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On the Interaction of Constitutionalization and
Fragmentation in International Law

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1. Statement of the Argument

This paper seeks to redefine the relationship between fragmentation and constitutionalization (both as legal processes and as accompanying discourses), and it highlights the persistence and the power of a global, albeit fragmented and mainly procedural constitutionalism.

‘Fragmentation’ and ‘constitutionalization’, understood as processes, seem to be two trends in the evolution of international law. Because both are, first, a matter of degree, and secondly no linear developments, the empirical claim that one or both phenomena are legally relevant beyond minimal or anecdotal episodes is contested. Moreover, each phenomenon is evaluated differently (e.g. as constituting a risk or opportunity for international law as a whole) by different observers. The diverging assessments are to some extent pre-shaped by the fact that both fragmentation and constitutionalization are inevitably descriptive-evaluative, and thus loaded terms. ‘Fragmentation’ has a negative connotation, is a pejorative term (rather than diversity, specialization, or pluralism). ‘Constitutionalization’, in contrast, feeds on the positive ring of the concept of constitution. Finally, both constitutionalization and fragmentation are terms which describe not only legal processes in the real world of law but are also labels for the accompanying discourses (mostly among academics, less among judges, and even less among political law-making actors). The putative trends so far do not have a clearly definable end-result, e.g. a completely fragmented international legal order on the one hand, or a world constitution on the other. Rather, the state of the law resulting from these processes is in itself a matter of contestable conceptualization.

Often, the scholarly diagnosis of constitutionalization, and the academic or political quest for reinforcing the putative trend, is depicted by skeptical scholars as a conscious or subconscious reaction against fragmentation; as a quest to counter that fragmentation (perceived as a threat) and to remedy its (presumably negative) consequences: ‘constitutionalism as a means of solving fragmentation problems.’¹ For example, Joel Trachtman notes: ‘In the fragmentation context, constitutionalization

¹ A van Aaken ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’ (2009) 16 *Indiana Journal of Global Legal Studies* 483-512 at 487. See also J G van Mulligen ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 *Leiden Journal of International Law* 277-304 at 284: ‘Constitutionalism’s anti-fragmentational virtue may indeed be said to represent its prime rationale, impetus, and driving force.’

(...) can be seen as a way of introducing hierarchy and order – or at least a set of coordinating mechanisms – into a chaotic system otherwise marked by proliferating institutions and norms.² Many observers framing the debate in that way castigate the idea of global constitutionalism as a naïve desire to re-create unity and harmony in international law.³ From that perspective, a holistic international constitution is (erroneously) hailed by its protagonists as a remedy against the threat of fragmentation, as a (vain) attempt to preserve order, stability and values, while in reality pluralism bordering chaos reigns.

Contrary to that stance, this contribution suggests that a constitutional perspective allows for a more adequate description of the international order as it stands, *exactly because* of the latter's fragmented character. I start with Olivier de Frouville's observation that 'the time may have come when the concept of a constitution should be put at the forefront again, not because there was no constitution before – in fact (...) there has always been a constitution in international law – but because this concept is now more useful than ever in understanding and describing international law as it is today, that is a legal order which has become more complex, fragmented, and difficult to conceptualize with such elementary concepts such as sovereignty and consent.'⁴ Beyond that heuristic insight, this paper makes four points: First, the constitutionalisation of international law is a broad and deep phenomenon which historically started before fragmentation (section 2) has been discussed as a problem. Second, fragmentation and constitutionalisation are mutually reinforcing and to some extent even mutually constitutive:⁵ On the one hand, constitutionalisation phenomena within international law have exacerbated fragmentation, because they have from the outset on taken place at multiple sites, and have produced only constitutional fragments (section 3). On the other hand, fragmentation in turn has triggered new forms of constitutionalisation in international law; the processes of fragmentation are themselves being 'constitutionalised'. Put differently, constitutionalisation (as a process) and global constitutionalism (as an intellectual framework) is profoundly shaping how law-appliers deal with fragmentation, notably because the current 'second stage'-fragmentation debate which concentrates on principles, procedures, and institutions for coordinating, harmonising, and

² Trachtman (note 69) at 251.

