Abkehr vom Multilateralsimus – Internationales Recht in Gefahr?, Herausgegeben von Anne Peters, Stephan Hobe, Eva-Maria Kieninger

(Turning away from Multilateralism – International Law in Danger?, edited by Anne Peters, Stephan Hobe, Eva-Maria Kieninger)

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English Summaries:

Does Universal International Law Still Have a Future? Reflections on the War in Ukraine and the Prohibition of the Use of Force

by Jochen von Bernstorff, Eberhard Karls Universität, Tübingen

1. The ongoing Russian war of aggression against Ukraine violates the prohibition of the use of force as a fundamental structural principle of international law and cannot be legally justified. The Russian justification-attempts refer to previous illegal Western interventions and their justifications. This form of „justification mimicry“ undermines the authority of international law as a legal order and hints at the existence of an erosion-spiral.

2. The UN Charter in 1945 established a comprehensive ban on the use of armed force in interstate relations, with narrowly defined exceptions. This restrictive consensus was confirmed and strengthened in subsequent decades by ICJ jurisprudence and important consensus declarations of the UN General Assembly.

3. The term „erosion“ of the prohibition of the use of force refers to a change of meaning in international legal discourse, as a result of which the substantive scope of the prohibition is restricted or its exceptions are expanded.

4. Clear condemnation by the community of states and institutional reactions, especially in the UN bodies, are of great importance for the defense of the restrictive consensus. Violations of international law that remain institutionally unmarked have an eroding potential that can be realized through subsequent discursive references.

5. Unilateral action in response to the Russian war of aggression, such as sanctions against Russia or arms deliveries to Ukraine, is in principle justifiable under international law. The prohibition of intervention and the right of neutrality are overridden by the right to take proportionate countermeasures and, in the case of military action, by the right of collective self-defense. Regarding the latter, the binary aggression/self defense paradigm supersedes applicable neutrality rules.

6. The prohibition of annexation of foreign territory from the Interbellum found repeated confirmation in international legal discourse after the Second World War until the end of the

20th century. The Russian annexation of Crimea (2014) and the Russian war of aggression against Ukraine, however, clearly demonstrate that the inviolability of borders is, even in Europe, no longer sacrosanct.

7. The collective security system of the United Nations has proven to be largely dysfunctional, even in the current conflict. This is due to the veto rights and the lack of rule of law-safeguards for the Security Council's broad powers. The General Assembly can compensate for these structural weaknesses only to a limited extent through the *Uniting for Peace* mechanism.

8. An effective collective security system is inconceivable at the universal level without a worldwide outlawing and disarmament of weapons of mass destruction, if only because any collective military enforcement action against a nuclear power could always trigger a nuclear Armageddon.

9. The system of the UN Charter, especially Article 103, is methodologically opposed to hasty adoptions of so-called „overtaking customary law“ by new (illegal) state practice. The extensive adoption of new exceptions to the prohibition of the use of force based on the practice of great powers contains considerable eroding potential and contributes to the latent destabilization of an institutionally secured normative content of Charter rules. The same applies to the often instrumental adoption of new „grey areas" in the interpretation of basic norms of international law in the literature, such as in the case of Art. 51 and the „*unwilling or unable*" doctrine.

10. War, climate crisis and global inequality threaten humanity in the 21st century in an unprecedented way and call for far-reaching institutional reforms while strengthening basic principles of international law. Falling back into camp or bloc mentality, such as the often-invoked struggle of democracies against autocratically governed states, stands in the way of meeting these challenges.

Internationalization versus Europeanization and Renationalization in Private International Law

by Prof. Dr. Martin Gebauer, Tübingen, Judge at the Court of Appeal in Stuttgart

1. A diversity of approaches towards private international law is neither concerning nor new. Such diversity has been a feature of private international law since the Middle Ages.

2. At an early stage, the private international law of continental Europe developed a remarkable openness in respect of its approach to legal plurality. However, this was always accompanied by limits to the tolerance of substantive foreign and particular law, e. g., the law applying only to a specific geographical area as opposed to the *ius commune*. For the rational delimitation of particular law, control mechanisms in the form of rules of private

international law were developed, both in terms of substantive law and the procedural approach taken towards foreign law.

