

## The Grammar(s) of Global Law\*

### Summary

This essay introduces the theme of the volume: *The Grammar(s) of Global Law*. Legal grammar is understood as the conceptual and linguistic foundation on which legal decisions rest – law’s meta-structure, its argumentative techniques and its systematicity. The essay distinguishes between two ways of thinking about this grammar. The first way of thinking appeals to a grammar as a stabilizing factor, maintaining the coherence of the law. The second way of thinking highlights the asymmetries of power within this structure and perceives legal grammar as the medium carrying the ideological commitments of the law. As the essay ultimately argues, both perspectives react differently to the challenges of globalization that the law is confronted with. While the debate on the grammar(s) of global law is one place where future political order is negotiated, the outcome of the debate is largely open.

### Zusammenfassung

Dieser Beitrag führt in das übergreifende Thema dieser Ausgabe ein: Die Grammatik(en) des globalen Rechts. Rechtliche Grammatik wird hier als konzeptionelle und linguistische Basis verstanden, auf der Rechtsentscheidungen beruhen: die Meta-Struktur des Rechts, seine Argumentationstechniken und seine Systematizität. Dieser Beitrag unterscheidet zwischen zwei verschiedenen Arten diese Grammatik zu begreifen. Die erste Art beschreibt die Grammatik als stabilisierenden Faktor, der die Kohärenz des Rechts sichert. Die zweite Art hebt die Machtasymmetrien in dieser Struktur hervor und versteht die Grammatik als das ideologietragende Medium im Recht. Wie dieser Beitrag abschließend argumentiert, reagieren beide Perspektiven unterschiedlich auf die Herausforderungen der Globalisierung. Während die Debatte über die Grammatik(en) des globalen Rechts ein Ort ist, wo über zukünftige politische Ordnung verhandelt wird, ist das Resultat dieser Debatte weitgehend offen.

### Résumé

Cet article présente le thème principal de ce numéro: la/les grammaire(s) du droit global. Une grammaire juridique est comprise comme base conceptuelle et linguistique, sur laquelle les décisions juridiques sont fondées: la méta-structure du droit, ses techniques de raisonnement et sa systématique. Cet article présente deux manières différentes de comprendre cette grammaire. La première manière décrit la grammaire comme un fac-

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\* David Roth-Isigkeit is a research fellow at Normative Orders, Cluster of Excellence at Goethe University Frankfurt/Main.

teur de stabilisation, ce qui assure la cohérence du droit. La deuxième manière met en évidence les asymétries de force produites dans cette structure et comprend la grammaire comme un cadre d'idéologie portant sur le droit. Finalement, cet article montre comment les deux perspectives réagissent différemment au processus de la mondialisation. Le débat sur la/les grammaire(s) du droit global est un des lieux au sein duquel l'ordre politique du futur fait l'objet d'une négociation. Le résultat de ce débat est largement ouvert.

Since the second half of the 20<sup>th</sup> century, the relationship between law and linguistics has been explored in great detail.<sup>1</sup> Analytic jurisprudence, starting with *Herbert Hart's* reading of *Jeremy Bentham*, *John Austin* and *Ludwig Wittgenstein*, understands law as a form of speaking, a particular abstract language.<sup>2</sup> This abstract language follows certain rules, a sort of grammar that describes more or less precise what is acceptable to say in that language. Why, for example, could it be acceptable to think in the context of some harbour regulation of a whale as a fish instead of a marine mammal, whereas this would not be the case in the ordinary usage? The answer to this and other examples of the usage of this language is not necessarily to be found in words or concepts. Rather, as any native speaker of a language intuitively understands, there is a dimension of speech usage that is below the surface of what can be grasped looking merely at formal characteristics.

