Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Viktor Bruns and the Orderly Order: Reflections on 'Völkerrecht als Rechtsordnung'

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I. Introduction

'International law is a legal system for the community of states, a system of legal principles that are interrelated in an orderly context.'[1] With this

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1 'Das Völkerrecht ist eine Rechtsordnung für die Gemeinschaft der Staaten, ein *System* von Rechtssätzen, die untereinander in einem *Ordnungszusammenhang* stehen' (my emphasis). All translations from German are mine (except otherwise noted), often quite liberal.

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sentence, Viktor Bruns, the founding Director of the Kaiser Wilhelm Institute for Comparative Public Law and International Law, opened his article 'International Law as a Legal Order' ('Völkerrecht als Rechtsordnung').[2] The article marked the launch of a new journal, the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV, English title: Heidelberg Journal of International Law, HJIL). The first issue, which contained Bruns' programmatic piece, was published in 1929, five years after the Institute took up its work.

In this contribution, I critically assess the scholarly pursuit of legal order that Bruns proclaimed as the research programme of his institute, a programme that then was executed by generations of scholars.[3] In this light, the topic of my paper is not the status of the law as such, but the scholarly ordering claims. While Bruns and his disciples did not explicitly acknowledge such effects, their scholarship not only 'finds' or identifies order in the law but at the same time actively contributes to creating or even imposing order, as will be shown.

Section II clarifies the key concepts, 'order' and 'system'. Section III examines how the quest for legal order resonates in our times of shifting world order. Section IV analyses Bruns' approach and arguments in their historical context. Based on archival material, the underlying motive of conducting lawfare for Germany is unveiled. Section V discusses the most important critiques (practical, epistemic, and political) of the scholarly pursuit of ordering the law, and discusses how 'order' might convey a modicum of thin legitimacy to international law. Section VI shows how the recent International Court of Justice (ICJ) Climate Advisory Opinion performed an 'ordering' task and thereby strengthened international (climate) law. The paper concludes in Section VII that the scholarly programme of ordering international law is not only for the dustbin of history, but has a (modest) value in our era in which the international legal and political order seems to unravel.

2 Viktor Bruns, 'Völkerrecht als Rechtsordnung I', HJIL 1 (1929), 1-56. The follow-up was Viktor Bruns, 'Völkerrecht als Rechtsordnung II', HJIL 3 (1933), 445-487. Bruns was the director of the Kaiser Wilhelm Institute from 1924-1943.

3 In a companion contribution, I compare Bruns' vision to the one espoused by his successor Hermann Mosler and ask to which extent their approaches foreclosed or facilitated a critique of the law (Anne Peters, 'International Law as a Legal Order: 1929 – 1976 – 2025', Max Planck Law Perspectives, 8 August 2025). I re-use some passages from that blogpost in this article.

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II. Legal Order and Legal System

In 'Völkerrecht als Rechtsordnung', Viktor Bruns did not explain in any detail what he understood by 'legal order'. He only mentioned that a legal order is not an '*unstructured* compilation of rules and institutions *unrelated* to each other'.[4] He also postulated that the international legal order was an 'order in a twofold sense': It (supposedly) creates order in social reality precisely through its own (internal) order.[5] Put differently, Bruns argued that the existence of this inner structure is indispensable for enabling the law – particularly international law – to fulfil its task of 'ordering' the world. Bruns saw the 'imperative of peace' as 'the essence of the legal order'.[6] For making and securing peace, dispute resolution through (arbitral) courts was central – without it there could be neither order nor law at all.[7] Both underlying premises are debatable: many observers wonder whether, to what extent, and how international law is conducive to the stabilisation and pacification of international relations. It seems even more problematic to claim that *the ordering* of the law would contribute to order in the real world, too. I will come back to this below (section V. 3.).

Otherwise, Bruns' conceptualisation of order as 'structured law' resonates today. Dana Burchardt writes that 'law is indeed characterized by a multitude of interrelations between legal norms, which cause the interacting legal norms to form a structured entity. In this case, individual legal norms transcend themselves, creating a structure that is more than its elements.'[8] This is a helpful circumscription of legal order in a broad sense, as a 'structured entity'. Such type of 'order' is an inherent feature of law, simply because legal norms coexist and interrelate.[9]

A more demanding, narrower conception of 'order' asks for a particular pattern, for an 'orderly order'. An orderly legal order is present when the rules and principles do not contradict each other (consistency) and when they are in normative terms compatible (coherency, sometimes also called 'harmony').[10]

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4 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 10 (emphases added).

5 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 10.

6 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 26.

7 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 28.

8 Dana Burchardt, 'The Functions of Law and their Challenges: The Differentiated Functionality of International Law', GLJ 20 (2019), 409-429, (413).

9 Burchardt (n. 8), 413.

10 The terminology varies. I here follow Raphaël van Steenberghe, 'The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-Based Approach to Dealing with both the "Interpretation" and "Application" processes', Int' l Rev. of the Red Cross 104 (919) (2022), 1345-1396. 'Consistency' is also called formal coherence. See below text with notes 133-135.

For example, three years before the launch of the ZaöRV, Alfred Verdross had postulated 'that international law is not merely a collection of individual fragments with no internal connection, but rather forms a *harmonious order* of norms anchored in a uniform basic order'.[11]

Such a demanding conception of order is mostly connoted with the word 'legal system'. For example, 'the effort to envision the various legal norms as arranged within a hierarchy, composing together a *coherent, logical order*' has been called the '*systemic vision*' of public international law.[12] In the fragmentation debate at the turn of the millennium, the fear was articulated that specialised courts and tribunals would 'develop greater variations in their determinations of general international law', which would 'damage the *coherence* of the international legal *system*'.[13]

Many traditional scholars with a doctrinal penchant use the word 'legal system', probably not with much thought given to possible differences between 'order 'and 'system'. James Crawford structured his General Course at the Hague Academy in three parts, with the headings: 'International law as law', 'International law *as a system*', and 'The rule of international law'.[14] In the Max Planck Encyclopedia of International Law, Rüdiger Wolfrum writes: 'International law is, as far as its sources and its foundation are concerned, not uniform. Nevertheless, it should be seen as *one system*'.[15] The very first sentence of a leading German textbook defines international law as follows: 'International law as the *legal order* of the international community – or, in a broader sense, of the international system – is especially close to the political realm […].'[16]

It seems that in those writings, the words 'order' and 'system' could be used interchangeably. Bruns himself in his programmatic article did so, already in the introductory sentence cited above.[17] Bruns missed saying much

11 Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926), V.

12 Eyal Benvenisti, 'The Conception of International Law as a Legal System', GYIL 50 (2008), 393-406 (393).

13 Jonathan I. Charney, 'Is International Law Threatened by Multiple International Tribunals?', RdC 271 (1998), 105-382 (347) (emphases added).

14 James Crawford, 'Chance, Order, Change: The Course of International Law. General Course on Public International Law', RdC 365 (2013) (emphasis added).

15 Rüdiger Wolfrum, 'International Law', in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (Oxford University Press, November 2006), para. 20 (emphasis added).

16 Jost Delbrück, 'Das internationale System der Gegenwart: Staatengesellschaft – Staatengemeinschaft – Rechtsgemeinschaft' in: Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht*, Band I/1 (2nd edn, de Gruyter 1988), 1-21 (1). In this opening sentence, 'international legal order' comes in one breath with 'the international community' which is also a German theme of predilection. See on the 'German' obsession with order and system below section V. 2.

17 See text with note 1.

about the kind or degree of 'order' he was searching. But from the entire article it transpires that he was indeed seeking and proclaiming an 'orderly' order, a consistent and coherent order, indeed a 'system'.[18]

III. Revisiting Bruns in Times of a Global Shift of Order

The big question of this contribution is whether Bruns' ideas published almost one hundred years ago can inspire timely answers or whether his essay should rest in peace as a purely historic document. I submit that especially in the current era of a global shift of order, the ordering claims of Bruns (and his likes) deserve renewed attention.

1. Ordering the Law – and With it the World?

Importantly, in the contemporary period of shift of order, the idea of order refers both to international law and to the real world. This duality is a constant feature of all ordering debates, also in Bruns' paper. In most of the usages in international political and legal life, the 'order' of the law and the 'order' of the world have been easily conflated, and most catch-phrases seem to imply that law has some power to shape the economic and governance conditions on the ground.[19] In the widespread talk of 'international order', most observers seem to suggest that this 'order' is a matter of degree, that the quest for 'order' is a never-ending task – in short: that 'order' is more an ideal than a reality.

In the 1960s and 1970s, in the ultimately lost struggle for a 'New International Economic Order', international law was seen by the states emerging out of decolonisation as a vehicle for the transformation of the global economic system.[20] With regard to the young European Union (then still called European Economic Community), the European Court of Justice employed the topos of the 'legal order' and (synonymously) 'legal system'

18 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 3, 10, 44. Bruns also conflated the scholarly 'system' with the legal system (e. g. on p. 2 and 8). Overall, Bruns' goal was no less than 'to find a system and method for international law' (Bruns, 'Völkerrecht als Rechtsordnung I', 8).

