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Summary

The age of globalization has brought about significant changes in the substance as well as in the structure of public international law – changes that cannot adequately be explained by means of traditional theory and doctrine. The concept of a horizontal legal order composed of sovereign States is challenged by the increasing importance of international organizations, the introduction of elements of non-consensual law-making, as well as by law-enforcement by States which are not directly affected. The concept of International Community Law, as presented in this thesis, aims to incorporate these changes in a comprehensive manner, to retrieve patterns for handling them in practice, and to depict perspectives for future developments. It identifies the reference to the international community as a common denominator of many developments in international law: The inclusion of all States as well as of every human being in the international community justifies and legitimizes a more progressive approach to international law with a stronger focus on community interests. The conclusions of the study can be summarized as follows:

I.

The term "international community", in principle, seems to be suited to encompass the structural change of the international legal order (*Chapter 1*). Regardless of its vagueness, the term community must be understood as an antipode to the concept of society. The concept of community contains a higher degree of interaction and connectivity between its members (*factual element*). Furthermore, it implies commonly shared values and interests which transcend the singular interests of its members and which are pursued by the community (*normative element*). For an international community to exist, there must, therefore, be an enhanced global interaction, one that can easily be recognized in the age of globalization (*Chapter 2*). From the perspective of public international law, the phenomenon of globalization proves to be of relevance not only because of the increasing interconnectedness of all international actors but also because of the significance of global challenges. Furthermore, there are remarkable tendencies towards the development of a transnational society in which national borders lose their relevance.

These developments are accompanied by a decrease in significance of the single State which does no longer have the ability to govern transboundary social and political processes on its own. These developments, as well as the challenges presented by globalization, lead to an increased closeness and interconnectedness of all members of the international community. At the same time, they expose the factual need for advanced legal cooperation and integration on the international plane.

What is harder to determine is whether commonly shared interests and values which could constitute the *normative* element of the community concept exist at the international level. In international legal theory, a number of approaches have been developed which focus on the idea of an international community (*Chapter 3*). The proponents of these theories usually emphasize the function and significance of law for the formation of an international community. However, in doing so, they run the risk of overestimating the integrative function of law. Common values and interests must hence not only be reflected in international law, but also recognized in social reality (*Chapter 4*). Whether such values and interests are, in fact, universally shared, is subject to controversy within different academic disciplines. Critics highlight the constraints and risks of an international community which is dominated by States and political antagonisms. However, the concept of an international community appears less utopian if the perspective is not narrowed to a community of States but complemented by the idea of humanity. Despite all cultural differences, elementary characteristics, abilities and ambitions are shared by all people; State boundaries and nationality prove to be inappropriate foundations for global ethics. The existence of community values and interests seems even more realistic if based on the concept of an *overlapping consensus*, meaning a political consensus that allows for commonly shared values regardless of ideological, religious or cultural justifications. Finally, the concept of an international community must be based on universal values and not only on western ideas and it must allow for cultural diversity and autonomy.

Modern public international law does not only entail norms which reflect interests of States but increasingly experiences the emergence of norms which comprise values of the international community and humanity. These internationally recognized and accepted values and interests indicate a core global consensus and constitute the foundation for the existence and progress of an international community.

II.

Against this background, the question arises to what extend the idea and concept of an international community is already reflected in the structures of the international legal order. In this regard, the organizational structure as well as the functions of law-making and law-enforcement are analyzed in order to determine if they contain elements of an International Community Law.

The international community is not fully institutionalized (*Chapter 5*). It is not comprised of organs which could be compared to the inner organization of the nation State and which would pursue the interests of the community in a representative and effective way. Nevertheless, actors can be identified – in the institutionalized as well as in the non-organized international community – which act on behalf of the international community in individual cases in a discretionary manner. Those actors can, therefore, be conceived of as organs of the international community in a functional sense. Within the institutional structure of the United Nations, the General Assembly can be understood – at least to a certain degree – as a representative of the international community. The Security Council, on the other hand, cannot be regarded as a community organ without reservations. Regional organizations allow for supranational integration within regional boundaries. This degree of integration is not imaginable on a global level. However, regional organization may display excluding tendencies. The behavior of States is not fully in alignment with community interests. Nevertheless, States increasingly engage in performing functions for the community. Non-governmental actors, and non-governmental organizations in particular, seem to link the state-centered international system to the interests of peoples and of humanity; they are, however, not themselves fully legitimized.