³ J Klabbers 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31-58 at 49: constitutionalism as a bulwark against fragmentation, 'as a promise that there is some system in all the madness'.

⁴ Olivier de Frouville, 'On the Theory of International Constitution', in : Denis Alland, Vincent Chetail, Olivier de Frouville, Jorge E. Viñuales (eds), *Unité et diversité du droit international : Ecrits en l'honneur du professeur Pierre-Marie Dupuy* (Leiden : Martinus Nihof 2014), 77-103 at 79.

⁵ See for the view that constitutionalization and fragmentation are parallel and co-constitutive phenomena the latest contributions to the debate such as T Kleinlein *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer Berlin 2012); D Kühne *Materielle Konstitutionalisierung im Völkerrecht* (Schulthess Zurich 2014) at 359.

integrating various international regimes, is explicitly or implicitly guided by genuine constitutionalist considerations (section 4).

Thirdly, the discourses of fragmentation and constitutionalisation are largely motivated by a common root concern, namely the concern about the legitimacy of international law. Both phenomena also share the merit of promoting contestation and politization within the international legal process; they are kindred-spirited. Importantly, constitutionalism is not a reconciliatory strategy responding to fragmentation but a critical discourse (section 5).

My conclusion is that global constitutionalism is a useful analytic lens for understanding how international law evolves and works, as long as it is understood as 'thin' (contending itself with procedures as opposed to substance), and inevitably multi-level (necessarily involving domestic constitutional law). Even if a global constitutionalism of this type stays (partly) outside the picture of international law proper, it will always be reproduced in the fragments of the international legal order (section 6).

2. The fragmentation of international law

2.1. Overview

The term 'fragmentation (of international law)' denotes both a process and its result, namely a (relatively) fragmented state of the law. The diagnosis refers to the dynamic growth of new and specialized sub-fields of international law after 1989, to the rise of new actors beside states (international organizations, NGOs, and business) and to new types of international norms outside the acknowledged sources.

The evolution was triggered by the break-down of the communist bloc in 1989 which brought to an end the stable bi-polar world order. In the wake of the post-cold war 'new world order' (US President GH Bush), a host of multilateral treaties were concluded: The Rio Conventions and numerous hard and soft environmental instruments were adopted in 1992, the membership of the ICSID-Convention and the number of BITs exploded. New organizations and other permanent international bodies were founded, such as the WTO in 1994. New international courts and tribunals were established (esp. the Yugoslavia and other criminal tribunals since 1992, the WTO dispute settlement body (1994), the ICC (Statute of 1998, functional since 2003), the ITLOS (operational since 1996)). Investment arbitration increased dramatically, and the ECtHR was transformed into a permanent Court with direct access for individuals in 1998.

That ‘proliferation’⁶ of these international dispute settlement institutions gave rise, at the end of the 1990s, to a fear that those specialized courts and tribunals would ‘develop greater variations in their determinations of general international law’, which would ‘damage the coherence of the international legal system’.⁷ This concern was most prominently voiced by the then President of ICJ, judge Gilbert Guillaume in his speech to the General Assembly in 2001.⁸ The articulation of such ‘problem’ by that office-holder was later criticized as a hegemonic attempt of a professional to preserve the power of the World Court.⁹

Against this background, the ILC tackled the topic in 2000,¹⁰ and a study group issued successive interim reports, with the end report based on a draft ‘finalized’ by Martti Koskenniemi in 2006.¹¹ The heydays of the academic fragmentation debate were the first decade of the millennium. Pierre-Marie Dupuy devoted his 2000 General Course in the Hague Summer Academy to the issue.¹² An important symposium on ‘diversity or cacophony’ was held at Michigan Law School (with contributions, *inter alia*, by Hafner, Teubner, and Simma) which resulted in a 500 pages-journal issue in 2004.¹³ While the debate, in its first phase, sought to understand, conceptualise and evaluate fragmentation, it later concentrated more on developing principles and procedures for coordinating and harmonizing the pieces, and for solving conflicts.¹⁴ In 2007 still, fragmentation was ‘le sujet à la mode’.¹⁵ But in 2014, the constatation was: ‘Much ado about nothing’.¹⁶

