

# State Law as a Transnational Legal Order

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*If transnational law is defined as different from national law, then state law cannot be a transnational legal order (TLO). And yet, state law is in many ways as transnational as it ever has been. In presenting state law as a TLO, I present then a critique of the dichotomy between TLOs and the state, albeit a friendly one. I find, essentially, that states qualify as TLOs. If that is so then it follows that a theory of transnational orders should, in order to be defensible, be generalized as a theory of legal orders.*

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## INTRODUCTION

“Law can no longer be viewed through a purely national lens,” say Halliday and Shaffer in their groundbreaking chapter on *Transnational Legal Orders*.<sup>1</sup> This is increasingly becoming a mainstream position, though it immediately leads to a difficult follow-up question: what lens should we use instead? For some time, the answer was globalization.<sup>2</sup> But globalization proved, for several reasons, a somewhat unfortunate paradigm.<sup>3</sup> The term never received a universally accepted definition. To many, globalization suggested an idea of universality and centralized top-down regulation,<sup>4</sup> which would be empirically doubtful and normatively undesirable. Globalization seemed to have no place for the state, except in a diminished fashion. And, ironically, the universal attractiveness of the term stripped it of much of the critical potential it once had: if everything is somehow globalization, then nothing remains that could be viewed through its lens.

Thus, with the decline of globalization has come the rise of transnational. Transnational suggests, in its name already, less an overcoming than a transcending of the state. Transnational law (TL) is not above the state (like supranational law), nor between states (like international law), nor, necessarily, outside of states (like non-state law, though a connection between non-state law and transnational law is often made and will be discussed below). The hope is that transnational law, somehow, cuts through the distinction between national and international, and thus between what is within and what is without the state.<sup>5</sup> It promises, in this sense to be law not *without* but *beyond* the state.<sup>6</sup> And yet—does the idea of transnational law really provide us with a better concept or a better theory? And if so, what can it contribute?

In this short piece, I address this question rather indirectly. Starting from Halliday and Shaffer’s concept of a “Transnational Legal Order,” I ask how this

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1. Terence Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 63 (Terence C. Halliday & Gregory Shaffer eds., 2015). See GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE*, I (Gregory Shaffer ed., 2013).

2. See Ralf Michaels, *Globalization and Law: Law Beyond the State*, in *LAW AND SOCIAL THEORY* 287 (Reza Banakar & Max Travers eds., 2d ed. 2013).

3. See WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 13-18 (2009).

4. E.g., Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 37 (1994).

5. Cf. Craig Scott, “*Transnational Law*” as *Proto-Concept: Three Conceptions*, 10 *GERMAN L.J.* 859, 866 (2009) (discussing how transnational cuts through the state).

6. See Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOBAL LEGAL STUD.* 447, 468 (2007).

concept differs from the traditional concept of a national legal order. More precisely, I ask whether states must not themselves be considered TLOs, making the distinction break down. In order to get there, I first lay groundwork. I explore, in section II, different meanings of transnational and of law in the concept of transnational law, and I discuss existing relations between national law and transnational law, finding important overlaps. Section III expands and looks at the role that the state plays for transnational law, finding that states remain central here.

With this buildup I can take up, in section V, my central question: I apply the definition of TLOs given by Halliday and Shaffer to state law. I find that state law meets all definitional criteria except for those that exclude the state by definition, and I find that such definitional exclusion is not warranted. State law, then, is also a TLO. This does not refute the theory of TLOs, however, quite to the contrary: in section VI I propose to generalize the insight towards a general theory of TLOs.

#### WHAT IS TRANSNATIONAL LAW? TWO DICHOTOMIES

The notion of transnational law is vague, and different authors use different conceptions. This vagueness is not surprising: transnational law is formulated as an attempt to deal with a paradigm shift, namely the decline of a Westphalian global order with states as the exclusive actors on the international sphere and with a corresponding dichotomy of law as either domestic or international law.<sup>7</sup> We are in the middle of this paradigm shift, and so we should not expect that a new paradigm has yet been found and, more importantly, accepted. What we can do, however, is analyze and structure the existing debate. When we do so, we find two important dichotomies. The first concerns the question what is meant by law, whether TL refers to a body of law or something else—a process, a method, or a theory. The second concerns the question of what transnational refers to—the scope of the law or its source.

##### *Transnational Law as Body of Law or as Process/Method/Theory*

The first of these dichotomies concerns what is meant by *law*: Is TL a body of law? Or is it something else: a process, a method, or a theory?<sup>8</sup> An example for the first conception—TL as a body of law—can be found in Philip Jessup's seminal

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7. See Peer Zumbansen, *Transnational Law, Evolving*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898 (Jan M. Smits ed., 2d ed. 2012). See Stéphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181 (2004) (arguing the Westphalian Model was never historically accurate).

8. See Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* 17 ARB. INT'L 59, 6263 (2001); cf. Roger Cotterrell, *What is Transnational Law?* 37 LAW & SOC. INQUIRY 500, 501 (2012) (explaining the distinction between substantive and procedural concepts). But see Scott, *supra* note 5 (describing a different distinction). I draw a comparable distinction between concepts of globalization as reality or as theory in Michaels, *supra* note 2, at 287-303. In that article, a third concept defines globalization as an ideology. I do not think transnationalism is invoked with similar frequency with an ideological aim; otherwise, this would provide a third relevant concept.

essay.<sup>9</sup> In Jessup's own definition of what constitutes transnational law, while still relatively basic, this body of law is made up of all kinds of laws: including national law, international law, and non-state law. The law is defined not by its sources but by its *functions*: "all law which regulates actions or events that transcend national frontiers."<sup>10</sup> Halliday and Shaffer seem to agree on the idea of transnational law as a body of law<sup>11</sup> when they define a "transnational legal order" as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."<sup>12</sup> The "bewildering profusion, variety, and complexity"<sup>13</sup> that emerges now from Halliday's and Shaffer's conceptualization of what they call "transnational legal orders" or TLOs, shows the long way that the idea of transnational law as a distinct body of law has taken. Still, in this conception, TLOs, like Jessup's earlier transnational law, designate a body (or bodies) of law—wide, perhaps, but not all-encompassing.

