Leiden Journal of International Law (2017), 30, pp. 305–326
 doi:10.1017/S0922156517000012

INTERNATIONAL LEGAL THEORY

Intertwinement of Legal Spaces in the Transnational Legal Sphere

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Abstract
This article analyzes the interactions between norms formally stemming from different orders and regimes so as to demonstrate how and to what extent the legal spaces composing the transnational legal sphere are intertwined. Furthermore, it addresses the consequences of the intertwinement and suggests a fresh approach to the traditional concept of legal orders: it stresses a norm-centered rather than system-centered understanding of the transnational legal sphere. It argues for a norm-based strategy in order to understand the phenomenon of intertwinement, analytically deducing the relationship of the legal orders from the relationship of the legal norms.

Keywords
concept of legal orders; conflict of norms; hybrid norms; interactions of legal norms; legal space

1. INTRODUCTION

The transnational legal sphere is subject to a process of legal intertwinement. Although not possessing tight systemic structures, the transnational legal sphere is characterized by the coexistence of multiple legal orders and regimes. These legal orders and regimes are not isolated from each other; phenomena of interaction have long-since been noted and acknowledged by legal scholars.[1] Examples of this interaction include the creation of norms on the basis of legal standards originating from different legal orders or regimes, the interpretation of legal norms in consistency with standards stemming from 'external' legal orders and regimes (e.g., domestic law norms being interpreted in consistency with international law standards) or the emergence of common principles linking different orders and regimes. In particular, this interaction has been triggered by the development of international law: a changing purpose and content of international law norms and, as a result, an intensified interaction with domestic law but also with norms of different international

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1 See, e.g., F. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (2002); A. Peters, 'Fragmentation and Constitutionalization', in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016) 1011; I. Raducu and N. Levrat, 'Le métissage des ordres juridiques européens', (2007) *Cahiers de droit européen* 111; M.A. Young, *Regime Interaction in International Law – Facing Fragmentation* (2012).

law regimes, i.e., fragments of the international legal order characterized by partly autonomous systemic structures.

However, engagement with this reality of the legal sphere has often been limited to affirming the general phenomenon of interaction. This is due to the fact that the analysis focuses generally on the interrelations of legal orders as entities. Questions posed often involve aspects such as an autonomy or dependence of legal orders, a rank relationship between legal orders or regimes and how legal orders deal with the influence of external legal norms. Choosing legal orders as primary subjects of the analysis, however, results in a limited analytical outcome. It blurs the vision for what actually happens on the level of the legal norms. Accordingly, the phenomenon of intertwinement is not captured to its full extent. An important aspect of the process of transnationalization of international and domestic law remains unaddressed.

The objective of this article is to go a step further by analyzing how the interaction of legal norms leads to a *norm-based intertwinement* of what this article will call the participating 'legal spaces', a term that, as will be shown shortly, stresses the permeability of the systemic structure formed by a group of legal norms. Beyond mere interaction of legal spaces through their courts or other actors, these legal spaces are closely connected or intertwined through the various connections and links existing between their legal *norms*. The interaction is not only factual but norm-related or normative. Whereas factual interaction occurs, for example, when external legal norms are used as a pure source of inspiration for the creation or application of internal norms, normative interaction touches upon the normative claim of a legal norm. In order to understand the normative rather than merely the factual dimension of this intertwinement, it is necessary to examine the impact of different forms of interaction between legal spaces on the legal norms concerned. Consequently, it is claimed that there exists a need for a conceptual shift from the legal order as an entity towards the individual legal norms as an object of analysis and as a point of reference of the intertwinement.

Further, the interactions of norms within the transnational legal sphere are complex. This complexity is created by a plurality of legal sources which are not isolated from each other but actively interrelate. It is based on the assumption that the input of normativity, i.e., the ability to create rights and obligations, into the transnational legal sphere is multifold. The sources for legal normativity are not situated exclusively within one legal order or within one legal regime of international law like criminal law, labour law, human rights law or other. They are spread across the transnational legal sphere. From the perspective of one individual norm or from the perspective of the norm-applying actors, the borders of the legal orders have become permeable. However, this coexistence of sources for legal normativity only constitutes the precondition when it comes to analyzing the interactions of norms within the transnational legal sphere. In order to understand the more specific nature of the intertwinement, it is necessary to analyze what forms the interrelations of norms take and what repercussions these interrelations have for the legal orders and regimes concerned. In doing so, this article argues: first, the focus is to be on the norms when the interrelations of norms in a transnational context are

analyzed and second, such an analysis allows the determination of consequences for the relationship of legal orders and regimes as a whole.

In other words, understanding the phenomenon of intertwinement requires that we analytically go from the norm to the order and not from the order to the norm. The analytical strategy needs to be inverted: it aims at deducing the relationship of the legal orders from the relationship of the legal norms. Seemingly theoretical, this shift is crucial for the practice of norm application in the transnational legal sphere. It makes the necessary differentiation possible.

Thus, the suggested conceptual shift will have two dimensions. Firstly, the primary *object* of the analysis will be the legal norms (not the legal orders as a whole) and the question as to how these norms actually interrelate and how this effects their own nature. Secondly, the conclusions resulting from this analysis will not be limited to the individual norms. Rather, in a subsequent step, the article will examine the *impact* of the interrelations on the level of the norms for the intertwinement of the legal orders as such. In this regard, the article will argue for a reassessment of the concept of legal order[2] and the opening of this concept in favour of a more permeable idea of *legal spaces*. The objective of using this term is to overcome the limitative, self-referential and inwardly-oriented nature that is inherent to the concept of legal order.[3] At the same time, it represents a more open concept that, although acknowledging systemic structures within groups of norms, does not consider these internal structures to be the exclusive point of reference for the individual norms of a group. Equally, this amounts to overcoming an order-based understanding of the transnational legal sphere.

The article primarily follows an analytical perspective: it aims to understand and conceptualize the intertwinement of legal spaces and it does not limit itself to noting the existence of such an intertwinement but actually captures its manifestations and characteristics. This analytical aspect is complemented by an underlying normative stance: the results of the analysis need to be taken into account when dealing with norms in the transnational legal sphere. However, what is not treated in this article is the normative question of legitimacy raised by the coexistence and interaction of different norm-creating entities.

The framework of the intertwinement as understood in this article is the transnational legal sphere. Here, I refer to a broader understanding of 'transnational', putting emphasis on the intertwinement of different legal spaces, in particular with regard to relations that could, from a classical standpoint, be labeled as international–domestic, domestic–domestic and international–international. Using the term 'transnational legal sphere', I accentuate an additional aspect. Here, 'transnational' does not stand so much for the attempt to overcome a state-related approach in the sense of 'trans-state', an approach that highlights the role of non-state

[2] On the development of this concept see G. Itzcovich, 'Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts', (2012) ELJ 358.

[3] For the classification of legal orders as autopoietic systems see N. Luhmann, *Das Recht der Gesellschaft* (1993), 38 et seq.; for further discussion see M. van de Kerchove and F. Ost, *Le système juridique entre ordre et désordre* (1988), 150 et seq.; A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001), 509 et seq.