Within legal research, this “reading between the lines” is well-explored.<sup>3</sup> This special issue revisits old quests in the light of new challenges. In the process of globalization, law undergoes fundamental change. Traditional international legal structures come increasingly under pressure, functionally differentiated regimes partly replace territoriality on the global level,<sup>4</sup> and the extension of regulatory structures beyond the state leads to shifts in the authority of private and public sector.<sup>5</sup> This equally provokes questions related to law's meta-structure, its argumentative techniques and its systematicity – elements that are here described as its underlying grammar.

1 See, generally, *Endicott*, Law and Language, The Stanford Encyclopedia of Philosophy (last modified April 2016), available at <http://plato.stanford.edu/archives/sum2016/entries/law-language/>.

2 *Hart*, *The Concept of Law*, 1961.

3 See *Green*, *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us about the Law*, *Virginia Law Review* Vol. 89, 2003, 1897. *Bix*, *Law, Language and Legal Determinacy*, 1996. *Fish*, *Doing What Comes Naturally*, 1989. *Blackburn*, *Spreading the Word*, 1984.

4 *Teubner*, *Constitutional Fragments: Societal Constitutionalism and Globalization*, 2012.

5 *Roth-Isigkeit*, *The Plurality Trilemma – A Geometry of Global Legal Thought* (forthcoming).

## I. Language, Law and Grammar

In the development of the human species, language takes an irreplaceable role. For example, it is suggested that the explosive development of complex tools, art, symbolic ceremonies and social cooperation, that can be observed approximately 40-50.000 years ago, directly relied on the parallel development of linguistic capacities and symbolic language.<sup>6</sup> Only language made it possible to convey across different human beings guidelines or “rules” how to do and to achieve more or less complex tasks, be it how to connect a stick and a stone to construct a hammer, or how to bury a fellow human in the traditional way. A grammar has a particular role in such development of language. Language that is capable of conveying complexity does not merely consist in the association of words with concepts. Rather, because it is usually in sentences that we express ourselves, it involves knowledge on *how to put words together*.

This required knowledge on how to combine single words to meaningful phrases makes human languages immensely complex to understand. The same words in a different order might convey a completely different meaning. This has made linguistic theorists like *Noam Chomsky* argue that it is essentially an exclusive quality of the human brain to master languages.<sup>7</sup> In particular, *Chomsky* believes that it is a form of universal capacity that already small children are endowed with. Language learning, in this view, is not merely the association of ideas but only possible through an intuitive ability to process the ‘Universal Grammar,’ describing the basic properties of all languages. What might be different across the multitude of languages is concepts and words, but some fundamental properties remain the same.

This is a far-reaching statement given that there are more than 7000 actually spoken tongues on the globe.<sup>8</sup> Other theoretical positions highlight the difference between several systems of grammar. *Benjamin Whorf*, for example, argued that “the background linguistic system (in other words, the grammar) of each language is not merely a reproducing instrument for voicing ideas but rather is itself the shaper of ideas, the program and guide for the individual's mental activity, for his analysis of impressions, for his synthesis of his mental stock in trade.”<sup>9</sup> As much as the grammar is a technical element providing rules how to make adequate statements in a form of language, it equally impacts the formation of ideas through channelling how these ideas can be formulated. *Whorf* highlights the interdependence of any mental activity with the grammatical structure of the language at its basis.

These paradigmatic positions correspond to difficulties that arise in the attempt to conceptualize the relationship between law and language. On the one hand, language is an important component of the law. On the other hand, law might itself be characterized as a language. This makes it hard to specify what we mean precisely when we think

6 *Ott*, The Evolution of I-Language: Lexicalization as the Key Evolutionary Novelty, *Biolinguistics* Vol. 3, 2/2009, 255, 257.

7 *Chomsky*, Aspects of the Theory of Syntax, 1965. *Cowie*, Innateness and Language, The Stanford Encyclopedia of Philosophy (last modified January 2008), available at <http://plato.stanford.edu/archives/sum2010/entries/innateness-language/>.

8 For a detailed account, see the *Ethnologue*, available at <http://www.ethnologue.com>. See also *Nettle*, Linguistic Diversity, 1999.

