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IS THE EU LEGAL ORDER THE TOMBSTONE OF THE DUALISTIC AND THE MONISTIC DOCTRINE?

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I. Introduction

The relationship between international and municipal law has been and still is a long-running debate in public international law. Even though this discussion was trivialized as "unreal, artificial and strictly beside the point",[1] the so called "globalization of law"[2] is testimony for the actuality and the ongoing and even growing importance of this debate. Furthermore, international organizations such as the European Union (EU) are obvious examples of entities based on international

1. G. FITZMAURICE, *The General Principles of International Law Considered from the Standpoint of the Rule of Law* 92 RdC II (1957) 71; furthermore Fitzmaurice argued that (71f): "In the same way it would be idle to start a controversy about whether the English legal system was superior to or supreme over the French or vice-versa, because these systems do not pretend to have the same field of application."

2. Compare for this nomination J.-B. AUBY, « Globalisation et droit public », 14 *European Review of Public Law*, 2002, 1219 : « De tous les phénomènes qui ont affecté l'évolution de nos systèmes juridiques à la fin du siècle dernier, et qui détermineront le cours de leur évolution pendant celui-ci, la globalisation est l'un des plus importants : c'est probablement même le plus important. »; cf. A. PETERS, "The Globalization of State Constitutions" *in* J. NIJMAN/A. NOLLKAEMPER (eds), *New Perspectives on the Divide Between National and International Law,* (2007) 251ff.

law. International organizations with decision making capacity do have enormous influence on and within the legal orders of member states and even non-member states. The theoretical foundation of this relationship was and still is dominated by the heavily disputed dualistic and monistic doctrines (I). This paper intents to concentrate on one simple, but very crucial point: both theories rely fundamentally on the concept of the legal order, which shall be unmasked here as a congenital defect of both doctrines. The EU serves as an example in order to give this theoretical criticism a practical frame (II).

II. Dualism v monism

In order to give the complex and often controversial relationship between international and national law a theoretical background, many theories have been developed. The most famous doctrines are dualism and monism. However, monism and dualism are two theoretically distinctive doctrines. Even though in practice they drew closer to each other especially when one concerns their de-radicalization,[3] the dogmatic discrepancies are still abounding.[4]

A. Dualism

Dualism divides international and municipal law into two (dual) different legal systems.[5] This was introduced by the famous phrase of Heinrich Triepel,[6] stating that the international and national legal

3. Compare K. SCHMALENBACH, Article 27 *in*: O. DÖRR/K. SCHMALENBACH, *The Vienna Convention on the Law of Treaties – A Commentary* (2012) paras 31–40.

4. Compare eg C. AMRHEIN-HOFMANN, *Monismus und Dualismus in den Völkerrechtslehren* (2003) 332 (with further references), and 334;cf. R. PFEFFER, *Das Verhältnis von Völkerrecht und Landesrecht – Eine kritische Betrachtung alter und neuer Lehren unter besonderer Berücksichtigung der Europäischen Menschenrechtskonvention* (2009) 82.

5. The terms legal system and legal order are used interchangeably.

6. H. TRIEPEL, *Völkerrecht und Landesrecht* (1899) 8f.

order, are "two circles, which possibly touch, but never cross each other".[7] The division of the legal systems was primarily based on the view that the law of international and national legal systems flew out of different sources, which leads to the fact that international and national law stem out of different legal orders relying on different grounds of validity.[8] Furthermore, dualism assumes that the addresses and the content of international and national law cannot be identical.[9] Out of this impossibility of identical addresses of international and national law advocates of the dualistic doctrine followed as a consequence that there cannot be a norm conflict between international and national law.[10] The division of the legal systems leads to the fact, that vice versa international law might not derogate national law and national law might not derogate international law.[11] In order to give international law effect within the national legal system, dualism demands a special procedure to transform or incorporate the international norm into a national norm.[12] This is because international law can only stipulate obligations for states.[13] Moderate dualism however de-radicalized the former strictly claimed division between interna-

7. H. TRIEPEL, *Völkerrecht* (Fn 6) 111 "Völkerrecht und Landesrecht sind nicht nur verschiedene Rechtstheile, sondern auch verschieden Rechtsordnungen. Sie sind zwei Kreise, die sich höchstens berühren, niemals schneiden." [Translation in the text by the author.]

