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Summary

International Standards – From an International Law Perspective

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A. The Goal: Realization of the International Rule of Law in the Postnational Era

1. The international rule of law, i.e. the effective rule of law over governmental and private power of any kind in the international sphere constitutes a great civilizational challenge and a fundamental value of the United Nations. The international rule of law must be established, maintained and effectively implemented. "Law" can, however, only contribute to the permanent defeat of anarchy, force, arbitrariness and injustice if it is sufficiently legitimate and compatible with higher-ranking law.

2. In our postnational era, and mainly due to globalization, statehood has become "disaggregated": The states have given up their monopoly on governance and relinquished important functions partly to international public authority, partly to non-state (social) actors. Governmental functions have thus increasingly been internationalized and privatized. This development has transformed the classical international legal order which was characterized by the states' monopoly on law-making into a new international normative order with considerable non-state elements, including international standards. These non-state elements can and must also be used as a means to further the ultimate goal – the international rule of law.

B. The Empirical Diagnosis: Growing Relevance of Standards in the International Normative Order

3. For the purposes of this paper, "standards" are general and abstract rules which are made by a competent body, irrespective of their name, their contents, their addressees, the nature of the standard-making body and the procedure followed by it. "International" are those standards which derive from an international source of a public, private or hybrid character. International standards are altogether part of international soft law because they all have similar soft behaviour control effects. International hard law norms in the sense of the classical triad of Art. 38 (1) of the ICJ Statute are, however, not international standards as that term is used here.

4. "Hybridization of rules" is a descriptive and not a normative term. It denotes the formation of syntheses of rules belonging to traditionally separate categories. Such syntheses can occur between hard law norms and soft law standards, between governmental (heteronomous) and private (autonomous) rules and between international or supranational (external) and national (internal) rules. Hybrids between more than two rule categories are also conceivable (e.g. between [supra-] national hard law norms and international soft law standards).

5. a) Genuine hybrid norms or standards are only those which are simultaneously attributable to several independent and coequal authors that have jointly created them (e.g. the UN Global Compact). That rarely occurs.

b) One individual author can only produce pseudo-hybrid norms or standards. These come into being where personal or substantive elements from other categories influence the norm- or standard-creation process of that author (this is the case e.g. with

regard to ILO norms and standards) or where that author refers to the norms or standards of another author (e.g. the reception of Codex Alimentarius standards by WTO norms).

6. Multifarious governmental (state and non-state), private and hybrid soft law standards have assumed an expanding practical and legal role in the international normative order, in addition to the classical international hard law norms, such as in the area of human rights protection (e.g. UN standards and ILO standards), responsibility of enterprises (e.g. OECD standards), food safety (Codex Alimentarius standards), technical standardization (e.g. ISO standards), regulation of financial markets (e.g. Basle Committee standards), environment protection (e.g. standards of the Rio Conference), culture (UNESCO standards), private law harmonization (e.g. UNCITRAL model laws), transnational commercial law (lex mercatoria) and transnational sports law (lex sportiva).

7. The international rule of law – which is a common task of state and non-state actors – can only be effectively established jointly by the two (hard and soft) components of the international normative order: Soft law standards complement hard law norms with regard to the intensity and directive force of the regulation, and soft implementation mechanisms complement hard enforcement instruments. This becomes particularly obvious with regard to the implementation of the social and ecological responsibility of multinational enterprises, including private military and security companies.

C. The Juridical Evaluation: International Legal Classification of International Standards

8. a) Soft law standards are as such not binding under international law, but they form syntheses with hard law norms in the course of a juridification process. These syntheses lead to a more or less close approximation of soft law standards to hard international law ("hardening") in the sense of relative normativity (pseudo-hybridity) with smooth transitions, unless the standard excludes such an approximation (e.g. ISO 26000:2010).

b) Although this juridification is controlled by states or state-empowered bodies (such as international courts or arbitral tribunals), it is often impossible clearly to identify and attribute a juridification decision for purposes of determining the responsibility of states under international law for particular standards.

