The Pillars of Global Law

GIULIANA ZICCARDI CAPALDO

ASHGATE
Contents

Preface xiii
List of Abbreviations xix
International Law Journals xxi

Introduction
The Four Pillars of Global Law: Verticality, Legality, Integration, and Collective Guarantees 1

PART I
Verticality and Sharing of the Decisional Processes 17

SECTION I
Global Law-Making 19

Chapter 1
Dynamics of Global Rule-Formation Processes 21
1. Introduction 21
2. The Principle of Democratic Legitimacy: Changes During the 1990s 22
3. New Principles in the Field of Human Rights 29
4. A Theory of Global Rule-Formation Processes 33
   The Dynamic Process Behind the Formation of New Principles: ‘Proposals’ by the Dominant Powers and Consensus Reached in International Fora 33
5. The Mechanisms Developed by the G8 and the Security Council’s Open Debates 37
7. Concluding Remarks: The Intersection of Prevailing Forces and the Public Interest in Global Rule-Formation Processes 41

SECTION II
Global Law-Enforcement System 43

Chapter 2
The Integrated System of Law-Enforcement 45
1. Introduction 45
2. The Private-Public Approach to Law-Enforcement 48
3. States Acting in the Common Interest and Institutional Control 53
4. Innovative Trends in the Practice of UN Bodies
   The Determination of Serious Breaches of Basic Global Principles
   Innovative Security Council Policies Regarding Collective Actions
5. Some Mechanisms of the Joint Governance
6. Mechanisms to Co-Manage Peaceful Enforcement Measures
7. Mechanisms to Co-Manage Measures Involving the Use of Force
   Authorized Uses of Force
   Unauthorized Humanitarian Interventions
   Enforcement Mechanisms to Safeguard the Peace Process
8. The Osmotic Relationship Between the Inter-State Community
   and the United Nations
9. Concluding Remarks: Moving Towards Shared International
   Governance

SECTION III
Global Justice

Chapter 3
The International Court of Justice – From Judicial Organ to Global Court

1. Introduction
   The First Phase
   The Second Phase
2. The ICJ as the Builder of the Vertical Global System
   The Court in Charge of the World’s Territorial Order
   The Court’s ‘Authority’ Over State Organs
   The Court as the Director of the Development of International Law
   The ‘Intrinsic Authority’ of the Court’s Decisions
   The Court’s Authority on International Institutions
3. The ICJ as Guardian of Global Constitutional Values
   Judicial Protection of Human Rights Beyond the ICJ Statute
   The Expansion of the Court’s Advisory and Provisional Functions
   The ICJ between Over-Reaching and Over-Caution
   Judicial Protection of Peace Beyond the UN Charter
   Functional Parallelism: Court-Council
   Complementarity: Court-Council
   Overcoming Veto Rule of Art. 27 of the UN Charter
   Weakness of Enforcement Remedies
4. The ICJ as a Supreme Constitutional Court
   Judicial Control Over the Acts of UN Political Organs
   Decisions Regarding Ultra Vires Acts
5. Concluding Remarks: The Road Ahead for the ICJ Towards the
   Legitimacy of Global Governance
PART II
Legality Principles and Common Global Values 137

Chapter 4
Legality Versus Effectivity in the Global Legal System 139
1. Introduction 139
2. The Question of International Legality in the Overthrow of Saddam Hussein: The Legal Basis for Allied Intervention in Iraq 141
   Self-Defence
   The Safeguard of Democracy
   A New Concept of Worldwide Democracy
3. Is There a Right to Overthrow an Illegitimate Regime? 150
4. The Difficult Coexistence Between the Principles of Legality and Effectivity 151
   Effectiveness in Classical International Law
   The UN Practice of Non-Recognition of Unlawful Territorial Situations
5. Co-Managing Action Against Illegitimate Regimes 156
6. Overcoming the Ineffectiveness of Decision-Making Institutions 157
   The Concentration of Decision-Making Power Within the UN
   States Claim a Role in the Decision-Making Process
   Processes of Multilateral Authoritative Decision-Making
7. The Unlawfulness of the Unilateral Intervention in Iraq 161
8. The Effectiveness of the ‘Occupying Powers’ 162
   Promotion of a Democratic International Order
   Gradual Tightening of Sanctions Against ‘Illegitimate’ Governments
   Evolution of Integrated Processes to Implement International Legality