9 *Whorf*, Language, Thought and Reality, 1956, 214.

about the linguistic component of law. What role does linguistic analysis play in the attempt to understand the internal structure of the law? Is law a language on its own, like *Turkish* or *Sanskrit*? Is it in itself a form of universal language that reaches across the boundaries of civilizations? Do grammatical rules governing languages apply to the law, such as how to build sentences and concepts? Or does the linguistic element in law merely reflect some basic aspects that are present in any form of human speech? While this special issue does not aim at a resolution of these questions about the relationship of law and language, it is nonetheless helpful to keep the different understandings as a mapping device in mind when reading the different approaches.

What this introduction will do is to trace two ways of thinking about legal grammar. The first way understands legal grammar as a pervasive set of argumentative rules that make a statement acceptable in the professional community of lawyers. Legal craftsmanship, in this perspective, is constructive and universal. The second way of thinking tells a story about legal grammar as the underlying ideological structure of the law, particular and culturalist. Here, grammar is the untold, that distorts legal processes with its impalpable influence. Even though such a clear cut might seem artificial at first, since there are continuities and interrelations between both perspectives, this essay argues that these two figurative characterizations boil down to fundamentally different basic principles. In a third step, summarizing the experience from reading the contributions of this issue, this introduction tries to illustrate some challenges of legal globalization that the grammar of global law is confronted with.

## II. Grammar as Rules of Argumentation

The *Chomskyan* perspective in mind, this first concept of a global legal grammar appeals to some basic properties that are similar across different legal regimes beyond the state. These shared properties account for a form of discursive unity that permits to situate decisions in a shared context of justification. The central element, in this perspective, are common rules of interpretation and argumentation. Through offering models how rules are supposed to be applied, they make outcomes comparable and predictable and allow for the stabilization of normative expectations in the law. In global law, this task is performed by general principles of international law and the rules of interpretation that the *Vienna Convention of the Law of Treaties* contains.<sup>10</sup> They provide the meta-theoretical backbone of any expression in the language of global law.

In this volume, this perspective is offered in the contribution by *Thomas Kleinlein* that analyses how the interpretation of UN *Security Council* resolutions generally follows this universal grammar.<sup>11</sup> This makes him consider that while the *Security Council* is embedded in the general practice of international law, some sector-specific particularities apply.<sup>12</sup> Grammar, in this way, can be understood as the fundamental core

10 See, in particular, *Pulkowski*, *Universal International Law's Grammar*, in Fastenrath et al. (eds.), *From Bilateralism to Community Interest – Essays in Honour of Bruno Simma*, 2011, 138 (145-50).

11 *Kleinlein*, *Der UNO-Sicherheitsrat und die Universalgrammatik des Völkerrechts*, in this volume, 253.

12 *Kleinlein* (note 11), 276-277.

of global legal argument, that tends to be slightly modulated in the specialized regimes. No area of law beyond the state is free from the general grammatical rules of international law.

This insight suggests an important function of such grammar: to maintain coherence across the fields in which the law applies. Grammar can be the mediating element between vastly different regulatory objects. An appeal to coherence, according to *Pulkowski*, does not in itself require that international law is actually coherent. Rather, coherence appears as a requirement of rational justification, “a decision that can relate the rules of various international regimes to common values or principles is more likely to appear as a rational decision”.<sup>13</sup> In the rules of the *Vienna Convention*, for example, this requirement for coherence is reflected in Article 31(3)c, requiring interpretation to reflect the general framework of international law.<sup>14</sup>

At the same time, different regimes might stand in fundamental tension to each other, as the contribution by *Dana Schmalz* argues. While International Humanitarian Law and International Human Rights Law increasingly overlap in their area of application, *Schmalz* holds, they build on opposing perspectives with respect to the foundation of rights.<sup>15</sup> In particular the “contrasting judgment on the permissibility to kill a person”<sup>16</sup> illustrates how conflicts are not simply a question of singular divergent rules, but of substantially different grammars. The concrete legal questions arising in the demarcation of the two regimes underline limits of both grammars, especially in the task to address contemporary challenges such as transnational terrorism or targeted killings. The extent to which formal legal argument can mediate between these conceptual collisions appears fairly limited.<sup>17</sup> Rather, *Schmalz* suggests viewing the relationship between IHL and IHRL as a dialectical process, in which a new grammar might incrementally arise by borrowing from both regimes.