Contrast this with a different conception of transnational law. According to this second conception, transnational law is not a body of law but instead a process, a method of decision-making, or even a legal theory. Transnational law is a *process* for Harold Koh, who defines transnational law as a process of transfer of laws between domestic and international law, or between different domestic laws.<sup>14</sup> Similarly, Halliday and Shaffer focus on the processes underlying transnational law from a sociological perspective.<sup>15</sup> Emmanuel Gaillard proposes transnational law as a *method* (for arbitrators) "of deriving the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice-of-law process, but from a comparative law analysis."<sup>16</sup> For Peer Zumbansen, finally, transnational law is less a body of law and more "a thought experiment in legal methodology and legal *theory*."<sup>17</sup>

It is clear that these conceptions of TL—as body of law on the one hand, and as process, method or theory on the other—are distinct. But in practice they are regularly connected. On the one hand, transnational law cannot be viewed as law without a theory that somehow moves beyond the traditional dualism of national and international law. On the other hand, transnational law as theory is, by necessity, a theory *of law* and, as such, needs to conceptualize what should count as law. One might think of the relation as that between a theory and its object. That is, we might think that TL *as theory* is the theory of TL *as a body of law*. I believe we see this connection in many theorists of TL. For example, although Zumbansen rejects to

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9. Philip C. Jessup, *TRANSNATIONAL LAW* (New Haven: Yale University Press, 1956).

10. *Id.* at 2.

11. Halliday & Shaffer, *supra* note 1, at 20.

12. *Id.* at 5, 11.

13. *Id.* at 20.

14. See Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.*, 183-84 (1996).

15. Halliday & Shaffer, *supra* note 1, at 24-26.

16. Gaillard, *supra* note 8, at 62.

17. Zumbansen, *supra* note 7, at 3 (emphasis added).

speak of TL as a body of law, the examples he uses are such that proponents of TL as a body of law could undoubtedly include them: *lex mercatoria*, corporate governance, public international law, human rights litigation.<sup>18</sup> Similarly, Halliday and Shaffer link their conception of TL as a body of law with a process theory of TL when they advocate “a perspective that places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame.”<sup>19</sup> Their interest is, thus, in the processes that create TLOs.

#### *Two Meanings of Transnational*

There is another important way in which we can distinguish different conceptions of transnational law, and that concerns the meaning of *transnational*. We can define transnational as pertaining to the scope of application or the functions of TL. Or we can define transnational law on the basis of the legal sources implied.

If we define transnational as pertaining to the *scope* of application or the *functions* of TL, then transnational law is that law (or that theory) that pertains to transnational relations. Such a functional concept seems to be what Jessup had in mind when he referred to transnational law as “all law which regulates actions and events that transcend national frontiers.”<sup>20</sup> Similarly, Halliday and Shaffer point out that “TLOs may apply to trans-boundary activities or simply have social effects in more than one jurisdiction.”<sup>21</sup> For them, transnational lies between global (which affects the entire globe) and national (which is confined within national boundaries).<sup>22</sup> Such a transnational scope must be what even those authors have in mind who confine transnational law to operations of domestic and international laws, such as Koh’s idea of transnational processes, but also Gaillard’s idea of transnational law as a method of comparing existing domestic laws in order to find out what are the dominant strands globally. The laws they speak about are not transnational with regard to their sources and only with regard to their scope and operation.

Alternatively, we can define TL on the basis of its *sources*. Under this conception, TL is that law which is neither domestic nor international in origin. It is, in a broader sense, non-state law: made by private actors, arbitrators, so-called formulating agencies, and the like. And it is, sometimes, not necessarily law but other types of norms—the literature on TL emphasizes frequently that TL transcends not just the boundary between domestic and international law but also that between law and non-law.

Analytically, these two conceptions—transnational law defined by its function and defined by its sources—are related. In the work of many scholars, however,

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18. *Id.*

19. Halliday & Shaffer, *supra* note 1, at 3.

20. Jessup, *supra* note 9, at 2.

21. Halliday & Shaffer, *supra* note 1, at 19.

22. *Id.* at 18-19.

such a relation clearly seems to exist. Transnational law, it is argued, emerged because the existing bodies of law were insufficient for the new transnational reality: domestic law covers only domestic matters; international law covers only matters between states. Those matters that are neither domestic nor international—transnational matters—require, therefore, not only a new type of law, but also must be grounded somewhere else than in the traditional realms of domestic and international law. We find such positions especially in many defenses of a new *lex mercatoria*, an allegedly privately made global commercial law.<sup>23</sup>

#### *The Relation Between National Law and Transnational Law*

It is thus not unnecessary to focus on the role of the state and its law when looking at a theory of transnational law. Granted, it is precisely the goal of such a theory to move beyond the state. If transnational law is meant to move beyond the pure dichotomy of national and international law, then it should be distinct from both national law and international law. Still, precisely in order to understand this move, we must look at the role that national law plays in it.

Notably, proponents of transnational law do not deny that national law remains important in the world. Halliday and Shaffer point out that “[n]ation-states remain central to TLOs (we do not live in a post-national world), but they do not alone define the territorial boundaries of legal ordering.”<sup>24</sup> In other words, national law (like international law) remains important; it is simply the case that there is a broader type of law that is relevant, namely TL.

The relation between national law and transnational law is, then, a complex one. At least according to many conceptions, national law is part of transnational law. At the same time, national law, when viewed by itself, is not transnational law; it is, in fact, opposed to transnational law.