8. D. ANZILOTTI, *Lehrbuch des Völkerrechts*. (Translation of the 3rd ed. by C. Bruns/K Schmid, 1929) 38f.

9. See H. TRIEPEL, *Völkerrecht* (Fn 6) 9, 11, 228f; cf. D. ANZILOTTI, *Lehrbuch* (Fn 8) 41f. auch bezüglich Inhalt?

10. See H. TRIEPEL, *Völkerrecht* (Fn 6) 254ff; D. ANZILOTTI, *Lehrbuch* (Fn 8) 42.

11. See H. TRIEPEL, *Völkerrecht* (Fn 6) 257f; D. ANZILOTTI, *Lehrbuch* (Fn 8) 38.

12. D. ANZILOTTI, *Lehrbuch* (Fn 8) 41, 45f.

13. See H. TRIEPEL, *Völkerrecht* (Fn 6) 228f, 119f, 271; see also D. ANZILOTTI, *Lehrbuch* (Fn 8) 41ff; cf. G. A. WALZ, *Völkerrecht und staatliches Recht – Untersuchung über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (1933) 238f who was considered to be a moderate dualist, however he did not postulate the impossibility of international law addressing individuals, but stated in 1933 that the character of the actual international law at 1933 is mediatized through municipal law. Moreover, he did propose a differentiation between international

tional and national law. This is reflected in the fact that transformed international norms, which are valid as national norms, might be interpreted according to the international norm on behalf of which the transformation has been carried out.[14] Another practical dimension of moderate dualism is the application of the general transformation procedure in order to transform international into national law. The ground of validity of the international norm still rests within the national legal order, however in fact the transformation works in a very generous and general way giving international law effect without establishing a different content or different addresses of international and national law.[15]

B. Monism

Monism, however, assumes one (mono) single world order unified in one legal system. Taking for granted a single legal system, the monistic doctrine had to deal with the question which jurisdiction should prevail in a norm conflict between international and national law. This led to the division of a monistic doctrine with primacy of international law and a monistic doctrine with primacy of municipal law. However, the primacy of national law goes back to a very nationalistic view of international law, which today is not dealt anymore with as a suitable explanation for the relationship between international and national law.[16] For this reason the monistic doctrine with

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law addressing states and international law (the former he called material and the latter formal international law), but is created in order to address individuals, which however still would have to be mediatized through states (see 242-244).

14. D. ANZILOTTI, *Lehrbuch* (Fn 8) 41;cf. G. A. WALZ, *Völkerrecht* (Fn 13) 239; cf. in general K. SCHMALENBACH, Article 27 (Fn 3) para 33.

15. Compare for instance G. A. WALZ, *Völkerrecht* (Fn 13) 260f who declared the formal international norm (see Fn 13) as the extension of the ground of validity of the international norm within municipal law.

16. For this, Walz classified this perception of monism as "pseudomonistic" G. A. WALZ, *Völkerrecht* (Fn 13) 40; See also J. G. STARKE, "Monism and Dualism in the Theory of International Law", 17 *British Yearbook of International Law* (1936)

primacy of national law is not dealt with here either. Monism with primacy of international law on the contrary earned a lot more interest in relation to its impact on the relationship between international and national law. In order to be able to fit in the law of all states into one overarching umbrella, monism with primacy of international law stipulates a common basis. Therefore this perception of monism does not split the ground of validity of international and national law, but premises the whole doctrine on a hypothetical unity.[17] This yields to the perception that states and their law making capacity are dependent on or directly derive from international law.[18] Based on one (fictive) single legal order general legal sanctions are derived to solve norm conflicts between international and national law. As a consequence monism stipulates that national norms, which conflict with interna-

66, (77) "Reduced to its lowest terms, the doctrine of state primacy is a denial of international law as law, and an affirmation of international anarchy."; out of this reasons the monistic conception with primacy of municipal law is left aside here; H. KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre*[2] (1928 reprinted in 1960) 317 himself equalized in earlier days of his work the monistic doctrine with primacy of national law as the "negation of all law". However, later on he left the decision to political science, see H. KELSEN, *Reine Rechtslehre*[2] (1960) 196ff, 339ff (Max Knight Translation, *The Pure Theory of Law* 1978) 339ff.