A grammar, in this view, appeals not only to a formal dimension, rather it appears as the conceptual (and philosophical!) basis on which legal decisions rest. This resonates with a perspective that understands the unifying vision of global legal grammar as a more substantive background condition of global legal argument. *Klaus Günther* argues that along the different logics of sub-regimes, there are criteria that make up a form of universal concept of law. “Such a uniform concept can be spelled out in terms of a legal meta-language which contains basic legal concepts and rules, like the concept of rights and of fair procedures, and the concept of sanction and competence.”<sup>18</sup> This meta-language, according to *Günther*, is the achievement of historical experiences.<sup>19</sup> This picture

13 *Pulkowski*, *The Law and Politics of International Regime Conflict*, 2014, 255.

14 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi, 13 April 2006, UN Doc. A/CN.4/L.682 (2006), paras. 424-432.

15 *Schmalz*, *Normative Demarcations of the Right to Life in a Globalized World: Conflicts Between Humanitarian Law and Human Rights Law as Markers*, in this volume, 233.

16 *Schmalz* (note 15), 234.

17 *Roth-Isigkeit*, *Promises and Perils of Legal Argument: A Discursive Approach to Conflicting Legal Orders*, *Revue Belge de Droit International*, 2/2014, 96.

18 *Günther*, *Legal Pluralism or Uniform Concept of Law – Globalisation as a Problem of Legal Theory, No Foundations – Journal of Extreme Legal Positivism Vol. 5*, 2008, 16.

19 *Günther* (note 18), 16.

of a legal grammar shares the universal aspiration, yet carries more substantive elements. It works as a form of storage for the legal history of a society.

The normative elements included in this grammar are crucially related to the societal frame in which the law applies. While undoubtedly such frame already exists on the level beyond the state, insecurity as to its normative foundations is pervasive. One substantial proposal involves an extension of the normative language of the nation state (and its grammatical foundations) to the global level. In this volume, *Matej Avbelj* examines the viability of constitutionalism to work as a grammar of global law. He argues that while there is a fundamental need for a grammatical backbone of global legal argument, constitutionalism in its different historical forms might only unsatisfyingly perform this role.<sup>20</sup> If, as *Günther* suggests, such grammar is the result of historical experiences, the differences between the histories of the globe might seem too large to be bridged by a common theory. Conscious of the disparity of contexts, *Avbelj* appeals to a more modest approach: “[D]ifferent forms of constitutionalism could be preserved (or developed) for different ‘environments’, taking into account their disparate historical, social and overall political characters.”<sup>21</sup> This minimal approach re-iterates the perspective that *Kleinlein* puts forward with respect to the interpretation of *Security Council* resolutions. A combination of common elements and sectoral specificities might bridge the differences between legal regimes.

A perspective of a grammar as a specific set of argumentative rules frequently relates to the idea of the discipline, the professional community that educates and determines the native speaker in their field. To learn to draw on certain argumentative models is an essential part of legal training. Quite frequently, in classic international law, this professional community has been associated with humanistic ideals, an “invisible college” pulling the threads behind the scenes, thus selflessly working towards a better future.<sup>22</sup> Whether an argument is considered admissible or not in this professional discipline crucially determines its validity. In the current pluralization of interactions between different legal orders, however, this validity criterion seems to be weakened.