9. Six exemplary levels of "hardening" of soft law standards with a decreasing degree of legal force can be distinguished: Firstly, their direct or indirect reception by hard law norms (the indirect reception being effected by a presumption of legality in favour of conduct corresponding to the standard in the sense of Art. 3.2 SPS). Secondly, soft law standards can function as declaratory reproduction of hard law norms; they can thirdly influence the interpretation of hard law norms; they can fourthly influence the concretization and supplementation of hard law norms; they can fifthly initiate a process of creating new hard law norms and finally exert factual pressure towards compliance with themselves. As an aliud, standards become legally binding if they are voluntarily made part of a contract between private persons.

10. These accumulating phenomena reflect the contemporary approximation between soft law standards and hard law norms which supports the assumption of relative – in contrast to the classical absolute – normativity. Relative normativity signifies a continuum of more or less binding rules from non-law to jus cogens, instead of the traditional categorical difference between hard law (i.e. law) and soft law (i.e. non-law).

11. Juridification deficits which exist for instance with regard to cyberspace and the social and ecological responsibility of multinational enterprises can also be legally relevant to the extent that there is an obligation under international law to make hard law (e.g. as a consequence of the protective duty under human rights law). As a rule, however, it is not possible to hold certain states responsible under international law for such a deficit but only the international community of states as a whole.

D. The Sovereign Responsibility: Providing for the Legitimacy of International Standards and their Compatibility with International Law

12. States still play an essential role in the process of international rule-making. They continue to monopolize the creation of the hard law norms of international law. With regard to those non-state governmental, private and hybrid soft law standards which at least exert significant factual pressure towards compliance (determinative standards), the states bear an international legal responsibility to provide: They have to provide for the legitimacy of those standards as well as their compatibility with international human rights norms and (where applicable) also other international legal norms (legality). The stronger the pressure towards compliance exerted by soft law standards (i.e. the higher the degree of their legal force), the greater the states' responsibility to provide for their legitimacy and legality.

13. In view of the contemporary acquis in public international law, the body to carry out that responsibility to provide legitimacy and legality ultimately is the international community of states, i.e. the entirety of sovereign states that are called upon to participate on equal terms in the consensual development of public international law. The individual states and associations of states bear the share of that responsibility which corresponds to their influence on the development of international law. In some cases, they can be entitled and even obligated to carry out their responsibility to provide unilaterally, at least for the time being.

14. The legitimacy component of the responsibility to provide is based on the international legal right of self-determination of peoples, the legality component on the principles of state responsibility for internationally wrongful acts (which are attributable), on the protective duty under international human rights law and potentially other specific obligations to act under international law. While the legitimacy problem is being taken more and more seriously in standard-setting practice, the legality problem is still being neglected.

15. Their responsibility to provide does not prevent states from transferring rule-making powers to international or supranational organizations, nor from privatizing rule-making. For on the one hand, a well-organized international community has greater problem-solving capacities and can also more reliably secure the international rule of law than individual states, each acting on its own. On the other hand, the mobilization of private expertise and commitment improves the regulatory quality and effectiveness. The additional amount of societal autonomy which goes along with privatization moreover corresponds to the concept of freedom and strengthens the human rights component of the international rule of law.

16. The core content of the right of self-determination, in conjunction with the principle of sovereign equality of states, consists in the effective opportunity of every people that has established a state, acting through its democratically legitimated government,

to exercise an equal amount of influence on the content of the international normative order. It is that order which in the common interest of humanity imposes hard or soft restrictions on every people's political, social, economic and cultural decisions that are taken in the exercise of their right of self-determination. Therefore the international normative order must, in the current state of development of international law, remain subject to the collective control of the community of states even where standard-setting is delegated or relinquished to international organizations or private persons.

17. a) The legitimacy of international standards can be based on state consensus and thus the democratic legitimation on the part of the peoples of the states; on the direct participation of the addressees, other stakeholders and civil society in standard-setting; on the comprehensive discourse in preparation of the standard-setting; on the adequacy of both the standard-setting and the standard-application procedure; finally on the private autonomy (protected by human rights) of those persons who voluntarily submit to the standards. All these approaches elaborate important aspects which can provide an adequate legitimation basis, especially if several of them are combined.

b) Because of the right of self-determination, however, the ultimate democratic responsibility of the international community of states must be preserved for the time being. The other legitimation factors can therefore only be taken into account as supplements which are to a certain extent capable of compensating weaknesses with regard to the democratic legitimacy of standards.