On the one hand, there can be laws that are domestic by source and yet transnational by scope. Here is how Gaillard describes this:

Indeed, there is no reason to believe that national legal orders are unable to accommodate adequately the specific needs of international situations, for instance by creating a separate set of substantive rules to govern international situations. Numerous examples can be found of this approach to accommodating the “specific needs of international business,” in monetary relationships for instance, or in the field of arbitration whenever, as in France or Switzerland, international arbitrations are governed by a different set of rules from domestic ones. In this connection,

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23. *But see* Michaels, *supra* note 6 (critiquing these defenses).

24. Halliday & Shaffer, *supra* note 1, at 6. *See also id.* at 13 (“the nation-state remains central to lawmaking, law recognition, and law enforcement in the world today, and it is not simply bypassed by transnational legal ordering”) and *id.* at 20 (“We need a concept, moreover, in which national law and practice remain integral to the formation and institutionalization of legal norms, one in which they are neither viewed as being bypassed by transnational legal ordering nor as being autonomous from processes of international and transnational legal normmaking and conveyance.”).

it is important not to confuse a national legal order with its domestic, as opposed to international, substantive rules.<sup>25</sup>

This incorporates domestic law, but only a part of it. Gaillard replicates here the dichotomy between national law on the one hand (which is domestic in focus) and transnational or international law on the other (which are not) and carries it into national law. For him, there are, within national law, both laws with a focus on domestic issues and others with a focus on international contexts.

It is true that we see such internal distinctions in many legal systems, and sometimes they go to questions of private law. Sales contracts, for example, are governed by different rules depending on whether they treat international contracts (governed by the Convention on the International Sale of Goods) or domestic contracts (governed by domestic rules). Socialist countries, especially, had whole bodies of rules specifically designed for transnational transactions that are often much more liberal than those for domestic situations.

On the other hand, national law can exist within transnational law. This is true in Jessup's original formulation, and it is the case for Halliday and Shaffer. Insofar as for them a TLO is defined through recursivity between a transnational and a national level, national law is even a necessary part of transnational law: transnational legal ordering without interaction with national law would not, it appears, create a TLO. Here, therefore, transnational law is defined as state law plus something. It makes sense, therefore, to look at the relation between state law and transnational law in more detail.

#### THE ROLE OF THE STATE FOR TRANSNATIONAL LEGAL ORDERS

In order to disentangle this, it seems apt to first recreate the different roles of the state. They can be grouped in impacts of the state on TLOs, and impacts of TLOs on the state. In doing so, I also discuss the extent to which state law is given a special status in the theory of TLOs—and to what extent this may not be necessary.

In many discussions of transnational law, the role of the state remains amorphous: it is somewhere, it is somehow relevant, but the focus is so much on the transnational that we do not learn exactly about the place of the state. Halliday's and Shaffer's chapter, by contrast, discusses in detail the role states play for TLOs, and it may be helpful to address these different roles in more detail.

#### *Construction*

States play an important role for Halliday and Shaffer's approach. TLOs may not themselves be state law, and are by definition constructed not exclusively by

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25. Gaillard, *supra* note 8, at 61 (internal references omitted).

states<sup>26</sup> (though I challenge this criterion in section IV.C). Nonetheless, states often play an important role in their construction. Halliday and Shaffer point out that transnational norms can originate inside the nation-state, though they are quick to point out that such norms “invariably are adapted transnationally.”<sup>27</sup> In comparative law, such processes of adaptation are well-known from the legal transplant debate.<sup>28</sup> And we know that transplants can also take place from the national to a supranational, or transnational, level.<sup>29</sup>

At the same time, it is worth pointing out that the transplant literature, insofar as it looks at horizontal transfers (from one country to another) has shifted its attention from the donor to the recipient of such transplants. Effectively, we have come to look at legal transplants more as elements of local law reform—emphasis is put on conditions in the receiving/reforming country,<sup>30</sup> and the rules of the donor country serve as mere legal irritants in such a process.<sup>31</sup> The extent to which this relation holds true for transplants between domestic and transnational legal orders cannot be answered in a general fashion—much depends on the individual order and the area of the law. Nonetheless, there seems to be an important difference. Horizontal legal transplants enter existing states as recipients—the state is already there; it just needs to build, or reform, its laws. This is different for TLOs, many of which do not rest on an underlying order that is independent of the TLO. The TLO itself is, in many ways, a construct of states—or, rather, of processes created by states (or at least in which states play a part). There is, in other words, no truly independent transnational sphere, while there is, at least in our traditional understanding, an independent national sphere. There is, at least in many cases, no structure (like a state) that receives law and implements it into its order; instead, the whole order itself is constructed through the transplant. It is doubtful, therefore, whether transplants from state to transnational law can be equated to those between states.

### *Enforcement*

States play a role not only at the origin of transnational norms, but also, and perhaps most importantly, at their enforcement. As Halliday and Shaffer point out,

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26. That is at least how I understand the definition, in Halliday & Shaffer, *supra* note 1, at 12, that “[t]he norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state.”

27. *Id.* at 19.

28. See also, Günter Frankenberg, ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND CULTURE (Günter Frankenberg ed., 2013) (on the questions of adaptations involved).

29. See Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *ECOLOGY L.Q.* 1295 (2001); Anna Dolidze, *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*, 26 *EUR. J. INT'L L.* 851 (2015).

30. See Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *The Transplant Effect*, 51 *AM. J. COMP. L.* 163, 179 (2003).

31. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *MOD. L. REV.* 11 (1998).