This necessity for arguments to be accepted in a professional community of international lawyers, however, results in some particularities with respect to the legal grammar. On the one hand, as a positive aspect, experiences that are part of international law’s history become automatically part of the legal grammar. Such view, for example, allows us to make distinctions that go beyond formal criteria of recognition, between substantive arguments and merely rhetorical practice, which have been raised in the case of the *Russian* annexation of the *Crimea*.<sup>23</sup> On the other hand, the roots of the grammar in the discipline leads to the perpetuation of existing power relations.<sup>24</sup> Critical scholars assert

20 *Avbelj*, Global Constitutionalism as a Grammar of Global Law?, in this volume, 216.

21 *Avbelj* (note 20), 230.

22 See *Schachter*, The Invisible College of International Lawyers, *Northwestern University Law Review* Vol. 72, 2/1977-78, 217.

23 *Marxsen*, The Crimea Crisis – An International Law Perspective, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* Vol. 74, 2014, 367. *Mälksoo*, Russian Approaches to International Law, 2015, 180-181.

24 *Kennedy*, Legal Education and the Reproduction of Hierarchy, *Journal of Legal Education* Vol. 32, 1982, 591.

that the bias in legal decision-making hides in the background conditions of legal practice and is thus hard to detect.

### III. Legal Grammar and the Asymmetries of Political Power

The bias of the professional language of international law is a particularly prominent theme in the scholarship of *Martti Koskenniemi*. According to him, the quality of legal arguments does not determine the outcome of legal cases. Rather, the indeterminacy of the law provides room for political elements of choice. “The argumentative architecture allows any decision, and thus also the critique of any decision without the question of the professional competence of the decision-maker ever arising.”<sup>25</sup> This structural indeterminacy of the law is also a (frequently deliberately intensified) weakness of the legal grammar to determine legal decisions.

This diagnosis of the indeterminacy in *Koskenniemi*'s work appeals to (and ultimately opposes) a *Schmittian* theme: the normativity of facticity. *Schmitt* analyses the way in which international legal grammar operates as an instrument of political power. The importance of international law, according to *Schmitt*, lies in the elasticity of its central concepts.<sup>26</sup> “It is one of the most important phenomena in legal and intellectual life of humankind in general, that the one who has true power is able to determine for himself concepts and words. *Caesar dominus et supra grammaticam*: the Emperor rules over the grammar.”<sup>27</sup> The outcome of legal decisions is as much the product of who decides with which political interest as it is a matter of legal language.

Legal grammar, in this view, carries the ideological structure of the law and perpetuates the implementation of interests.<sup>28</sup> The grammatical structure of the law, understood in this way, exercises power, but not in the form of coercion. Rather, relations of power perfidiously diffuse into all areas of society, promoting a biased conception of the common good that *Antonio Gramsci* described as *hegemony*. It is “an organic and relational whole, embodied in institutions and apparatuses, which welds together a historical bloc around a number of basic articulatory principles”.<sup>29</sup>

Legal argumentation is a crucial part of this organism. The legal grammar is “the substantive reference framework of various norms and decisions that fixes in time solutions once found and thus makes them reproducible, establishes legal figures, enables systematization and stores manifold model solutions and bygone conflicts. Doctrine [...] acts as a stopping rule for justification-seeking argument”.<sup>30</sup>

25 *Koskenniemi*, From Apology to Utopia, Rev. Ed. 2006, 589 (emphasis omitted).

26 *Schmitt*, Völkerrechtliche Formen des modernen Imperialismus, in: *Schmitt* (Ed.), Positionen und Begriffe im Kampf mit Weimar, 1932, 202.

27 *Ibid.* (my translation).

28 See, for example, *Kennedy*, Law and the Political Economy of the World, *Leiden Journal of International Law* Vol. 27 7/2013. See also, for further references, *Beckett*, Critical International Legal Theory, Oxford Bibliographies (last modified April 2012), available at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0007.xml>.