19 See on the 'realist' scepticism in this regards below text with notes 101-102.

20 See e.g. 'Declaration on the Establishment of a New International Economic Order', UN Doc. A/RES/S-6/3201 of 1 May 1974; 'Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order', UN Doc. A/RES/41/73 of 3 December1986.

for strengthening the new organisation's legal existence outside general international law.[21] In the 1980s, the new United Nations Convention on the Law of the Sea (UNCLOS) was called a 'world order treaty', with the connotation that it set up a comprehensive legal regime embodying the international or global public interest.[22] After the dissolution of the socialist block and in the context of the first UN Security Council-authorised military operation against Iraq, US President George H. W. Bush coined the phrase of the 'new world order':[23] 'A world where the United Nations, freed from cold war stalemate, is poised to fulfil the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.'[24] The slogan of the new world order was 'used and overused to refer to the post-9/11 […] geopolitical landscape', wrote Anne-Marie Slaughter, who set out her own conception of a '*New World Order*' to describe 'a system of global governance that institutionalizes cooperation and sufficiently contains conflict', a 'web of links between disaggregated state institutions'.[25]

Generations of political scientists working in a 'realist' paradigm that focuses on power politics in international relations have downplayed or outrightly denied any power of the legal order to contribute to order in the real world. In contrast, the more 'idealist' or legalist analysts assume that the law has some (however weak) impact on the workings of international relations, and thus deploys some (modest) ordering power, and this was also Bruns' view. I will come back to the controversy below in section V. 3. Against the background of such diverging assessments about the relevance and notably

21 The ECJ spoke of a '*new legal order* of international law', ECJ, *Van Gend & Loos v. Administratie der Belastingen*, judgement of 5 February 1963, case no. C-26/62, ECLI:EU:C:1963:1, ECR 1963, 12 (emphasis added). 'By contrast with ordinary international treaties, the EEC Treaty has created *its own legal system.*' ECJ, *Costa v. ENEL*, judgement of 15 July 1964, case no. C-6/64, ECLI:EU:C:1964:66, ECR 1964, 593 (emphasis added).

22 Christian Tomuschat, 'Obligations Arising for States Without or Against their Will', RdC 241 (1993-IV), 195-374, 247 and 269.

23 George H. W. Bush, 'Address Before a Joint Session of Congress on the Persian Gulf Crisis and the Federal Budget Deficit', 11 September 1990, in: Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: George H. W. Bush*, Book II (1990), 1218-1222 (1219); George H. W. Bush, 'Address Before a Joint Session of the Congress on the State of the Union', 29 January 1991 in: Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: George H. W. Bush*, Book I (1991), 74-80 (74 and 79).

24 George H. W. Bush, 'Address Before a Joint Session of Congress on the Cessation of the Persian Gulf War', 6 March 1991 in: Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: George H. W. Bush*, Book I (1991), 218-222 (221).

25 Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004), quotes at 15.

the 'ordering' power of international law, we can concede that – especially in comparison to domestic law – 'international law as a whole has a weak character of order',[26] if at all. It is probably adequate to say that international law is not a full-fledged order but an 'amalgam of orders, built around often inconsistent and competing norms, principles, and political projects',[27] at best a 'superficial unified global pattern of political and legal order for the whole of humankind'.[28] The pattern is that this order aspires to be global ('universal') but is in many ways divided or fragmented along functional, regional, ideational, and economic lines. The international order is especially shaky nowadays, as will be discussed next.

2. Shift of Order

There is the general sentiment that the so-called 'liberal' order of international law and of the world, as established after the second world war, is waning or collapsing.[29] Due to shifts in power and ideas, the 'liberal international order' is under enormous strain.[30] The strain results from the dual hacks against both pillars that normally uphold a given legal order's functioning: its effectiveness and its legitimacy. Many of its rules and principles (especially in the realm of free trade and human rights), are not or no longer appreciated by many players (the problem of legitimacy). The legitimacy crisis is all the more serious as it is fuelled by an unholy alliance of actors from different, even antagonist ideological camps, ranging from socialism/Marxism to far right nationalism and conservatism. Since 6 January 2025, the 'enthronisation' of Donald Trump as the 47th President of the United States,

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26 Burchardt (n. 8), 422.

27 G. John Ikenberry, 'Liberal Internationalism and Cultural Diversity', in: Andrew Philipps and Christian Reus-Smit (eds), *Culture and Order in World Politics* (Cambridge University Press 2020), 137-158 (137).

28 Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press 2002), 122.

29 See for many and from various perspectives: G. John Ikenberry, 'The End of Liberal International Order?', Int'l Aff. 94 (2018), 7-23; Hanns W. Maull (ed.), *The Rise and Decline of the Post-Cold War International Order* (Oxford University Press 2018), with the main claim that we are in a liberal order 2.0; Anne Orford, 'The Sir Elihu Lauterpacht International Law Lecture 2019: The Crisis of Liberal Internationalism and the Future of International Law', Austr. Yb. Int'l L. 38 (2020), 3-28; Rebecca Adler-Nissen and Ayse Zarakol, 'Struggles for Recognition: The Liberal International Order and the Merger of Its Discontents', IO 75 (2021), 611-634; Monika Polzin, 'The Global Illiberal Dawn: Toward a Definition of "Authoritarian International Law Norms"', Nord. J. Int'l L. 93 (2024), 237-266.

30 Anne Peters, 'International Law and its Scholarship in the Times of Monsters', LJIL (forthcoming).

it is moreover the principal architect of the international liberal legal order who is tearing it down from within. And even those rules and principles that enjoy wide recognition such as the prohibition of the use of force, territorial integrity, and self-determination, to name a few, are not complied with, and violations are not followed up by sanctions (which manifests the problem of effectiveness).

At the same time, an illiberal or anti-liberal 'New World Order' seems to emerge. China, together with its junior partner Russia, is openly articulating this – most recently in the 2025 Tianjin Declaration of the Shanghai Cooperation Organisation which begins with the statement that '[t]here is a growing desire to create a more just, equitable and representative multipolar world order'.[31] Indeed, China has been 'quietly crafting the initial building blocks of a so-called parallel order that is already now complementing and potentially challenging and superseding the current international legal order […].'[32] This parallel order – which might in due course become a 'counter order' – is being built up with institutions such as the New Development Bank, the Asian Infrastructure Investment Bank, the Road and Belt Initiative, besides the above-mentioned Shanghai Cooperation Organisation. The normative conflict between the old 'liberal' international order and the new 'illiberal' order has become obvious in the 2024 Convention on Cybercrime sponsored by Russia.[33] Civil society organisations such as Human Rights Watch have warned that the vaguely worded convention endangers journalists, activists, researchers, and dissenters, can be misused to imprison bloggers or block entire platforms, and therefore fails to comply with the liberal international

31 SCO, 'Tianjin Declaration of the Council of Heads of State of the Shanghai Cooperation Organisation' of 1 September 2025, <http://en.kremlin.ru/supplement/6376?utm_source=substack&utm_medium=email>, last access 12 March 2026). See the Prior Sino-Russian Declarations: Ministry of Foreign Affairs of the Russian Federation, 'Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions, unofficial translation', 23 March 2021; President of Russia, 'Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development', 4 February 2022; Joint Statement Between the People's Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership of Coordination for a New Era on the Occasion of the 75th Anniversary of the Establishment of Diplomatic Relations Between the Two Countries, 16 May 2024.

32 Oliver Stuenkel, *Post-Western World: How Emerging Powers are Remaking Global Order* (Cambridge University Press 2016), 10 and 203.

33 United Nations Convention Against Cybercrime: Strengthening International Cooperation for Combating Certain Crimes Committed by Means of Information and Communications Technology Systems and for the Sharing of Evidence in Electronic Form of Serious Crimes of 24 December 2024, UN Doc. A/RES/79/24, (not yet in force).

order's freedom of expression standards.[34] I submit that – exactly in this constellation – reflections on international law as a legal order are urgent, and that Bruns therefore deserves to be revisited.

IV. Re-Reading Bruns in Context

The political context of Bruns' programmatic article of 1929 was marked by Germany's defeat in the First World War. The intellectual context was lively: new trends in other fields emerged which would later become highly significant for international law and scholarship. The Muslim Brotherhood, whose offshoot Hamas is today designated as a global terrorist organisation,[35] was founded in 1928. In the same year, Margret Mead published *Coming of Age in Samoa*, a work that would later become important in debates on cultural relativism and legal pluralism.

1. Ordering the Law as a Doctrinal, Practice-Oriented, and Traditionalist Activity

Viktor Bruns, given his academic and social connections, was likely aware of the spectrum of the above mentioned contemporary intellectual trends in the humanities and social sciences.[36] Yet, he deliberately opted for a strictly doctrinal approach, eschewing inter- or transdisciplinary contextualisation or methods. For Bruns, arguments had to be system-conforming in order to be accepted as valid. His effort to establish the *orderliness* of international law was an exercise situated *inside* the law as an intellectual edifice. It took the form of 'proving' the absence of legal gaps and identifying ('necessary') general legal principles.[37] Bruns did not offer any theoretical underpinning, his approach was based on legal logic and was self-referential, with the arguments entirely dependent on their own legal premises. Bruns dismissed several lines of reasoning as legally 'unthinkable' or inconceivable in legal terms, while his own thoughts were supposedly '*a priori*' or 'in accordance

34 Open letter of 22 December 2021 to the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communication Technologies for Criminal Purposes, <https://www.hrw.org/news/2022/01/13/letter-un-ad-hoc-committee-cybercrime>, last access 12 March 2026.

35 From the EU side: Council Common Position 2003/651/CFSP of 12 September 2003, 42; Council Decision 2003/646/EG of 12 September 2023, 22.

36 I thank Alexandra Kemmerer for this observation.

37 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 27 and passim.

with the 'essence' ('*Wesen*') of international law, or of order, and thus correct.[38]

Bruns' doctrinal approach was a response to the flourishing of international and transnational arbitration, which produced extensive case law to address the Great War's consequences, particularly in determining compensation claims against the German state. These arbitral courts made the international law 'material' and 'tangible', according to Bruns.[39] Yet, 'today's systems' (by which Bruns meant scholarly systems) were insufficient to 'capture this legal material' and weave it into a fabric of law. Accordingly, Bruns tried to 'fulfil the most important task of scholarship, which is to be ahead of the courts' work and reveal to them [to the courts] *the law's systemic interconnections in a complete legal order*'.[40] Bruns' quest for order was thus primarily practice-oriented (which goes on par with doctrinalism[41]). This is underlined by the many examples he took from treaties and court rulings.

