CHAPTER I

WHO HOLDS TOGETHER THE LEGAL ORDERS OF THE WORLD?

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I. INTRODUCTION

STATE sovereignty is becoming diluted. Public power is being rearticulated in pluralistic and polycentric forms. National legal orders must confront problems that are beyond their capacity to resolve alone. And onto these legal orders are superimposed a number of others, on many different levels.

This pluralism requires an order: to fill in the gaps, reduce fragmentation and induce cooperation between the different systems; to establish hierarchies of values and principles; and to introduce rules on the recognition, validity and effectiveness of norms.

In the absence of a superior legal order that imposes order among the "inferior" ones,[1] each must find within itself the instruments for cooperation with the others. And within each, it is only governments and parliaments that have responsibility for foreign policy. Yet there exist neither governments nor parliaments beyond the State; at the same time, within States, "foreign policy" has become too complex to be managed by governments alone.

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[1] This is one of the elements studied in the numerous analyses of the "fragmentation of international law" – a theme on which there is already an abundant literature. Amongst recent examples, see Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, (United Nations, 2006); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

Judicial bodies are, however, also present in the legal space beyond the State: indeed, more than one hundred of these are full and genuine courts, to which one should also add the numerous quasi-judicial bodies and other forms of adversarial proceedings that are now present, under various different guises, in many of the roughly two thousand global regulatory regimes currently in existence.

Courts and quasi-judicial bodies, moreover, operate on a case-by-case basis. They are, therefore, able to make progressive adjustments to the law they apply, using strategies that either alternate between or blend activism and deference, law-creation and "self-restraint," dynamism and tolerance, rigidity and flexibility.

For this reason, courts are assuming an important role in the definition of the relations between different legal orders. There is much talk nowadays of "judicial dialogue" or "judicial conversation," of "inter-judicial coordination" and a "community of judges."[2]

II. FRAMING THE PROBLEM

According to the traditional criterion of the dualism between internal and external legal orders, the power to take "external" action (that is, the power within States to take foreign policy decisions) is vested in the government. Parliament supervises the exercise of this

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[2] *See generally* Sabino Cassese, *La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale*, Rivista trimestrale di diritto pubblico 609 (2007) (which includes a number of further references on this issue). More recently still, see Eyal Benvenisti & George W. Downs, *National Checks that Balance Global Institutions: Judicial Review of International Organizations*, paper for Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory, NYU Law School, September 24, 2008; Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts*, Acta Juridica 90 (2009); Andrea Hamann & Hélène Ruiz Fabri, *Transnational Networks and Constitutionalism*, 6 Int'l J. Const. L. 496 (2008).

power and the administration executes it, although not in its own name, but only as the agent of the government. The judicial system, however, is absent (unless the internal legal order has "imported" or recognized certain external norms.) In this manner, the paradigm of the "State-as-a-unit" is maintained.

This structure is confronted – both in positive law and in conceptual terms – by two difficulties. Firstly, it is capable of explaining only relations between the national and the international (or supranational) levels; not those between different global regimes, in which the key actors do not display the characteristics of States, but are rather global bodies with sectoral "governments." Secondly, it has been surpassed by the disaggregation of the State, which occurs when administrative actors and judges also begin to engage in direct, cross-border dialogue with each other.

At this point, law is slowly – very slowly – taking the place of politics in the global arena. If the initial move was from soldiers to ambassadors in the resolution of international disputes, now the move is from ambassadors to judges. Courts are "crossing borders" more and more frequently (this phenomenon can also be observed in terms of bureaucracies – so called "intergovernmentalism" – and legal theory;[3] these, however, are beyond the scope of my analysis here).

The encounter between different legal orders, which can be situated at different levels (in the sense that they can be, for example, located at the national or supranational levels), is also an encounter between different legal traditions, each with its own identity. A number of different problems stem from this. One is the issue of

[3] Contrary to the position that "legal thinking does not cross national boundaries easily" (Richard A. Posner, How Judges Think 368 (2008)).

"sustainable diversity,"[4] in the sense of tolerance and mutual adaptation. Another is that of the constitution of a "common core" of principles, drawn from each of the legal traditions in question; a third is that of the recognition of a minimum body of superior principles (such as *jus cogens* in international law.)