17. Compare H. KELSEN, *Rechtslehre*[2] (Fn 16) 196ff, 221f (Max Knight Translation) 193ff, 215 : "A norm of general international law authorizes an individual or a group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm thus legitimates this coercive order for the territory of its actual effectiveness as a valid legal order and the community constituted by this coercive order as a 'state' in the sense of international law."

18. See Fn 17; compare also A. VERDROSS, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) 30 "The freedom of states is nothing else than a margin of discretion depending on international law." See also 35 "Taking the international basic norm for granted, […] also municipal law derives from this basic norm. " [Translation by the author], according to Verdross (48ff) the lawmaker of public international law are not States, but the international community, acting through an international organ with supranational power; *cf.* H. KRABBE, *Die moderne Staatsidee*[2] (1919 reprinted in 1969) 305ff and 309.

tional norms, are null and void. Moreover a contradicting national norm cannot be created as a valid norm.[19] Moderate monism[20] in contrast de-radicalized monism by lowering the legal consequence of such norm conflicts. Conflicting national norms are considered to be valid at national level until the conflict is solved by a procedure at international level.[21]

III. Inappropriateness of dualism and monism based on its congenital defect, the concept of the legal order

Each doctrine was and still is facing with a lot of criticism.[22] However, by criticizing elements of one or the other doctrine the debate is missing a critical overview. As a matter of course both theories focused on the legal system(s) as the starting point of their explanations.

A. The fundamental basis of the concept of the legal order of these doctrines

Both doctrines have one very crucial point of criticism in common: both rely fundamentally on the concept of the legal order. However, this starting point leads us to the inevitable question whether the

19. See H. KELSEN, *Problem* (Fn 16) 113, 146.

20. The major advocate of moderate monism is A. VERDROSS, *Le fondement du droit international* 16 RdC (1927) 247, (287); *id.*, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (1920) 34ff.

21. See A .VERDROSS, *Verfassung* (Fn 18) 36f; *id.*/B. SIMMA, *Universelles Völkerrecht*[3] (1984) 54; Kelsen joined Verdross' concept of moderate monism in his later work by adopting this slightly weaker legal consequence, see H. KELSEN, *Rechtslehre*[2] (Fn 16) 330 (Max Knight Translation) 330.

22. See for an overview S. GRILLER, "Völkerrecht und Landesrecht" *in*: R. WALTER *et al.* (eds), *Hans Kelsen und das Völkerrecht – Ergebnisse eines Internationalen Symposiums in Wien* (2004) 83ff; H. WAGNER, *Monismus und Dualismus – eine methodenkritische Betrachtung zum Theorienstreit Archiv des öffentlichen Rechts* (1964) 212ff.

concept of a legal order, respectively system as such can be still applied nowadays.[23] In order to shed some light on this question it is necessary to take a short look on what the concept of the legal order is all about. According to the aim of this analysis it suffices to take a look at the concepts of the legal order, which constitute the basis of the advocates of the dualistic and the monistic doctrines. It is neither appropriate nor would it be helpful to go into details of the general debate concerning the diverging concepts of a legal order.

In relation to the dualistic doctrine and its immanent division of two legal orders it is not that decisive how the legal order is defined. It suffices to demonstrate that the fundamental element of the dualistic doctrine based on that division, cannot be uphold under current legal developments. The differentiation between the content of international and national law has a flaw. For instance the shift of competences from EU member states to the EU clearly demonstrates that EU law as much as international law in general might and does stipulate international norms which do have the same content as municipal norms. In the same vein, the impossibility that international and national law share its addresses has to be qualified as artificial, because it turns a blind eye on the direct interaction between international law and individuals.[24] EU law as well as international law does address individual persons directly. For this the relationship

23. For a critical approach concerning the importance of the concept of a legal order and the current relationship between international and national law see also S. LAGHMANI, « Droit international et droits internes : vers un renouveau du *jus gentium* ? » *in* B. ACHOUR, S. LAGHMANI (eds.), *Droit international et droits internes – Développements récents* (1998) 23, (41) ; and G. TIMSIT, *L'ordre juridique comme métaphore* 33 Droits (2001) 3ff criticizes that the concept of a legal order is especially concerning its generality a less decisive argument; quoted after A. PETERS, *Rechtsordnungen* (Fn 39) 3, (9, fn 29).