⁶ Symposium Issue: ‘The Proliferation of International Tribunals: Piecing Together the Puzzle’, (1999) 31 *New York University Journal of International Law and Politics*, 679-933.

⁷ J I Charney ‘Is international law threatened by multiple international tribunals?’ (1998) 271 *Recueil des Cours* 101-382 at 347.

⁸ Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001, available at: <http://www.icj-cij.org/court/index.php?pr=82&pt=3&p1=1&p2=3&p3=1>.

⁹ See, e.g., M Prost *The Concept of Unity in International Law* (Hart Oxford 2012) at 202-209.

¹⁰ See as a first text the study by G Hafner ‘Risks ensuing from fragmentation of international law’ (*Yearbook of the ILC* 2000, Volume 2 Part 2, also in Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), paras. 726-728 and 729(5), study in the Annex)

¹¹ 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, finalized by Martti Koskenniemi, 13 April 2006 (UN Doc. A/CN.4/L.682), with Appendix: Draft conclusion of the work of the Study Group, 2 May 2006 (UN Doc. A/CN.4/L.682/Add.1); 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 of 18 July 2006 (UN Doc. A/CN.4/L.702).

¹² P-M Dupuy ‘L’unité de l’ordre juridique international’ (2002) 297 *Recueil des Cours* 9-490.

¹³ ‘Diversity or Cacophony: New Sources of Norms in International Law’ (symposium) (2003-2004) 25 *Michigan Journal of International Law* 845-1375.

¹⁴ Prost (note 9) at 9.

¹⁵ B Conforti ‘L’ Unité et fragmentation du droit international; “Glissez, mortels, n’ appuyez pas!”’, (2007) 111 *Revue Générale de droit international public* 5-10, at 5.

¹⁶ T Meggido ‘Much Ado About Nothing: Are Concerns about International Law’s Fragmentation Justified?’ ICON-S Inaugural Conference on ‘Rethinking the Boundaries of Public Law and Public Space’, Florence, Italy, June 26-28, 2014.

2.2. Causes of fragmentation

The causes of fragmentation seem to be both functional and political. First of all, fragmentation is inbuilt in the decentralized structure of international law which results from the absence of a central world legislator. Second, and connected to the former, fragmentation originates in the domestic sphere: Different issue areas are handled by different departments of government which negotiate different treaties, and different administrative authorities then apply them. Third, fragmentation is a response to globalization. Global problems (ranging from climate deterioration over migration and terrorism to the financial crisis) have triggered a demand for more international, and also more special regulation.¹⁷

From the perspective of global constitutionalism, the political causes may be more interesting. States negotiating treaties normally have different views about policy priorities which translate into relationships between different regimes, for example trade agreements and treaties on cultural or biological diversity. When the states are unable to reach a political solution through treaty design, they leave texts deliberately open-ended, for example, the non-economic exceptions in the GATT, TRIPs, or TBT-Agreement. The bucket is thus passed to the law-appliers, including arbitrators, to possibly 'integrate' the regimes, at the occasion of a concrete legal dispute.

