures are open exclusively to NGOs, i.e. the ILO freedom of association procedures and the European Collective Complaints procedure, Lindbloom (2005).

¹¹¹ Shelton (1994).

¹¹² Bianchi (1997), 187. A limited approach to the submission of *amicus* briefs have been reflected in judicial proceedings before ITLOS in respect of issues of environmental protection. Whilst the Tribunal has expressed its willingness to admit *amicus* briefs, it has denied the submissions of NGOs such as Greenpeace and the World Wide Fund for Nature on ‘procedural grounds’ (Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17 (ITLOS Feb. 1, 2011)), and most recently in the Arctic Sunrise case, the Tribunal declined to include Greenpeace’s submitted *amicus* brief, even though the NGO was directly affected by the actions of the Russian government which formed the subject matter of the dispute between Russia and The Netherlands (*Kingdom of the Netherlands v Russian Federation*, Case No. 22, Order of Nov. 22, 2013.)

¹¹³ Rules of Procedure ICC 103(1).

¹¹⁴ United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, Doc. Nr. WT/DS58/R. (15 May 1998).

¹¹⁵ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, Doc. Nr. WT/DS138/AB/R (10

Moreover, civil society organizations have now established better cooperation mechanisms with international organizations. Under Article 11 of the UN Charter, the Economic and Social Council may make ‘suitable arrangements for consultations with NGOs which are concerned with matters within its competence.’¹¹⁶ The United Nations General Assembly on the other hand has granted observer status to four NGOs, including the ICRC in reflection of the ‘special role’ carried on by the organization in international humanitarian relations.’¹¹⁷

Finally, many now view international conferences as providing an important platform for civil society to influence international law-making.¹¹⁸ These are seen as the primary fora in which civil society organizations can be ‘important catalysts in the promotion of the goals of peace and disarmament, antislavery, women’s rights, humanitarian law, environmental law, human rights, worker rights, and international economic law.’¹¹⁹ NGOs can be seen to have provided instrumental participation in human rights and environmental law conferences: for example 14,000 NGOs were registered at the 1992 Rio Summit on Environmental and Development;¹²⁰ ‘NGOs outnumbered representatives of States’ at the 1997 United Nations Framework Convention on Climate Change leading to the Kyoto Protocol;¹²¹ again, the 1997 Ottawa Conference is commonly ‘heralded as a model for cooperation between governments and non-governmental organizations’,¹²² or the 1998 Rome Conference, where up to eight hundred civil society organizations headed by Amnesty International and Human Rights Watch lobbied for the establishment of the International Criminal Court.¹²³

May 2000) para. 42. The Appellate Body has set further rules restricting submission of *amicus* briefs in the *Asbestos* case (*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, Doc. Nr. WT/DS135/AB/R (12 March 2001), para. 52), and According to Charnowitz, the ‘fanfare regarding NGO opportunities at the WTO’ is misplaced, as ‘neither the Appellate Body nor the panels have made substantive use of the information in *amicus curiae* submissions.’, Charnowitz (2006), 355.

¹¹⁶ See also for criteria for granting consultative status to NGOs, Resolution 1296 (XLIV) of 23 May 1968.

¹¹⁷ A/RES/45/6, ‘Observer Status for the International Committee of the Red Cross’, 16 October 1990. The other NGOs that have been granted observer status with the UNGA are the International Federation of the Red Cross and Red Crescent Societies, in October 1994 (A/RES/49/2), the Order of Malta, in August 1994 (A/RES/48/265), and the Olympic Committee, in October 2009 (A/RES/64/3).

¹¹⁸ Lindblom (2005), 446. However, on the basis of empirical research in the area of civil society participation in UN World Summits on the Information Society, Dany argues that the influence of NGOs often ‘hinges on opportunity structures’, tends to be ‘reduced to less relevant issues’, and that ultimately NGOs are ‘much more determined and constituted by governance structures than they are able to create or use them’, Dany (2014), 420. Ultimately the full inclusion of civil society organizations into the development of international law continues to be resisted by nation-states, in so far as it pressures them into greater disclosure and transparency and conflicts with state-centric visions of world order, Charnowitz (2012), 902.

¹¹⁹ Charnowitz (2012), 891; McCorquodale (2004), 494.

¹²⁰ Clark (1998), 9.

¹²¹ Bestill (2002), 50.

¹²² Short (1999), 481.

¹²³ Kamminga (2002), 398.