“[m]uch transnational legal ordering involves networks that develop legal norms that are directed towards enactment or recognition and enforcement within nation-states.”<sup>32</sup> Sometimes such enforcement is direct: states will enforce the rules made by TLOs. Sometimes, such enforcement is indirect: “actors aim to catalyze through these instruments the adoption, recognition, and enforcement of binding, authoritative legal norms in nation-states.”<sup>33</sup>

In principle, there is nothing wrong with the idea that one legal order enforces the rules made by another legal order. This is what happens in conflict of laws with some regularity. It is another matter, however, when one legal order (in this case TLOs) relies, to a significant degree, on enforcement by another legal order because it lacks its own enforcement institutions. Such reliance on enforcement by states was long characteristic of (public) international law, and the fact that international law lacked its own enforcement powers was long the main argument for those denying its character as law. The question for TLOs would be, similarly, to what extent they can be viewed as existing beyond the state when they rely on the state, including when they simultaneously give rise to transformations of the state.

Granted, the suggestion that international law is not law is no longer seriously made. This is so less because international law has, after the Second World War, created a number of institutions—arguably, it is still the case that the main enforcers of international law are states. It is so, rather, because our concept of law has changed: we no longer see enforcement, the idea of rules backed by force, as necessary for legal orders. Giving up the requirement of enforcement institutions was an important step to recognize the multiple orders outside of the state as laws.

Yet it is not clear that Halliday and Shaffer are ready to give up the idea of enforcement altogether. Although they suggest that TLOs are “[not] invariably backed by coercion,”<sup>34</sup> enforcement does seem to play a crucial role. For them, law is characterized “by both power and reason, exercising its authority both through coercion and a normativity that is grounded in legal reasoning and process.”<sup>35</sup> It is, in part, for this reason that states play such a prominent role for their concept of TLOs. I will have more to say about this towards the end of this Paper, in Section VI.D.

### *Recognition*

Arguably the most contentious role of the state for this theory of TLOs comes in the idea of recognition. It seems that, for Halliday and Shaffer, TLOs become law only if and insofar as recognized by states. They say so explicitly for religious laws which, they view “in terms of religious [and thus not legal] ordering until they become recognized within national or local law and applied and enforced by

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32. Halliday & Shaffer, *supra* note 1, at 12.

33. *Id.* at 14.

34. *Id.* at 18.

35. *Id.* at 17.

national or local legal institutions.”<sup>36</sup> They say something similar for private lawmaking whose norms are “if necessary, ultimately recognized and enforced by the state.”<sup>37</sup> Soft law, it appears, becomes relevant because it shapes behavior, but the typical case appears to be its recognition and enforcement under national law.<sup>38</sup>

This role is problematic. It falls behind a long-held demand from the legal pluralism literature. John Griffiths, in his seminal 1986 article on *What is Legal Pluralism*, protested loudly against a concept of law that was dependent on recognition by the state.<sup>39</sup> His argument was not just that such a requirement would subordinate non-state legal orders to the state, thereby denying them a deserved equal status.<sup>40</sup> Worse, he said, making non-state law dependent on recognition by the state abolished the idea of legal pluralism altogether and perpetuated what he called legal centralism—the idea that, ultimately, all law can be traced back to a fundamental source which is the state.<sup>41</sup> To the extent that Halliday and Shaffer view recognition by the state as a *necessary* element in the existence of TLOs, they open themselves up to the same criticism and will be unable to uphold their claim that “[u]nlike for many legal positivists, the legal in TLOs requires no single hierarchy of norms.”<sup>42</sup> To the extent that they view such recognition as a merely typical element in TLOs, they may highlight a relative marginality of TLOs. After all, for them the relation appears to be asymmetrical; it is not required, at the same time, that state law be recognized by TLOs.

#### *Legitimation*

Closely connected to recognition is the last, and perhaps most problematic function of state law vis-à-vis TLOs—that of legitimation. On the one hand, states legitimize their norms by enrolling international and transnational organizations.<sup>43</sup> On the other hand, and that appears more crucial here, “[n]ation-state institutions provide legitimating mechanisms within the national context by implementing and enforcing the legal norms.”<sup>44</sup> This does not create a full symmetry. State law is, in a traditional understanding, automatically legitimate insofar as it can rest upon the state’s own legitimacy. Here, reliance on TLOs merely provides additional legitimacy. TLOs, by contrast, would need to bring about their own legitimacy—or borrow legitimacy from the state. Halliday and Shaffer seem to argue for the latter. This gives a broader role to states than others would allow. When they say, for example, that arbitration awards “are validated through the recognition and

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36. *Id.* at 15. For discussion, see Ralf Michaels, *Law and Recognition—Towards a Relational Concept of Law*, in *IN PURSUIT OF PLURALIST JURISPRUDENCE* (Nicole Roughan ed., forthcoming 2016).

37. Halliday & Shaffer, *supra* note 1, at 14.

38. *Id.* at 17.

39. John Griffiths, *What is Legal Pluralism?*, 24 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1 (1986).

40. *See id.*

41. *See id.*

42. Halliday & Shaffer, *supra* note 1, at 18.

43. *See id.* at 12.

44. *Id.* at 19.

enforcement of arbitral judgments by these systems,”<sup>45</sup> they reject a view held not just by arbitration proponents but even the French Cour de Cassation that “la sentence internationale, qui n’est rattachée à aucun ordre juridique étatique, est une décision de justice internationale.”<sup>46</sup>

I do not, here, discuss questions of legitimacy at more length.<sup>47</sup> I point out only that the state’s own legitimacy has become questionable as well. Overcoming the exclusive state lens implies, necessarily, the need to question the state’s own legitimacy—and thereby, by extension, its ability to legitimize, at least in universal fashion, legal orders other than its own.

