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Summary

The interplay of legal sources from a public international law perspective

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I. Introduction: Monism, Pluralism, Hybridization

1. Beyond the horizon of an inter-State law, present-day international law deals with a pluralism of actors, subjects and legal effects – from jus cogens to soft law. A monist conception of law fails to adequately reflect the pluralism of legal orders, because a hierarchical concept of law cannot grasp the multiplicity of legal orders and their respective legal effects.

2. The thesis of the hybridization of legal orders is an expression of this pluralism. Legal systems such as the "hybrid" criminal tribunals for Sierra Leone, Cambodia and Lebanon apply both international and domestic penal law to prosecute crimes against international law, whereas "mixed" implementation régimes include non-State actors and provide them with a limited treaty-making capacity. It is the task of legal research to analytically separate different legal orders as far as possible and to differentiate between their legal effects. In the last resort, not the legal orders themselves are hybrid, but rather the actors and the subjects regulated by them.

3. The pluralism of inter- and supranational legal orders also produces a multitude of legal sources and methods of interpretation. But this pluralism does not necessarily lead to a falling apart of the complete legal order that is kept together by a common régime of sources and basic principles. Citizens may be confused by the differing claims of authority that makes it difficult to follow them. The task of legal research, but also legal decision-making, lies in the clarification of the scope and the limits of differing legal orders.

II. From Bilateralism to the establishment of common principles

4. Bilateralism necessarily fragmented classical international law. Rights and duties of different States do not coincide; neither do the mechanisms of implementation. Contemporary international law is pluralist by means of different institutions based on several multilateral treaties. This fragmentation a fortiori also applies to regulations that include private next to public actors, such as investment protection and arbitration.

5. The Charter of the United Nations has established basic principles and consensual mechanisms for the implementation of international law that can also be applied to "hybrid" actors. However, the Security Council as most important organ of the United Nations does not consider itself formally bound by these principles, regardless of the proviso contained in Charter Articles 24 para. 2 in conjunction with Article 1.

6. Neither the recognition of *jus cogens* nor the conflict rule of Article 103 of the UN Charter can avoid contradictory regulations. Rules incorporating public international law on law-making and interpretation, such as Art. 21 of the Rome Statute, Art. 3 of the WTO Dispute Settlement Understanding or Art. 42 of the ICSID Convention

contribute to complexity, but are typical for the development of a pluralist network of regulatory régimes.

III. Sources doctrine and legal pluralism

7. The classic sources triad of Article 38 of the ICJ Statute cannot maintain the unity of public international law by connecting different legal orders. However, it provides a modest blueprint for establishing a decentralized legal system that allows for the filling of lacunae by reference to the legal practice of relevant actors.

8. *Treaties* are not only concluded between States, but also between States and non-State actors, from multinational enterprises to armed groups under the law of armed conflict. As explicit, concrete, and detailed regulation, multilateral treaties can produce legal effects beyond the State parties. This is also the case with regard to treaties between parties with unequal legal status.

9. In treaty interpretation, traditional conflict rules such as *jus cogens*, *lex posterior* or *lex specialis* commonly lead to acceptable results when combined with the presumption of coherence with international rights and duties in other legal systems, towards other parties and with custom and subsequent practice ("principle of systemic integration" in Article 31 para. 3 of the Vienna Convention on the Law of Treaties). A recourse to general international law can reduce indeterminacy, help to fill gaps and provide explicit (Article XX GATT) as well as implicit (state of necessity) reasons of justification for *prima facie* violations of the law.

10. It is impossible to decide in the abstract whether and how far gaps in the law are to be filled by the presumption of the freedom of States (*Lotus*) or by community interests. In the last resort, collective and individual interests have to be balanced against each other. International constitutional principles have found their expression in the UN Charter and in the "bill of rights" contained in universal and regional human rights treaties. However, it seems that these mechanisms of interpretation are not sufficiently used in arbitration so far.

11. *Customary law* is traditionally based on State practice, but also takes "verbal practice" into account, in particular with regard to duties of abstention. It thus contains a normative element that also gives weight to the legal practice of "hybrid" (sub)systems. *General principles of law* reflect a process of gap filling by comparative recourse to the generally acceptable practice of domestic legal orders and have gradually developed into general principles of *international* law. As a law between equal subjects, international law thus has a problem-solving capacity also for incomplete "hybrid" legal orders. Pre-condition for the acceptance of a general principle of law in this sense is the fairness of a rule that brings the interests of all sides into balance.

12. Finally, national courts increasingly play a normative role in the use of judicial decisions for the determination of custom and general principles. With regard to doctrine, collective bodies such as the International Law Commission, but also private associations such as the Institut de droit international or the International Law Association play – due to their pluralist composition – a more important role than individual authors ("publicists"). In addition, one may think of pluralist or hybrid normative bodies.