3. Developments in private international law were always influenced by the relevant historical political developments and ideological concerns. Such developments and concerns were also consistently reflected in legal dogmatics. So far as the dogmatics of private international law are concerned, its inherent contradictions were made manageable: the universal, the particular, the foreign, the unacceptable, the similar and the peculiar.

4. The respective functions of legislation, jurisprudence and legal practice differed throughout the various epochs of private international law and transformed themselves with the changing concept of law, i. e., whether law derived from the legislature or some other body. All three actors were involved to varying extents in the respective national and international tendences of the various epochs, together with the rise and fall of the European influence on private international law. Increasing awareness of the ideological traditions of the respective epochs can assist to reveal the rise of hidden national approaches.

5. European private international law in the present is strongly influenced by new, uniform European legislation and case law. Particular schools of thought, which have been cultivated in jurisprudence and have persisted beyond developments in law, constitute a possible challenge to the coherency of the system, but can also be viewed as an opportunity.

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The Crisis of Uniform Law

by Prof. Dr. Matthias Weller, Mag.rer.publ., Bonn

1. Uniform Law has undergone a productive transformation and maturation in its theoretical, narrative, methodical and practical foundations, compared to its utopian and exaggerated starting points (comprehensive global uniform law; *„Weltrecht"):*

2. The theory of normative orders presupposes a priori a heterogeneity of orders („partial orders").

3. Even within such partial orders a principle of normative entropy is at work – particularly within partial orders of uniform law.

4. As far as uniform law is conceived solely as a project of nation-states amongst each other, diminished ordering powers of these nation-states must be perceived as crisis of uniform law. However, uniform law has gone far beyond state-produced norms.

5. The narratives underlying uniform law have fundamentally shifted („commercial approach), not least under the impression of powerful counter narratives.

6. The notion of „law“ as such has changed („legal pluralism”), in particular in the transnational arena („global legal pluralism”).

7. Uniform law has long grown beyond the „monoculture“ of treaties and has developed a variety of instruments: model laws, restatements, pre-statements, model rules, legislative guides, model contracts and clauses etc.

8. Accordingly, a variety of norm producers beyond the state has emerged.

9. In dealing with this variety, specific techniques for treaty-making have emerged („soft hard law”), for example the limitation of treaties to selected state parties, modular solutions or options between regulatory settings instead of options to refuse certain settings etc.

10. In further dealing with this variety, methods for the choice of the proper instrument type have emerged. These methods make visible the specific benefits (enabling of interfering in third party rights; maximum of legal and transaction certainty), but also downsides (petrification) of treaties on uniform law. The same applies to other kinds of instruments respectively.

11. More could be done for teaching and explaining.

12. Against this background we should continue working on the following three key points: (1) expectation management; (2) building of expertise; (3) a supportive attitude towards experiments.

The struggle over natural resources in international law Postcolonial sovereignty and the politics of transnationalization

by Prof. Dr. Sigrid Boysen, Hamburg

1. The distribution of natural resources lies at the heart of the international legal order. The international law of the modern era has co-evolved with changing legal forms of the industrialized states’ access to the natural resources of the Global South. Despite this obvious importance, there is no international „law of natural resources”, no „commodity law” as a specific legal field. Relevant regulations can be found scattered in various fields of law, especially in international economic, environmental and investment protection law. The regulations here remain mostly unspecific and treat raw materials like other goods and investments related to the extraction of raw materials like other foreign direct investments.

2. Natural resources are at the heart of both colonial and post-colonial economic relations between the industrialized countries of the North and the Global South. The colonial constellation is characterized by a specific relationship toward the natural environment. The

industrialization of the colonial powers relied heavily on raw materials from the colonies. Natural resources thus became both the justification and the driving force of colonialism. As a result of these developments, natural resources until today define the conflicted nature of international environmental law. It has to combine its emancipatory impetus (sovereignty over natural resources) and the associated promise of distribution with its imperial roots and a universally oriented instrumental-economic approach.