#### *The Analytical Relation*

TLOs and state law are thus closely interrelated, and yet, it is precisely this interrelation that creates, at the same time, their analytical distinctiveness. TLOs are defined as encompassing state law, but are different in that they go beyond. TLOs combine those norms that “are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state.”<sup>48</sup> These organizations are insofar defined in at least partial opposition to those “primary institutions of law” within the nation state which “include legislatures, executive departments, agencies, and courts.”<sup>49</sup> Thus although state law and TLOs interrelate, they are distinct: there is an “interaction of transnational lawmaking and national legal practice, holding them in tension.”<sup>50</sup> The relation between state law and TLOs is described as one of recursivity:

[T]ransnational legal process is viewed not as unidirectional, but a process in which the transnational and local are held in tension, in which actors engaged in transnational legal processes seek to influence local lawmaking and practice, and in which national legal norms, adaptations, and resistances provide models for, and feed back into, transnational lawmaking.<sup>51</sup>

It is presumed, therefore, that we can distinguish different levels that are local, national, and transnational. The question that emerges from this is this: is there something qualitatively different between state laws and TLOs? In the remaining sections, I assess to what extent state law can, and should, be characterized as a transnational legal order, and what would follow for the theorization of TLOs. I do think, however, that a positive result on the first question would allow for a greatly

45. *Id.* at 14.

46. *PT Putrabali Adyamulia v. Société Rena Holding*, Cour de Cassation, 1e civile, 29 June 2007.

47. See Peer Zumbansen, *The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy*, in *NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGES OF GLOBAL AND LOCAL LEGAL PLURALISM* 83 (Michael A. Helfand ed., 2015).

48. Halliday & Shaffer, *supra* note 1, at 12.

49. *Id.*

50. Gregory Shaffer, *Transnational Legal Ordering and State Change*, in *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* 1, 2, *supra* note 1.

51. *Id.* at 13-14.

improved generalized understanding of relations between legal orders more generally.

#### STATE LAW AS A TRANSNATIONAL LEGAL ORDER?

It follows from the discussion so far that the role of state law in a theory of TLOs is of crucial importance, and at the same time complex. On the one hand, states are necessary parts of TLOs—without states there are no TLOs. On the other hand, state law is distinct from TLOs—pure state law is distinguished from TLOs, the national level is distinct from the transnational one.

I have elsewhere suggested that there is (almost) no law without a state.<sup>52</sup> Here, I want to ask the opposite question: can there be TLOs that are not more than state law? Can we characterize state laws as TLOs? Apart from their definitional exclusion, are they different from TLOs? And if they are not, can we learn something about the concept of transnational law, but also about the role of state law? In order to analyze this, I rely on the definition of a transnational legal order provided by Halliday and Shaffer.<sup>53</sup> The definition elaborates on each of the three words of the term—transnational, legal, order. Remarkably, they spend far less time on defining what makes TLOs *transnational* than what makes them *legal*.<sup>54</sup> From the perspective of legal theory, it would be the move from national to transnational law that would require most analytical work. From the perspective of legal sociology, by contrast, perhaps the increasingly transnational character of much interaction can be taken as a given, and the main question would here be under what circumstances the orders created by, and applied to, transnational interactions can be considered legal. Be that as it may—because some of their other criteria concern, effectively, the transnational character as well, I address them too. The question comes in two stages: First, does state law meet the criteria given for TLOs, too? Second, where it does not meet these criteria, does the criterion rest on a solid theoretical conception or is it formulated merely with the categorizing goal to distinguish TLOs from state law?

#### *Unproblematic Factors*

Some of the factors Halliday and Shaffer collect are unproblematic, because they are borrowed from state law. Insofar as a TLO is required to have qualities similar to those of state law, it is automatically true that state law fulfills these criteria as well. This is true for the requirement that TLOs come in “recognizable legal forms.”<sup>55</sup> This requirement is met even if one shifts, with Halliday and Shaffer, from a rule understanding of law to a process understanding, because such process

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52. See Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31 (2010).

53. See Halliday & Shaffer, *supra* note 1, at 5.

54. See *id.* at 11-21.

55. *Id.* at 15.

understandings were developed in the context of the state and can be used fruitfully for state law.

Other criteria are not borrowed from the state but, because they use the state centrally, are easily met by the state. This is so for the “positivist” (and ostensibly unnecessary) criterion that TLOs become law only through the effects they have on the state. State law, which is typically enforced by states, necessarily falls under this rubric, too. Difficulties concern other criteria.

#### *Engaging Multiple Nation-States*

One of the most important definitional criteria for TLOs is this: “The norms, directly or indirectly, formally or informally, engage legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the norms.”<sup>56</sup> This is in one way a constraining condition (as Halliday and Shaffer themselves acknowledge) insofar as it leaves out such norms that function wholly independently from the state (though such norms are probably, in reality, hardly existent).<sup>57</sup> It links back to the requirement of state recognition discussed earlier. This criterion is obviously unproblematic for state law.

It is the other aspect that might be thought of as difficult: the requirement that multiple nation-states are engaged. One might think that this rules state law out from the definition of TLOs. After all, does not state law, unlike international and transnational law, operate only within that state itself? Actually, the answer is no. The main reason is that conflict of laws ensures that domestic laws engage institutions in foreign states, too. Thus, U.S. law engages legal institutions in a number of nation-states, without the need of a trans- or supranational organization as an intermediary. Such engagement happens as *recognition or enforcement* of the norm in the context of judgment recognition: foreign countries will, when their conflict of laws system so directs them, apply U.S. law and enforce U.S. judgments. Such engagement happens as *adoption* in the context of choice of law, when U.S. law becomes applicable. (Under the old, and now discarded, local law theory, application of foreign law was conceptualized literally as adoption: the idea was that a state would adopt a local norm identical to the foreign one. Under modern approaches that assume that what is applied is actually foreign law, that application can still be conceptualized as an adoption for the concrete case.<sup>58</sup>) This should be uncontroversial, but it is rarely mentioned explicitly in transnational law scholarship.

Granted, it is regularly acknowledged that rules of private international law are part of transnational law.<sup>59</sup> But this applies only to the rules of choice of law that

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56. *Id.* at 13.