13. Further complexity is added by the different "hardness" of rights and duties. Soft law supports interpretation and gaps filling in the law, but also the search for general

standards of behaviour. Art. 38 para. 1 lit. d ICJ Statute thus describes a process of „hardening" of standards to generally accepted principles by legal practice.

14. Non-State actors are in general not legitimized to produce law with binding force for third parties. Thus, their jurisdiction over third parties either derives from consent or from democratic decisions by States or other more or less democratic holders of public authority. Examples for consent-based régimes are investment law and the law of armed conflicts. In addition, non-State actors play an important role in the process of law-making and its further development by providing expertise, but also by interpreting and applying international rules. Finally, legal authority can be broadly delegated to them.

15. Clauses opening a legal system enable a mutual effect of legal orders on each other. Art. 3 DSU, Art. 21 ICC-Statute or Art. 298 UNCLOS, Art. 42 ICSID Convention and Art. 15 UDRP Rules, but also Articles 41 and 46 ECHR or Art. 345 ff. TFEU provide important examples that enable, but also limit the mutual impact, each in a specific fashion. Similar opening rules are contained in domestic legal orders such as Art. 23, 24, 25, 59 para. 2 German GG or Article VI of the U.S. Constitution. In addition, international legal rules are applied to non-State actors, as in the ICSID example. The judicial actors owe each other mutual respect reaching, wherever possible, „practical concordance" between rights and duties emanating from different legal orders. At least, diversions from established legal standards need to be justified.

IV. Legitimation and Recognition of plural legal orders

16. As far as they establish duties for third persons, it is not sufficient to legitimize hybrid and pluralist legal orders by the consent of the original parties or the fulfilment of their function. Pursuant to a democratic model of legitimacy, only the democratic State – based on a plural demos and governed by changing majorities that protect the rights of minorities – is legitimized to regulate also against the individual will of the subjects of the law. However, a large space is left open for self-regulation that requires the participation of those subjected to the respective régime.

17. For the foreseeable future, the democratic deficit of international regulation can be mitigated only by tying the delegation of powers to international institutions to the domestic democratic process. National parliaments should participate at an early moment in the negotiation of international agreements, but also in their national implementation. In a multi-level system, the democratization of international decision-making – for example by introducing international or regional parliaments or by the participation of the persons concerned – and links to national parliamentary processes provide a maximum of democratic legitimacy, in which ideally all decisions are based on a delegation of limited enumerated powers from the democratic State to the international legal sphere.

18. It is the main task of international as well as national courts and tribunals to balance different principles of decision. In a multi-level system, they can fulfil this task not by insulating themselves, but rather by engaging with each other, in particular when this is done in a critical fashion. National courts have developed mechanisms for such a dialogue of courts and tribunals in the European framework, but they can be generalized also beyond. Only rarely do they allow withdrawal from international obligations,

but they prefer a harmonizing interpretation over re-negotiation or confrontation. For that purpose, interpretation may occasionally test its limits.

19. Together with the other members of the European network of constitutional courts, the German Federal Constitutional Court has developed three "counterweights" to the democratic deficit of international institutions and their decisions. How far these criteria can be transferred to the relationship between different international legal orders remains to be clarified.

a) The "Solange" ("so long as")-jurisprudence has developed into a general topos of the inter-relationship of different legal orders. Equivalence rather than identity of human rights protection does not only describe an existing relationship between legal orders, but also circumscribes the conditions for their reciprocal acceptance.

b) In order to respect the *identity* of another legal order it is necessary to keep their basis of legitimation in mind. We find a scale from the untouchability of the core principles of a constitution by other law – such as in Articles 23 (1) and 79 (3) of the German Grundgesetz – to the more general *ordre public* with regard to the implementation of foreign or private law within another domestic legal order.

c) Different legal order of the same rank can exist only next to each other if they stick to their respective jurisdiction. The limit of acceptance is reached when a Court obviously disregards its competences or powers, in other words, when it acts *ultra vires*. In exceptional cases, this can lead to divergence and denial of implementation. In general, Courts and tribunals will prefer to interpret and apply their law in conformity with other legal orders with jurisdiction on the matter.

V. Conclusion: Towards a plural world system of rights

20. A solution of conflicts of powers can only be found in a process of mutual "give and take", in other words, in a dialogue over time between legitimate holders of power, be they judicial or non-judicial, state or non-State. No legal system – even not the national one – can manage the normative pluralism and multiple allegiances in the contemporary world alone. General principles of law common to all major legal orders and/or based on international consent provide a common frame. Thus, pluralism does not constitute an argument against but rather for the observance of the law and thus for the concordance of the rights of the one with the rights of the other – in other words, an argument in favour of accepting and observing a global system of law – or, rather, of reciprocal rights and duties.