Despite these advances however, many international lawyers still feel that civil society organizations and other private non-state actors have not yet attained their proper status in international law. Ryngaert, for example, states that '[n]on-state actor participation in international norm-setting processes remains a 'discretionary' decision of relevant bodies and institutions.¹²⁴ Likewise, Boyle and Chinkin argue that despite the inroads that have been made in inclusion of private organizations in the public international legal system, it is still 'premature to assert that there is a right to access and participation' for those organizations.¹²⁵ In general, many feel that 'the opportunities for participation of NGOs and other civil society actors in the legal sphere continue to be limited to domestic litigation with the role of NGOs in international dispute resolution still largely relegated to advisory and publicity roles';¹²⁶ or that a 'legacy of positivism' in international legal scholarship continues to frustrate any inclusion beyond nation-states and international organizations.¹²⁷ The position is well summed up by Pierre-Marie Dupuy: 'We are led back to the role of legal scholars faced with the paradox of NGOs: *de jure* these entities have no existence or a very narrowly defined one, if any; but *de facto* they do a lot, especially in the functioning of international institutions and the implementation of the law created in their midst.'¹²⁸

Many perceive this dissonance between the *de facto* and *de jure* positions of civil society organizations as an issue of the legitimacy of international law itself. The question according to Charnowitz, is not 'whether it is legitimate to allow NGOs into international governance, but rather the opposite: is legitimate to keep NGOs out?'¹²⁹ Thus, for many the issue cannot be simply limited to the 'seemingly technical issue of international legal status', but rather relates to 'broader questions about participation and representation of different groups on the international plane and the legitimacy of international law.'¹³⁰ This approach conceives that the 'legitimacy gains of NGO involvement are apt to outweigh the legitimacy problems',¹³¹ and that, in fact, international law's failure to constitute and reflect the *de facto* emergence of global actors poses a 'legitimacy crisis' for the international legal system

¹²⁴ Ryngaert (2010), 81.

¹²⁵ Boyle and Chinkin (2007), 57.

¹²⁶ Currie (2004), 151; de Brabandere (2011a), 6.

¹²⁷ Binachi (1997), 182. Clapham even argues that any pluralization of law-making processes should not be viewed as a retreat of the nation-state, but on the contrary, that, 'in at least some contexts, states have expanded their clout.' (Clapham 2006, 5). It has even come to be recognized that in many ways the pluralization of the exercise of public authority at the international level may even lead to a 'reinforcement of states' powers, for it allows states to be even more present and influential, even in areas traditionally adverse to it and without being subject to accountability mechanisms.' (d'Aspremont, 2011b, 5).

¹²⁸ Dupuy (2008), 214.

¹²⁹ Charnowitz (2012), 895.

¹³⁰ Lindbloom (2005), 3.

¹³¹ Peters (200d), 317.

itself.¹³² Thus, in excluding non-governmental organizations from fuller participation in the affairs of international society, the international legal system is seen as lacking effectiveness and failing to reflect an important reality about the international community.¹³³ This marks recognition that civil society organizations contribute to a ‘communicative process whereby the conduct of states is no longer assessed in terms of acting in conformity with international binding rules, but by a much less formal code according to which the legality of their behaviour largely depends on its being consistent with some basic understanding of certain human values the respect of which is perceived to be fundamental.’¹³⁴

In light in what has been said about expectations emerging as social structure, it is worth pointing out that many now see civil society organizations as having a ‘legitimate expectation’ of the general right to participate in international legal discourse.¹³⁵ In acknowledging such a legitimate expectation, Ann Peters argues that while a ‘principle of openness’ has not yet fully crystallized in international law, it is nonetheless ‘nascent’.¹³⁶ Thus, Peters argues that accredited civil society organizations have a legitimate expectation of rights of participation, that international institutions have a corresponding ‘good faith’ procedural obligation to realize those rights of participation, and that any denial of such a right must be attended with a ‘concrete justification’.¹³⁷ As a review mechanism in this respect, Peters suggests an ‘NGO ombudsman’ who would impose sanctions for undue refusals of the participation of civil society organizations.¹³⁸

This approach is commendable for the extent to which it recognizes the importance of civil society organizations in the global normative order. That could certainly provide the basis of a developed legal recognition of the function of SMOs in the global normative order in particular. However, the problem is that, even with this more constitutive approach, the kind of legal formalization involved may lead to a co-option and over-determination that would ultimately frustrate the important function that such organizations have come to perform in world society. The issue is accurately summed up by the question posed by Bakker and Vierucci: ‘Does the increasing international role that NGOs *de facto* play require a reconsideration of their *de jure* position, or, on the contrary, does the flexibility currently enjoyed by NGOs constitute the most effective and desirable solution for all international

¹³² Cutler (2001), 147.