57. See Ralf Michaels, *supra* note 52, at 37-40.

58. For more detail, see Nils Jansen & Ralf Michaels, *Die Auslegung und Fortbildung ausländischen Rechts* [Interpreting and Developing Foreign Law], 116 ZEITSCHRIFT FÜR ZIVILPROZESS 3 (2003).

59. See Halliday & Shaffer, *supra* note 1, at 19-20; Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005); for a different view, see

designate the applicable law; it does not seem to extend to the rules of substantive, and typically domestic, laws that are thereby designated. Such a restriction is arbitrary and incomplete. What one could say is that choice-of-law rules have the effect of making domestic laws transnational. But, importantly, they do that without stripping these domestic laws of their domestic origin and content: the rules remain national rules, they do not need to be transferred somewhere else as they do, it appears, in the theory of TLOs.<sup>60</sup>

*Production by, or in Conjunction with, a Legal Organization or Network*

Another criterion appears, at first sight, harder to meet. Halliday and Shaffer require that “[t]he norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state.”<sup>61</sup> By definition, it would seem then, state law would be excluded here. Closer analysis makes this outcome less certain, however.

First, although states are not, formally, transnational organizations or networks, they do frequently produce norms in conjunction with such entities. This is in accordance with Halliday’s and Shaffer’s argument. This conjunction is often quite concrete. Most transnational organizations are staffed by representatives of nation-states. These states, therefore, are directly involved in the process of norm production. Similarly, many transnational networks consist of representatives of agencies from different countries.<sup>62</sup>

Second, an argument can be made that states themselves are transnational organizations. Taking up my earlier distinction, they are not transnational by source, but they are by scope. The problem of the definition here is that it is somewhat circular: a set of norms becomes a transnational legal order if it is transnational.

This suggests, thirdly, that the requirement of production by or in conjunction with a transnational network or organization is, at heart, arbitrary and unnecessary as a criterion. What makes a legal order transnational is the scope of its norms, not the nature of the institutions that make it. And what makes an institution transnational is, in the end, the transnational character of the rules it creates. In this sense, the criterion has it backwards: instead of defining transnational rules as those created by transnational institutions, we should define transnational institutions as those producing transnational rules. If this is so, then the state certainly qualifies.

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Christopher A. Whytock, *Conflict of Laws, Global Governance, and Transnational Legal Order*. 1 U.C. IRVINE J. INT’L TRANSNAT’L AND COMP L.1 17 (2016).

60. Halliday & Shaffer, *supra* note 1, at 19.

61. *Id.* at 12. This is listed as a subcriterion for “legal,” although arguably it is more a subcriterion for “transnational.” I understand span here as not different from transcends; otherwise, national law would undoubtedly qualify.

62. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press ed., 2004).

*“Transnational”*

The last criterion to address is that specifically of transnationality. Halliday and Shaffer define as follows:

If a national legal order refers to a legal system inside a nation-state that exercises sovereign jurisdiction, and if a global legal order refers to legal ordering that covers all nations and localities, then TLOs span legal orders that vary in their geographic scope, from bilateral and plurilateral agreements to private transnational codes to regional governance bodies to global regulatory ordering. Such TLOs may apply to trans-boundary activities or simply have social effects in more than one jurisdiction.<sup>63</sup>

This is a definition full of (necessarily) vague terms like jurisdiction, all localities, and so forth. The general gist, however, seems to be this: transnational is placed somewhere between the national and the global, between that law that is purely inside a locality (in this case the nation-state) and that law that is everywhere (global law). It thereby replaces (or supplants) traditional structures like subnational-national-supranational-global, or local-national-global (this latter structure appears with modifications elsewhere).

The question is whether, under this definition, there are any legal orders that are not transnational orders. To begin with global legal orders, there are of course laws that aim to govern globally (for example certain *ius cogens* norms of international law, or human rights). But from a sociological perspective, this criterion is nearly impossible to meet. There is, simply, no law that is of relevance at every place in the world. All law that transcends national boundaries remains limited in its effective territorial reach.

More importantly for my purposes, however, there is very little left to national legal orders. Sure, national legal orders emerge from the exercise of sovereign power (though, to be sure, this is true for much transnational law as well). But very little law remains “inside a nation-state.”<sup>64</sup> Especially the law of dominant countries like the United States constantly spills over its borders: U.S. rules on product specificities have an impact on foreign companies that want to export to the United States; U.S. standards on accounting impact foreign companies that want to list on U.S. stock exchanges or otherwise participate in the U.S. capital markets, and so on and so forth. Even if we leave out conflict of laws and look at such laws as applicable only in the United States, we must realize that they are so confined only with regard to the institutions that enforce them (U.S. courts and agencies) but not the actors affected by them. We can measure some of these spillover effects in the law where they are discussed as non-tariff barriers, but these give us only a small glimpse into the effective transnationality of national laws.

From a sociolegal perspective therefore, the rules confined inside a nation state are only a small subset of national rules. In reality, much national law applies to

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63. Halliday & Shaffer, *supra* note 1, at 18-19.

64. *Id.*

trans-boundary activities, if only because so many activities are trans-boundary these days. Even more, national laws have effects in more than one jurisdiction. If this is what defines transnational legal orders as transnational, then most state law must indeed be viewed as such.

#### TOWARDS A GENERAL THEORY OF TLOS?

I would like to reemphasize the aim of this article. The point of showing that state law should be characterized as a TLO is not to criticize that theory, at least not in a fundamental way. My aim is twofold. First, I want to demonstrate (or perhaps just remind) that today's state is not confined to boundaries in ways in which we sometimes think it was before, and that therefore the state law from which TLOs are distinguished is, in some regards, a straw person. Patrick Glenn has recently made this point in a much more general sense, and in many ways what I present here is merely a consequence of his findings.<sup>65</sup> Second, I want to help pave the way towards a theory of transnational law that is a theory of today's law at large, not of a subset of its orders that cannot easily be defined and distinguished. Such a general theory would in some ways be simpler, because it could dispense with some of its distinguishing criteria. In other ways, it would simply be more general.