Hermann Mosler, the third director of the Max Planck Institute as it was called by then, regarded Bruns' argument for the coherence of the international legal order, constituted 'through rational argumentation and state practice', as 'one of the main achievements of Bruns' work'.[42] However, the purely doctrinal work (in the style of Bruns) had little (if any) critical bite.[43]

From international law's quality *as a legal order*, Bruns deduced that it is international law itself that positively assigns competences to states and that the states' 'right to personality and freedom' must be 'generally limited'.[44] (Bruns' vision was a strictly inter-state legal order in which non-state actors did not count.) The states' right to freedom is intrinsically bounded because it needs to respect the rights of 'the other members of the community which are equal in rank'. Otherwise 'legal order would not be conceivable'.[45] Bruns concluded that states could not (as a matter of legal logic) enjoy a general freedom of action, and he drew this conclusion from his concept of legal order.[46] Put differently, Bruns theorised that it is international law which

38 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 4, 6, 7, 17, 19, 31, 36, 37, 39.

39 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 2.

40 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 2 (emphasis added).

41 See text with notes 109-111.

42 Hermann Mosler, 'Völkerrecht als Rechtsordnung', HJIL 36 (1976), 6-49 (12-13). Hermann Mosler succeeded Carl Bilfinger who was the second director of the Institute from 1943-1954.

43 See below section V. 4. on the inherently conservative nature of the 'systemic approach' to law.

44 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 54.

45 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 54.

46 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 11, 22, 33, and passim.

defines the states' powers and their limits.[47] Bruns thereby rejected the *Lotus* principle of the Permanent Court of International Justice (PCIJ), which presumed a general freedom of action for states unless prohibited by international law.[48]

With this idea, Bruns positioned himself – as his successor Mosler put it – against 'the contemporary proponents of the doctrine of absolute state sovereignty'.[49] Today, some voices in the (German) literature tend to follow Bruns' position, 'derived' from the nature of international law as a legal order, arguing that the states are competent to act on the international plane or with extraterritorial repercussions only when international law allows this.[50] By contrast, in its *Kosovo*-opinion, the ICJ reverted to the *Lotus*-style presumption that states are free to act, also with extraterritorial effects, if not specifically prohibited by international law.[51]

It may well be that Bruns' argument – that state powers are constituted by international law – was a 'progressive idea for the time'.[52] However, Bruns was clearly not progressive or visionary in his choice of scholarly themes. He failed to address key international law issues that were emerging in 1929 and remain central today: the prohibition of the use of force was absent in his article, despite the Briand-Kellogg Pact coming into force that year. Bruns did not mention the law of armed conflict, although the Red Cross movement was formalised in 1929, and two Geneva Conventions were signed in the same year. Bruns did not discuss human rights despite likely having been aware of the *Institut de Droit International*'s ongoing work on a 'Declaration of the International Rights of Man', published on 12 October 1929.[53] Bruns made hardly any mention of the League of Nations either, except in the context of a lengthy discussion of the *domaine réservé* of states.[54] His article lacks any reflection on the potentially innovative character of this young international organisation and its work.[55] Bruns was not committed to the

47 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 9-11.

48 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 12, 13, 22, 33, 54. PCIJ, *The Lotus Case* (*France v. Turkey),* judgement of 7 September 1927, PCIJ Ser. A, No. 10 (1927).

49 Mosler (n. 42), 13.

50 Ulrich Fastenrath, *Lücken im Völkerrecht* (Duncker & Humblot 1991), 245.

51 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports 2010, 403, para. 56.

52 Again in the words of his successor Mosler (n. 42), 9, 12.

53 Institut de Droit International, Annuaire 35 (1929), 298-300.

54 See Art. 15(8) of the Covenant of the League of Nations of 19 June 1922 (108 LNTS 188); Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 40-50.

55 See, in contrast: Paul Guggenheim, *Der Völkerbund: Systematische Darstellung seiner Gestaltung in der politischen und rechtlichen Wirklichkeit* (B. G. Teubner 1932), 273-274 on the new 'League of Nations method'.

'Geneva spirit'.[56] Thus any later critique of interwar international law scholarship as naively idealistic does not apply to him.[57]

2. Ordering the Law as a Tactic in the Lawfare for Germany

Bruns was not a legal idealist, and he was highly attentive to the political moment. After the lost war, Germany was weakened as a state, even regarded as a *pariah* among nations, and was struggling to regain its place in the community of civilised nations. In this constellation, international law could be used to advance German interests on the international political stage. At the occasion of the Institue's 50th anniversary, Director Hermann Mosler explicitly acknowledged that the Institute as founded by Viktor Bruns was motivated by 'the struggle against the Treaty of Versailles, which was perceived as unjust'.[58] 'The legal means provided for in the treaty itself were to be exhausted.' 'The Institute owes its existence largely to the need *to take part in the struggle* with solid international legal arguments based on an extensive documentation.'[59]

This ambition and objective is amply confirmed both in official (non-public) correspondence and in a private diary. It was Bruns' intention that research conducted at the Kaiser Wilhelm Institute should primarily if not exclusively serve German foreign policy interests, and that the new journal would be its platform. In a 1925 draft memorandum on the Kaiser Wilhem Institute, Viktor Bruns noted: 'Anyone familiar with the *highly organised scholarly propaganda of our neighbours* to the west and east knows how necessary it is to systematically monitor the academic statements made abroad. They know how to influence academic opinion in their favour long before a legal issue leads to diplomatic negotiations or is submitted to an international court for a decision. For example, not only have several monographs and entire series of journal articles been written in France over the past year in favour of Poland in its relationship with Danzig, but a number of

56 Joseph Kunz, 'The Swing of the Pendulum: from Overestimation to Underestimation of International Law', AJIL 44 (1950), 135-140 (136-137); see also Robert de Traz, *L'esprit de Genève* (Bernard Grasset 1929).

57 Edward H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (first published in 1946; 2nd edn, MacMillan 2001), 29-31. Wilhelm Grewe, who wrote his main work utilising the Kaiser Wilhelm Institute's library, sharply attacked the 'normativistic hypertrophy of international law' in the inter-war period, which was eventually lost in the swirl of the second world war: Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (2nd edn, Nomos 1988), 717.

58 Mosler (n. 42), 14.

59 Mosler (n. 42), 14 (emphasis added).

international law experts in England and the United States have also represented the Polish position. The Danzig postal dispute clearly demonstrated that such works have a far greater impact on an international court than the expert opinions submitted for a case already pending. *It is precisely here that the institute will have a particularly important task to perform in the interests of Germany*.'[60] In his annual report 1928/29, Bruns wrote: 'Only in this way will it be scientifically possible to promote German ideals of law and justice in the international formation of concepts of law and justice.'[61]

These ideas did not remain within in the realm of the Kaiser Wilhelm Society, but were deposited with the Foreign Office. In 1925 Bruns expounded to a consular officer his projected network of correspondents, to be employed by the Institute. Konsul Mundt's *note verbale* written for his superiors at the AA explains: 'Prof. Bruns wants to use this to counter French scholarly propaganda in this field. The correspondents are also to write expert reports on legal issues of international interest, which, if necessary, can represent the German position abroad *and be used to Germany's advantage*.'[62] To this end, the Foreign Office distributed the ZaöRV to German embassies abroad with the request to disseminate in the receiving states: 'In the interests of German scholarship and the dissemination of German views on international legal issues, it would be highly desirable for the journal to become known among interested circles of foreign legal scholars and relevant foreign authorities.'[63] Interestingly, Bruns' objectives did not change after the Nazis came into power. In his correspondence with the legal department of the Geman Foreign Office (*Auswärtiges Amt*) asking for subsidies for printing the ZaöRV, Bruns still in 1938 underlined that the journal serves 'the dissemination of the German standpoint abroad'.[64]

With this appeal to disseminate the German standpoint, Bruns did not merely make a strategic argument in order to extract some funding for his Institute, but articulated his genuine ambition based on his personal convictions, as his wife's personal diary proves. In October 1924 (some months before the actual establishment of the Kaiser Wilhelm Institute) Marie Bruns

60 Viktor Bruns, 'Memorandum on the Institute of 30 October 1925', in: PA (Politisches Archiv) AA (Auswärtiges Amt) R 54245, emphases added. I thank Dr Robert Stendel and Dr Richard Dören for sharing their archival research with me.

61 Institute for Comparative Public law and Public International Law, Report on the Fiscal Year 1928/1929 by Viktor Bruns, academic work programme, PA AA R 54245, 1.

62 Note verbale of 12 October 1025 on a conversation between Viktor Bruns and a consular officer (Konsul Mundt) on 7 October 1925, PA AA R 54245, 2 (emphasis added).

63 Letter of the AA of 18 December 1930 to selected German representations abroad, PA AA R 54245.

64 Viktor Bruns, Letter to AA, Legal Department, of 30 May 1938 in: PA AA R 43147 KWI Volk, p. 2.

noted: 'In the coming year, Viktor will found a journal, for which his fellows and assistants will write articles on the questions of the time. After all, one had to witness the publishing of essays on international law cases of the greatest relevance to Germany in the Paris journals every other week – while the country it was really about, did not raise its voice. *If Germany's voice is cast aside by the Entente time and time again, it's certainly better than to remain silent like a slave in chains,* who does not dare to even move.'[65]

Understandibly, the official (self-)representation of the Kaiser-Wilhelm Institute was a scholarly one, eclipsing the politics. Bruns' seminal article made explicit the Institute's task of collecting and systematising the material, while avoiding obvious instrumentalism and epistemic nationalism. Also the already mentioned post world war II Director Hermann Mosler hastened to say, after explaining the historical origins, that the Institute was not designed to be the handmaiden of German politics: 'the Institute was not an auxiliary instrument of the *Reich*-government, but an Institute committed to basic research', tasked first of all with collecting the necessary materials.[66] However, the sources cited above cast a shadow of doubt on the purity of the scholarly interests. They provoke the question whether the idea of a 'legal order' was merely camouflage to make the struggle for German interests more effective.