24. See this criticism already expressed by A .VERDROSS, "Die normative Verknüpfung von Völkerrecht und staatlichem Recht" *in* M. IMBODEN *et al.* (eds), FS MERKL (1970) 425, (432ff), *cf.* R. P. MAZZESCHI, *The marginal role of the individual in the ILC's articles on state responsibility* 14 The Italian Yearbook of International Law (2004) 39, (42f with further references in Fn 12) "This means that

between international and national, respectively EU law and national law can no longer be called simple inter-state law. Likewise, the phenomenon of direct applicability of international norms has faced difficulties within this doctrine, because the question whether a norm is directly applicable or not within dualism needs to be clarified by municipal law, no matter what international law demands. It is true that the need for sovereign States to create international law is a fact. However, at the same time it is obvious that states should not have latitude concerning the bindingness of these norms by using diverging subsequent transformation techniques. This shows that the validity[25] of international norms within a national legal order cannot be left to the latter without any consideration of the content of the former. This gets immediately clear if one tries to establish a unitary legal subjectivity of international organizations out of a dualistic point of view. International norms are based on a national ground of validity within the dualistic doctrine. As a consequence international organizations would be based on an international validity and furthermore on that many national grounds of validity as many member states they have.[26] This insecure starting point is complicates the effect of legal measures of these international organizations within national law when applying the dualistic doctrine.

For the analysis of the monistic doctrine, Kelsens' approach of a legal order is taken here as the predominant basis. Kelsens' approach of a legal order is inevitably linked with "the hierarchical structure of the legal order" *("Stufenbau der Rechtsordnung"),*[27] which can be

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international law now regulates some relationships between States and individuals in a formal manner (and not only in a substantive one)."; cf. ICJ, *LaGrand* (*Germany v USA*) ICJ Reports 2001 p 466ff para 77.

25. The terms validity and bindingness are used interchangeably.

26. See for this illustrative criticism S. GRILLER, *Völkerrecht* (Fn 22) 97; see also the general criticism by J. G. STARKE, *Monism* (Fn 16).

27. See H. KELSEN, *Rechtslehre*[2] (Fn 16) 228ff (Max Knight Translation) 221ff; cf. for the nomination "chain of validity" J. RAZ, *The Concept of a Legal System*[2] (1990) 105; *cf.* J. G. STARKE, *Monism* (Fn 16) 75; C. RICHMOND, *Identity* (Fn 40) 388;

traced back to the famous fundamental basic norm.[28] If a set of norms can be traced back to the same basic norm, one can speak of a unitarian legal order in Kelsen's terms,[29] which finally aims to establish the "unity of the legal world view".[30] However, by postulating the monistic doctrine it is inevitable to trace back all norms worldwide to one and the same fundamental basic norm.[31] The monistic doctrine with primacy of international law and its hierarchical structure of the legal order demands that the respectively lower norm derives from the higher norm ending in the common basic norm.[32] Even if one would consider other criteria to define or identify a unitarian legal order such as for example an authoritarian[33] or an empirical criteria,[34] the problematic element is the necessity to trace back the diverging norm complexes of international, EU and national law to one common "source".[35] This "chain of validity"[36] however stipulates the major, or at least a major element of most definitions aiming to establish the unity of a legal order.[37] This leads us to the criticism that the monistic doctrine cannot cope with the status quo of the relationship between international and national law either. One single legal world order

28. See H. KELSEN, *Rechtslehre*[2] (Fn 16) 228 (Max Knight Translation) 221.

29. See H. KELSEN, *Rechtslehre*[2] (Fn 16) 196 (Max Knight Translation) 193.

30. See A. VERDROSS, *Die Einheit des rechtlichen Weltbildes – auf Grundlage der Völkerrechtsverfassung* (1923); *cf.* H. KELSEN, *Rechtslehre*[2] (Fn 16) 329 (Max Knight Translation) 328f.

31. Here it suffices to focus onto the hierarchical structure on the legal order. Other criticized points such as for example the nature of the basic norm are not primarily relevant for the here raised criticism.

32. See already Fn 29.

33. See the focus on the sovereign by J. AUSTIN, *Lectures on Jurisprudence – Or the Philosophy of Positive Law* (1911) 221.