29 *Laclau / Mouffe*, *Hegemony and Socialist Strategy*, 2<sup>nd</sup> ed. 2001, 67.

30 *Buckel / Fischer-Lescano*, Gramsci Reconsidered: Hegemony in Global Law, *Leiden Journal of International Law* Vol. 22, 3/2009, 437, 446.

Here, the constraints of legal grammar are understood as a perfidious tool of hegemonic rule to which subversion is the only plausible answer.

In the post-modern picture, such an approach to legal grammar can be radicalized further. Assuming with *Jean-François Lyotard* that language itself is radically fragmented, fragments of language receive a completely different meaning when they are in different contexts: a fragment in the law will be understood differently than in arts, economy or sports.<sup>31</sup> The focus on common grammatical rules in legal discourse, however, tends to blind out the socially determined narrative character of legal decisions and concepts in seemingly scientific argumentation. Legal grammar is to be found in the narrative dimension of the law, in the non-articulated background assumptions about political, economic and ethical conditions that remain unprocessed in the use of formal legal language.

In this volume, *Julia Otten* provides a perspective on these narrative background conditions in international law. Her contribution traces the use of narratives as legal “stories.” Narrators, as the ones who are writing the story, have an immense power over the way the grammatical structure of the law develops, because they are the ones in the position to influence its most basic rules.

*“Narrators can use several tools to persuade their audiences. First, within narratives they can merge fiction, which is generally considered a non-issue in international law, and reality in a way that becomes unnoticeable to the reader. The fictitious aspects of a story, whether those are characters or events (for example, the international community or State sovereignty) are intertwined with the storyline and become a real and, most important, a necessary part of the development of the story.”*<sup>32</sup>

Her contribution opens a perspective on how legal knowledge and the underlying background conditions of legal argumentation are shaped. In particular, the normativity of the law remains crucially connected with the formal, narrative structure of the story. Recalling Whorf’s perspective on the cognitive influence of a grammatical structure, *Otten* demonstrates how content-based argumentation can turn into a mental tool through seemingly simple story-telling.

The view of legal argument resulting from this perspective is one of continuous contestation instead of harmonizing consent. *Otten* argues: “Since there is a plurality of narratives, rhetorical techniques of persuasion are needed in the struggle over authority of interpretations and readings of international law. Rhetoric should not be dismissed as a negative instrument; instead it is existential for international law. Narratives are a powerful tool to establish, overthrow or reinforce this authority in international law.”<sup>33</sup> This view highlights that international legal argument is a process in which the grammatical structures determining the validity of normative statements as law are themselves subject to contestation and change.

31 *Lyotard*, *The Differend*, 1983, transl. Van Den Abbeele 1988. See also *Kronenberger*, *Theorien der Radikalen Fragmentierung*: Ladeur, Weber, Wiethölter, in: Buckel et. al. (eds.), *Neue Theorien des Rechts*, 2<sup>nd</sup> ed., 2008, 229, 240.

32 *Otten*, *Narratives in International Law*, in this volume, 187.

33 *Otten* (note 32), 215.

#### IV. Grammar and Legal Globalization

In particular, the currently observable change of law beyond the state in the process of globalization sheds a new light on the questions related to legal grammar. Will it be possible to contain societal change within rationalizing grammatical structures, upholding the historically grown order of the nation state? Or will globalization dissolve the traditional legal grammar and establish a new background condition of legal argument in the global realm? Is it possible to “conserve the great democratic achievements of the European nation state, beyond its own limits,”<sup>34</sup> (*Habermas*) or will the modern democratic concept of law be replaced by other grammatical structures? More radically, the time of structure might be over altogether. Ultimately, the modern concept of law, *Luhmann* argued, could be nothing more than a *European anomaly*.<sup>35</sup>

In dealing with legal globalization, there are several strategies available.<sup>36</sup> The constitutionalist strategy appeals to the stabilizing dimension of a legal grammar and transfers the model of the nation state to the global realm. Sometimes, this transfer is perceived as a mere necessary complement to an (in any case) deteriorating world of statehood.<sup>37</sup> Other authors emphasize the normative and factual pull of supranational institutions.<sup>38</sup> In both cases, it is the grammatical structure of the nation state that is considered suitable to deal with global challenges.