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press

actors in the creation and application of transnational law.[4] Rather, the cross-border assumption that comes with the concept will be given a more norm-related accent. The article will primarily highlight the 'trans-*order*' dimension of transnational law: the cross-border phenomenon tackled here is one of transcending the borders of legal orders and regimes and ultimately the limits of the concept of legal order as such.

The first section of this article sketches the conceptual background constituting the need for a norms-based understanding of the intertwinement of legal spaces. In the second section, I analyze the various interrelations between norms formally stemming from different orders and regimes in order to demonstrate how and to what extent the legal spaces composing the transnational legal sphere are intertwined. The third section will address the consequences of this intertwinement and suggest a fresh approach to the traditional concept of legal orders as a normatively closed system by stressing a norm-centered rather than system-centered understanding of the transnational legal sphere.

2. The need for a norm-based understanding: Differentiation, graduation, hybridity

In the conventional engagement with the individual phenomena of intertwinement, the conceptual implications have not sufficiently been taken into account. This is primarily due to an important shortcoming of the traditional concepts that deal with the relationship between legal orders and regimes: they are limited by a system-related focus. Legal systems, i.e., orders and regimes, in their entirety constitute the object of the analysis whereas the individual legal norms composing these systems are not given the analytical importance that they deserve.

To begin with, the analytical questions that deal with the relationship between legal orders and regimes revolve around two central aspects: the potential autonomy and hierarchy of legal orders and regimes. Even if not always addressed explicitly, these aspects are the underlying points of reference when it comes to conceptualizing the relationship between legal orders. However, both aspects seem to address legal orders and their relationship in a way that only allows for absolute answers. If, for example, the concept of 'original' or 'theoretical' autonomy is defined as describing a particular legal order that is not derived from any other legal order,[5] a particular legal order can only be either autonomous or not. The coexistence of elements of both autonomy and derivation or dependence and therefore a gradual approach to the autonomy question (in its theoretical dimension)[6] is not part of such a concept. Regarding the rank question, the inherent absolutisms are even more pronounced. First, a hierarchy of legal orders seems to be opposed to a heterarchy of legal orders,

4 For an approach that involves the concept of hybridity in relation to the state/non-state relationship see P. Schiff Berman, 'Towards a Jurisprudence of Hybridity', (2010) 1 *Utah Law Review* 11.

5 T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', (1996) 37 *Harvard International Law Journal* 389; A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', (2010) *Zeitschrift für öffentliches Recht* 3, at 31 et seq.

6 For the other dimensions of autonomy see Peters, *supra* note 5, at 31 et seq.

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press

put forward, e.g., by legal pluralism,[7] here again apparently excluding differentiated or gradual approaches.[8] Second, under the premise of a hierarchical relationship, the question is asked in a way that aims at determining the superior rank of one entire legal order over the other. As a result, the structural relationship between legal orders is equated with a hierarchical relationship of norms stemming from different legal orders. It is crucial, however, to differentiate between the two. This allows the realization that there are two ways of approaching the question, i.e., deductive or inductive: cross-border relationships of norms being either the cause or the result of the relationship between legal orders. Finally, the rank question can be conceived in an order-related manner concerning the effect of a rank relationship: a hierarchical effect can be limited to a specific legal order (internal primacy)[9] or extended to all legal orders concerned (international primacy).[10]

Now, these system-related questions are, in addition, often addressed in a system-related manner. To start with, they can be answered from the perspective of one legal order or regime – that is a system-related perspective. Classical examples here would be to analyze what rank a specific domestic legal order grants to international law or whether, based on a dualist approach to the autonomy question, a transformation or incorporation of international law is needed or not,[11] whether a human rights law regime considers itself supreme over other international law regimes,[12] whether the EU legal order considers itself autonomous from the international legal order,[13] or superior to the legal orders of the member states. Such perspectivist approaches, although undoubtedly useful for certain contexts, cannot fully conceptualize the relationship between legal orders and regimes. They lead to contradicting or inconsistent solutions which undermine the functionality of the underlying concepts.[14] Only a 'holistic cognitive frame'[15] can respond to this problem.

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7 See, e.g., E. Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (2009), in particular Chapter 2. Further regarding legal pluralism see P. Schiff Berman, 'Global Legal Pluralism', (2007) 80 *Southern California Law Review* 1155; W. Burke-White, 'International Legal Pluralism', (2004) 25 *Michigan Journal of International Law* 963; J. Klabbers and T. Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (2013); A. Fischer-Lescano and G. Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of International Law', (2004) 25 *Michigan Journal of International Law* 999; P. Zumbansen, 'Transnational Legal Pluralism', (2010) 1 *Transnational Legal Theory* 141.

8 For an additional explicit focus on heterarchy see, e.g., D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in: J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), 326.

9 Terminology used by B. De Witte, 'Retour à «Costa», La primauté du droit communautaire à la lumière du droit international', (1983) RTDE 425, at 427.

10 Ibid.

11 See, e.g., D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011).

12 See, e.g., with regard to the peremptory character of the European Convention on Human Rights according to the jurisprudence of the European Court of Human Rights (ECtHR), S. Gardbaum, 'Human Rights as International Constitutional Rights', (2008) 19 EJIL 749, at 756 et seq.

13 See, e.g., R. Barents, *The Autonomy of Community Law* (2004).

14 S. Besson, 'How international is the European legal order?', (2008) *No Foundations* 50, at 60; also problematizing perspectivism: C. Tietje, 'Autonomie und Bindung der Rechtsetzung in gestuften Rechtsordnungen', (2007) 66 *Veroffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 45, at 51.

15 M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), 258 at 310.

However, even a holistic cognitive frame is no guarantee for avoiding a system-related element. As soon as the analysis aims at answering questions concerning the relationship of legal orders uniformly for the whole order in an absolute manner, the object of the analysis becomes too indistinct. As a result, the either–or scheme of opposing absolutisms continues to prevail. The most prominent example for this comes in the form of the traditional concepts of monism[16] and dualism.[17] These concepts are a reflection of the analytical choice between a unified and a fragmented legal world and therefore of a system-related either–or scheme. To an extent, this underlying approach can still be found in the concepts of constitutionalization and fragmentation of international law which in some of their forms oppose similar absolutisms.[18] Whereas constitutionalization includes elements of an at least partially unified or unifying international legal order, fragmentation highlights how the particular regimes drift apart. Other concepts follow a system-related approach when trying to generalize solutions developed from within a specific system. Doing that, they actually disguise perspectivism. An example in this respect is the attempt to use the private international law rules regarding conflicts of laws to encounter the complexity of multi-system conflicts of norms.[19] Also, an either–or scheme is reflected by some (rigorous) forms of the concept of legal pluralism[20] by accepting different outcomes of conflict resolution created by different legal systems and by different theoretical frameworks. This ultimately perpetuates the coexistence of solutions incompatible with each other.[21] It is the incompatibility of absolute positions that is accepted as legally insurmountable. As a result, the possibility to resolve these dichotomies in an integrative manner is not considered. The conceptual possibility of an 'as well as' approach instead of the strict 'either–or' approach is neglected.