And did the objective 'to promote' 'scientifically' the 'German ideals of law and justice'[67] on the international plane demand a conceptualisation of international law as a legal order? One might consider that international law could well be employed strategically by Germany and German scholars without being 'orderly'. However, to some degree, the mantle of scienticism and logic, conveyed by the focus on order, can sharpen the weapon that is law, exactly because it shrouds to some extent the strategic considerations undergirding interpretations and legal arguments.[68] It is probably fair to conclude that Bruns' quest for order was not only 'organised scholarly propaganda' (to use his own words[69]), but had both scholarly and political motives. Be it as it may, the German perspective and instrumentalism is painfully obvious in the foreword of the newly founded journal. Here, Bruns identified as the 'main contemporary problems' the reparations issue, the

65 Philipp Glahé, 'Marie Bruns, A "Completely Unexpected Joy". Impressions from the Time of the Institute's Founding 1924-1926', MPIL#100, 25 October 2024 (transl. by Philipp Glahé; emphasis added). <https://mpil100.de/2024/10/eine-ganz-unverhoffte-freude-ein druecke-aus-der-gruendungszeit-des-instituts-1924-1926/>.

66 Mosler (n. 42), 14.

67 Bruns, Report on the Fiscal Year 1928/1929 (n. 61).

68 See also below section V. 4. on fake depoliticisation through ordering.

69 Bruns, Memorandum 1925 (n. 60) (on the 'neighbours to the west and east').

interpretation of peace treaties, [and] the problem of [German] minorities'.[70] Globally, these were not necessarily the most important problems of the international law of the time, but they were in fact the most pressing questions Germany was faced with.

Bruns' manuscript of a lecture entitled 'International Law as a Legal Order' ('*Völkerrecht als Rechtsordnung*'), on which Bruns' article was based, reveals his militant posture plainly.[71] The manuscript concludes with the words: 'I think us Germans have everything to hope for from a victory of law, and nothing to fear.' Bruns sought to use international law as a weapon – lawfare for Germany.

V. Problems and Potential of Ordering the Law

Moving beyond Bruns and his time, the scholarly attempt of identifying and creating order in international law is confronted with epistemic, practical, political, and moral critique. This section discusses the most salient problems and the potential of the pursuit for legal order, especially in our times.

1. Legal Order as an Outdated Modernist and Western Concept?

A key objection against any ordering programme concerns the potentially flawed epistemics. Moving forward in a systematic fashion, 'being systematic' has been the quintessential modernist marker of science.[72] Along this line, Immanuel Kant wrote: 'Any doctrine, if it is to be a *system*, i. e., a whole of knowledge organised according to principles, is called science.'[73] Such focus on 'order' and 'system' as the hallmark of a 'scientific' approach was also present in the legal field: 'Legal scholarship must be systematic, or it is none', wrote Hans J. Wolff.[74] '[L]'élaboration de toute théorie scientifique présuppose une exigence de systématicité', according to Michel van de Kerchove

70 Bruns (n. 2), 'Foreword'.

71 Viktor Bruns, 'Völkerrecht als Rechtsordnung', unpublished manuscript (MPIL Archive 1927).

72 See only Alois von der Stein, 'System als Wissenschaftskriterium', in: Alwin Diemer (ed.), *Der Wissenschaftsbegriff: Historische und systematische Untersuchungen* (Verlag Anton Hain 1970), 99-107.

73 Immanuel Kant, *Metaphysische Anfangsgründe der Naturwissenschaft*, Werkausgabe Vol. 9 (Suhrkamp 1968), 11: 'Eine jede Lehre, wenn sie ein System, d. i. ein nach Prinzipien geordnetes Ganzes der Erkenntnis sein soll, heißt Wissenschaft' (emphasis added).

74 Hans J. Wolff, *Typen im Recht und in der Rechtswissenschaft*, Studium Generale 5 (1952), 195-205 (205): 'Rechtswissenschaft zumindest ist systematisch oder sie ist nicht!'.

and François Ost.[75] In these statements, the two pursuits of applying an ordered, systematic approach and of creating order in the object of one's study (the law) are blurred. A recent overview of styles of international legal scholarship aptly sums up: 'Traditional approaches tend to describe the objective reality of international law as a given, and arguably perennial, form of order.'[76]

However, this modernist infatuation with being 'systematic' has been discredited in post-modern times. The search for system and order is said to be an illusion of enlightenment and a thinking-style that is woefully outdated. In their Dialectics of the Enlightenment, Theodor Adorno and Max Horkheimer castigated that approach severely: 'The Enlightenment only recognises as being and happening that which can be grasped through unity; *its ideal is the system* from which everything and anything follows. There is no difference between its rationalist and empiricist versions in this respect. Although the individual schools may have interpreted the axioms differently, the structure of unified science was always the same.'[77]

Critical theory not only discredits the 'modernist' forms of doing science but also the cultural relativity of all 'ordering'. A famous example of disparaging 'Western' order can be found in Michael Foucault's *Order of Things*. Here Foucault cites a taxonomy from 'a certain Chinese encyclopaedia', reported by Jorge Louis Borges.[78] In it, animals are regrouped as follows: a) animals belonging to the emperor, b) embalmed ones, c) tamed ones, d) sucking pigs, e) sirens, f) mythical ones, g) stray dogs, h) those included in this classification, i) those acting as if mad, j) innumerable ones, k) those drawn with a very fine brush of camel hair, l) and so on, m) those having just broken the flower vase, n) those looking like flies from far. This strange and irritating order has, through Foucault, become a prime example of non-western order, by which Foucault apparently wants to remind us of the relativity and cultural embeddedness of our (western) modes of ordering things, laws, institutions.[79] However, the Chinese order is purely fictional, an invention of Louis Borges himself, hence a 'western'

75 Michel van de Kerchove and François Ost, *Le système juridique entre ordre et désordre* (PUF 1988), 128.

76 Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford University Press 2016), 38.

77 Theodor Adorno and Max Horkheimer, 'Begriff der Aufklärung' in: Theodor Adorno and Max Horkheimer, *Dialektik der Aufklärung* (18th edn, S. Fischer 2009; original New York 1944; Fischer 1969), 9-49 (13) (my translation and emphasis).

78 Jorge Luis Borges, 'El idioma analítico de John Wilkins', in: Jorge Luis Borges, Otras inquisiciones (Sur 1985), 102-106 (104-105), quoting 'el doctor Franz Kuhn'.

79 Michel Foucault, *Les mots et les choses: Une archéologie des sciences humaines* (Gallimard 1966), 3.

idea.[80] Some may consider this literary construction as yet another manifestation of preconceived notions of ostensibly 'Asian' logic, which we share when we adopt Borges' artefact as historically correct. Others may, on the contrary, take Borges' ingenious invention as a proof that Borges was able to transgress his (western) confines. In any case, being a fiction, the 'emperor's order' cannot authentically illustrate the cultural relativity of order.[81]

Moving beyond Foucault, in times that require a de-westernisation of international law and scholarship, the question might no longer be *which* order of international law but rather *whether* order at all. Drawing on the whole gamut of critical philosophies ranging from Jacques Derrida to Judith Butler, Jean d'Aspremont deplored a 'crude modernism in international legal thought'.[82] In contrast, his post-modernist approach insists that 'coherence – and the idea of unity on which it is built – is always bound to collapse under the weight of the normative presuppositions it is derived from.'[83] Therefore, 'any pursuit of coherence is bound to remain a fantasy', wrote d'Aspremont.[84]

In a similar vein, Michelle Staggs Kelsall found the focus on 'order' to be inherently problematic because she deems it a Western obsession that is, so she claims, not compatible with non-western cosmo-visions. Instead, Staggs Kelsall called for '*dis-ordering* international law'.[85] International law, disordered, would be 'an attempt to integrate non-liberal and largely non-Western norms, conventions and principles – determined with reference to a multiplicity of spatial orders existing over time – into international law'.[86] I agree with Staggs Kelsall that the international legal order needs to become more responsive to non-Western values and interests. It is also likely that determinants of order are culturally saturated. It is however implausible that 'order' as such is a Western construct. Especially Foucault's famous passage on the supposedly Chinese taxonomy that defies any 'order' is a hoax, as explained above.

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80 See Umberto Eco, *La ricerca della lingua perfetta nella cultura europea* (4th edn, editore Laterza 1993), 222.

81 Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Postmodernism', in: Armin von Bogdandy and Eberhard Schmidt-Aßmann (eds), *Theorising Comparative Public Law* (Nomos 2024), 89-129, 119-120 (reprint from ICLQ 49 (2000), 800-834).

82 Jean d'Aspremont, 'The Chivalric Pursuit of Coherence in International Law', LJIL 37 (2023), 191-198 (192).

83 d'Aspremont (n. 82). See on the meaning of 'coherence' below text with notes 133-135.

84 d'Aspremont (n. 82).

85 Michelle Staggs Kelsall, 'Disordering International Law', EJIL 33 (2022), 729-759.

86 Staggs Kelsall (n. 85), 732.

With due cultural sensibility, scholarly attempts to order international law might help to grasp and understand international law better, and therefore may make an intellectual contribution to ongoing debates. To conclude, the scholarly programme of international law as a legal order is not doomed to fail for epistemic and cultural reasons alone – however interesting or uninteresting one might find this programme.