3. The initially imperial hierarchy in the law of natural resources changed its form in the 20th century. After decolonization, the situation of natural resources is characterized by a setting in which the formal legal rules of global appropriation and distribution of nature have become independent to such an extent vis-à-vis the explicit political domination of the leading states that they no longer necessarily require formal colonial titles of domination.

4. The institutional separation of sovereign equality and economic inequality proves to be crucial for the postcolonial constellation. In the context of natural resources, this functional separation of the economic and the political sphere, which is constitutive of international law, becomes particularly virulent, since it is necessary here to reconcile political-normative objectives (preservation of global common goods) with economic imperatives (exploitation of resources, economic growth).

5. The most important rule of the international law of natural resources is the very principle of sovereignty. It simultaneously excludes and includes questions of distribution in a paradoxical form. In the legal concept of permanent sovereignty over natural resources, the question of the fair distribution is seemingly excluded and thus indirectly inscribed in international law all the more strongly. By appropriating them according to territorial sovereignty, international law decides about natural resources. The key feature of this appropriation is that it is purely formal. The principle of sovereignty over natural resources is thus inherently connected to their marketization.

6. This marketization does not take place in the forms of international law, but in a transnational constellation mainly through private law. Not least, this casts a different light on multilateral international law and the political significance and future of multilateralism.

7. Multilateralism cannot be viewed in isolation. Rather, it must always be understood in the specific combination with its alternatives – above all bilateralism and imperialism. Particularly in the context of natural resource law, multilateralism does not appear as a monolithic phenomenon, but rather as part of a larger frame of reference, which, in addition to bilateral agreements, is decisively shaped by transnational economic law.

8. The law dealing with access to and distribution of natural resources can therefore only be grasped as transnational law. It consists not only of public and international, but also of non-state legal forms. The complexity of transnational resource law reveals that almost more crucial than the question of the scope and development of multilateral agreements is the

question of which areas have not been regulated multilaterally. It is especially in these areas that imperial legal patterns continue to operate.

The Influence of Human Rights on Private International Law

by Prof. Dr. Christine Budzikiewicz, Marburg

1. In addition to the fundamental rights of the German constitution, the German legislature must also observe the guarantees of human rights under international law when forming conflict-of-law rules. Human rights set the limits within which the legislator can act. They are part of the principles on which the formation of rules must be based. They encompass, in particular, the choice of non-discriminatory connecting factors. However, human rights do not contain any concrete requirements with regard to the choice of a connecting factor. This also applies to the rights guaranteed in the ECHR. Within the framework drawn by human rights, it is up to the legislator to formulate concrete conflict-of-law rules.

2. With the increasing europeanisation of private international law, the question as to the influence of human rights must be answered, with particular consideration of the European conflict of laws. According to article 6 TEU, the protection of fundamental rights in the EU is primarily based on the rights, freedoms and principles laid down in the Charter of Fundamental Rights. The importance of the Charter, also for European conflict-of-laws rules, is emphasised in the recitals of several regulations.

3. Cultural identity has no direct influence on the formation of rules in private international law. In particular, it does not force a connection to either the residence or the nationality of a person.

4. Neither the divorce monopoly of the German courts, nor the compulsion to marry before the registrar, violate the rights guaranteed in the ECHR.

5. Increasing attention is being paid to private international law in the civil law enforcement of human rights guarantees. This applies not only to the enforcement of human rights guarantees via the public policy reservation, but also to the establishment of overriding mandatory provisions.

6. Overriding mandatory provisions can help enforce human rights standards under conflict-of-law rules. Above all, the catalyst for this development is the discussion about the liability of companies for human rights violations. However, the characterisation of human rights, or human rights guarantees, as overriding mandatory provisions must be denied.

7. To guarantee the protection of minors from early marriage under fundamental and human rights, no special public policy clause would be necessary. The general public policy reservation would be sufficient in this respect. The same applies to nondiscriminatory access to divorce. The abstract control of foreign divorce law, which the Advocate General at the

ECJ considers necessary, contradicts the traditional understanding of private international law with regard to the fundamental equivalence of legal systems.