Such approaches do not allow for a differentiated conceptualization of the relationship between legal norms and orders. The multi-dimensional nature of legal norms, regimes and orders, as well as of their interrelations, remains unconsidered. A more fruitful way to conceptualize the relationship between legal orders and regimes is to capture the relationship between legal norms stemming from them by taking a norm-based rather than system-based approach.

The differentiated understanding of the relationship between legal spaces that follows from the norm-based intertwinement of legal spaces has consequences for

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16 L. Duguit, *Traité de droit constitutionnel* (1927), vol. I, at 96; H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1928), 111; G. Scelle, *Précis de droit des gens* (1932), vol. I, at 39; A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), 17, 29 et seq.

17 D. Anzilotti, *Lehrbuch des Völkerrechts* (1929), 42; H. Triepel, *Völkerrecht und Landesrecht* (1899), 30, 32.

18 For a discussion of these concepts as well as of their interrelation see Peters, *supra* note 1, at 1011.

19 See, e.g., R. Michaels and J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law', (2012) 22 *Duke Journal of Comparative & International Law* 349.

20 See, e.g., N. MacCormick, 'Beyond the Sovereign State', (1993) *Modern Law Review* 1; C. Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', (1997) 16 *Law and Philosophy* 377.

21 For a critique see, e.g., N. Walker, 'The Idea of Constitutional Pluralism', (2002) *Modern Law Review* 317; M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), 258 at 311 et seq.

the two main aspects of the relationship between legal systems, the questions of autonomy and hierarchy of legal orders and regimes. The close interrelations of norms and especially the existence of multiple phenomena of *hybridity* (which will be elaborated in the next section of this article) exclude absolute positions. As will be demonstrated, a significant number of the legal norms within the transnational legal sphere are not exclusively attributable to one legal order or regime. Thus, the antagonisms of autonomy and dependence, of hierarchy and heterarchy, lose their analytical pertinence. An absolute statement concerning these categories is not possible; legal orders and regimes are not fully autonomous of, or dependent on, each other, they are not in a comprehensive relation of hierarchy or of heterarchy. Instead, different elements of autonomy and dependency as well as of hierarchy and heterarchy coexist. Regarding the latter, it is indeed necessary to differentiate between, on the one hand, the initial heterarchical premises that comes with a pluralist understanding of the coexistence of legal spaces and norm-creating entities; and on the other hand, the comprehensive, norm-based relationship between legal orders and regimes. The heterachical premise only excludes a fully-fledged hierarchy of systems and allows, to an extent, for a differentiated structure: heterarchical coexistence of norm-creating entities and of norm-applying actors, hierarchization of the relationship of norms for specific cases of conflict, heterarchical or hierarchical patterns that organize the relationship of norms beyond situations of conflict. Likewise, the question of autonomy or dependence can only find a gradual[22] answer: elements of dependency, e.g., in the form of imperative implementation resulting in hybrid norms, coexist with autonomous standards and yardsticks for norm creation and application. Here again, the premises might be one of autonomy of legal orders and regimes as well as of their norm-creating entities, but this element of autonomy is relativized by the normative intertwinement of legal spaces and its dimension of complementarity and dependence between various norms.

3. Analysis of the intertwinement: Interrelations on the level of the legal norms

In order to embrace a differentiated approach and conceptualize the phenomenon of intertwinement from a norm-centered perspective, this section will first highlight how, through the process of cross-border creation of legal norms, the very nature of these norms is affected. It will demonstrate that, as an expression of the intertwinement of legal spaces, norms of a *hybrid* nature emerge. Second, this section will address the cross-border application of norms, which is an equally important aspect of intertwinement. Both aspects constitute elements of dependence between legal spaces. Finally, it will analyze the transnational effect of certain legal norms, constituting a normative linkage of the transnational legal sphere. In addition to highlighting the different phenomena of intertwinement, the analysis in this

[22] Thus, the theoretical dimension of the concept of autonomy can be gradual as well. See regarding the different dimensions of autonomy Peters, *supra* note 5, at 31.

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section also aims at providing a basis for the conceptual shift suggested in the last section of this article, taking into account an evolving 'transnational normativity'.

3.1. 'Cross-border' creation of legal norms

The most intensive form of intertwinement of legal norms stemming from different legal orders or regimes is the 'cross-border' creation of legal norms. Distinct from the traditional understanding of norm creation, presently, this process does not exclusively occur within the framework of a single legal order or regime and according to the (substantive and formal) legal standards of that legal order. Instead, norms can be – and are – created on the basis of legal standards and normative elements originating from different legal orders or regimes. I exemplify this by reference to situations of implementation of norms on the one hand and to general principles of law as addressed in Article 38 of the Statute of the International Court of Justice (ICJ) on the other.

3.1.1. Cross-border implementation of norms

At the core of the process of cross-border creation of norms lies the mechanism of implementation which is well established in the context of European Union (EU) law and which can be understood as a more general phenomenon in the transnational legal sphere. Here I use the term 'implementation' and not 'transposition' because the former better expresses the two-step nature of the process reflected within the norm. Other than transposition which in the end only aims at giving internal effect to an international law norm, implementation has a broader impact on the normativity of the resulting legal norm.

A graphic example of an implementation based 'cross-border' creation of legal norms is provided by international treaties like the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998 in the Danish city of Aarhus (Aarhus Convention). This convention sets standards for domestic procedural law concerning, *inter alia*, the access to environmental information as set out in its Article 4 which reads as follows: 'Each Party shall ensure that … public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation ….' The Aarhus Convention, although of course being formally a treaty between states, concerns the relationship between each contracting party and the individuals within the territory of the state; the international obligations set out in the convention require implementation into domestic law. Given the rather abstract nature of most of the stipulations, such an implementation is also required should a state follow a monist approach of direct effect of these norms within the domestic legal order. In any case, pluralist or monist assumptions left aside, Article 4 of the Aarhus Convention requires the creation of a domestic (procedural) rule guaranteeing access to environmental information.

The result of this process of norm creation is a norm-based intertwinement. What is created is not only a legal norm of a domestic law nature. Taking the impact of the process of implementation on the resulting norm seriously requires going beyond the formal origin of the norm. It is a legal norm of a *hybrid* legal nature that is

created.[23] Its character is hybrid in the sense that the legal norm is composed both by domestic and by international elements of legal normativity. Formally, of course, the norm is of domestic origin since it has been set by the domestic legislature. However, its character cannot be reduced to that formal origin. It has to be taken into account that the creation of this formally domestic norm has been triggered by a norm of international law.