With regard to the sources of public international law, first signs of the development of an International Community Law can be identified in numerous instances (*Chapter 6*). At first glance, the creation of international law seems to remain grounded in a concept based purely on inter-state action. The sources of international law as they are laid down in Article 38 (1) of the Statute of the International Court of Justice are shaped by the principle of consent, thereby incorporating and expressing the principle of State sovereignty. Generally speaking, a State cannot be bound by a rule of international law without or against its will. This paradigm of international law constrains the development of universally applicable international legal norms designed to safeguard community interests. The opposition of even a single State can lead to the failure of

ambitious regulatory projects and may serve as a negative role model for other States.

Structures of a body of an International Community Law can be detected in instances where the principle of consent in international law-making is softened or suspended. With regard to the development of international treaties, the freedom of action of the single State is restricted by the institutionalization of the treaty-making process, the practice of adopting treaty drafts by majority vote or consensus, as well as through the influence of non-governmental organizations on the treaty-making process. In the law of reservations to multilateral treaties, the community principle partially supersedes the conceptual fixation on the will of the single State. Even the principle of *pacta tertiis nec nocent nec prosunt* does not apply without exception. It is generally accepted that treaties may produce legal effects even for States that are not parties to them. This is the case at least for the Charter of the United Nations as well as for certain treaties constituting an international regime or status. With regard to the amendment of treaties as well as the withdrawal from treaties, the will of the single State may be neglected for the benefit of the international community. Finally, an analysis of the law of State succession discloses a tendency to assume the continuity of treaty obligations for the sake of community interests.

Like treaty law, customary international law is generally meant to be based on the principle of State consent. However, it also incorporates non-consensual elements. The concept of customary international law enables the international community to create universally binding law, even against or without the will of single States. The conceptual vagueness of customary international law in particular makes for a wide margin of appreciation in the identification of customary norms. The creation of customary international law is handled more and more "flexible", thereby allowing for the integration of community interests in positive international law. This potentially community-oriented dimension of customary international law becomes most apparent in the transformation of international treaty provisions into customary norms. Not much attention is paid to the *empirical* study of the behavior and statements of States; instead, the customary nature of certain treaty norms is presumed by means of a results-based approach. Thereby a *normative* and highly subjective element is established in the process of the development of customary international law – an element which is rather incompatible with the very concept of customary law but which makes the law-making process receptive to the values and interests of the international community. There is also a tendency to assume the

universal validity of customary international norms as well as to bind dissenting States contrary to the principle of *persistent objector*. Furthermore, the very concept of a consensual foundation of customary international law seems flawed insofar as it is based on the assumption that a State which remains silent to the creation of a customary norm implicitly consents to its creation. This assumption proves to be merely a legal fiction which is not grounded in the reality of public international law. As a consequence, the principle of consent is weakened by the general shift from an empirical law-making process to a more normative approach to customary international law, in which the will of the State plays only a minor role. Therefore, customary international law creates an opening through which values and interests of the international community may be incorporated into the legal system. At the same time, it enables powerful States to pass off their own subjective ideas of international law as the state of international law in effect. In addition, the fortification of customary international law with normative elements distorts the very concept of customary law and thereby threatens the objectivity and normativity of this source of law.

General principles of international law – as defined in Article 38 (1) *lit*. c) of the Statute of the International Court of Justice – do not fully adhere to the principle of consent, either. Their existence does not depend on a consensual act of will of States and their application is subject to a margin of appreciation much like the identification and application of customary international law. Therefore, they also are a potential point of entrance for the influence of community interests on the legal system.

Law-making through international organizations constitutes the most manifest form of international legislation. It is not fully reconcilable with the principle of consent either. The consent of the State to such legislative acts of international organizations is said to be invested in the founding document of the respective organization. However, the idea of an "anticipated consensus" is a mere legal fiction considering that competences are open to interpretation and that international organizations tend to develop a dynamic of their own over time.