2. Legal Order and the Doctrinal Approach: A Germanicism?

Further objections against the scholarly programme of ordering international law relate to the technical limits of the doctrinal approach (with 'ordering' the law as its quintessential aspect), and expand the observation of cultural contingency made above. Ordering the law is part of the discipline of legal doctrine which can be defined as the 'discipline that seeks to penetrate and organise [*ordnen*] positive law in order to guide legal work and answer questions raised by legal practice. It endeavours to examine and secure ideas and insights about law by forming concepts, introducing distinctions, developing figures or principles, and by *ordering* the material.'[87]

Such a systematic, ordering, doctrinal, approach to the law is an outgrowth of German legal positivism around the turn of the 19th and 20th century. In his '*Foundations of a System of German Constitutional Law*', Carl Friedrich von Gerber, eminent legal scholar and holder of several ministerial posts in the German Land of Saxony, transferred the systematic approach which he had developed in the field of private law to public law. He identified 'the need for a sharper and more accurate definition of fundamental doctrinal concepts' and called for the 'establishment of a scientific system […] in which the individual structures are presented as the development of a uniform basic idea. Only through the establishment of such a system […] would German constitutional law, in my opinion, achieve scientific independence and provide the basis for reliable legal deduction.'[88] His book, a leading work of legal positivism, was first published in 1865, before the German *Reich* was established. A major purpose of Gerber's scholarly organisation of the law found in the various German *Länder* was to identify underlying common principles which eventually led to the emergence of *one* legal constitutional order on which the subsequent constitution of the German *Reich* could build.

87 Christian Bumke, *Rechtsdogmatik: Eine Disziplin und ihre Arbeitsweise: Zugleich eine Studie über das rechtsdogmatische Arbeiten Friedrich Carl von Savignys* (Mohr Siebeck 2017), 48 (emphasis added).

88 Carl Friedrich von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Tauchnitz 1865), Vorrede, VIII.

Writing 60 years after Gerber, Viktor Bruns was not the first German scholar to apply doctrinal thinking and legal positivism to international law. Especially August von Bulmerincq had already some years before Gerber attempted to establish a 'System [*Systematik*] of international law which insisted on the character of international law as a positive law, purified from all philosophical and political contaminaton, and strictly separate from domestic constitutional law [*Staatsrecht*].[89] Both in Blumerincq and in Bruns, the 'system' or 'order' of the scholarly exposition and of the law that the scholar expounds are blurred; one wonders where the 'order' exactly resides.

One might observe critically that the 'systematic' approach to international law comes naturally for German scholars, and that it is a 'transplant' which is not well suited for dealing with international law. According to Eyal Benvenisti, '[p]erhaps the most distinctive aspect of the German approach to public law in general and to public international law in particular is the systemic vision […]. This systemic approach has contributed significantly to the emergent conception of international law as a legal system.'[90] Martti Koskenniemi, who went so far as to characterise international law as a 'German Discipline', drew attention to the '*System-denken*' as a constant theme in German international legal scholarship.[91] 'There is no dearth of German international lawyers lamenting the lack of systematicity of international law, nor of German projects trying to remedy that lack.'[92] He asserted that the systematising work is indeed 'what German lawyers nowadays do best. They have interpreted and systematised and thereby supported the law of the UN, the European Human rights system as well as European law as robust structures of international government.'[93] This characterisation not only draws out the parochialism of the undertaking, but also its conformist character (more on this below in section V. 4.).

One might ask the question whether (besides being culturally contingent (Germanic)), the scholarly pursuit of ordering the law fits well to the peculiar architecture of international law. Although, as mentioned, the idea of a legal system was promoted by people like Carl Friedrich von Gerber in order to promote the legal harmonisation of a plurality of legal orders, the main

89 August von Bulmerincq, *Die Systematik des Völkerrechts: von Hugo Grotius bis auf die Gegenwart. Erster Theil: Kritik der Ausführungen und Forschungen zu Gunsten der Systematisierung des positiven Völkerrechts* (E. J. Karow 1858). See esp. at 5, 7, and 12.

90 Benvenisti (n. 12), 393.

91 Martti Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline', Redescriptions 15 (2011), 45-70 (63).

92 Koskenniemi (n. 91), 63.

93 Koskenniemi (n. 91), 60.

training ground for *Dogmatik* has always been the densely codified law of a nation state. This law is produced by a central body (in democratic states by the parliament). It is supplemented and thus refined by a thick layer of judicial interpretation and extrapolation, created by courts which are hierarchically organised and therefore bound to produce a coherent body of case-law.

All this is different in the realm of international law (at least by degree), and the specific features of international law make the doctrinal analysis difficult. First, international law is much less centralised than domestic law. International rules grow in a decentralised fashion, are dispersed in millions of treaties concluded by different actors. Also customary rules emerge out of dispersed practice. The judicial elaboration of all rules is extremely scarce and only punctuated, given the absence of compulsory jurisdiction.

Second, the stuff of international law is less dense than in the main field of application for doctrinal research: domestic contracts, tort, and property law. There are, in total, fewer rules and judicial decisions. So, a logical-semantic analysis of this 'thin' legal subject matter yields less. Third, a considerable amount of international law is still uncodified. The exact content of customary international law must first be investigated with non-logical-semantic methods. This is a different task from determining the meaning or sense of a written rule (treaty interpretation). Fourth, international law is to a higher degree than domestic law the result of political compromise, and for that reason less systematic and less clear than other legal materials. Because of these special features of international law, and in such disarray, the attempt to organise the law is a rather artificial undertaking, which leaves (too) much room for scholarly creativity, one might say. Other scholarly approaches to the law (theoretical, historical, empirical) are therefore even more needed than in the domestic realm to gain a full understanding of the law.[94] But even with these limitations, the doctrinal work of ordering the law might help clarifying (and thus operationalising) a body of law that is as thin and incomplete as international law, as we will see in the next section (section V. 3.). Ultimately, neither its inherent doctrinalism nor its German heritage seem to be a death-blow for the programme of international law as a legal order.

94 Anne Peters, 'International Legal Scholarship Under Challenge', in: Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (Cambridge University Press 2017), 117-159 (151-152).

3. (Small-Scale) Practical Benefits of Ordering the Law

The major, pragmatic, objection against the scholarly pursuit of ordering is that it is *l'art pour l'art* without any practical consequence, while an important objective of international law has always been to promote social order in the real world of international relations in international life.[95]

The expectation of Bruns and scholars writing in the same vein was not only that international law generally contributes to ordering the world, but that especially the orderly feature of the law, its quality as an international legal *order,* makes a difference here. However, sceptics do not buy into the claim that ordering the law will help international law in ordering the world.[96] As already Hedley Bull masterfully explained, international law is neither necessary nor sufficient for bringing about order in real life of international relations.[97] International law can deploy its ordering function only when its prescriptions find 'some basis in the actual dealings of states with one another'.[98] If factors (outside the law) which are conducive to order (for example an equilibrium of power) are present, then international law can 'mobilise' these. Bull rightly pointed out that international law can also hinder order, and gave as an example the imposition of sanctions after an aggressive war.[99]

In a similar spirit, international order has been qualified as nothing 'but an abstraction, a figment of internationalist hopes that have never been able to triumph over the realities of world politics'.[100] According to Steven Krasner, 'realists of all types agree […] [i]t is naïve to expect that a stable international order can be erected on normative principles embodied in international law.'[101] Younger realists such as Carlo Masala prefer to speak of current world disorder ('*Weltunordnung*') – the opposite of order.[102]

However, the opposing, 'idealist', intellectual camp has similar pedigree as the realist one. At the end of the 19th century, the 'Peace Through Law'

95 See on the conflation of the legal and the political/social order in the writings on 'world order' aboce section III. 1.

96 See e. g. Jack Goldsmith and Eric A. Posner, 'The Limits of International Law Fifteen Years Later', Chi. J. Int'l L. 22 (2021), 112-127.

97 Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd edn, Macmillan 1995), 136-137.

98 Bull (n. 97), 137.

99 Bull (n. 97), 138.

100 Maull (n. 29), 4. (Maull puts a question mark here).

101 Steven D. Krasner, 'Realist Views of International Law', ASIL Proc. 96 (2002), 265-268 (268).

102 Carlo Masala, *Weltunordnung* (3rd edn, Beck 2022). His book's main claim is that 'the world of the 21st century is in disorder', 159.

Movement emerged and motivated the Hague Peace Conferences and the founding of the Hague Academy of International Law.[103] This idea is also the principal purpose of the League of Nations which was officially established '[i]n order to […] achieve international peace […] by the firm establishment of the understandings of international law as the actual rule of conduct among Governments […]', as the preamble of the Covenant of the League of Nation puts it.[104] Social order provided through legal order has been, as Stefan Kadelbach and co-authors put it, the all-times 'utopia international legal thought explores in its writings'.[105] In the interbellum period, Hersch Lauterpacht in his seminal work on the functions of international law dealt with 'law conceived of as *a means of ordering* human life'.[106] In this tradition, contemporary legal and political scholars observe that '[s]ocial orders increasingly are legalized transnationally', and they write of 'social ordering *through* […] legal norms that are transnational in scope'.[107] International law is assumed to contribute to world order mainly by discharging actors from the burden of re-negotiating every move, by providing a language for communication, by aligning the normative expectations of all those actors who are subjected to the law, thereby allowing for their coordination and also for collective action, and by slowing down and providing for the procedures for change.[108]

An underlying assumption is that an 'orderly' international law can fulfil this task of ordering international society better than an untidy international law. Although we do not have empirical proof of this assumption, it seems highly plausible. When those subjected to international law are confronted with erratic or even contradictory norms, they have more difficulties in adjusting their behaviour and to coordinate. However, all 'order' is a matter

103 Marcus M. Payk, *Frieden durch Recht? Der Aufstieg des modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg* (De Gruyter 2018); Sarah Jäger and Wolfgang S. Heinz (eds), *Frieden durch Recht: Rechtstraditionen und Verortungen* (Springer 2020).