Moreover, realist analyses have depicted fragmentation as the result of a deliberate agenda of powerful states.¹⁸ Benvenisti and Downs have argued that fragmentation serves the latter's interests because it limits the bargaining power of weaker states (which cannot group up within one forum but are isolated in a multitude of settings) and because only those states with a greater 'agenda-setting power'¹⁹ can easily create alternative regimes which suit their interests better. The authors identify four fragmentation strategies: Avoiding broad regulatory regimes, one-time negotiations (no mechanisms to update agreements), avoiding the creation of authoritative institutions (courts, administrations). The fourth strategy is 'regime shifting', that is creating a new regime as soon as the original regime becomes too responsive to the interests of weaker states (the latter are protected by rules which constrain the actors and through the principle of legal equality).²⁰ While it is not clear whether Benvenisti and Downs have – beyond the anecdotal examples given – revealed a behavioural pattern that is strategically motivated and in fact has hegemonic effects,²¹ their

¹⁷ See also below text with note 31.

¹⁸ E Benvenisti and G W Downs 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595-631.

¹⁹ *Ibid.*, at 615.

²⁰ *Ibid.*, 599, in detail at 610-619.

²¹ Critically M Zürn and B Faude 'On Fragmentation, Differentiation and Coordination', (2013) 13 *Global Environmental Politics* 119-130 at 125-26.

analysis has the merit of politicizing the facially technical fragmentation debate. It draws attention to the loss of overall legitimacy connected to fragmentation – which is exactly the focus of the constitutionalization debate, too.

2.3. Types of fragmentation

Taxonomies of fragmentation differ. For example, we might distinguish ‘functional’ fragmentation from regional (‘geographic’/‘territorial’) fragmentation.²² Two relevant facets seem to be the *institutional* fragmentation (different treaties, organisations, bodies, courts) and the *ideational* fragmentation (different objectives and values). These two facets flow into each other, assuming that each institution (COP, dispute settlement body, etc.) tends to favour the values and objective of its own regime, be it only because the law-makers and law-appliers know that regime better than competing ones (the expertise-based bias).

The ILC-works on the law of international (state) responsibility, mostly in the 1970s and ‘80s, ventilated the idea of regimes which prescribe and control all reactions to breaches of their norms. Any recourse to the general law of international responsibility, notably to counter-measures, would then be precluded (*self-contained régimes*). The ICJ applied this concept once and qualified the ‘rules of diplomatic law’ as a ‘self-contained régime’.²³ That term needs to be buried. For reasons of structural coherence and policy results, there are and should be no sealed-off regimes.²⁴ General international law always constitutes the normative environment, and is applicable to fill gaps or when the rules of the regime themselves can not fulfill the régime’s stated objectives. The ILC study of 2006 therefore suggested the label ‘special treaty-regimes’ instead.²⁵

More importantly, we can distinguish between fragmentation in law-making and fragmentation in law-application. As just mentioned, the political process of developing international (treaty) law results in fragmented law, either for lack of political agreement on inter-regime relations, or due to the hegemonic interest of powerful law-making states (see above sec. 2.2.). But even if fragmentation were avoided in law-making, the law could be (further) fragmented by the autonomous law-appliers. The adoption of overarching, multi-issue treaties (in the form of ‘linkages’ of different subject matters, e.g. trade and labour) would not necessarily eliminate conflicts in law-application, because there are often no strict incompatibilities of different broad objectives (such as promoting free trade and

²² In trade law, investment law, and human rights law, we find both universal and regional agreements.

²³ ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, ICJ Reports 1980, 3, para. 86.

²⁴ B Simma and D Pulkowski ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *EJIL* 483-529.

²⁵ ILC May 2006, para. 492.

promoting labourers' welfare), but rather merely *tensions* arising from the prioritization of different objectives. Actual conflicts normally only arise in the concrete case at hand, i.e. in law-application and dispute-resolution.

Typical issue areas among which tension may arise are free trade in tension with environmental and species protection,²⁶ or with human rights/ labour rights.²⁷ These tensions can – somewhat simplistically – be framed as conflicts between ‘private’ interests (property, contract) and the (global) public interest, even if – at least in the theory and experience of free market economy/capitalism – the protection of those private rights has trickle down benefits for (some) other market participants and society at large.