This fact has two implications. First, the normative content of the formally domestic norm is determined (partially or entirely) by the international law norm – that is the *substantive* dimension of intertwinement. Consequently, the resultant norm is a combination of international and domestic normative input. Second, the international law norm contains an imperative element that is reflected in the formally domestic norm. The formally domestic norm *had* to be created in order to fulfil the international obligation (imperative element); at the same time, its creation was enabled by the domestic legal framework which sets out the rules of competence (competence-related element). That is the *formal* dimension of intertwinement. Since the international norm induces the creation of the domestic norm, domestic law-making is triggered not only by the domestic rules of norm-creation but also by the legal requirement contained in the international law norm. Thus, not only the content but also the origin of the norm is two-fold. These two essential dimensions (substantive and formal) inherent to the created legal norm require a holistic understanding of its nature: the legal norm is hybrid in the sense that it is composed of substantive and formal elements stemming both from domestic and international law.[24]

Such a process of implementation resulting in legal norms having a hybrid nature can be found in diverse areas of law. Beside environmental law, the area of human rights law is prominent in this respect. An example is provided by Article 17 of the International Covenant on Civil and Political Rights which stipulates that everyone has the right to the protection of the law against arbitrary or unlawful interference with his privacy, family, home or correspondence and against unlawful attacks on his honour and reputation. As it explicitly mentions the right to the protection of the law, this provision creates the obligation for the domestic legislator to implement the relevant right by translating the rather abstract requirement of the Article into specific legislative norms of protection. The formally domestic norm resulting from the required implementation is, here again, of a hybrid nature, being the expression of a substantive and formal intertwinement of the international and domestic legal sphere. In addition, this example shows that in the area of human rights law those rights which are understood to contain positive obligations are generally likely to create obligations of domestic implementation with detailed statutory or regulatory

[23] It may be stressed that it is the actual legal norm and not 'merely' the legal space which is characterized by hybridity. For an approach of a 'hybridity of legal spaces' see P. Schiff Berman, 'Global Legal Pluralism', (2007) 80 *Southern California Law Review* 1155.

[24] Also, this analysis spells out the extent to which the process of implementation qualitatively goes further than a pure mechanism of transformation of international law into domestic norms as required by a dualist approach to the relationship between the domestic and the international legal order.

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press

responses. Along this line, international human rights courts[25] have increasingly taken up this aspect and linked the dimension of positive obligations within human rights to specific legislative remedies imposed to the member states of their respective conventions.[26] This development further strengthens the range of existing hybrid norms.

The field of implementation and therefore of intertwinement resulting in hybrid norms is indeed broad. Given the numerous norms of this nature, presently it is feasible to provide only a few additional examples, including the Rome Statute of the International Criminal Court setting out various obligations of the state parties to adapt their procedural law or extend their criminal laws penalizing specifically described offences,[27] implementation requirements in the Convention against Torture,[28] in the Chemical Weapons Convention,[29] the OECD Anti-Bribery Convention,[30] the UN Convention for the Suppression of the Financing of Terrorism[31] and the UN Convention against Corruption.[32]

However, situations of implementation are not limited to the relationship between the international and the domestic legal order. Under certain circumstances, implementation also occurs within the international legal space. This is illustrated by treaties like the UN Convention against Corruption which takes up the obligations regarding various relevant behaviors in the context of corruption which have been created by previous conventions such as the Inter-American Convention against Corruption, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union or the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, depending on the specific norms in question, the formal dimension of intertwinement, that is the extent to which a formal obligation of implementation and not merely the substance of the

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[25] For the broad application of the concept of positive obligations by the Inter-American Court of Human Rights see, e.g., L. Lavrysen, 'Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights', [2014] *Inter-American and European Human Rights Journal* 94; Regarding the use by the ECtHR see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[26] Regarding the Inter-American human rights framework, the obligation to take legislative measures of implementation is explicitly enshrined in Art. 2 of the American Convention on Human Rights. See also Inter-American Court of Human Rights, *'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*, Judgment of 5 February 2001, Series C, No. 73, para. 87: 'In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies.'

[27] See Art. 70 concerning offences against the administration of justice.

[28] See in particular Art. 4 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

[29] See in particular Art. VII, para. 1 of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45.

[30] See in particular Art. 3 and Art. 8 para. 2 of the OECD 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

[31] See in particular Arts. 4–6 of the 1999 UN Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197.

[32] See in particular Arts. 15–42 of the 2003 UN Convention Against Corruption, 2349 UNTS 41 (although some of these provisions do not create immediate obligations of implementation).

'implemented' provision is reflected within the created norms of implementation, tends to be less pronounced than in the context of international-domestic implementation. Nonetheless, the substantive dimension of the resulting norms can said to be hybrid.

3.1.2. General principles of law

Another manifestation of the 'cross-border' creation of norms and of norm-based intertwinement are the general principles of law as addressed in Article 38 of the ICJ Statute.[33] These general principles, which – as widely recognized principles of domestic law constituting international law – are applied in legal systems throughout the transnational legal sphere, contain two 'cross-border' elements at the same time, a 'horizontal' and a 'vertical' element.[34] By use of a normative legal comparison,[35] the common substrate of all relevant domestic norms is extracted in order to create, in a second step, the corresponding norm formally belonging to international law.

Consequently, the hybrid nature of the resulting norm is pronounced. In its 'horizontal' dimension, which corresponds to the first step of the process of norm creation, the general principle integrates substantive normative elements stemming from different domestic norms. For example, in order to determine the existence and content of a general principle of fair trial, the domestic provisions regarding the guarantee of fair trial have to be compared and their common normative content has to be determined. From the perspective of the participating norms, the common normative elements of the individual domestic norms interact and combine. In this respect, the process of creating a general principle is an expression of a transnational normative linkage. It creates a hybridity of the resulting general principle that includes a normative transfer on a domestic–domestic level. In this respect, the determination of general principles exercises a broad integrative function, going beyond a unilateral relationship between two legal orders or regimes.

In its 'vertical' dimension, the general principle is the result of a migration of normative elements from the domestic to the international legal sphere. In the former example, the common normative content of the domestic rules on fair trial can create the corresponding international norm of fair trial. Although formally of an international law nature, the normative elements composing the principle and stemming from the domestic legal sphere lead to an international–domestic hybridity comparable to the norms of implementation. Here, though, the direction of the process of intertwinement is inversed in the sense that the formal nature of the norm is international and not domestic and that the migration happens from the domestic to the international legal sphere and not the other way round.

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33 For an approach that attributes a central role to general principles in the articulation of legal orders, regimes and norms in the international context see E. Tourme Jouannet, 'L'ambivalence des principes généraux face au caractère étrange et complexe de l'ordre juridique international', in R. Huesa Vinaixa and K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* (2006), 115 at 134 et seq.

34 The terms 'horizontal' and 'vertical' are used for the sake of clarity, not as a statement in favour of a hierarchical relationship between international and domestic law.

35 For this comparative approach see *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, and 324 (Judge Simma, Separate Opinion) at para. 66.

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This multi-layered hybridity of the general principles of law does not only highlight the complex interaction of norms within the transnational legal sphere. What is more, the way general principles of law engage with the plurality of legal sources shows that it is possible, when it comes to transnational relations of norms, to overcome the formal borders of *multiple* legal orders at the same time.