34. See H. L. A. HART, *The Concept of Law* (1984, reprinted 1961) 103 "*[T]he rule of recognition is the ultimate rule of a system.*"

35. Source in an abstract point of view.

36. See for this denomination Fn 27.

37. Compare A. PETERS, *Rechtsordnungen* (Fn 39) 19, see also 26f; see also K. ENGISCH, *Die Einheit der Rechtsordnung* (1935) 25 for whom the common source lies in the common will of the community.

does not fit neither into the actual debate on the fragmentation of international law[38] nor into the still actual perception of sovereign states.[39] Monism therefore overburdens the relationship of international and national law by giving international law a too dominant role, which does not fit to the current division of power between sovereign states and international law as such. Admittedly, if one considers a very abstract interpretation of the monistic doctrine, which solely refers to the unity of law instead of the unity of the legal system,[40] the doctrine as such might be maintained. Anyhow, the monistic doctrine understood in this sense would not be able to clarify the relationship between international and national law, if not to say it would be a practically irrelevant doctrine then.[41] However, even though the unity of the legal order with his inherent hierarchical structure delegating all norms top-down beginning with the basic norm might be classified as theoretically. This fundamental basis of the monistic doctrine is a very courageous interpretation of the relationship between international

38. Compare M. KOSKENNIEMI (as the chairman of the Study Group of the ILC), *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission* (2006) UN Doc. A/CN.4/L.682.

39. Compare eg A. PETERS, *Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung des Verhältnisses* 65 Zeitschrift für Öffentliches Recht (2010) 3, (19ff); *cf.* M. POTACS, *Das Verhältnis zwischen der EU und ihren Mitgliedstaaten im Lichte traditioneller Modelle 65 Zeitschrift für Öffentliches Recht* (2010) 117, (129).

40. For this kind of interpretation see T. ÖHLINGER, "Die Einheit des Rechts – Völkerrecht, Europarecht und staatliches Recht als einheitliches Rechtssystem?" *in* SL. PAULSON, M. STOLLEIS (eds.), H. KELSEN – *Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005) 160, (161) according to Öhlinger the differences concerning the interpretation of monism rely to the modifications made by Kelsen himself (167); C. RICHMOND, "Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law" *in* N. MACCORMICK (ed), *Constructing Legal Systems: "European Union" in Legal Theory* (1997) 47, (78ff).

41. Having this in mind T. ÖHLINGER, *Einheit* (Fn 40) 168, 170, 172.

and national law, which begins to crumble at the latest when one tries to adopt this doctrine on current developments as for example the interference of International organizations such as the EU.

B. The relationship between the EU and its Member States: unmasking the inappropriateness of the dualistic and the monistic doctrine

The example of the EU is taken, because it probably reflects the most progressive current development concerning the interference between international and national law. Even though the EU is seen as an entity *sui generis* by many observers, this does not excludes this example. On the contrary, the progressive development of the EU, which led to the sui generis qualification reflects nothing else than a very advanced establishment of the classical relationship between international and national law.

The Court of Justice (ECJ)[42] postulated since a long time the "autonomy of the Community legal order",[43] which seems to favor a dualistic conception. Anyhow, the direct effect of EU law within the national law of the member states,[44] as much as the primary applica-

42. ECJ is used in this article as the well-known abbreviation even though the new nomination after the Treaty of Lisbon, which named the European Court of Justice simply as the Court of Justice.

43. See ECJ, *Costa v Enel*, Case C 6/64, 1964 ECR I-585 para 3 "[T]he EEC treaty has created its own legal system"; The german version states "*Rechtsordnung*"; The french version uses "*ordre juridique*" , *cf.* ECJ, *EEA I*, Opinion 1/91, 1991 ECR I-6079 para 2 postulated the "autonomy of the Community legal order" compare the german version "*Autonomie des Rechtssystems der Gemeinschaft*"; See furthermore on this W. SCHROEDER, *Das Gemeinschaftsrechtssystem – Eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrecht* (2002) 104f with further references in Fn 6 and 7.