¹³³ Sands (1989), 393.

¹³⁴ Bianchi (1997), 189.

¹³⁵ Lindbloom (2005), 526; Peters (2009a), 226.

¹³⁶ Peters (2009a), 222.

¹³⁷ *Ibid.*, 226.

¹³⁸ *Ibid.*, 227.

actors involved?’¹³⁹ It is a point James Crawford also raises, although admittedly his concerns may lie with the positivity of the legal system, rather than the function of civil society organizations in world society: ‘[s]tates and international organizations, and by inference other subjects, are bound not to intervene in the domestic jurisdiction of another state. The whole point of an NGO may be to do just that, in the pursuit of its aims.’¹⁴⁰ In this sense, the recognition and inclusion in the international legal system which many advocate may lead to constraints which ultimately frustrate those aims.

Of course, Peters’ approach is already quite unique amongst predominantly legal approaches in its sensitivity towards this special character of civil society organizations. Thus, she recognizes that the important role they play is one of ‘opposition and contestation’ at the global level,¹⁴¹ that such organizations ‘speak for minorities, for vulnerable groups, or for otherwise voiceless entities’,¹⁴² and that such organizations ‘do not need a democratic mandate by the global citizenry, because they are in functional terms the global opposition’.¹⁴³ Furthermore, Peters clearly recognizes the need for civil society actors to be ‘kept at a distance from the international law-making process’ and for the need for them to ‘stay outside the formal political and legal process in order to fulfil their watchdog and opposition function.’¹⁴⁴

Much of this sensitivity to the function of transnational civil society organizations, however, is only exercised in respect of constructing the limitative approach to civil society organizations. Peters suggests that the participation of NGOs is extended only to a ‘voice’, and not a ‘vote’,¹⁴⁵ and that on this more contained basis of participation, the problems of the accountability of civil society actors is not so contentious as to require imposing excessive limitative measures. But, Peters does not seem to entertain the possibility that the degree of formalization envisaged to afford those organizations participation rights within the international legal system may itself lead to a co-option and over-determination of that ‘voice’ by the political and legal sphere, and ultimately to the frustration of the function of civil society organizations as a global opposition.

Like the limitative role of international law vis-a-vis civil society organizations, the constitutive role of international law in this respect, must also be developed by a more refined

¹³⁹ Bakker and Vierucci (2008), 8.

¹⁴⁰ Crawford (2012), 126.

¹⁴¹ Peters (2009d), 314.

¹⁴² *Ibid.*, 316.

¹⁴³ Peters (2009a), 236.

¹⁴⁴ *Ibid.*, 156.

¹⁴⁵ *Ibid.*, 225.

appreciation of the function of civil society organizations, and particularly SMOs, in the global normative order. It too could be developed by a more functionalist and reflexive legal approach that both understands and supports the function of those organizations in world society, and which better understands the specific institutional context of those organizations. This approach must understand the limits of the inclusion of civil society within international law. Only this can ensure that the participation of civil society organizations within the legal system will not lead to a co-option of their ‘voice’, and only this will preserve their function as a ‘global opposition’.

7.4 Conclusion

In light of the difficulties involved, it might be wondered whether it is really necessary for civil society organizations, and particularly SMOs, to find a ‘voice’ in international law. From the functionalist perspective, the evolution of SMOs can be construed as a response to the exhaustion of law in globalized society; SMOs stabilize the norm through their recursive decision operations and through their communicative capacity. So far as the trajectory of antinuclear norms can be generalized to other general norms, it might be said that social evolution has already found a solution to the problem of such norms through the functional specification of SMOs. However, it would seem somewhat premature to draw definite conclusions without further empirical research; the problem-solution could be much more complex than this. It could be that SMOs provide only some elasticity in the general evolutionary framework, that they allow for a diffraction and consolidation of the problem of general norms in such a way that they may yet find a greater realization in differentiated society beyond the social movement, including within the legal and political spheres. SMOs *and* law may be just part of the bigger picture here, and therefore it would seem more sensible to develop law in such a way that it cautiously responds to the development.