8. The general public policy reservation is of particular importance for the enforcement of human rights guarantees. Fundamental and human rights are among the essential principles of German law. If a human rights violation is at issue, a violation of public policy already exists if the application of the foreign law referred to would lead to a violation of human rights by the sovereign authority involved in the case. In this case, it is out of the question to relativise the human rights violation by additionally examining a domestic reference.

9. The ECJ and the ECtHR, within the scope of their competences, monitor the limits within which the member states or convention states may invoke the public policy exception.

10. The ECJ rulings in *Coman* and *Pancharevo* do not imply an obligation to introduce a comprehensive principle of recognition of personal status. Nor can a general duty to recognise a personal status be inferred from the decisions of the ECtHR. In its case law on article 8 ECHR, the ECtHR grants the Convention states a considerable margin of appreciation. If the conflict-of-law system is to be supplemented by a recognition principle, a decision by the legislature would be required.

Backlash against international and regional human rights? / International and regional human rights amid headwinds

by Prof. MMag. Dr. Christina Binder, E.MA, Universität der Bundeswehr München

I. *Localization*

1. International and regional human rights have been confronted with backlash especially in the last two decades. Particularly visible are backlash tendencies against hu- man rights monitoring institutions in the European, Inter-American and African human rights systems and in relation to treaty-based mechanisms within the United Nations framework.

II. *Symptoms*

There are several symptoms which are reflective of backlash.

a) Populist criticism

2. The political rhetoric of populist governments in numerous states demonstrates opposition to regional human rights monitoring institutions in particular. It is frequently argued that such institutions lack legitimacy, do not have democratic legitimacy, and disregard the security interests of states.

b) Withdrawal, re-dimensioning and lack of cooperation

3. States' resistance within institutional and organizational structures often directly relates to the above rhetoric. It is illustrated by states' withdrawals from human rights treaties or certain human rights procedures, by calls for a 're-dimensioning', i. e. a pushing back on regional human rights protection systems, and by a lack of cooperation. The forms of resistance vary, at the regional and international levels.

c) Resistance to decisions and lack of implementation

4. Resistance to decisions of regional human rights courts and their delayed, only partial or lacking implementation are further signs of headwinds. As regards international human rights, the deficient domestic implementation is the most obvious symptom.

III. *Diagnosis*

The headwinds have several reasons.

a) Nationalism and authoritarian regimes

5. Criticism of human rights monitoring institutions benefits the nationalist propaganda of populist regimes. This is related to an increasing abandonment of pluralistic democracy and a turn to authoritarianism in numerous states.

6. The headwinds against human rights monitoring institutions are accompanied by a growing scepticism toward international cooperation and multilateralism and an emphasis on national concerns.

b) Reasons within the realm of human rights monitoring institutions

7. Another cause of headwinds lies in the sphere of regional and international human rights monitoring institutions. Capacity problems and the frequently long duration of proceedings provide critics with arguments. At the same time, numerous problem areas in the institutional-organizational sphere of human rights monitoring institutions arise in light of an unresolvable tension: In terms of their composition, functioning and funding, the institutions are attached to the 'umbilical cord' of states and are thus dependent on the very states that they are supposed to control.

8. In addition, there are internal rivalries between organs of the human rights monitoring institutions in the two-track monitoring process and an excessive bureaucratization as a side effect of institutionalized human rights protection.

c) Deficient coordination between systems at the national, regional and international levels

9. There are coordination problems, particularly in the concretization and dynamic development of the necessarily broad human rights standards by the human rights monitoring institutions. In this context, (domestic) political reasons often intermingle with problematic situations in the (international) legal sphere.

10. The legal 'coordination problems' are particularly evident in the European and Inter-American human rights systems. This can most often be seen in the jurisprudence of national supreme courts.

11. Limits are placed on the jurisprudence of regional human rights courts above all in conflicts with the national constitution. This often involves questions of interpretation and balancing, such as the differing assessments by regional human rights courts and national courts of how to weigh different competing rights.

12. An international law perspective regularly relates to the extent to which the dynamic interpretation of human rights standards by regional human rights courts is covered by their mandate as guardians of human rights conventions.