*Klaus Günther* has spelled out how such a meta-code that preserves the historical experiences from the nation state might look like: The *universal code of legality* contains the essential normative principles of a democratic concept of law.<sup>39</sup> Dispute about what these principles might mean strengthens rather than weakens this structure:

*“The more we struggle about contested universals [...] the more we get entangled into the requirements of fair procedures which meet democratic requirements as the legitimate medium for the interpretation and institutionalisation of the code of legality.”*<sup>40</sup>

Since the rationality of fair dispute resolution is inscribed in law’s grammatical foundations, it can be preserved in the multipolar processes of global law. This resonates well with the view of *Stefan Kadelbach*, who argues that the argumentative structure in this discourse has already reacted to today’s challenges by attaching obligations to actors rather than territorial entities.<sup>41</sup> Accordingly, a thin layer of universal principles, adapted

34 *Habermas*, Why Europe Needs a Constitution, *New Left Review* Vol. 11, 5/2001, 5.

35 *Luhmann*, Law as a Social System, 1993, transl. Ziegert 2004, 490.

36 *Roth-Isigkeit* (note 5).

37 *Peters*, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, *Leiden Journal of International Law* Vol. 19, 2006, 579.

38 *Fassbender*, The United Nations Charter as the Constitution of the International Community, 2009.

39 *Günther* (note 18), 18.

40 *Günther* (note 18), 19.

41 *Kadelbach*, The Territoriality and Migration of Fundamental Rights, in: Handl et al. (eds.), *Beyond Territoriality – Transnational Legal Authority in an Age of Globalization*, 2012, 295, 316.

to the respective legal cultures, has the potential to gradually bridge the gaps that open between different legal regimes in the course of fragmentation.<sup>42</sup>

In this issue, a similar perspective appears in the contribution by *Matej Avbelj*. Here, it is argued that a constitutionalist and a pluralist perspective on the grammar of global law might be complementary rather than opposing. *Avbelj* suggests that the project of a grammar of global law ought to be a process of continuous searching: “we should be, as in a mosaic of concentric circles, collecting different conceptual and practical expressions of constitutionalism to build a complementary framework.”<sup>43</sup> He illustrates how this interplay between a pluralist search for a constitutionalist theory might relate to the concept of a legal grammar.

*“[I]n legal grammar too, morphology and syntax are not sealed categories, but often form a morphosyntax. The meaning of the words is formed not only through syntax, by way the words are combined into sentences, but also by the form(ation) of the words itself. In a similar way, the present grammar of global law can be portrayed as a mutual interference by many constitutionalisms, drawn together by principled legal pluralism.”*<sup>44</sup>

*Günther, Kadelbach* and *Avbelj* share their optimism as to the mutual compatibility of grammars. The advantage of arguments framed from the perspective of rights might be that they inhabit both, a constitutionalist and a pluralist perspective. The language of rights is of central importance for today’s legal grammar.<sup>45</sup>

Rights-based pluralism is a qualified concept, a *pluralisme ordonnée*.<sup>46</sup> In contrast to this meaning of pluralism, there is a perspective highlighting the virtues of fragmentation in order to break up the ideological frame that the traditional grammar comes with. Scholars sharing this perspective aim at a pluralization of political spaces for contestation. While there is a pressing need to include individual articulations in the formation of global order, the danger of such an unqualified plurality is that in the multitude of voices only the loudest make themselves heard. It would then give undue preference to the articulations of private economic actors, while failing to safeguard the common interest. A grammar is a stabilizing factor in a legal system, even though this might, in some cases, uphold historical injustices.