Much of the discussion of the structural relation between law and civil society organizations in this chapter has centred around the issue of ‘legitimacy’. There certainly seems to be an underlying theme here about legitimacy being no longer able to ‘anticipate evidence of the validity of its prescriptions or observations in easily discernible socio-institutional settings’, as being no longer able to suppose ‘a *demos* to underwrite its power.’¹⁴⁶ That seems to be especially true in relation to the evolution of law in relation to the

¹⁴⁶ Ashenden and Thornhill (2010), 7.

structures the increasing fragmentation (and consolidation) of normative institutionalization in world society. This development necessitates a more contextualized legal approach to this issue.

In the second chapter, this thesis argued that the ‘reflexive turn’ marked a point in the development of law away from the focus on the kind of questions that were taken up in this study. That was not to ‘throw the baby out with the bathwater’ though. Once function and norms are brought back into view, and the function of SMOs in stabilizing norms is observed, the reflexive law approach could be developed to refine law’s construction of civil society organizations. The way in which reflexive law is tailored to a structural correspondence with the institutional contexts and realities of an increasingly fragmented society may be just what is needed here. Of course, it would have to be balanced out, with a more relaxed focus on coding, and with a more maintained focus on function and norms. The introduction of the concept of functional equivalents to law, and even of the concept of the limits of law, may appear slightly out of left field for reflexive law, but it is difficult to see why that should be anything other than an improvement of that approach, allowing it to understand better the institutional contexts it structurally corresponds to *in terms of the larger social system*.

Conclusion

One of the most intriguing things about law is that, while it places such importance on distinguishing between ‘what is legal, and what is not’, the limits of the law remain so elusive.¹ Both these qualities come from the same place, however. It may well be said that law—much like Marx complained of capital²—can hardly abide a boundary, but must reconstruct it instead as an internal distinction, and thereby transcend it. This is not to suggest anything dysfunctional about law’s openness and closure *per se*. It is this expansionist capacity which secures the relevance of law to those behavioural expectations in society that must be carried through time and projected against a disappointing reality in the future. One can see just how important coding has been to law’s evolution in recent years, effectively maintaining the legal system’s functional reference to the fluid conditions of globalized society. But, *non liquet* offers a rare glimpse ‘behind the curtains’, a chance to ‘break through the illusion of normality’. With it, the limits of law are suddenly thrown into sharp relief.

This thesis has focused on the limits of law in order to study the problem of generalized norms which are formulated and recognized in society, yet which are inadequately realized in law. What happens to such norms? The thesis answered that, in one case, the connecting thread of such a norm can be traced to social movement organizations which stabilize it through decision-making and through communication of the norm at the political and legal systems. This has formed the basis of a theory of the functional specification of social movement organizations as institutionalizing norms in the *social*, *material* and *temporal* dimensions, similar to how law functions in respect of norms. This has also been used to point out the complexity of the evolution of the global normative order, suggesting not only the increased fragmentation of normative institutionalization through the proliferation of organizations, but also the periodic organization of such organizations in the interest of retaining an apex for collective action.

There are a number of implications to this. For a start, it should mean that more care needs to be taken with statements like, ‘[t]here is hardly any alternative to law with respect to the stabilization of normative ... expectations’,³ or ‘the stabilisation of normative expectations, can only be fulfilled within the self-referential structures of a legal system’.⁴

¹ Raz (1972), 823.

² Marx (1939), 265.

³ Luhmann (2004), 170.

⁴ Calliess and Renner (2009), 268.

This appears a little overbearing now and takes too much for granted. Moreover, it is no longer precise. There *do* seem to be increasing institutionalization of norms beyond law at the global level; there *may well be* an alternative to law with respect to the stabilization of normative expectations; and, it *is possible* that the stabilization of normative expectations can be fulfilled in self-referential structures beyond the legal system. The change may seem trifling, but it could prove the basis of a more sophisticated development of law in respect of the global normative order. Bringing the limits of global law into perspective like this turns hitherto unexamined practices or structures within the system into themes or problems.