IV. *Therapy*

13. Possible solutions from a 'realpolitik' perspective must strike a balance between effective human rights protection and keeping states 'on board' in times of headwinds.

a) Improving the efficiency and enhancing the legitimacy of human rights monitoring institutions

14. Institutional reforms to increase efficiency are inherently limited and regularly involve trade-offs. Particularly in Europe, it is important to maintain a balance between efficiency and individuals' access to human rights protection.

15. There is also some potential in increasing the legitimacy of human rights monitoring institutions, for example through greater involvement of particularly affected individuals.

b) Better coordination of substantive standards at the national, regional and international levels

16. The different human rights protection systems require different responses for the better coordination of human rights standards.

17. Particularly in the European and Inter-American human rights systems, a comprehensively understood cooperative subsidiarity principle can provide guidance for a vertical coordination between the different levels. The doctrine of a procedural margin of appreciation developed by the ECtHR, for example, seems promising for a better interlocking of these levels.

18. In the case of international human rights monitoring institutions, attention should be paid to the possibility of domestic operationalization of international human rights standards by actors such as NGOs and social movements (i. e. 'transnational experimentalist governance' (*de Búrca*)). Dialogue and the persuasiveness of the decisions of human rights monitoring institutions are crucial to further the implementation of international standards at the national level.

c) Better coordination of national, regional and international monitoring systems

19. Major institutional reforms, such as the establishment of a universal human rights court with the mandate to prosecute the most serious human rights violations, are hardly feasible and would come with disadvantages.

20. The realpolitik of human rights must begin with a solid anchoring of human rights protection at the domestic level. Recognizing that human rights are not a purely legal project makes their embedding in society as a whole ('vernacularization') all the more necessary.

21. The development of a 'human rights culture' at the national level ideally counteracts backlash tendencies and reduces the danger of populist positioning against international and regional human rights monitoring institutions.

Crisis and Future of State Courts as an Instrument of Dispute Resolution in International Trade

by Prof. Dr. Michael Stürner, M.Jur (Oxford), Konstanz

1. A state must provide a functioning court system that is designed to provide effective and accessible legal protection for the full range of private disputes.

2. Judicial systems around the world are in de facto competition with each other. Whether Germany will face up to this is primarily a question of legal policy. In any case, Brexit may diminish London's attractiveness as a forum for transnational disputes.

3. German commercial courts are in global competition with other specialised courts and arbitral tribunals. The more prominent their position in the judicial landscape, the more attractive they would become for potential litigants.

4. The German rules of civil procedure rules (Zivilprozessordnung – ZPO) need to be given more flexibility in order to be able to compete with arbitration proceedings.

5. The conduct of proceedings in English corresponds to a widespread interest of the parties. An amendment to the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG) would be advisable.

6. The publicity of the proceedings is of such importance that its unconditional exclusion cannot be justified by the general interest of the parties to a commercial dispute to conduct the hearing ex parte.

7. The prestige of a commercial court largely depends on the reputation of the judges sitting on the bench. A partisan selection of judges would probably not be in line with German constitutional law. Therefore, the judges appointed to those courts must be chosen with a

view to their commercial expertise. Given the present focus on career judges, it would be advisable to open up the judiciary to lawyers with different backgrounds.

8. According to a widespread, but not undisputed, view, in arbitration proceedings there is greater freedom with regard to the applicable law. This applies to the conflict of laws rules themselves, but also to the choice of non-state law rules and to the application of overriding mandatory rules. In this respect, there is no regulatory leeway with regard to German commercial courts as the Rome Regulations are mandatory.

Arbitration Reform from an International Law Perspective

by Hans-Georg Dederer, University of Passau

1. As multilateralism crumbles, there is a certain irony to the fact that states are in search of multilateral solutions for investor-state arbitration.

2. The mainstream narrative of a „legitimacy crisis“ in investor-state arbitration has created a dynamic that states could not but participate in the multilateral reform debate.

3. The reform options presently discussed within UNCITRAL Working Group III mirror both the criticism of the current system of investor-state arbitration and the diverging reform ideas of states.