104 Covenant of the League of Nations of 19 June 1922 (108 LNTS 188).

105 Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit, 'Introduction' in: Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017), 1-16 (9-10). These authors use the term 'legal system' for the legal sphere, not 'legal order'.

106 Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon 1933, re-issued by Oxford University Press 2011), 73 (emphasis added).

107 Terence C. Halliday and Gregory Shaffer, 'Transnational Legal Orders', in: Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015), 3-72 (3; emphasis added).

108 Heike Krieger, 'Von den völkerrechtlichen Fesseln befreit? Zur Ordnungsfunktion des Völkerrechts in einer Welt im Umbruch', Der Staat 62 (2023), 579-612; Burchardt (n. 8), 414.

of degree. There is no 'natural' or objectively proper modicum of ordering and system building.

And even if, in the grand scheme of things, the practical effects of ordering the world through an orderly law are unclear, the small-scale practical utility of ordering the law is obvious. Actually, the doctrinal approach (with its main activity being 'ordering' the law) was invented out of the desire to connect theory to practice, and intends to serve practice.[109] The practice-orientation is so strong that doctrinal scholarship has been dubbed as 'law application science'[110] or 'decision-preparation science'.[111] Of course, the actual practical utility of doctrinalism is a question of degree. If the scholarly ordering gets too complicated it can degenerate into an ivory tower exercise that will not resonate with the requirements of the legal profession.

One benefit for practice is that a well-ordered legal order channels the path for orderly legal change. According to Eyal Benvenisti, 'the systemic vision has provided a potent tool for the development of international law'.[112] This is especially welcome because a clearly codified procedure for the amendment or revision of international law is lacking. Rather, the various types of law (treaty law, customary rules, secondary law of international organisations, judge-made law) follow quite different procedures for change.[113] However, a full-fledged system is not needed to bring more clarity and legal security into the development of the law. Rules of change would suffice to fulfil the job.

A probably more important practical consequence of the vision and construction of international law as a legal order is that it tends to empower or even embolden courts and tribunals. Already Bruns envisaged his work programme to serve the newly created and flourishing arbitral bodies.[114] One reason is that the 'order' is to a large extent built by identifying overarching principles which serve as brackets or bridges to link together the isolated rules.[115] Examples are necessity and proportionality, the no-harm principle,

109 Bumke (n. 87), 1. See on the doctrinal approach above section V. 2.

110 'Rechtsanwendungswissenschaft': Anne van Aaken, 'Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft', in: Matthias Jestaedt and Oliver Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008), 79-104 (79).

111 'Entscheidungsvorbereitungswissenschaft': Andreas von Arnauld, 'Die Wissenschaft vom öffentlichen Recht nach einer Öffnung für die sozialwissenschaftliche Theorie', in: Andreas Funke and Jörn Lüdemann (eds), *Öffentliches Recht und Wissenschaftstheorie* (Mohr Siebeck 2009), 65-118 (87).

112 Benvenisti (n. 12), 393.

113 Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in: Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023), 3-32.

114 Bruns, 'Völkerrecht als Rechtsordnung I' (n. 2), 29.

115 See below section V. 5. on general principles as ordering mechanisms.

or non-discrimination. These principles need to be fleshed out, and this is typically done by courts.

Through the 'completing mechanism'[116] in form of general principles, with the gap-filling done by the courts and tribunals, the entire idea of international law as a legal order works to support those bodies.[117] This is not in itself a bad consequence, but tends to be viewed with suspicion by those who wish to secure the governments' control over international law or fear judicial overreach that threatens democracy and sovereignty. In contrast, weaker participants in the international legal process such as small states and non-state actors ranging from indigenous groups to civil society groups, often welcome the judicialisation, being the effect of the 'ordering vision' of international law. The judicialisation works in favour of feebler actors who can use the judicial system. Procedures before courts and tribunals operate on the basis of an equality of arms of the parties which neutralises power imbalances. A recent example is the ICJ proceeding Nicaragua against Germany in which Nicaragua can attack German arms' export to Israel with much more leverage than outside the courtroom.[118]

In conclusion, any academic ordering of the law has repercussions in the realm of legal practice even if, on a macro level, its power to order the world remains doubtful. The reproach that the scholarly programme of international law as a legal order is '*law pour law*' is not warranted.

4. (Fake) Depoliticisation and Conformism by Ordering the Law

The next important objection against scholarly attempts to find and create legal order is that any 'ordering' of international law in the service of coherence does not guarantee the fairness of this order. The International Law Commission (ILC) study on fragmentation rightly noted that order (coherence) is only 'a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so.'[119] This critique has a point. For instance, parts of the law of the Nazi regimes or colonial laws were orderly, but they were nevertheless patently unjust.

116 Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), 257.

117 Benvenisti (n. 12), 396.

118 ICJ, Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany) (pending).

119 Study Group of the IILC, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 491.

A related aspect is that any lawyerly pursuit of order and the scholarly endeavours to 'create' a legal system is inherently conservative (in a descriptive sense). It serves to *maintain* the social system which undergirds the law.[120] The standard critique of the liberal legal tradition brings this to the fore: 'Order' can stand in the way of justice or fairness, because the orderly laws and procedures are simply legitimating mechanisms that re-ify power relationships and perpetuate the (unfair) status quo. As Anne Orford put it: 'The strongest current advocates of a vision of an *international order constituted by law* are the cosmopolitan formalists of continental Europe, […] defending a projection of power imagined in their own terms – […] a *form of power* that depends upon the operation of international institutions envisaged as having moral authority'.[121]

In a trenchant critique of doctrinal scholarship building an international legal order or system, Sué González Hauck noted that these endeavours are only masked as being unpolitical, while they pursue patently political objectives: 'The notions of system, order, and coherence significantly contributed to relegating the Third World's attempts to reshape international law to the political realm, and allowed to counter those attempts with ostensibly neutral and legal arguments, that just so happened to preserve Western dominance.'[122]

This critique is well taken. Of course, law is inherently counterfactual and thus conservative (in a descriptive sense), and thereby fulfils its stabilising function. The systemic and orderly character of international law contributes to this stability, because every attempt to change the rules must fit into the system and must satisfy expectations of coherence.[123] Along the same line, it can be said that 'coherence serves as a shield against value change'.[124]

This would be a problem if both the legal order and the accompanying scholarship were so rigid that self-reflection and renewal are in fact out of

120 This was the point Martti Koskenniemi made on the collusive role of the German lawyers. See above text with note 93.

121 Anne Orford, 'Constituting Order', in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), 271-289 (272, my emphasis).

122 Sué González Hauck, 'Systemerhaltung durch Systematisierung: Lehrbücher, Allgemeine Kurse und Kodifikation im Völkerrecht als politische Projekte', AVR 62 (2024), 3-29 (26). I agree with these observations on the point that international legal scholarship should make no claim to being 'neutral' or 'apolitical', because the political implications of legal arguments can hardly be avoided.

123 See Krieger, 'Ordnungsfunktion' (n. 108), 610.

124 Heike Krieger and Andrea Liese, 'Conclusion: Turbulence, Robustness, and Value Change', in: Heike Krieger and Andrea Liese (eds), *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (Oxford University Press 2023), 319-342 (338).

reach – which is an empirical question. Additionally, 'conservation' is not per se bad, and is currently intensely and benevolently debated under the heading of the 'resilience' of international law and its protection against erosion. The assessment of this resilience depends on the observer's view whether international law is *worth* conserving as it is.

Returning to the example given above, the National Socialist legal order (and actually also the 'national socialist international law') was surely not worth conserving. It illustrates that a legal order can be orderly but still unjust. However, the inverse statement is not true: If there is no order at all, then – as I will explain in more detail in the next section (V. 5.) – the law cannot be just, because a formal feature of justice is missing. So, while order is no sufficient condition for justice, it is still a necessary one. This brings us to the deep question of the legitimacy of international law.

5. The Thin Legitimacy of International Law *as* Order

I submit that, despite the above-mentioned serious problems, despite the uncertainty of practical effects, parochialism, and inherent conservatism, the scholarly pursuit of ordering international law has some merit. For Viktor Bruns, writing in 1929, an important goal was to furnish the ontological proof that international law *is* law, despite its special features that distinguish it from the domestic law of nation states. In his time, the 'deniers' of international law, building on the philosophies of Georg F. W. Hegel and John Austin, were probably mainstream voices.

Until quite recently, such an ontological proof seemed no longer warranted. International law has been firmly established as a factor in international politics and in law school curricula. Writing in the golden age of international law (the 1990s), Tom Franck found international law to be in the 'post-ontological era'.[125] He and many scholars no longer felt the need to explain that international law is law.[126]

But this was perhaps too superficial. Unlike what Franck thought, the existential question never completely went away.[127] Arguably, the aspect of normative coherence and the ensuing formal or rationalist legitimacy was

125 Thomas M. Franck, *Fairness in International Law and International Institutions* (Clarendon 1998), 6.

126 For an excellent analysis: Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press 2014) 18.

127 E. g. Anthony D'Amato, 'Is International Law Really Law?', Nw. U. L. Rev. 79 (1985), 1293-1314; John R. Bolton, 'Is There Really Law in International Affairs', Transnat. L. & Contemp. Probs. 10 (2000), 1-48.

even a main concern driving the fragmentation debate of the early millennium, although it was rarely openly articulated.[128] Precisely because international law is 'weak' and its legitimacy precarious, it seems to need such normative coherence more than any other body of law. If international law could, e. g. due to its 'fragmentation' 'no longer be a singular endeavor, […] but merely an empty rhetorical device that loosely describes the ambit of the various discourses'[129] – then its very reality *as law* would be imperiled.