As far as the protection of property and other rights or interests of *foreign investors* are concerned, the necessity that the law-applier reconcile private rights and public interests now arises in international law just as it is familiar from domestic law. The identification of public purposes which would allow, e.g., an expropriation, normally falls within the *domaine réservé* of the host state. Norms of other specific branches of international law such as environmental law,²⁸ cultural heritage law,²⁹ and human

²⁶ See, e.g., WTO Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generating Sector; Canada – Measures relating to the Feed-in Tariff Program*, WT/DS412/AB/R; WT/DS426/AB/R, adopted 6 May 2013. The Canadian province of Ontario sought to encourage the use of renewable energy through a pricing scheme. The measures were held to be inconsistent with Art. 2(1) of the Agreement on Trade-related Investment Measures (TRIMS) and Art. III(4) GATT. Or, a state's entitlement or even obligation to restrict imports based on an environmental treaty or CITES may conflict with that same state's obligation to open up its markets for products under trade agreements.

²⁷ For example, there are tensions between the prescription of plain packaging for cigarettes, sought by the WHO Framework Convention on Tobacco Control and WTO rules on free trade.

²⁸ The *Vattenfall* case illustrates the friction between investment protection and (international) environmental law. German authorities here denied or delayed water and emission permits for a Swedish power plant project in order to comply (at least so it was argued) with commitments under international environmental law such as the EU Water Framework Directive and the UNFCCC (cf. ICSID, *Vattenfall v. Germany*, Request for Arbitration (30 March 2009), at para 17). This stood in tension with the state's obligations under the Energy Charter Treaty not to expropriate foreign investors and to accord them fair and equitable treatment. See also ICSID, *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB 96/1, Final Award 17 February 2000: In this case, the right of the state to expropriate the investor for the public purpose of protecting the environment (in conformity with the general international law on protection of property), was not in dispute. The dignity of the public interest had no impact on the amount of the compensation.

²⁹ NAFTA Chap 11, Arbitration, *Glamis Gold v United States of America*, Counter-memorial of the United States of 19th september 2006, at pp. 33-35: The defendant state justified its regulations requiring backfilling and grading for mining operations in the vicinity of Native American sacred sites by relying, *inter alia*, on the principles of the UNESCO World Heritage Convention concerning the preservation of historic and cultural property which arguably limit investor's rights under NAFTA. The state relied on ‘principles of cultural preservation (...) that reflect the “policy” of the international community.’ (p. 35). The award of 8 June 2009 mentioned the UNESCO Convention only in the statement of the relevant legal instruments (pp. 46-47). See already ICSID, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, award of 20 May 1992, ARB/84/3, YB Commercial Arbitration 19 (1994), 51-104, para. 158: expropriation through cancellation of a tourist development project for the public purpose to protect antiquities.

rights law,³⁰ might enter the balance here – as in fact cautiously accepted in arbitration practice. It is doubtful whether the fragmentation, i.e. the dispersal of the relevant rules among the different branches of international law, changes anything in the outcomes of such balancing decisions which would also have to be made by law-apppliers if all relevant norms were united in one single treaty.

2.4. *The assets of fragmentation*

Fragmentation may be beneficial. First of all, fragmentation is an adequate reaction to modernity and modern complexity of life. It is, to speak with Michael Zürn, ‘not the dissolution or decomposition of a preexisting world polity or order, but rather an indicator for the emergence of a differentiated world polity or order.’³¹ Complexity requires differentiated norms and specialised law-apppliers who divide labour. The idea of the priority of the *lex specialis* is exactly motivated by this consideration: Special norms are normally better tailored for the regulation of an issue, and special institutions are normally better equipped to apply them.³² This proximity (in terms of substance and in terms of regional culture) may enhance acceptance and thus increase compliance rates.