4. ICSID rules and regulations were already comprehensively updated and entered into force on 1 July 2022.

5. International investment law is a *lex specialis* of international human rights law. Based on the functional equivalence of international investment law and international human rights law, the structure, function, and jurisdiction of an international investment court can be substantiated and developed.

6. International investor-state arbitration or court proceedings must be understood as

7. „international public authority“. Accordingly, they must conform to certain structural principles derived from public law.

8. The post-colonial critique of modern public international law offers the perspective that the guarantee of an effective judicial remedy under international investment law, which privileges foreign investors over other domestic or foreign economic actors, should by no means be taken for granted.

9. At the same time, the post-colonial critique of public international law creates a sensitivity for the fact that – effectively no different from international human rights law – international investment law must also always strike a fair balance between state sovereignty and legitimate concerns of foreign investors regarding their protection.

10. In order to achieve the UN Sustainable Development Goals, developing countries, in particular, depend on enormous investment flows from abroad. Therefore, more and more developing countries, especially in Africa, recognize that it is international

11. investment agreements which include a dispute settlement clause that provide foreign investors with the legal certainty required to assume the risk of foreign investment.

12. The different regions of the world must be conceived as keen experimental living labs for reforms of international investment law and, in particular, of investor-state arbitration or court proceedings respectively.

13. Abolishing international arbitral or court-based investor-state dispute settlement would weaken the modern international legal order shaped by human rights considerations significantly from a rule-based perspective.

14. Public authority must be grounded in legitimacy. At the level of public international law, as a rule, only states can give legitimacy to international public authority. Therefore, with a view to personal legitimacy, judges must be appointed by states.

15. Public authority must be exercised in a substantively correct way. It reflects historically evolved beliefs that impartiality and independence of judges are indispensable for the substantive correctness of judicial decisions. Therefore, they must be safeguarded against conflicts of interests. This is also where the problem of third-party funding lies.

16. Public authority must be exercised in a transparent way. In the case of arbitral or court-based investor-state dispute settlement, the publicity of court hearings and the publication of decisions alone are required.

17. As a matter of principle, the concept of „amicus curiae" should be dismissed.

18. Public authority must be predictable. The predictability especially of the judicial authority can be facilitated through binding interpretative agreements as well as through judicial decisions which have, at least de facto, a binding effect also on future disputes.

19. Public authority must be subject to review. It follows that a second instance is imperative even though there is no compelling need to structure it in the form of a genuine appellate body.

20. Recourse to international arbitral or court-based investor-state dispute settlement constitutes an exceptional judicial remedy and, therefore, requires the prior exhaustion of local remedies.

21. Within arbitral or court-based investor-state dispute settlement proceedings, counterclaims should be permissible in principle.

22. The foreign investor should have access to a permanent international investment court which could be designed – only sketching it out here – as follows: chambers; grand chamber

as second instance with appellate jurisdiction on points of law only; state-appointed part-time or full-time judges with fixed terms; exhaustion of local remedies but admissibility of claims after five years at the latest; permissibility of third-party funding subject to a disclosure obligation; preliminary references by domestic courts on questions of interpretation; binding effect of treaty interpretations by the treaty parties, *pro futuro* only, though; admissibility of counterclaims; public oral hearings; complete publication of court decisions (only); no participation of amici curiae; judicial declaration of breaches of the law, award of damages; enforceability of final judgments just like domestic judgments.

23. The international treaty design for the introduction of a reformed international arbitral or court-based investor-state dispute settlement must satisfy the diverging reform aspirations of states. At the same time, it should render individual amendments to the existing international investment agreements unnecessary. To this effect, a viable option may be an opt-in convention which has already been proposed in the reform debate.

24. Such an opt-in convention could, *e. g.*, provide three options which the treaty parties could sign on to: (1) an investment court following the EU model; (2) an appellate court for ad hoc arbitral proceedings; (3) an investment court based, *e. g.*, on the model envisaged in this contribution, *i. e.* including, in particular, the local remedies rule. This convention system could and should be further refined via instruments such as reservations, declarations, or positive or negative lists respectively.

25. The end result would be a multilateral, albeit – not least with a view to the substantive standards of review – highly fragmented solution, in short: „fragmented multilateralism".