This peril has now materialised, especially after the three shocks of Ukraine (2022), Gaza (2023), and Trump (2025). New qualms and doubts about international law abound. The question has popped up with a bang whether the mess we see deserves the name 'law' at all, or whether it is not simply 'power politics in disguise',[130] as the realists had suspected all along. We therefore need a new 'law-ness' test. Applied to the situation of today, the empirical tests whether there is compliance (in deeds) or whether – at least – international law is invoked as a benchmark to assess behaviour in the international arena (by words) yield rather negative results. Blatant violations of international law and its core principles (use of force, basic rules of International Humanitarian Law, self-determination of peoples, territorial integrity) are breached on a massive scale, hardly without sanction.[131] Key actors such as US President Trump avoid mentioning international law at all, and other players such as the Russian President Putin transmogrify international law by forwarding ridiculous legal 'arguments'.

In this constellation, I do not think that the argument of 'order' does the trick. The scholarly demonstration that the rules on paper are orderly will not prove that international law still exists. However, the orderliness of the legal order bestows a modicum of legitimacy to international law, and this is also needed nowadays. The order of the law (supposedly) follows some rationality, and this (supposedly) makes the law both worthy of recognition and furthers compliant behaviour of states and other actors.

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128 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', I.CON 15 (2017), 671-704.

129 Matthew Craven, 'Unity, Diversity, and the Fragmentation of International Law', FYBIL 14 (2005), 3-34 (5) (emphasis added).

130 Georg Schwarzenberger, *Power Politics: A Study of World Society* (3rd edn, Stevens & Sons Ltd. 1964), 203.

131 To mention only the most blatant violations: The annexation of Crimea (2014) and full-fledged aggression against Ukraine by Russia (since 2022); war crimes, crimes against humanity and possible genocide by Israel against Palestinians, following the Hamas massacre of 2023; threat to annex Greenland by US President Trump in 2026; abduction of the Venezuelan President and his trial before US courts in 2026, war against Iran by the US and allies in 2026.

Tom Franck, building on Ronald Dworkin, has well elaborated this value of 'coherence' for international law.[132] Also building on Dworkin and on the theoretical works of Norberto Bobbio and Neil MacCormick, Raphaël van Steenberghe explained that 'a legal system is characterized by both consistency (or formal coherence) and coherency (or material coherence)'.[133] In that terminology, 'consistency' (formal coherence) means that 'no apparent or genuine contradiction exists within the concerned system or, at least, that the system contains within itself the necessary tools, such as the lex specialis principle, to solve any apparent or real conflict of norms'.[134] However, to be a 'genuine legal system', the law needs to be not only logically consistent but also materially coherent.[135] Material coherence means the compatibility of all norms (rules and principles) in their substance, which requires that there are legal mechanisms to resolve normative (not logical) conflicts among them. A normative conflict is present when an addressee, by obeying or applying one norm, necessarily or potentially violates another norm.[136] For example, a state may be entitled to exercise the right to self-defense, but this risks to violate its obligations flowing from international environmental treaties. The resolution of such a norm conflict is not purely a logical operation but requires choices of a substantial nature, for example, by allowing for a suspension of environmental obligations. These choices must be guided by a 'hermeneutical constraint'.[137]

At this point, general principles of law come into play. General principles of law 'are seen as the best candidates to serve as such a hermeneutical constraint, as they express the fundamental values of a system'.[138] And because general principles are not clear-cut rules but optimisation norms, the test of compatibility (unlike the question of logical consistency) is one of degree. Through their ponderable quality, the principles provide some constraint while giving at the same time a sufficient margin of flexibility.[139]

The general principles' function of creating coherence has been recognised in the realm of legal practice. In the ILC's work on the General Principles of

132 Franck (n. 125). Ronald Dworkin used the term 'integrity' of the law as a source of its legitimacy (Ronald Dworkin, *Law's Empire* (Belknap 1986), esp. Chapter 6.

133 van Steenberghe (n. 10), 1368. See on Tom Franck's (diverging) notion of coherence below text with note 147.

134 van Steenberghe (n. 10).

135 van Steenberghe (n. 10), 1368.

136 Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', EJIL 17 (2006), 395-418 (418). Importantly, norm conflicts can arise between obligations, permissions, and prohibitions, not only when there are two conflicting obligations.

137 van Steenberghe (n. 10), 1368.

138 van Steenberghe (n. 10), 1369.

139 van Steenberghe (n. 10), 1369.

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law in the technical sense of Art. 38(1) lit c) of the ICJ statute, Conclusion 10 sec. 2 is: 'General principles of law contribute to the coherence of the international legal system'.[140] ILC Special Rapporteur Marcelo Vázquez-Bermúdez called this the '*systemic function* of general principles', and 'a natural consequence of the fact that this source of international law is essentially aimed at filling gaps in the international legal system'.[141]

It is this dimension of coherence that is implied in the concept of 'legal order' or 'system'. According to Franck, 'evidently unprincipled' rules which 'lack coherence' 'fail to connect with the skein of general legal principles which make up the body of the law'.[142] 'A rule is coherent […] when the rule relates in a principled fashion to other rules of the same system.'[143] And Franck sees this 'aspect of coherence, the connectedness of rules as a factor in their legitimacy'.[144] Put differently, '[l]egitimacy must be manifested by the relationship between any given rule and the rule system of the international community'.[145] This coherence will, according to Franck, generate a 'pull to compliance' which at the same time evidences the rule's perceived legitimacy.[146] Franck sums up: 'Coherence is that quality of a rule which permits it to be seen holistically: that is, as part of a context in which the separate rules acquire "compliance-pull" *from the purpose and meaning of a larger whole*. A rule which can plausibly claim to be *part of such a system* exercises a greater compliance-pull than one which cannot.'[147] In this model, compliance with international law is augmented through the fact that the rules are coherent and connected – that they form an order or system. The more orderly and principled international law is, the more it will be complied with.

So far, there is no empirical evidence for this hypothesis. From a practical standpoint, a discernible order (in form and substance) aids avoiding or eliminating norm conflicts. This is helpful for those who are supposed to observe the law. Even short of outright normative conflicts, any observable order enhances foreseeability and legal certainty of the rules applicable to a

140 ILC, 'General Principles of Law: Draft Conclusions', ILC 74th Session (Report on the work of the seventy-fourth session, UN Doc. A/78/10, 12 May 2023), paras 30-41.

141 *Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, ILC 73rd Session (UN Doc. A/CN.4/753 of 18 April 2022), para. 139, also para. 145. In line with this idea, Draft conclusion 13 of the ILC text on General Principles of law is: 'The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.'

142 Franck (n. 125), 38, referring to Dworkin (n. 132), 190-192.

143 Franck (n. 125), 38.

144 Franck (n. 125), 41.

145 Franck (n. 125), 41.

146 Franck (n. 125), 121.

147 Franck (n. 125), 121 (emphasis added).

situation, and this allows those subjected to the law to plan their actions better. Based on these considerations, the hypothesis of the orderly order's legitimacy-pull is plausible – on the premise that the actors in the legal process are in good faith and guided by a conscious or unconscious sense of fairness, and that this sense is shared and not culturally contingent.

Consistency and coherency of the law, its orderliness, is also implicitly or explicitly acknowledged as one element of the rule of law. The Venice Commission's rule of law checklist contains the bullet point 'consistency of law'.[148] The conceptual underpinning of this view is often seen in Lon Fuller's theory of law which considers the absence of normative incompatibilities to be a marker of law properly speaking, a criterion of lawliness.[149] Fuller's condition of normative compatibility has been widely received and is accepted as a key element of a 'formal' conception of the rule of law, a conception that looks at the form through which legal norms should be expressed, rather than at the substantive content of those norms.[150]

Revisiting these US-American legal philosophies of the 20th century forces us to ask the question of cultural, regional, and temporal contingency. Especially Dworkin's and Franck's thinking exemplifies the legal liberalism of the 1980s and 1990s. Also the rule of law has this liberal colouring, especially its formal conception. Further investigation into non-Western legal theory can show to what extent the ideas orderly order and the attempt of avoiding formal and material incoherence have pluri-cultural roots and a cross-cultural appeal.[151]

It is submitted that the contemporary surge of the accusation of 'double standards', which relates more to orderly *application* of the law (rather than to the orderliness on paper), actually proves the cross-cultural appeal of an orderly order. Deploring an incoherent (discriminatory) application of international law,[152] the reproach of double standards is regularly brought forward by certain states of the Global South and by Russia and by China,

148 European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist (Strasbourg 2016), paras 60-61. The Venice Commission does not seem to distinguish 'consistency' (formal coherence) and 'coherency' (material coherence), see text with note 133.

149 Lon L. Fuller, *The Morality of Law* (Yale University Press 1964), 70.

150 See only Kristen Rundle, 'The Morality of the Rule of Law: Lon L. Fuller', in: Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021), 186-201 (189) with reference to Fuller.

151 See e. g. Edwin Etieybo, 'Logic', in: Dilip M. Menon (ed.), *Changing Theory: Concepts from the Global South* (Routledge 2022), 67-79.

152 Especially in Tom Franck's account, coherence also refers to the non-discriminatory (general or coherent) application and implementation of the law. See Franck (n. 125), 39.

mainly against western states.[153] One motive of this reproach is to undermine the moral standing of the West and throw the western states from their pedestal, after the deep humiliation of non-western states by the West, a humiliation performed to a large extent *through* international law (for example through the early 20th century unequal treaties and international legal doctrines such as terra nullius, standard of civilisation, and so on) that facilitated imperialism and colonisation.