3.2. Consistent interpretation

Beside the cross-border creation of norms in the transnational legal sphere, the cross-border application of norms is an equally influential factor. A manifestation of this aspect of the intertwinement of legal spaces is the concept of consistent interpretation. This can be observed both in the 'inter-order' and 'inter-regime' dimension of transnational legal relations. Most prominent is, of course, the consistent interpretation of domestic law with international law which has been established as a common practice in many domestic legal orders.[36] Domestic legal norms are interpreted in a way that ensures their conformity to international law standards.[37] By drawing on this mechanism, domestic law-applying bodies participate in a process of harmonizing the legal standards of different legal orders (this aspect will be addressed below). What is more, the normative content of domestic legal norms is influenced, complemented and ultimately modified by the normative content of international legal norms. Under the premise that the normative content of a legal norm is influenced by its application, the substance of the norm is not limited to the immediate content by the isolated individual norm. Instead, the normative context in which the individual norm is embedded can add its elements as well. Other norms, be it of domestic or international formal origin, influence the content actually applied in the specific situation. In this way, the individual norm becomes, to some extent, detached from its exclusively domestic content and is opened towards being complemented, or even modified, by international law.[38] As a consequence, the 'resulting' norm applied in the specific situation has, here again, a 'mixed' content, combining normative elements of norms stemming from different legal orders. In its substance, the resulting norm is a hybrid norm as well. However, in contrast to the strong substantive hybridity which follows from a process of cross-border creation of norms, the hybrid character induced by consistent interpretation is not rooted in the isolated norm itself. Only once the formally domestic norm is applied, i.e., put in context, is the additional element stemming from the international law norm attached to it. In this respect, the hybridity that follows from consistent interpretation only relates to the *application* of the norm, not its creation.

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[36] For an overview regarding this mechanism see A. Nollkaemper, *National Courts and the International Rule of Law* (2011), 139 et seq; G. Betlem and A. Nollkaemper, 'Giving effect to public international law and European Community law before domestic courts – A comparative analysis of the practice of consistent interpretation', (2003) 14 EJIL 569; see also G. Betlem, 'The doctrine of consistent interpretation – managing legal uncertainty', (2002) 22 *Oxford Journal of Legal Studies* 397.

[37] In the EU law context, the concept of consistent interpretation is not only directed from the domestic legal orders towards supranational law but also reciprocally from the supranational legal order towards domestic – constitutional – law. See A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001), 289 et seq.

[38] For a comparable observation concerning the EU law context see Raducu and Levrat, *supra* note 1, at 118.

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Such substantive complementarity, induced by consistent interpretation, cannot only be observed in the inter-order dimension. Inter-regime consistency is an equally important outcome of the interpretation of international law.[39] An example of that is the European Court of Human Rights interpreting human rights provisions in a way that they are consistent with 'generally recognised rules' of international law.[40] Other examples include the interpretation of international humanitarian law in consistency with human rights law as (implicitly) undertaken by the ICJ.[41] Going further, Article 31(3)lit.(c) of the Vienna Convention on the Law of Treaties even stipulates an obligation of inter-systemic interpretation.[42] In this imperative respect, this provision is comparable to the approaches of different domestic constitutional courts which deduce from their respective constitutional law an obligation of consistent interpretation of domestic law in order to best meet the standards of international law.[43] Finally, the mechanism of consistent interpretation can also be observed in the relationship between EU law and international law.[44]

Going beyond the reference to the mere legal provision of another regime, international courts[45] as well as domestic courts[46] also tend to refer to the interpretation that the court belonging to the other order or regime has given to a norm of this order or regime. What can be observed in these cases is an immediate intertwinement on the level of application of norms. Not only is the application-related dimension of the norm being interpreted in consistency with a norm of another order or regime concerned, but also the application-related dimension of the latter norm, that is the norm serving as reference or yardstick of the interpretation. The interrelation does not

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39 For an approach that considers cross-regime interpretation as a systemic element in the international legal sphere see N. Matz-Lück, 'Norm Interpretation across International Regimes: Competences and Legitimacy', in M.A. Young (ed.), *Regime Interaction in International Law – Facing Fragmentation* (2012), 201 at 211 et seq.

40 *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 139, ECHR 2013.

41 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion)*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, para. 104 et seq; *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, para. 25.

42 For an analysis of this provision see C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', (2005) 54 *International and Comparative Law Quarterly* 279.

43 See, e.g., the German Federal Constitutional Court, Order of 1 March 2004, 2 BvR 1570/03, para. 12: 'The Basic Law is intended to accommodate international law . . . and hence as a rule may not be interpreted in such a way to give rise to a conflict with obligations of the Federal Republic of Germany under international law.' Regarding this German constitutional law concept see also M. Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip', (2009) 57 *Jahrbuch des öffentlichen Rechts der Gegenwart* 465. For a similar approach of the Czech Constitutional Court regarding the obligation of consistent interpretation in the EU legal context see the Dec. Pl. ÚS 66/04 of 3 May 2006, para. 61: 'A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs.'

44 See, e.g., F. Casolari, 'Giving indirect effect to international law within the EU legal order: the doctrine of consistent interpretation', in E. Cannizzaro et al. (eds.), *International law as law of the European Union* (2012), 269.

45 For an analysis of the extensive references of the International Criminal Tribunal for the former Yugoslavia to the jurisprudence of the ECtHR see A. Cassese, 'The Impact of the European Convention on Human Rights on the International Criminal Tribunal for the Former Yugoslavia', in P. Mahoney et al. (eds.), *Protection des droits de l'homme: la perspective européenne – Protecting Human Rights: The European Perspective, Mélanges à la memoire de/Studies in Memory of Rolv Ryssdal* (2000), 213.

46 See references *supra* note 36. See also M.D. Kirby, 'Transnational judicial dialogue, internationalisation of law and Australian judges', (2008) 9 *Melbourne Journal of International Law* 171.

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press

only occur with respect to the 'written' content of the norms as apparent from their statute, treaty etc. References by the norm-applying actor to another norm, including the interpretation giving to this norm by the respective norm-applying actor, leads to an even more comprehensive intertwinement. The interrelation touches the extended content that these norms have developed in the process of their application. This leads to a very dynamic intertwinement between the norms and consequently between the legal spaces involved. The dynamic character significantly structures the transnational legal sphere. Also, it needs to be stressed that this dynamic intertwinement actually takes place on the level of the norms and therefore cannot be captured to its full extent by what is generally referred to as judicial dialogue.[47] The interrelation of the actors is only one aspect of the mechanism. However, in order to understand its consequences for the legal spaces involved, the perspective of the interrelating *norms* is crucial.

Finally, a similar phenomenon of cross-border interpretation can also be observed between domestic legal orders. Undoubtedly, the frequency and importance of the form of transnational cross-references in particular in the jurisprudence of constitutional courts has increased.[48] Here, contrary to forms of consistent interpretation that are based on an imperative (following, for example, from domestic constitutional law), 'inter-domestic' interpretation generally lacks this formal element of intertwinement. Nonetheless, the substance of the norm applied in the specific situation will still be influenced by the normative elements stemming from outside the borders of the original legal order. Transnational migration of normative contents happens here as well. However, the normative impact of these external elements will vary between the different legal orders, depending on whether the respective legal order grants a significant normative value to these elements or not. In any case, however, the underlying precondition of cross-border interpretation is the coexistence of different sources of legal normativity – and the acceptance of this coexistence. Accordingly, the use of this mechanism as such already induces a certain amount of normative value attributed to the external norm by a specific legal order.