The quasi-legislative function of the international community manifests itself most visibly with respect to peremptory norms of international law (*ius cogens*). The international community as a whole decides whether a norm of international law has a peremptory character. The dissent of a single State is irrelevant. Thereby, the principle of consent is noticeably breached. However, the development of a norm of *ius cogens* initially requires the existence of a norm which is created according to

the regular sources of international law. Against this background, a State cannot – theoretically – be bound by a peremptory norm against its will. The practice of identifying peremptory norms is, however, not primarily focused on the consent of States. Due to the vagueness of the criteria for the creation of *ius cogens*, the existence of such norms is regularly only postulated. In this process, ethical and political considerations usually play a more dominant role than the will of States. It is regularly not examined if a peremptory norm can be based on the will of States. Fundamental interests of the international community can, therefore, exert an influence on positive public international law by means of *ius cogens*. There is, moreover, a tendency within the theory and practice of international law, to accord a general precedence to the community interests embedded in *ius cogens* over the will and interests of single States. Furthermore, the legal consequences generated by *ius cogens* are continuously expanding. This increase in importance of *ius cogens* strengthens the position of the international community within the international legal order. At the same time, the boundaries of the legal concept of *ius cogens* become blurred, and the question comes to mind whether the steady extension of the scope of application of *ius cogens* does not overburden this concept.

In conclusion, the law-making process within the modern international legal order does not fully adhere to the principle of State consent. International norms can emerge without or against the will of single States and unfold binding effect even for dissenting States. This way of law-creation is, however, only seldom openly acknowledged, rather, it can be found within the practical application of the sources of law. In this context, a number of patterns of reasoning can be identified which are put forward to justify non-consensual law-making without or against the will of single States: the existence of a community interest, a humanitarian concern, the participation of representative components of the international community and, in particular, of international organizations, as well as a law-making process which is open to all States.

The concept of an International Community Law cannot only be identified within the process of law-making but also with regard to law-enforcement (*Chapter 7*). The traditional approach to law-enforcement which is based on the bilateral structure of legal relations between States cannot ensure the effective compliance with norms which incorporate community values. When community interests are at stake, there is not always a particular State specifically affected by a violation. Centralized law-enforcement, on the other hand, is far from being fully developed on the international plane and can also not guarantee that

community norms are being respected. A "third approach" to law-enforcement in modern public international law is the concept of collective but decentralized law-enforcement. The theoretical basis for this approach lays within the concept of obligations *erga omnes*, obligations which incorporate fundamental community interests and which are owed by a State not only towards single other States but also towards the international community as a whole. As a consequence, every State has an interest in the fulfillment of these obligations by every other State and is legally entitled to claim a violation of such an obligation before international courts (*ius standi*). Whether, in addition to that, every State has the right to resort to countermeasures – apart from military violence – as a reaction to the violation of an obligation *erga omnes*, is subject to controversy. This way of enforcing international law by States not directly affected by a breach forms part and parcel of international practice. It may also promote compliance with norms that incorporate interests of the international community. At the same time, this approach may be abused by single States which may pretend to honor community interests while, in fact, pursuing their own interests. Therefore, it seems necessary to ensure that enforcing States truly act in the interests of the international community: As a matter of principle, modern public international law shows the tendency to allow every State to react with countermeasures to the breach of an obligation *erga omnes*. But the recourse to such countermeasures has to be in accordance with the will of the international community which has to be safeguarded by substantive law as well as institutionally. In this context, international organizations play an important role, in that they may articulate the will of the international community and either approve or disapprove of countermeasures of single States.

III.

These developments in the context of the organization as well as of the functions of law-making and law-enforcement in the international community raise the question of how they can be explained in terms of legal theory and methodology. The concept of an International Community Law, as developed in this thesis, tries to approach these developments normatively by construing the international community as a legal person under public international law and, furthermore, by acknowledging International Community Law as an independent source of public international law. In addition, the concept is meant to encompass the structural change of the international legal system from an international law of coexistence to an international law of cooperation to

an International Community Law as a third step in the development of the international legal order.