PART III
Integration of Legal Systems in the Direction of Global Law 171

Chapter 5
State Law and International Law in a Globalizing Legal System 173
1. Introduction 173
2. International Minimum Standards for Internal Applicability of Treaty Law 177
   Direct Applicability
   Good Faith
   Primacy
3. Recent Trends in Domestic Implementation of Treaty Obligations 187
   Treaty Obligations Embodying Jus Cogens 190
4. The Italian Solution Regarding the Status of Treaties 193
   Italian Norms and Practice Before the Amendments to the Constitution
   The Amended Italian Constitution
   Shortcomings of the Amended Italian Constitution
   The Supremacy of Treaty Law
The Direct Applicability of Treaty Law
The Conflict Between Treaties and the Constitution
An Important Step but Only the First

5. Reducing State Freedom in the Internal Applicability of Treaties 209
6. Concluding Remarks: Towards an Integrated Global Legal System Arranged in Concentric Circles 212

PART IV
Collective Guarantees: An Embryonic New System 215

SECTION I
Actions to Combat Global Terrorism 217

Chapter 6
Heteronomous Actions Against Terror: The Military Interventions 219
1. Introduction 219
2. The Dual Functions of Collective Guarantees – Punitive and Tutelary 220
3. The State Practice of Military Incursions in the Fight Against Terrorism 222
4. Under What Authority Can a State Exercise Its Sovereign Powers Beyond Its Borders? The Scholars’ Approach to the Problem 225
6. Insufficient Regulation of Extraterritorial Powers to Safeguard Global Interests Principles and Criteria Based on International Practice: The Subsidiarity Principle Interventions on the High Seas or in Free Spaces Interventions in the Territory of Other States 234
7. Concept and Structure of the Embryonic System of Collective Guarantees 243

Chapter 7
An Integrated Self-Defence System Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict 253
1. Introduction 253
2. The Proportionality of Self-Defence 254
3. Legal Basis for Israel’s Right to Resort to Self-Defence The Requirement that an ‘Armed Attack’ Be Attributable to a State 256
Standards for Attribution to a State of Non-State Acts
The Need for New Standards Less Rigid in Their Application

SECTION II
Global Enforcement Mechanisms Against Terrorism

Chapter 8
Joint Mechanisms Against Terrorists, Insurgents and Other Non-State Actors
1. Introduction
2. Terrorist Acts Committed on Behalf of ‘Peoples’
3. A New Global Approach to Terrorist Activities in Armed Conflicts: Principles and Mechanisms
   A Coherent Legal Framework Applicable to Non-State Actors
   An Integrated Monitoring System and Action Programme
   A System of Properly Targeted Collective Measures
   The Concept of ‘Smart Sanctions’
   Political-Diplomatic Measures
   An International Judicial System for the Prosecution and Punishment of Terrorists

Chapter 9
The UN Counter-Terrorism System
1. Introduction
2. Special Treaty-Regimes vis-à-vis General International Law: Is the Security Council Permitted to Derogate to Key Human Rights?
3. Non-Derogable Human Rights Norms While Countering Terrorism
4. The Lack of Respect for Non-Derogable Human Rights in the UN Counter-Terrorism Regime
5. Proposals for Eliminating Deficiencies
6. Providing the UN Counter-Terrorism Regime with a System of Judicial Remedies Based on the UNAT-ICJ Model

Conclusions

Tables
1. The Westphalian System
2. The UN Charter System 311
3. The Global Legal System 312
4. Rule-Formation Processes in Global Law 313
5. The Global Law-Enforcement System 314
6. The Global Judicial System 315

Bibliography 317
Index of Case Law 375
Documents 397
Analytical Index 411