3.3. Common principles as normative linkage of the transnational legal sphere

Another phenomenon that reflects the intertwinement of legal spheres is the growing appearance of overarching legal principles. Although, unlike the aforementioned mechanisms, this phenomenon does not contribute to the creation of hybrid legal norms, it causes intertwinement insofar as it normatively bridges the apparent gap between what are traditionally understood to be different legal orders and regimes.

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47 For some examples of the discussion see A.M. Slaughter, 'A Global Community of Courts', (2003) 44 *Harvard International Law Review* 191; M.A. Waters, 'The future of transnational judicial dialogue', *American Society of International Law: Proceedings of the 104th annual meeting* (2011), 465; T. Harbo, 'Legal integration through judicial dialogue', in O.K. Fauchald and A. Nollkaemper (eds.), *The practice of international and national courts and the (de-)fragmentation of international law* (2012), 167.

48 For an early discussion of this phenomenon see C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', (2000) 20 *Oxford Journal of Legal Studies* 499.

Here, the norm itself is not only the result but the mechanism of intertwinement. This can be observed on different levels of the transnational legal sphere.

First, the increasing harmonization of various legal standards through international law norms causes a normative linkage between *domestic* legal orders. The existence of such 'bridging mechanisms'[49] has been well acknowledged for the European legal space. Within the EU, legal principles of European law that are equally applicable within the legal orders of the member states (and here I do not speak about harmonization through directives which require implementation) are a cornerstone of normative integration. European fundamental freedoms, or the rights enshrined in the EU Charter of Fundamental Rights, are prominent examples of how a common legal body can be applicable within several domestically-routed legal spaces, influencing a broad variety of domestic norms. Certainly, the EU context is specific in this regard as it significantly facilitates the impact of such a common legal body on the domestic legal orders through the principles of direct effect and direct applicability of EU law norms.

However, whereas the intertwinement of legal norms within the European legal space has reached a very intense level, similar – although more basic – examples of this kind can be found in the form of classical international law. In this respect, international (and regional) human rights standards probably exert the most notable impact both on domestic legal orders and on several other international law regimes.[50] Human rights obligations can have a transformative impact on domestic legal norms, both through processes of norm creation and interpretation. Accordingly, they practically permeate the whole transnational legal sphere, bridging old as well as new gaps that might be created by movements of fragmentation. In that way, they are of a transnational nature, namely because of their transnational *effect*. Of course, their transnational origin (in the sense of hybrid norms) is, although less pronounced, existent as well when it comes to considering domestic constitutional standards as a basis for the determination of specific international human rights contents. On the account of their transnational nature, some have even considered them to represent constitutional elements of international law[51] if not of transnational law. However, even without going that far, human rights standards and their far-reaching scope of application provide a basis for some of the aforementioned mechanisms of intertwinement, in particular consistent interpretation. What is more, even without the hierarchical connotation of a constitutional character, these norms establish a 'trans-border' stream of normativity to which other norms and norm-applying actors can relate. At the same time, they obviously also intensify the substantive harmonization of the transnational legal sphere. This is especially true regarding the impact of common human rights standards on the inter-domestic

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49 See N. Walker, 'Sovereignty and Differentiated Integration in the European Union', (1998) ELJ 355, at 375; for a comparable approach regarding the 'métissage' of legal orders see Raducu and Levrat, *supra* note 1.

50 For regime-related examples see the work of international organizations charged to harmonize international commercial and trade law standards that recommend adoption of model laws, which often reflect best practice in domestic jurisdictions. See, e.g., the work of the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT).

51 See, e.g., S. Gardbaum, 'Human Rights and International Constitutionalism', in J. Dunoff and J. Trachtman (eds.), *Ruling the world? Constitutionalism, International Law, and Global Governance* (2009).

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press

level. As evidenced by the fact that most inter-domestic cross-references by domestic courts are made by constitutional courts[52] and therefore concern human rights issues, common human rights standards can be seen to migrate in a truly transnational fashion. As a result, they weave a fragmentary yet broad texture permeating the domestic and international legal spaces and creating normative intertwinement between them.

In addition to human rights, international law offers a variety of common standards strengthening this normative intertwinement. There is, for example, the newly developing phenomenon of global administrative law standards that are either extracted from the common normative content of norms stemming from different international law regimes,[53] or alternatively tied back to domestic law principles.[54] For example, international administrative tribunals have started to refer to general principles of international civil service law.[55] This is a clear-cut expression of how a sufficient quality and quantity of elements of interrelations of norms (be it judicial cross-references, the influence of procedural human rights standards or the migration of normative content during the process of norm creation) can condense into developing legal norms. Given the process of their creation, these principles are of a genuine transnational nature and thereby strengthen the intertwinement even further.

Other more traditional standards having a 'trans-border' impact will be briefly mentioned. Amongst them is the law of treaties as well as the rules on international responsibility and *jus cogens* norms.[56] All of those aim at influencing or governing norms belonging to different international law regimes; their inherent purpose and character is 'trans-border' oriented. Given their importance, especially regarding bridging the gaps created by the fragmentation in international law, the cross-regime applicability of these norms deserves to be considered as an aspect of the intertwinement within the transnational legal sphere.

4. Consequences of the intertwinement: The norm as a key conceptual element of the transnational legal sphere

As evidenced by the analysis undertaken in the previous section, the interrelations of norms formally stemming from different legal orders and regimes lead to an

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52 G. Halmai, 'The Use of Foreign Law in Constitutional Interpretation', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), 1328.

53 See regarding common procedural principles B. Kingsbury and L. Casini, 'Global Administrative Law: Dimensions of International Organizations Law', (2009) 6 *International Organizations Law Review* 319, at 333.

54 See, e.g., C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', (2006) 17 EJIL 190.

55 *Judgment No. 2991*, Administrative Tribunal of the International Labour Organization, Judgment of 2 February 2011, para. 13; see also *De Merode et al. v. The World Bank*, Decision No. 1 of June 5 1981, The World Bank Administrative Tribunal, para. 28.

56 On the merely limited trumping impact of *jus cogens* norms on other international law norms see J. Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?', in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012), 13; E. De Wet and J. Vidmar, 'Conclusions', in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012) 300, at 307.

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intertwinement of legal spaces characterized by differentiation, graduation and hybridity. In a transnational legal sphere, norms are not exclusively international or domestic, do not exclusively belong to human rights law or international criminal law etc., are not applied exclusively in their formal framework of creation, and can have different forms of 'trans-border' effects. Consequently, legal orders and regimes no longer provide a sufficient conceptual basis for a comprehensive understanding of the various interrelations taking place between norms in the transnational legal sphere. Otherwise, the complexity and graduation of intertwinement get lost.

4.1. Re-evaluating the concept of legal order in a transnational context

As the intertwinement of legal spaces takes place through the interrelations of norms, there is a corresponding impact on the concept of legal order as such. The legal order as point of reference for the creation and application of norms is no longer exclusive.