In order to grasp the structural change of the international legal system, the argument is put forward that the international community as a whole is awarded legal personality under modern public international law (*Chapter 8*). Within the context of *ius cogens*, of obligations *erga omnes*, as well as in the non-consensual aspects of law-making, the international community is endowed with rights of its own. Against this background, the legal personality of the international community can be derived by applying an approach of inductive reasoning. The international community may not have independent organs, but the actions of single international actors can be attributed to the international community in particular instances. Single States, international organizations, and NGOs thereby become community organs in a functional sense. This concept of a legal personality of the international community is neither meant to extend the competences of the community, nor can concrete legal consequences be derived from it. Rather, it is designated to highlight the connection between the individual legal concepts which reflect community interests and the actions of single actors in the interest of the community. Thereby, it is clarified, for example, that States, when objecting to violations of obligations *erga omnes*, do not exercise their own subjective rights but rather enforce the rights and protect the interests of the international community on a trust basis. Their actions must, therefore, be in accordance with the interests of the international community as a whole.

In addition, the analyzed mechanisms of non-consensual law-making without or against the will of single States in the interests of the international community are conceptualized as an independent source of international law *de lege lata* (*Chapter 9*). Non-consensual law-making is part and parcel of modern international law but cannot be encompassed by the traditional triad of sources as laid down in Article 38 (1) of the Statute of the International Court of Justice. Contrary to the view of some scholars, neither does the notion of *ius cogens* adequately explain non-consensual law-making, for its conceptual background lies not in law-making but in ascribing certain legal consequences to an already existing norm. It is, therefore, necessary to assume the existence of an independent source of International Community Law through which the international community as a whole can perform its legislative function.

On the basis of an analysis of the arguments put forward to justify non-consensual law-making within the traditional sources of international law, the following requirements can be identified for the development

of a norm of International Community Law: Formally, the process of law-making must be open to all States. The norm then has to be accepted by the international community as a whole. This acceptance has to be based on the overwhelming majority of all States, but statements by international organizations have to be taken into account as well. Substantively, there must be a community interest, meaning an interest accepted by the international community as a whole. Moreover, law-making without or against the will of a State is only acceptable when the pursued community interest outweighs the legitimate interest of the State concerned. Decisions, declarations and resolutions of international organizations as well as of "world summits" can be seen as significant indicators for the existence of a norm of International Community Law. Also, much importance has to be attributed to the decisions of the International Court of Justice. A norm of International Community Law is universal and binds all States, regardless of whether they participated in its development, accepted the norm, or even objected to its formation. The proposed concept of International Community Law serves to explain and legitimize the instances of non-consensual law-making – as discussed and widely accepted within the traditional sources of international law – without distorting the conception of the traditional sources of international law.

From the perspective of legal theory, this form of non-consensual law-making can best be explained by means of a pluralist approach, which understands natural law, positivism, as well as sociologically inspired theories, not as mutually exclusive but as different perspectives of the concept of law.

Finally, the analyzed developments lead to the assumption that the international legal order has reached a new level of development which focuses more on values and interests of the international community (*Chapter 10*). Beyond its normative meaning, the concept of an International Community Law, therefore, also has a descriptive function and serves to conceptualize the structural change of the international legal order. The traditional ideal types of an international law of coexistence and an international law of cooperation are complemented by an International Community Law as a third approach to reflect the legal order. Against the background of globalization, International Community Law introduces an element of vertical structure into public international law. It accentuates the increase in significance of international organizations as independent legal entities and political actors above the State level, a development which is culminating in the assumption of a legal personality of the international community as a whole. With re-

gard to the substantive norms of public international law, there is an increase in norms which are designed to safeguard or to pursue community interests. Law-making departs from the will of single States and is more aligned with and increasingly focuses on the will of the international community as a whole. Law-enforcement becomes disconnected from the traditional bilateral structures of legal relations between States. Even if the functions of law-making and law-enforcement are still performed by States and are *de facto* dominated by their interests, the analysis shows that the State, rather than appearing as a disengaged subject of international law, presents itself as a functional entity of the international community. In return, the international legal system pays more attention to the individual and his well-being. Sovereignty can, therefore, no longer be equated with independence but is restricted to an autonomous scope of action within the legal community. The concept of sovereignty is undergoing a functional change in which the right of the State to participate in international decision-making processes is emphasized more than the freedom of the State.