44. See for this groundbreaking ECJ, *Van Gend & Loos*, Case C 26/62, 1963 ECR 1.

tion of EU law[45] cannot be fitted into a dualistic scheme anymore.[46] Therefore some authors try to fit the relationship between the EU and its member states into a monistic scheme, even though the CJ proclaimed an autonomous legal order of the EU. In order to achieve this, arguments are put forward which want to explain the interaction of EU law with the law of its member states at least by some elements of the monistic doctrine.[47] Admittedly, it cannot be neglected that some elements, respectively descriptions of the monistic doctrine such as for instance the direct interaction between international, respectively EU law and individuals became more and more relevant under current developments. However, the conformability of some elements of the doctrine and practical developments cannot detract from the fact that the fundamental basis of the monistic doctrine is the unitarian legal order, which is structured as a hierarchical com-

45. Again ECJ, *Costa v Enel*, Case C 6/64, 1964 ECR 585 ; and ECJ, *Internationale Handelsgesellschaft*, Case C 11/70, 1970 ECR 1125 para 3f ; ECJ, *Simmenthal II*, Case 106/77, 1978 ECR 629.

46. See for instance the former president of the ECJ *G. C. Rodríguez Iglesias*, Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts EuGRZ (1997) 289, (295); *cf.* W. SCHROEDER, *Gemeinschaftsrechtssystem* (Fn 43) 122; accepting some elements of dualism as appropriate to apply M. POTACS, *Verhältnis* (Fn 39) 120. However, if one is willing to apply some elements of both doctrines either way the doctrines as such have to be called outdated, which of course does not prevent from applying new explanation schemes with elements of these doctrines.

47. See for such a classification eg N. MICHEL, "L'imprégnation du droit étatique par l'ordre juridique international" *in*: D. THÜRER *et al.* (eds) *Verfassungsrecht der Schweiz* (2001) 63, (67) ; S. GRILLER, *Völkerrecht* (Fn 26) 82, (109) ; *id*, "Der Stufenbau der österreichischen Rechtsordnung nach dem EU-Beitritt" *in*: *8 Journal für Rechtspolitik* (2000) 273, (284); T. ÖHLINGER, *Einheit* (Fn 40) 169, concerning the very abstract interpretation Öhlinger favors of Kelsens' monism this kind of interpretation is possible. However, one has to bear in mind then that this abstract monism cannot help to provide for a theoretical concept explaining for instance the primacy of EU law. (172) ; see also W. SCHROEDER, *Gemeinschaftsrechtssystem* (Fn 43) 113, 122; P. PESCATORE, *L'ordre juridique des Communautés européennes – Étude des sources du droit communautaire*[2] (1973) 151.

plex of norms.[48] Having this proclaimed unity in mind – inherently basing on one fundamental basic norm, from which all lower norms are delegated *("Delegationszusammenhang")* – there comes up an inevitable consequence: national law (also constitutional law) would have to be seen as delegated from EU law and EU law in turn from international law. This is a position which cannot be assumed to reflect the current practical situation. Neither member state law can be qualified as being delegated from EU law[49] nor does the CJ itself consider EU law to be delegated from international law. Quite contrarily, the approach of the CJ confronts the outside world with an expressly reference to different legal orders.[50] This is adopted by

48. See above III.1).

49. Compare eg the case law of the German Federal Constitutional Court *BVerfG*, 2 BvE 2/08, 30.06.2009, *Lissabon-Urteil*, para 339 "The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, a concept conferred under an international treaty, i.e. *a derived concept* which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This derivative connection is not altered by the fact that the concept of primacy of application is not explicitly provided for in the treaties but was developed in the early phase of European integration in the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court". [Emphasis added by the author] in English available at *http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html* (last time visited in December 2011); for further references see W. SCHROEDER, *Gemeinschaftsrechtssystem* (Fn 43) 168ff; for an overview see (248f with further references in Fn 270); *cf.* M. THALER, "Rechtsphilosophie und das Verhältnis zwischen Gemeinschaftsrecht und nationalem Recht" 8 *Journal für Rechtspolitik* (2000) 75, (77 with further references in Fn 5).