First, the role of the legal order as a point of reference for legal norms becomes weaker. Whereas traditional concepts of legal theory perceive validity and applicability of norms exclusively in relation to a specific legal order in which norms are created and applied, this exclusiveness has been challenged by the various interrelations of norms. According to the Kelsenian conception of validity, a norm is valid (existent) only if it has been created through the law-making procedure of a *specific* legal order.[57] The norm needs to be derived from one or several norms of this legal order, in the sense of a legal conditionality (*rechtliche Bedingtheit*).[58] According to the conception of Hart and Raz, a principle of authoritative recognition determines whether a legal norm belongs to a specific legal order. In that manner, it defines the validity of the norm.[59] In other words, the affiliation of a norm to a legal order is equated with the validity of a norm, with a rule of recognition determining both.[60] These conceptions of validity are order related. The question of validity of a norm necessarily has to be answered in reference to a *specific* legal order. A norm is only valid within a certain legal order and because it fulfils the requirements set by this specific legal order. In that manner, a legal norm is attributed to 'its' respective legal order.

In a transnational context, such a restrictive and formal understanding can no longer be exclusive. Because of the normative intertwinement and the phenomenon of hybridity, the 'borders' between legal orders and regimes become blurred. The traditional criteria for determining the attribution of a legal norm[61] to a specific order or regime need to be reassessed in the sense of a broader understanding of *legal spaces*. This term reflects the attempt to overcome the limitative, self-referential and inwardly oriented nature that is inherent to the concept of legal order. It represents

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57 H. Kelsen, 'Der Begriff der Rechtsordnung', in H. Klecatsky, R. Marcić and H. Schambeck (eds.), *Die Wiener Rechtstheoretische Schule* (1968), vol. 2, 1395 at 1400.

58 See T. Schilling, *Rang und Geltung von Normen in gestuften Rechtsordnungen* (1994), 159 et seq.

59 J. Raz, *Concept of A Legal System* (1970), 190.

60 H.L.A. Hart, *The Concept of Law* (1965), 92, 97 et seq.

61 These criteria are addressed by the 'identity problem' according to Raz's understanding of legal systems, see Raz, *supra* note 59, at 1.

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a concept that acknowledges systemic structures within groups of norms without considering these internal structures to be the exclusive point of reference for the individual norms of a group.

As is apparent from the analysis in the second part of this article, the reference to a single order is – at least partially – replaced by a more openly designed model. The parallel existence of different norm-creating entities is to be taken into account. This is not only the case conceptually but it can actually be observed in legal practice. As has been shown, norms of different origins claim validity in a parallel manner and this claim is not limited to their respective legal order or regime but goes beyond the borders of the order or regime. Reciprocally, this validity claim is taken into account by the 'other' legal orders and regimes – 'other' than those from which the respective norms stem. Unlike, for example, the classical international law approach expressed by the Permanent Court of International Justice[62] which considers domestic law as pure facts, legal orders and regimes do not ignore the legal nature of external norms any more but allow for a norm-based intertwinement. External norms are regarded as legal norms and not as mere facts. Their legal quality and consequently their (potential) impact on the 'internal' norms is recognized.

However, this does not mean that external norms enjoy, from an internal perspective of a specific order or regime, in every situation the exact same legal stance as internal norms. The acceptance of a plurality of norm-creating entities does not go along with an absolute normative equality of origins. In this respect, the broader international context clearly differs from the situation within the legal framework of the EU. Here, the validity related reference to a legal order has been replaced by the reference to an integrative and norm-based conceptual framework,[63] which leads to norms of different formal origins enjoying an equal validity in the inter-order dimension. In the integrated European legal space, a norm is regarded as valid and enjoys a legal impact within the *whole* legal space when it has been created according to the norm-creating procedure of one legal order or of several legal orders combined.

Even in the international context, legal norms interact legally, not only factually. The depicted interrelations go beyond factual interaction, which is a weak form of transnational interaction occurring, for example, when existing legal norms of one legal order or system are used as pure inspiration for the creation of similar 'internal' norms without the former exercising any legal impact in order to reach this reference. In fact, the international legal sphere shows a stronger form of *legal* interaction which takes the normative claim of an 'external' norm into account and is an expression of its legal impact. This becomes clear when considering that otherwise 'cross-border' relations of norms as described above would not be possible.[64] The interrelations of norms in the international sphere are testament to the interacting validity claims of these norms going beyond the borders of specific orders and regimes. As demonstrated in the previous section, a legal norm can combine – with

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62 *Certains intérêts allemands en Haute-Silésie polonaise – Fond*, PCIJ, 25 May 1926, Series A, No. 7, at 19.

63 See D. Burchardt, *Die Rangfrage im europäischen Normenverbund* (2015), 199 et seq.

64 Unless assuming – what this article does not – a monist legal world on the one hand or a considerable quantity of explicit norms of transposition on the other which would ensure the legal existence of certain external norms within a legal order or regime.

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respect to its formal process of creation as well as with respect to its substance – elements stemming from different legal orders or regimes. In that way, the normativity emanating from different legal orders and regimes overlaps. This phenomenon may be described as a 'gradual' external validity of norms. It is independent of the classical mechanism of transformation to the extent that it creates a legal effect of norms in a 'cross-border' manner without the integrating legal order or regime explicitly establishing this effect by a unilateral act. However, it is only 'gradual' with respect to the fact that not all legal norms of the transnational legal sphere are regarded, in a monist way, as having the same 'full' legal impact in every situation. Rather, the 'external' normativity claim of a certain legal norm depends on its link towards its transnational surrounding. As has been shown, this link can be of a formal and/or substantive nature, based, for example, on the process of norm creation or on the content of the norms concerned. Thus, the term 'gradual' external validity stresses that the legal effect of a norm can differ depending on the context.

The result of this external validity is that norms formally stemming from different legal orders can interact. More than pure coexistence, this interaction allows for a certain normative integration: the elements of the transnational sphere are linked not only on the factual level but also on the level of legal normativity. To a degree, this creates a *transnational normativity*, detaching the *impact* of norms – and gradually also their validity – from the order or regime and generating a partially[65] integrated legal space. This stresses that the formal nature of a norm, respectively the fact that it belongs to a particular legal order, does not limit or even exclude its external impact. In other words, the normativity of norms taking part in the phenomenon of intertwinement is transnationalized. This adds a complementary layer of normativity to those existing with reference to the individual legal orders and regimes.

Such a linkage is reflected in a formal and substantive *complementarity and dependence* of legal spaces. Above all, the practice of implementation exemplifies the determining effect that norms from one legal order or regime can have for the other. The content of the norm of implementation can be completely or partly determined by the implemented norm stemming from another legal order. In the latter case, the 'mixed' content of the created hybrid norm reflects the *substantive* complementarity of normative interrelations, given that the created norm content is a combination of normative input stemming from different legal orders or regimes. Moreover, as has been shown in this article, an additional *formal* complementarity is always a characteristic trait of every procedure of implementation. This is based not only on the formal process of norm-creation but also on the imperative element included in the norm requiring transposition.[66]

However, the exclusiveness of orders and regimes as a conceptual point of reference is not only a challenge with regard to the creation of norms. As shown, the application of norms is, within the transnational legal sphere, equally characterized

[65] Other than the concept of monism, the approach suggested in this article is not based on a fully integrated, normatively homogenous legal sphere. The graduated character of the approach may be stressed here again.

[66] See *supra* at Section 2.