#### *The State as a Model*

On the one hand, our legal theories remain firmly within a state tradition, even (or especially) where they go transnational. This is so because, although states themselves are not TLOs, they often provide the blueprint for what we should expect in TLOs. When Halliday and Shaffer find transnational “quasi-legislature[s]”, “quasi-regulatory bod[ies]”, and courts,<sup>66</sup> these are modeled after the correlating state institutions. And even where these concrete parallels to state law do not exist, state law remains the model: the “recognizable legal form” as derived from the state remains a criterion for TLOs<sup>67</sup> (and puts into question the role of non-formalized laws like customary and some religious laws). Indeed, Halliday and Shaffer even go so far as to suggest that their definition “generally accords with what can be viewed as a positivist conception,” that ultimate state-based view of law.<sup>68</sup>

There is nothing wrong per se in drawing on experiences from state law for transnational law. Peer Zumbansen has shown impressively how such learning experiences are used.<sup>69</sup> And indeed, it would be strange if TLOs were so essentially other from state law as to constitute an entire break from it.

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65. See H. PATRICK GLENN, *THE COSMOPOLITAN STATE* (Oxford Univ. Press ed., 2013).

66. Halliday & Shaffer, *supra* note 1, at 12.

67. *Id.* at 15.

68. *Id.* at 13.

69. See Peer Zumbansen, *Ordnungsmuster Im Modernen Wohlfahrtsstaat: Lernerfahrungen Zwischen Staat, Gesellschaft Und Vertrag* [Regulatory Patterns in the Modern Welfare State: Learning Experiences Between State, Society and Contract] (2000); see also Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 886–87 (discussing transnational law as a reproduction of national law).



Still, the desire to model TLOs on state laws is not without problems. The first problem is that if we define TLOs against the model of state laws, we may be unable to understand them on their own terms. Pluralists have long suggested that we should call normative orders other than state law “law” because not to do so would denigrate them. As against such suggestions, Simon Roberts has pointed out the risks involved in modeling non-state law after the state.<sup>70</sup> We may hope that calling phenomena other than state law “law” enhances their status. But by doing so, we may, unduly, equate these phenomena to state law and thereby colonize them. Although what Roberts has in mind are mainly non-western laws, his warning applies also to transnational law. Why would we be interested in orders that are like state law more than in orders that are not? Does it matter more to assuage legal positivists than to develop a concept of law that is truly independent of the state?

The second reason why such modeling is problematic is related. When we model the definition of TL on that of the state, we may perpetuate a concept of law that is already no longer up to date. Take, for example, existing debates on the democratic qualities of international law. These debates often measure the reality of international law against some idealized version of democratic domestic law, instead of asking how state law is actually situated in our times.

There is, then, both liberating and conservative potential in the modeling function. Modeling is liberating for transnational law where it enables us to see other orders than state law as law. It is conservative where it essentializes certain characteristics of law also for these other orders. Ironically, by applying the traditional state concept of law to transnational law, we do not move beyond the state, but we do the opposite: we enhance the state paradigm by making it the yardstick also for law other than state law.

#### *The Transnationalization of the State*

While thus the state still serves as the model, at the same time we need to realize that the state itself has changed. What, after all, is the state law from which transnational law is distinct? We often read about the Westphalian model that needs to be overcome—a model in which states are internally sovereign (in having exclusive jurisdiction over their territories and peoples) and externally sovereign (in being equal, at least formally, to other states). This was of course always an ideal more than reality, but more importantly it was a legal, not a sociolegal, concept. The sociological correlative is what we call methodological nationalism with its idea of the state as a container, the natural entity of social interactions. We know this to be a fiction, and it is thanks to studies of globalization that we have found the need for methodological alternatives, too.

It seems right that we develop legal theory alternatives to this Westphalian model, too. But it seems appropriate, at the same time, to place this Westphalian

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70. Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1 (2005).

model properly in history. Long after the Westphalian peace and the conceptualization of sovereignty, much law remained in what we may call a pre-Westphalian state. Comprehensive lawmaking, especially in the area of private law, was long not thought of as a domain of sovereign lawmaking at all.<sup>71</sup>

Thus, ideas of a transnational private law continued to exist for a long time. The most important of those was not really the oft-cited *lex mercatoria* (which, as a truly transnational law, is mostly a historical fiction),<sup>72</sup> but, at least in continental Europe, the *ius commune*. Similarly, in England and the United States, the common law was long viewed as truly common to several countries, as can still be seen in the U.S. Supreme Court decision in *Swift v. Tyson*.<sup>73</sup> The idea that all law emerges from the state is really a modern idea from the 19<sup>th</sup> and 20<sup>th</sup> century, enacted in Europe through the codification movement and in the United States in the idea that all law, including the common law, emerges from sovereignty.

All of this is not just to suggest that the state has always been transforming. It is also important to see of what kind this transformation was. Up until the 19<sup>th</sup> century, it can be said that the public/private distinction was at the same time a national/transnational distinction. Only for a relatively brief time, around the first half of the twentieth century, can it be said that most law was not transnational. After this time, we find again the transnationalization of private law (new *lex mercatoria*, international arbitration) and now, increasingly, public law. But now this transnationalization happens not necessarily in a sphere separated from the regulatory apparatus of the state, but instead with intense participation of the state.

After all, it is crucial to realize that neither globalization nor transnationalization are developments that can be thought to take place outside the state. Early analyses of the “decline of the state” under pressures from globalization underestimated the active role that the state had been playing in bringing globalization about.