One legal practice which it problematizes, for example, is the excessive focus that lawyers place on coding in global law. The necessity for law beyond the traditional structures of the nation-state and for law in ever tighter and rarefied social spaces (as well as the competition that normative stabilization now faces with cognitive mechanisms), has probably resulted in some anxiety in the focus on legal coding. As stated, coding is necessary to maintaining the functional relevance of law. However, code *alone* is not law.⁵ Norms are what give law content and substance after all. Moreover, the cognitive shift of global society should not be exaggerated. Nor should everything outside the internal worlds of global society be reduced to the transfer of meaning components between normative orders. Norms function on the global level too, above differentiated society, and this is only becoming increasingly so as the negative side-effects of those internal rationalities spill out into the larger system.

This is not to say that, if there was a more balanced approach with as much focus on norms and function as there is on code, that law could be reformed to better accommodate general norms. It seems to be that law cannot offer a direct solution to this problem of globalized society. But, that does not mean that there are no possibilities for the functional development of law here either. The communicative capacity of social movement organizations, and the importance of keeping norms in circulation as proto-legal communications, seems to suggest a complex aggregate of factors here. The deeper reasons for this can only be discovered on further research.⁶ At any rate, whatever law's exact relationship with social movement organizations turns out to be, it would still be prudent for the legal system to develop more sophisticated structural relations with civil society

⁵ *Contra*, Lessig (2006), 5.

⁶ One thing worth noting is that Luhmann's differentiation theory needs refinement to provide any kind of insight into the complexity of world society. His adopted evolutionary perspective of a linear shift from segmentary differentiation through to functional differentiation does not adequately capture the conditions of world where the three forms seem to form part of a complex.

organizations. Thus far, lawyers have contemplated such organizations in contexts like, civil society organizations forming part of the discursive logic of law, as a potential source of legitimacy for law, as global governance bodies that need to be held accountable by law. However, there has been little contemplation so far by the legal system of those organizations as a functional equivalent to law. Developing a better understanding of the function of social movement organizations would certainly result in a more considered approach to the way that law structurally relates to those organizations.

There are implications here too for broader social science research. The concept of the functional differentiation of social movement organizations in reference to general norms should be of interest to international relations scholars and sociologists who focus their research on the global normative order. More specifically the thesis should be relevant to the work of people like Martha Finnemore and Kathryn Sikkink who already pay particular attention to the role of norms at the global level, or Jackie Smith who looks more specifically at social movement organizations. As I said, those approaches could be developed by casting off any old Weberian notions of norms as ‘culture’, and by adapting the insights of more detailed approaches to the internal logics of the legal system. But, if they were willing to develop their approach in this way—there is a some aversion to functionalist sociology in the American academy⁷—they would be well poised for undertaking further research into the functional specification of social movement organizations.

This thesis has relied heavily upon Niklas Luhmann’s systems theory and functional method of analysis to generate the insight, but it does not seem necessary to adopt a strict Luhmannian approach for developing research in this area. The question addressed in this thesis first took shape during time spent in The Hague, studying international law. It was borne out of a sense of frustration with the way in which law’s description of itself always obscured its limitations in respect of general norms. Luhmann’s method has proved very useful for breaking through this illusion.⁸ The observer need not be frustrated about the smoke screens law uses to hide its limits in respect of general norms. One can actually admire now how the World Court has managed the challenges of globalization, just as one can admire many things about how law has developed itself beyond the state in the various niches of world society. Most impressive of all, however, is how civil society has organized itself without law.

⁷ Which is more a reaction to Parsons structural-functionalism than Luhmann’s functional-structuralism, see, for an early statement, Gouldner (1971).

⁸ In this respect, Luhmann is too often overestimated by his critics and underestimated by his most devoted followers.

Appendix: list of interviewees

1. Interview with Mr. Reiner Braun, Executive Director of International IALANA, Executive Director of IALANA Deutsche Sektion, Berlin, 11/03/2015, Skype call, interview recorded using Amolto Call Recorder software.
2. Interview with Mr. Tim Wright, ICAN Asia Pacific Director, New York, 11/03/2015, Skype call, interview recorded using Amolto Call Recorder software.
3. Interview with Ms. Alice Slater, New York Director of NAPF, member of the Coordinating Committee of Abolition 2000, New York, 11/03/2015, Skype call, interview recorded using Amolto Call Recorder software.
4. Interview with Dr. John Burroughs, Director of IALANA United Nations Office, Executive director LCNP, New York, 17/03/2015, Skype call, interview recorded using Amolto Call Recorder software.
5. Interview with Professor Tilman Ruff, Co-president IPPNW, Australian chair of ICAN, Melbourne, 19/03/2015, Skype call, interview recorded using Amolto Call Recorder software.

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