50. Compare only ECJ, *Kadi & Al Barakaat International Foundation*, joined cases C-402/05P and C-415/05 P, 2008 ECR I-6351 para 285ff, 326f; And ECJ, *Bank Melli Iran*, Case C-548/09 P, 2011(not yet published in the ECR) para 100 "It is important to note at the outset that Security Council resolutions and Council common positions and regulations originate from *distinct legal orders*". [Emphasis added by the author]. See also B. FASSBENDER, *Triepel in Luxemburg* 63 Die öffentliche Verwaltung (2010) 333, (336ff).

the CJ despite claiming a diametrically opposed internal view, which is dominated by arguments borrowed from the monistic doctrine.[51] In light of this situation, one and the same international organization would – depending on its viewing direction and not on a different standpoint of the observer – have to be categorized according to two completely diverging doctrines.[52] This shows on the one hand theoretical flaws of these doctrines, which fail to explain current developments, even though on the other hand one could criticize the CJ to maintain a stringent application of one doctrine by saying: in for a penny, in for a pound. It can be noted that the delegation of the lower level from a higher level is in practice neglected by the member states concerning EU law as much as by EU law concerning international law. Furthermore, such a hierarchical organization in form of delegation would be denied as much as far less powerful and less developed international organizations than the EU are concerned. However, this delegation, which is based on the hierarchical structure of the legal order in order to maintain its unity, does not simply constitute an insignificant theoretical fiction of the monistic doctrine. Quite contrarily, this presumption is the fundamental reason for the practical output of the monistic doctrine. In order to contribute a solution to norm conflicts which might arise between different levels of the unitarian legal order (eg between EU and member state law), the hierarchical structure of the legal order is the reason for the application of the norm conflict solution rule *lex superior derogat*

51. See Fn 44-47 above.

52. Compare the opinion of Adovate General P .Maduro in ECJ, *Kadi & Al Barakaat International Foundation* , joined cases C-402/05 P and C-415/05 P, 2008 ECR I-6351 para 21, which clearly demonstrates this opportunism in one phrase proclaiming the EU legal order as "a municipal legal order [postulating a dualistic separation in confrontation to international law] of trans-national dimensions, of which it forms the 'basic constitutional charter' [postulating a monistic unity of the EU and its Member States]".

legi inferiori.[53] The difference between original and moderate monism concerning the invalidity, respectively the automatically nullity versus the simple voidability of the lower norm[54] does not change this presumption of delegation.

IV. Conclusion

The dualistic as much as the monistic doctrine turned out to be inappropriate in order to explain the current relationship between EU law and the national law of its member states satisfactorily. This negative finding is based on the problematic foundation of both theories. Dualism as much as monism rely heavily on the concept of the legal order, which on the one hand separates and on the other hand unifies EU law from the law of its member states so much that either way none of both doctrines might be brought into harmony with the current situation. However, even though this paper dealt with the relationship of the EU and its member states, the findings of this example can be put in a more general setting. The reason to exclude the dualistic doctrine was its negation of the individual as direct addressee of EU law. However, also in the general framework of international law individualization is a phenomenon which cannot be neglected anymore. The fundamental criticism concerning the monistic doctrine with primacy of EU law, respectively international law, was based on its inherent hierarchical structure. As much as national constitutional courts do conquer the delegation of national (constitutional) law from

53. In Kelsens' terms, H. KELSEN, *Rechtslehre*[2] (Fn 16) 330f (Max Knight Translation) 330 there cannot exist a norm conflict between international and national law, because "a norm contrary to a norm does not mean a conflict between a norm of a lower level and a norm of a higher level, but only means that the validity of the lower may be abolished or the responsible organ may be punished." However, the result whether speaking of a norm conflict or previously excluding it by speaking of a "norm contrary to a [higher] norm" (in german "*Normwidrigkeit*") stays the same concerning to the result of the here discussed matter.

54. See for this above II.2).

EU law, this will be valid for a possible delegation from another international organization, or even worse from a fictive international constitution as it is asserted by the monistic doctrine. Proposals to reduce monism to an abstract unity of law instead of legal orders fall short to contribute solutions to possible norm conflicts. Finally it remains to make clear, that picking and choosing some elements from one and some elements from the other doctrine, neither is able to safe the dualistic nor the monistic doctrine. This simply shows that none of both doctrines may fully satisfy to explain the current relationship between international and national law. However, this does not preclude jurisprudence to learn from both theories in order to develop new theoretical concepts, which surely might base also on elements already considered by one or the other doctrine.