Halliday and Shaffer seem to agree when they say that “[t]he nation-state participates in its own transformation in transnational legal ordering.”<sup>74</sup> But they still seem to imply that this transformation must happen through TLOs as a catalyst: states participate in the emergence of TLOs which then in turn influence states. I think that this is only one of several transnationalization processes within the state. In most regards, it seems to me, the state is transnationalizing simply in response to the transnationalization of society (while at the same time actively promoting this).<sup>75</sup> Its agencies operate transnationally in an increasing manner. If, in the process of

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71. Ralf Michaels, *Of Islands and the Ocean: The Two Rationalities of European Private Law*, in FOUNDATIONS OF EUROPEAN PRIVATE LAW 139 (Roger Brownsword, Leone Niglia & Hans-Wolfgang Micklitz eds., Hart 2011).

72. Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEXAS L.REV. 1153 (2012).

73. 41 U.S. 1 (1842).

74. Halliday & Shaffer, *supra* note 1, at 13.

75. See BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN PARADIGMATIC TRANSITION (2d ed., 2002).

this, they operate in networks with agencies, this is more a consequence of than a source for the state's own transnationalization.

*Transnationality as a Gradual Concept*

If state law is transnational and thus the dichotomy of national/transnational breaks down, this does not mean that transnationality needs to be given up as a distinguishing characteristic to describe legal orders. But it should be turned from a separate category into a gradual concept. We could order legal orders (including state law) on a continuum between purely local and truly global—with the expectation that very few orders really belong at the extreme points of the continuum and most will be somewhere in between.

Such a gradual concept seems more useful than existing categorizations like the one between local, national, and transnational laws. Whereas here local and transnational clearly describe territorial scopes, national seems to rest more on the source than the scope of the norms (unless it is meant to describe those rules that remain, in their application, within state borders). Translated into a gradual concept, this categorization helps us dispense of the need of drawing boundaries and of lumping together orders with vastly different scopes. Moreover, it helps take account of the increasingly deterritorialized nature of law.

Dispensing of these different categories can also help develop a more general theory of interrelations between legal orders. Halliday and Shaffer go a long way towards such a general theory when they describe different interrelations.<sup>76</sup> Reading through their impressive analysis, one is struck by how structurally similar these interrelations actually are—and how the categorization of transnational actually does not play a defining role for them. This suggests that theorizing transnational law (just as theorizing legal pluralism) should help us develop a more generalized understanding of interactions between legal orders. I have suggested elsewhere that the basis of such an understanding might be found in a generalized understanding of private international law.<sup>77</sup> A general theory of transnational law should be a theory of such interactions, too.

*The Role of the State in Transnational Law*

None of this should deny that state law, in some ways, remains in many ways different from other legal orders.<sup>78</sup> State law has characteristics that give it advantages over other legal orders: “a technical administrative capacity that cannot be replicated at this time by any other institutional arrangement[,] . . . military power, which for some states is global power,”<sup>79</sup> as well as unmatched financial means to

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76. Halliday & Shaffer, *supra* note 1, at 55-63.

77. Ralf Michaels, *What is Non-State Law? A Primer*, in NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 41, 55-58 (Michael A. Helfand ed., 2015).

78. See Michaels, *supra* note 52, at 40-41.

79. SASKIA SASSEN, A SOCIOLOGY OF GLOBALIZATION 38 (Jeffrey C. Alexander ed., 2007).

save an ailing financial system, as we know after the bailout. At the same time, the state still faces strategic disadvantages: relative immobility and locality, transparency of decision making, and the ensuing relative inflexibility. Legally, the state combines advantages—its rules can claim general hierarchical superiority over privately made rules like contracts, and the state maintains the monopoly of violence to enforce its laws—and disadvantages—it is bound to a Constitution, unlike private actors.

Maybe the most important characteristic that distinguishes the state from most transnational legal orders are the institutions that it provides. First and foremost, among these are, perhaps, courts that have enforcement power and thereby differ not just from arbitrators but also from most supranational courts. Thus, although I do not think it is necessary to turn enforceability by state courts into a definitional requirement for transnational legal orders,<sup>80</sup> such enforceability is certainly an important way in which such orders ensure their own enforceability. One could say that these TLOs “borrow” the state’s institutions, and the state, in turn, lends out its courts. Or, one could go even further and discuss the extent to which state courts, when used for the enforcement of TLOs, actually lose some of their character of being “state” courts and instead become something else: truly transnational courts.<sup>81</sup> At some point we may wonder whether it still makes sense to speak of discrete legal orders altogether. Maybe, what we have are not different legal orders (state or transnational) but instead one global law, within which we can at best distinguish different regimes.<sup>82</sup> Until we go this far, however, I believe it is necessary to admit that the differences between state law and TLOs are not those between domestic law and transnational law.

#### CONCLUSION

I have argued that state law is a transnational legal order, and that a theory of transnational legal orders should really be a theory of legal orders more broadly, encompassing states not just as factors but as actual objects of the theory. None of this is fatal to Halliday’s and Shaffer’s theory. If it is a critique, then not of their theory but of their unnecessary restriction to TLOs as a special category. What I have proposed is a generalization of their theory of TLOs as a (transnational) theory of legal orders more broadly. TLOs are not an anomaly but the norm; all laws are, presumably, TLOs. In this sense, transnational law is no longer a body of law and does indeed become a theory of law—though one informed no longer by state law as the model but instead of TLOs as the model. The promise of such a theory is significant, and Halliday’s and Shaffer’s approach helps us a good part of the way.

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80. See Michaels, *supra* note 52, at 40-41.

81. Thus George Scelle’s theory of *dédoublement fonctionnel*, on which see Antonio Cassese, *Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law*, 1 EUR. J. INT’L L. 210 (1990). See also Ralf Michaels, *Global Problems in Domestic Courts*, in *THE LAW OF THE FUTURE AND THE FUTURE OF LAW* 165, 167-177 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura Kistemaker eds., 2011).

82. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2003).