A qualified version of right-based pluralism as a sketch for a future grammar of global law is confronted with considerable problems, too. While the rights-based constitutions of the national state have succeeded in solving many of society’s collective action problems, a convincing reconstruction of public interest beyond the state is missing. Additional problems result from the fragmented structures of the legal architecture concerned with the protection of individuals. As the contribution by *Dana Schmalz* highlights, it is difficult to entirely reconcile the demands of Human Rights Law and Humanitarian Law. “IHL and IHRL evolved in different historical phases and have a different focus: While IHL introduces some rules to the situation of war and aims to limit suffering under

42 *Kadelbach* (note 41), 323.

43 *Avbelj* (note 20), 230.

44 *Avbelj* (note 20), 232.

45 *Bhuta*, *The Frontiers of Extraterritoriality: Human Rights as Global Law*, in: *Bhuta* (Ed.), *The Frontiers of Human Rights*, 2016, 1, 4. *Domingo*, *The New Global Law*, 2010.

46 *Delmas-Marty*, *Le Pluralisme ordonné*, 2006.

those conditions, IHRL generally proceeds from the perspective of peace and contains much more far-reaching requirements for the protection of individual rights.”<sup>47</sup>

The overlap between both regimes leads to complex problems that frequently involve a decision for one of the underlying grammars rather than a mediation between them.

The stabilizing function of the legal grammar is particularly visible in global security law. The contributions by *Julia Otten* and *Thomas Kleinlein* shed a differentiated light on their essentially reflexive dimension. *Kleinlein* argues that the *Security Council* can crucially influence the interpretive practice of its own resolutions. On the one hand, it is bound to the universal grammatical rules that determine the admissibility of arguments in international law. On the other hand, it can preconfigure through specific formulations how its resolutions will be received in the professional community.<sup>48</sup> This reflexive element, as *Otten* argues, perpetuates the *status quo*. The narrative of collective security fixes a particular historical situation and relies on certain legal concepts: “State sovereignty is part of the hidden cargo of the script of the collective security narrative and it cannot be easily redefined, which is why it leads to many of the troubles that the narrative encounters.”<sup>49</sup> This leads to a weak form of *autopoiesis*: The narrative can treat, to some extent, the changes in the factual order as external events.

Whether this self-stabilizing, reflexive element of the grammar of global security law can be upheld even if the role of statehood fundamentally changes remains difficult to say. The *United Nations* might be the result of a historically asymmetric consensus, but the state-based system of collective security and dispute resolution arguably is one of the most central achievements of the 20<sup>th</sup> century.<sup>50</sup> If the basic grammar of global law changes towards other forms of authority, it might cease to carry the particular historical experiences in the background of the traditional form of the international legal system and its aims, “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>51</sup> Grammatical change influences the basic mode, in which a legal system operates – it overwrites historical experiences. If the traditional state-focused grammar does not resist the centrifugal forces of globalizing private interest, it will need a replacement that keeps private and public, right and duty, in balance.

## V. Conclusion

The approaches of this volume highlight a wide spectrum of aspects and challenges that the grammar(s) of global law, depending on the perspective in singular or in plural, is confronted with. The debate on the grammar of global law is one place where future political order is negotiated and contended. The outcome of this process is largely open. Will global law find *one* language? Will it be many languages that coexist and interact? Will these many languages still refer to the same basic grammar? Or will even the

47 *Schmalz* (note 15), 239.

48 *Kleinlein* (note 11), 276.

49 *Otten* (note 32), 197.

50 *Dupuy*, Some Conclusions, in: Kadelbach et. al. (eds.), *System, Order and International Law – The Early History of International Legal Thought* (forthcoming).

51 Preamble of the Charter of the United Nations.

grammar of global law be fragmented? With the concept of legal grammar, it is possible to illustrate many theoretical variations beyond unity and particularity. The contributions of this volume demonstrate that it can serve as a helpful tool for the analysis of global order.