III. RELATIONS BETWEEN NATIONAL AND SUPRANATIONAL ORDERS, AND BETWEEN GLOBAL REGIMES

Two different types of relations have developed as a result of the pluralization of public power discussed above. On the one hand, there are those between national or State orders, and "superior," supranational or international ones. On the other, there are the relations between the different – and by now extremely numerous – global legal orders. Strictly speaking, a further set of relations should also be considered: those containing mixed elements of the first and second types.

As noted previously, these relations are not governed by superior principles; a cooperative effort is thus required if collisions are to be avoided. This effort must be incremental, both in order to avoid upsetting the delicate balance between coexisting legal orders, and because it is, in large part, voluntary (in the sense that it is not imposed by a superior order).

The difficulties that must be overcome with regard to the first type of relations concern coordination between non-hierarchical forms of interaction between orders, in which a principle of primacy is developed through quasi-voluntary forms of cooperation. The difficulties with regard to coordination and reciprocal adjustment

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[4] H. Patrick Glenn, Legal Traditions of the World 331 (2000).

are equally present in the second type of relation; however, there is also the problem of how to construct, from the bottom up, a body of shared principles, rules or values capable of constituting a general "corpus" common to the different sectoral regimes. In both cases, there is the additional difficulty of maintaining control over or limiting the impact of the diverse possibilities – in terms of choice of law and of choice of forum – that are the consequences of pluralization. In essence, the challenge is to ensure that the individual planets and the universe as a whole can co-exist.[5]

IV. LEGAL ORDERS AND COURTS

An examination of the problems outlined above must – as already noted – proceed in two directions at once: it must focus both on the relations between domestic and extra-State legal orders, and those between global regulatory regimes.

Two main themes alternate in the second of these spheres: the fragmentation of legal orders ("self-contained global regimes"), and the proliferation of heterarchically-organized international courts ("a Babel of judicial voices").[6] A number of reciprocal influences between these two phenomena have been identified, albeit pulling in different directions.

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[5] Bruno Simma, *Ein endlose Geschichte? Artikel 36 der Wiener Konsularkonvention in Todesstrafenfällen vor dem IGH und amerikanishen Gerichten*, *in* VÖLKERRECHT ALS WERTORDNUNG: FESTSCHRIFT FÛR CHRISTIAN TOMUSCHAT/ COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 423 (Pierre-Marie Dupuy et al eds., 2006).

[6] Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT'L & COMP. L.Q. 791 (2006). On the proliferation of courts, see the research conducted within the "Project on International Courts and Tribunal" (www.pict-pcti.org).

Some, for example, view fragmentation as a product of the proliferation of international courts.[7] In particular, the claim made is that the growth in the number of international tribunals has gone hand in hand with the development of divergent and contrasting lines of jurisprudence. For this reason, it is argued, the general competence to determine issues of customary international law or to interpret international treaties should be vested only, or at least principally, in the International Court of Justice. In this way, the principle of the unity of the law would be protected.

According to others, however, the multiplication of tribunals represents a step forward for international law: if the basic activity of courts is to "gather, interpret and develop the law,"[8] then the increase in the number of supranational judges should simply extend and strengthen that function. Moreover, the "specialization" of different judicial fora should serve to limit the potential for overlapping competences and judgments. In this sense, the proliferation of tribunals can be considered as one means of overcoming the fragmentation of sectoral legal orders and creating a connective tissue of common principles between them.

The works by Yuval Shany on these issues, on *Regulating Jurisdictional Relations Between National and International Courts* and *Competing Jurisdictions of International Courts and Tribunals*,[9] examine

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[7] Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 Int'l & Comp. L.Q. 863 (1995). See, in particular, his claim that "[t]he rule of law based upon the uniform development of jurisprudence will be best secured by strengthening the role of the International Court of Justice, not by dispersing the judicial function of dispute settlement in the international community among various scattered organs. The Convention is so misguided as to deprive the Court of its role as the sole organ for the judicial settlement of ocean disputes by setting up a new judicial institution, the ITLOS, in parallel with the long-established Court" (*id.* at 864).

[8] Tullio Treves, Le controversie internazionali. Nuove tendenze, nuovi tribunali 59-67 (1999).