18. This ultimate democratic responsibility of the international community of states for the international normative order must be maintained until such time in the distant (perhaps utopian) future when that responsibility can be assumed by an international or supranational authority that is directly supported by the right of self-determination of the peoples without the intercession of states. Already today, however, we need to work towards the realization of a supplementary legitimation component in the form of a direct representation of the peoples on the international level and in particular the world level which operates in addition to the legitimation via the states. Gradually, the monopoly of states on the democratic legitimation of international norm- and standard-setting would then be replaced by an EU-like system of dual legitimation based simultaneously on the states and the directly represented peoples.

19. The personal, procedural and substantive legitimacy of the standards need to be provided for. The insufficient realization of one of those criteria can be set off by a higher degree of realization of another criterion. It is crucial that on balance the different amounts of legitimacy input under those criteria add up to a sufficient overall level of legitimacy.

20. The personal legitimacy of the standards rests primarily on the democratic mandate bestowed upon the standard-setters by the peoples of the states, secondarily on the special expertise of the standard-setters or the self-regulatory (autonomous) standard-setting directly by the addressees. The procedural legitimacy is based on the transparency, inclusiveness and quality of the standard-setting procedure. The substantive legitimacy as the most important component depends on the material correctness and adequacy with regard to the particular situation (i.e. the "just" character) of the set standards.

21. Legitimacy deficits of the original standard can be subsequently compensated by a juridification decision which is legitimate for its part. Deficits concerning the personal and procedural legitimacy of a standard are readily made irrelevant by a juridification

decision which is personally and procedurally legitimate. In contrast to that deficits concerning the substantive legitimacy of a standard are passed on if the hard law norm does not strike a new balance of interests which is more just. Depending on the source of the soft law standard, there can be more or less serious cause for its substantive re-evaluation and, if necessary, its modification before it is included in the hard law.

22. a) The legality component of the responsibility to provide requires the states' unqualified responsibility for the compatibility of standards with international law only in the following two cases: either if the setting of the standards as such or their juridification is attributable to the states according to the customary international legal rules on state responsibility or if a circumvention in the sense of Art. 61 of the ILC Draft Articles on the Responsibility of International Organizations of 2011 has occurred.

b) Within the scope of the states' protective duty concerning human rights, there is no unqualified state responsibility for each and every human rights violation by non-state standard-setters. Otherwise the delegation or relinquishment of standard-setting by the states to autonomous supra-state public authorities (internationalization with the accompanying increase in effectiveness) or private persons (privatization with the accompanying increase in private autonomy) would be made exceedingly difficult. This would not be in the interest of a world order based on the international rule of law. Rather, states comply with their protective duty if they only take adequate precautions to ensure that human rights are respected also by non-state standard-setters. This precautionary duty is probably less strict where standard-setting is privatized than where it is internationalized, because privatization leads to an increase in the overall level of freedom.

E. The Road: Cooperative Realization of the International Rule of Law through Relative Normativity

23. The relative normativity which soft law standards acquire in the juridification process transforms them into an essential factor for the realization of the international rule of law. Relative normativity does not pose a threat to the international legal order but rather a chance coupled with the task for the international community of states continuously to ensure the legitimacy and legality of the standards.

24. It must be ensured that the exercise of delegated or relinquished standard-setting and standard-implementation power permanently meets the substantive requirements of "just" regulation and does not only serve the assertion of the special interests of powerful actors. For that purpose, the primacy of political decision-making on the national and international level must be safeguarded. Such primacy is an essential ingredient of "good governance" on both levels.

25. In view of their responsibility to provide for the legitimacy and legality of international standards, the states remain central components of all multilevel systems of governance. On the other hand, they share international governance with other international actors of public and private character. Together they work towards the international rule of law, but the ultimate responsibility remains with the international community of states as long as there is no supra-state public authority with sufficient democratic legitimacy. Although one can undoubtedly discern efforts by the states to fulfil their responsibility to provide, they have not yet been completely successful in this regard.