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by a multitude of 'cross-border' interrelations of norms. These interrelations not only actively weaken the system-related approach that a traditional theory of norms would take as its basis. They actually require a conceptual shift towards a focus on the norm. The most prominent expression of this phenomenon is the concept of consistent interpretation. As described above, by a trans-border interpretation of norms, the normative content of legal norms of one legal space is influenced, complemented and ultimately modified by the normative content of the norms stemming from another legal space. The resulting hybrid norm combines normative elements of norms stemming from different legal spaces. This is an expression of a substantive complementarity that represents one of the key characteristics of the current transnational legal sphere.

4.2. Rethinking the application of norms and the resolution of norm conflicts in a transnational context

Beyond the analytical aspects addressed above, the intertwinement of legal spaces also has repercussions on *how to apply* norms within the transnational legal sphere. As has been shown in the previous section, the existence of intertwined legal orders and regimes creates norms that are closely interrelated and even of a hybrid nature. Hence, both for the application of norms, for example, in the form of their interpretation and for a comprehensive understanding of conflicts of norms in a transnational context, the close interrelation and hybridity have to be taken into account.

A hybrid norm stemming from a process of implementation cannot be interpreted exclusively based on its formal origin or, alternatively, its substantive origin. Instead, its interpretation should be guided both by the various normative impacts on its content and by the fact that it nevertheless needs to integrate into the legal framework of its formal origin. Whereas the latter aspect might constitute a certain minimum requirement or limit, the former might be regarded as the leading consideration. In concrete terms, a norm – the content of which is exclusively determined by a norm stemming from another legal order or regime – should be interpreted in the light of the norm that it implements, including this latter norm's broader normative embedding. If a norm is only partially determined by such an 'external' norm, the described points of reference for the interpretation will be complemented by 'internal' legal considerations.

In fact, this differentiated way of norm interpretation is already adopted by various courts when dealing with norms characterized by hybridity. Here, the *Trianel* judgment of the European Court of Justice concerning the interpretation of a directive creating obligations for the EU member states to implement the Aarhus Convention is an example of how the international law element in the European law directive is taken into account.[67] However, it is important to stress that this way of proceeding is not an optional tool of interpretation but an *imperative required by the intertwinement of legal spaces*. This requirement, which follows from the approach advanced in this article, is routed in the nature of the relevant norm itself. The different normative

[67] Case C-115/09, *Bund für Umwelt- und Naturschutz v. Arnsberg* (*Trianel*), [2011] ECR I-3673.

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press

elements of the norm constitute an imperative for the norm-applying actor to take its hybrid nature into account. Consequently, there is no need to have recourse to an additional principle, such as domestic constitutional law principles of consistent or international law friendly interpretation. Even in legal orders or regimes which do not have similar principles, norm-applying actors are bound by the requirement inherent to the norm itself. In a nutshell, norms reflecting 'cross-border' phenomena require a 'cross-border' interpretation.

Regarding the approach taken in cases of conflicts of norms, the impact of the intertwinement of legal spaces is even broader. First and most notably, the substantive interrelations of legal norms make it impossible to establish purely formal hierarchies of norms as they are known from the traditional approaches. Bearing the normative intertwinement in mind, norms formally stemming from different orders or regimes cannot be ranked exclusively with respect to their system of origin. Instead, a more flexible and differentiated approach is required in order to reflect the specificities of each norm and each interrelation. It is critical to consider that the immediate objects of conflict are specific norms and not legal orders or regimes. It is the specific content of individual norms that might be divergent, not the entire legal orders or regimes attached. A focus on the systemic level is, to that extent, neither necessary nor helpful. Rather, this would cement the idea of monolithic blocs that are not only impermeable but also opposed to each other. Such an opposition or open conflict between legal orders and regimes does not reflect the reality of transnational interrelations. In contrast, the normative intertwinement depicted above calls for complementarity even on the systemic level.

Second, as a minimum, the existing conflict rules must be applied in a way that takes the hybrid nature of norms into account. Especially when a hybrid norm results from a process of implementation, hierarchization in a situation of conflict should not exclusively relate to the formal nature of the norm. If, for example, a formally domestic norm which implements an international law norm conflicts with a 'pure' domestic norm, the conflict resolution has to take the hybrid nature of the former into account. This may have the result that the hybrid norm – because of its substantive international law element – might trump a conflicting domestic norm that, formally, would be hierarchically superior according to pure domestic standards (assuming that a conflict rule provides for the supremacy of international law as such or of the content in question). Likewise, the hybrid but formally domestic norm could, in another area of conflict, trump an international law norm on the basis of the consideration that the content of the hybrid norm reflects an international law norm that might be considered superior to the latter international law norm.

Beyond applying the existing conflict rules in a differentiated manner, a third consequence of the above premise would tackle the rules or criteria of conflict resolution itself. In a transnational context, the differentiated structures of norm interrelations can serve as points of reference for determining cross-border legal standards of conflict resolution. The conceptual shift towards a norm-centered approach allows for the development of normative structures that, grounding on certain guiding principles, offer context specific solutions. Structural principles can give indications for 'cross-border' conflict resolution and guidance for the actors involved. They can

contribute to the development of holistic structures originating from the transnational legal sphere as a whole (and not just from one order or regime) and offer common elements to 'cross-border' conflict resolution. The central aspect in this regard is providing a holistic basis to which the specific conflict resolution can resort. This allows for the necessary flexibility that the heterogenic transnational legal sphere and the corresponding qualitative plurality of conflict situations require, as well as for the possibility of gradual harmonization of the concrete conflict resolution induced by common standards.

Such norm-based co-ordination in an inter-systemic context can be provided by a range of structural principles. It is their interplay that provides guidance for the totality of inter-systemic relations. In scholarly debates, the emphasis is put on different kinds of structural principles, some of a formal or procedural, others of a substantive nature. Such principles can contain, both directly and indirectly, guidelines for structuring conflict resolution. Relevant approaches not discussed in depth in this article include possible references to the principles of legality, subsidiarity, democracy and human rights protection.[68]

Finally, the role of domestic and international courts should be emphasized. It is their task to overcome the traditional, order-related and regime-related perspective that has been typical in the past for most judicial bodies. Instead, with the objective of doing justice to the intertwinement of legal spaces, they should focus more on the legal norms and less on their systemic embedding when applying norms and solving conflicts in a transnational context.

5. Conclusion

Analyzing the intertwinement of legal spaces, this article sketches how a conceptual shift to a norm-centered understanding of the transnational legal sphere can capture the various interrelations of legal norms formally stemming from different legal orders or regimes. On this basis, it draws conclusions on the impact of the ever more intensified interrelations of norms on the legal orders and regimes concerned as well as on the concept of legal order as such. It offers a conceptual approach that, if implemented, can provide both a theoretical basis and practical guidance in dealing with the phenomena of normative intertwinement within the transnational legal sphere.

[68] For such approaches see S. Besson, 'How international is the European legal order?', (2008) *No Foundations* 50, at 65; M. Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism', in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012), 39 at 55 et seq.

https://doi.org/10.1017/S0922156517000012 Published online by Cambridge University Press