Importantly for our topic, this subversion of the moral credibility of the West functions well because the appeal to consistency and coherence, also in the application of the law, has force.[154] Anyone who complains of double standards is thereby signalling that they regard consistency and coherence of international law in its application as valuable goods. The speaker implicitly calls for a general principle of equal treatment that is, in current international law, present only *in nuce*. The spread of the accusation of double standards can therefore be read as a sign that normative expectations towards international law – with respect to equality and fairness – are rising. Consistent and coherent application and enforcement of the law prove themselves here as a universal, not merely 'Western', regulative idea. Western states, accused of double standards, should orient themselves towards this idea – and they can also hold their critics to it. In the end, the invocation of (real or alleged) double standards thus carries a latent message that is welcome: that legitimacy flows from an *orderly* international legal order.

VI. Ordering International Law as a Contribution to Its Legitimacy and Effectiveness: The Example of the ICJ Climate Advisory Opinion of 2025

The ICJ's recent Advisory Opinion on *Obligations of States in Respect of Climate Change* demonstrates the relevance of ordering (systematising) international law and the contribution of coherence to the effectiveness and legitimacy of this body of law – especially in the context of the advisory

153 See last SCO, 'Tianjin Declaration' 2025 (n. 31), sec. I. See also the Sino-Russian Joint Statement 2021 (n. 31) and written statements by Cuba and Kuwait in the ICJ proceeding on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Cuba 24 July 2023, at p. 29; Kuwait of 25 July 2023, para. 27).

154 Anne Peters, 'The Double Effect of Double Standards: Both Erosion and Strengthening of International Law', Verfassungsblog, 12 September 2025, <https://verfassungsblog.de/the-double-effect-of-double-standards/>.

function.[155] Being an Advisory Opinion, and not a judgement in a contentious case between two or more litigant parties, the Court considered 'that it has been requested to address legal consequences in a general manner, and that it is not called upon to identify the legal responsibility of any particular State or group of States.'[156] Concomittantly, the Court only sought to 'outline in general terms the legal consequences' flowing from breaches of state obligations to protect the climate system,[157] and in doing so, did 'not prejudge the merits of any future claims'.[158] The Court also emphasised that it was 'not called upon to identify particular States that may have breached their relevant obligations'.[159] This abstract approach has attracted critique, with Judge Yusuf finding the majority to dodge the question asked by the General Assembly.[160] However, the Court's analysis seems to be in keeping with the format of an Advisory Opinion as opposed to a judgement in an adversarial proceeding. Here, the ICJ's explicit and strong systematisation *could* make a contribution which was appropriate to the type of proceeding and nevertheless was able to further develop and strengthen the states' obligations regarding climate change.[161]

Because the high emitter states such as the US and China had attempted to kick customary law out of the scope of the Opinion by arguing (unsucessfully) that the Paris Agreement was a lex specialis, a key issue was the 'relationship between the climate change treaties and other rules of international law'.[162] The Court summarised the view of 'most participants' that the climate change treaties '*form part of a broader set of rules*'.[163] Moreover, various participants in the proceedings 'invoked the principles of harmonious interpretation and systemic integration'.[164] The ICJ stated 'that it is a generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations', and cited the ILC study on fragmentation.[165] The Court also searched (and denied) 'any actual inconsistency between the

155 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025.

156 ICJ, *Climate Change* (n. 155), para. 106.

157 ICJ, *Climate Change* (n. 155), para. 106.

158 ICJ, *Climate Change* (n. 155), para. 106.

159 ICJ, *Climate Change* (n. 155), para. 109.

160 ICJ, *Obligations of States in Respect of Climate Change, Advisory Opinion* (Separate Opinion of Judge Yusuf), 23 July 2025, General List No. 187, para. 6.

161 Elia Alexiou, 'The Revival of the ICJ's Advisory Function: Enhanced or Contested Legitimacy', International Community Law Review (2025), 1-26.

162 ICJ, *Climate Change* (n. 155), see para. 162.

163 ICJ, *Climate Change* (n. 155), para. 163 (emphasis added).

164 ICJ, *Climate Change* (n. 155), para. 164.

165 ICJ, *Climate Change* (n. 155), para. 165; for the ILC study see n. 119.

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provisions of the climate change treaties and other rules and principles of international law'.[166] It also applied a classic 'ordering' strategy by using certain principles of international law as 'guiding principles for the interpretation' of the more specific rules, and here the Court mentioned 'sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, and the precautionary approach or principle'.[167] Based on these considerations, the ICJ found that it was mandated to give its Opinion on obligations flowing both from the climate change treaties *and* from other rules of international law.

Importantly, the ICJ explained that these two types of sources (treaty law and customary law) mutually guide and inform each other: Treaties must be interpreted in the light of relevant customary law,[168] while concomittantly, the exact content of a customary law-based rule (e. g. due diligence) must be determined in the light of treaty law.[169] Also, the practice of state parties in application of a treaty may form the objective element required for the emergence of a customary rule that, once established, then binds also non-parties.[170]

It may be no coincidence that the German judge, Georg Nolte, deepened the systemic approach of the Court by insisting that the parallelism of treaty law and customary law 'does not prevent the climate change treaties and the general customary obligations from informing and influencing each other'.[171] Nolte explained that 'the full and bona fide compliance by a State with its obligations under the climate change treaties "suggests" that this State substantially complies with, i. e. is presumed to fulfil, the customary duty to prevent significant harm to the environment […]. This approach is not lex specialis by another name. Rather, it is a way of achieving a harmonious interpretation of, and maintaining a proper relationship between, the climate change treaties and customary international law.'[172]

The Court not only intertwined treaty law and customary law, but also linked primary (treaty) law and secondary Conference of the Parties (COP) law. It to some extent 'upgraded' decisions of the COPs by specifically mentioning the possibility of their binding legal force, their possible function as subsequent agreements in terms of Art. 31(1) lit a) Vienna Convention on

166 ICJ, *Climate Change* (n. 155), para. 168.
167 ICJ, *Climate Change* (n. 155), para. 172.
168 ICJ, *Climate Change* (n. 155), para. 311, referring to Art. 31(3) lit c) VCLT.
169 ICJ, *Climate Change* (n. 155), paras 311-313.
170 ICJ, *Climate Change* (n. 155), para. 315.
171 ICJ, *Climate Change* (n. 155), Declaration of Judge Nolte, para. 9.
172 ICJ, *Climate Change* (n. 155), Declaration of Judge Nolte, para. 13.

the Law of Treaties (VCLT),[173] and the COP pronouncements' relevance for the identification of customary law.[174]

The Court's method of 'treating these sources as interlocking parts of a living legal system' has been described as 'action-forcing, because it ties the work of implementation […] to good-faith co-operation, due diligence and rights-based constraints, and because it makes clear that breaches sound in responsibility with the full suite of consequences.'[175] It seems fair to say that – although the pronouncments in the Advisory Opinion are abstract and general – they 'deepen […] the legal texture' of the mentioned obligations in the climate field.[176] The ICJ Advisory Opinion (in its alignment and cross-referencing of the prior International Tribunal for the Law of the Sea (ITLOS) Advisory Opinion on a similar topic) should be hailed as a deliberate contribution 'to the consolidation of a *coherent* legal framework', with a 'convergent legal grammar for addressing the cross-sectoral challenges posed by climate change'.[177]

To conclude, the Climate Advisory Opinion manifests the ICJ's systemic vision of international law, employing several well-known ordering techniques, in an attempt to strengthen both the legitimacy and notably the effectiveness of the relevant law. At the same time, the recent Opinion illustrates how the idea of international law as a legal order empowers courts and tribunals as a matter of principle.

VII. Conclusions: The Orderly Order as an Evergreen of International Legal Thought and Practice

Is the quest for an orderly international legal order – an outgrowth of doctrinalism, Germanicism, idealism, and liberalism – outdated today, when the dawn of the so-called liberal international order is being diagnosed by many?[178] I would say: not completely. Despite the ongoing global power shift towards illiberal states, the concomitant evolution of international law

173 ICJ, *Climate Change* (n. 155), para. 184.

174 ICJ, *Climate Change* (n. 155), para. 288.

175 Margaretha Wewerinke-Singh, 'Harmonizing Sources, Hardening Duties: Inside the ICJ's Advisory Opinion on Climate Change', Verfassungsblog, 11 August 2025, <https://dx.doi.org/10.59704/ca99ffd63031501e>.

176 Wewerinke-Singh (n. 175).

177 Khaled El Mahmoud, 'One Climate, Many Courts: The ICJ Advisory Opinion on Climate Change, Systemic Integration, Cross-Judicial Law-Making and Interjudicialism', Völkerrechtsblog, 13 August 2025, <https://doi.org/10.17176/20250814-122339-0>, (emphasis added).

178 See n. 29.

and current egregious but unsanctioned breaches, the idea of *order* has not lost its appeal. This is notably manifest in non-western states' opposition against double standards.

Comparing Viktor Bruns' official proclamation of international legal order with his confidential notes reveals that the programme was launched in the service of national interest politics and to some extent sought to sanitise its political impetus. This motivation does not exclude the agenda's scholarly drive and merit. The practical utility of ordering international law has been recently confirmed by the ICJ Climate Advisory Opinion in which several ordering mechanisms were applied, which likely strengthens the operationality of international climate law, e. g. in domestic judicial proceedings.

The thin legitimacy flowing from the markers of order, logical consistency and normative coherency, is not enough, but it is still a necessary quality to make international law a potentially good law for life on our planet. To conclude, the quest for an 'orderly order' seems to live on (and rightly so) in the struggle not only for the legitimacy of international law but for its very existence.