[9] Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals (2003); Yuval Shany, Regulating Jurisdictional Relations between National and International Courts (2007).

both types of "judicial interaction" from the perspective of overlapping or conflicting jurisdictions. It is, however, also interesting to consider the same argument from a different perspective: that of the contribution of judges to the establishment of either an order, or a "connective tissue," between two regimes. In this case, more emphasis is placed on substantive rather than procedural aspects.[10] The concern here, then, is not with regulating the activity of judges, but rather with ascertaining whether they are succeeding in regulating the pluralization of public power and in contributing to the development of a common legal order. From this standpoint, courts are to be considered not in their passive role, to which issues relating to the limitation and exercise of jurisdiction are central, but rather in their active role, as creators of an order quite different from that dominated by pluralization.

It is clear that the two aspects outlined above are closely related in a number of ways. For example, constitutional courts within the EU have been keen to safeguard their own role in defining the relations between the Community legal order and the internal orders of Member States.

V. THE INTEGRATIVE ROLE OF JUDGES: HOW IS IT PERFORMED AND WITH WHAT RESULTS?

My basic hypothesis in this paper is, therefore, that courts fulfill an important role in removing from isolation the various different legal orders existing at various different levels. It is thus important to establish how this happens and with what results; inquire as to why, for example, the Belgian, Austrian and Czech Constitutional

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[10] But – as we will see – the emphasis is not primarily on those substantive aspects related to the rights-protecting role of judges, such as ensuring respect for the "due process of law."

Courts make direct use of preliminary references to the European Court of Justice, while those of Germany, France and Italy do not; or how national laws, and those of other global regimes, are treated by international commercial tribunals or the International Tribunal for the Law of the Sea.

An essential component of this integrative role of courts is composed of a number of "doctrines" that enable cooperation, each acting as a "clutch" for connecting or disconnecting legal systems, as "glue" that holds them together or as a rhetorical device that enables judges to more readily exercise restraint.[11]

These doctrines can be listed as follows:

a. Counter-limits (where a "superior" law is accepted by an "inferior" legal order, on the condition that the former respects the fundamental principles of the latter);

b. Margin of appreciation (where a "superior" law is imposed upon "inferior" legal orders, but leaves a certain margin of freedom to the latter);

c. The distinction between supremacy and primacy (where a "superior" law applies within "inferior" legal orders not as the result of its hierarchical superiority, but rather on the basis of the spheres of competence of the two orders);

d. Atypical or infra-constitutional sources; "interposed rules" (where a "superior" law is imposed upon the ordinary legislation of the "inferior" legal order, but not upon its constitutional laws);

e. Direct effect and "interpretation in conformity" (where a "superior" law, although not directly addressed to private actors, obliges the

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[11] The issue of the necessary interconnections between different legal orders beyond the State has been examined in two recent studies. *See* Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 Int'l J. Const. L. 373 (2008); Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 Int'l J. Const. L. 415 (2008).

authorities of the "inferior" legal order to apply their norms in conformity with the "superior" law);

f. "Judicial comity," referrals or "deference" among regulatory regimes (where different extra-State legal orders are treated as integrated or as bound by obligations of cooperation);

g. Equivalent protection (where one legal order recognizes the validity of another on the condition that the latter guarantees a level of protection of fundamental rights comparable to that furnished by the former);

h. Division of functions (where one legal order makes room for another in relation to a particular function, where the principal role of the latter is to fulfill that function);

i. Subsidiarity (where a legal order abstains from intervening in a particular matter over which another legal order, less removed from the interests at stake, has jurisdiction).

These issues will be examined in the following order. The first section will consider a number of examples of convergence and divergence of interests between national and supra-State legal orders, and between global legal orders. The second will examine two disputes in which judicial or quasi-judicial bodies were called upon to resolve conflicts between different legal orders, located at various different levels. The third and largest section will review a number of key examples, chosen from among the many available today, in which judicial or quasi-judicial bodies define the modalities of connection between different legal orders, whether situated on the same or on different levels. The final section will conclude by drawing together the various threads of the analysis.

My inquiry here will depart from an examination of concrete cases. In the area of interest to us here, approximate and general ideas abound; and these often lead to similarly general and abstract

conclusions. These include, for example, the claims that it is always States that, in the final instance, resolve conflicts and establish relations with other legal orders; that globalization is primarily an economic phenomenon, which, in the field of law and institutions, is dependent upon the consent of the parties; or that non-State legal orders are destined to remain mere isolated monads until the constitution of a superior, global order. The analysis that follows seeks to demonstrate that theory, if it is to be capable of grasping new phenomena, cannot simply content itself with these *idées reçues*. It must instead engage in a detailed collection and examination of the basic data in order to then ascertain their importance and their potential to modify our traditional paradigms.