A related stance is that some competitive pressure may be beneficial: Competition between regimes, organisations, courts, and any other institutions may promote productive exploration and experimentation, enhances creativity, allows for correcting mistakes, reduces the risk of failure of one single institution, and thus overall leads to improved performance, notably to better law-making and -application.³³

³⁰ The privatization of infrastructure (*service public*), notably water services, partly required by the World Bank from developing states, has often attracted foreign investors. Measures taken by host states such as repudiation of lease contracts, failure to improve facilities, negative propaganda, or lowering of water prices have been attacked by investors before arbitral tribunals with the argument that the host state violated the investment contracts and international investment law. It has been suggested that ‘human rights and sustainable development issues are factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations as between the investor and the host State.’ This would mean that ‘foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development (...), have the highest level of responsibility to meet their duties and obligations as foreign investors, before seeking the protection of international law. This is precisely because such investments necessarily carry with them very serious risks to the population at large.’ ICSID, *Biwater Gauff (Tanzania) Ltd. (Claimant) v. United Republic of Tanzania (Respondent)*, Award, Case No. ARB/05/22, 24 July 2008, para. 380 (amici submission, summarized by the Tribunal). See also para. 723 (host state’s defense). See further ICSID, *Azurix Corp. (Claimant) and The Argentine Republic (Respondent)*, Award, ICSID Case No. ARB/01/12, 14 July 2006. The province of Buenos Aires had privatized the water services. Subsequent regulations were alleged by the concessionaire to amount to expropriation. The province raised the issue of the compatibility of the BITs with human rights treaties, but the Tribunal ‘fail[ed] to understand the incompatibility in the specifics of the instant case’, because water services to the consumer continued to be provided without interruption (para. 261).

³¹ Zürn and Faude (note 21) 119-130 at 22.

³² See only O Casanovas *Unity and Pluralism in Public International Law* (Martinus Nijhoff The Hague 2001) at 246.

³³ See, eg, K J. Alter and S Meunier ‘The Politics of International Regime Complexity’, (2009) 7 *Perspectives on Politics* 13-24 at 19; Trachtman (note 69) at 250.

Another aspect is protection against concentrations of power. While it has been asserted that in practice the existence of multiple institutions tends to favour big states which possess sufficient manpower and expertise to staff those numerous institutions, any institutional dispersal in the first place helps to prevent abuse because it constitutes a separation of powers with the possibility of checks and balances. Furthermore, accountability is increased by the existence of more and 'new opportunities for dissatisfied parties to challenge existing rules'.³⁴ Finally, a higher number of international courts and tribunals leads to a better enforcement of international law, and this conforms to the ideal of a rule of law.

At first sight, the creation of antagonist treaties allows different political preferences (of the political opposition within states, but also of transnational interest groups) to express themselves on the international level.³⁵ In fact, some treaties have been, in political terms, explicitly designed as 'counter-conventions' to others. For example, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 seeks to mitigate the WTO-regime, after the attempt of some negotiating states such as Canada and France to insert into the GATS and GATT an *exception culturelle* had failed.³⁶ In the same sense, the Cartagena Protocol on Biosafety of 2000 is a counter convention to WTO.³⁷ It can be said that the resulting 'regime conflicts' are praiseworthy because they manifest pluralism – but it remains to be discussed what this means in normative terms (see below sec. 3.4.).

To conclude, fragmentation (and the pluralism going with it) may enhance both the effectiveness and the legitimacy of international law and its application – but only when it is channeled by constitutional principles and procedures (see below sec.4).

2.5. Fragmentation as a problem

The institutional, procedural, and substantive diversification called 'fragmentation' indeed bears risks. First of all, fragmentation may create conflicts and incompatibilities of legal obligations. A conflict in a narrow sense is present when mutually incompatible obligations arise from diverging rules. These are often treaty conflicts, but also conflicts with or among new types of norms such as codes of conducts, memoranda, and so on.

³⁴ C Overvest and J Zeitlin 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (2012) 6 *Regulation and Governance*, 1-29, at 3.

³⁵ I Ley *Opposition im Völkerrecht* (Springer Berlin 2014).

³⁶ This antagonism becomes manifest in several provisions; preamble no. 18 (cultural activities as non-commodities), Art. 2(5) 'Principle of the complementarity of economic and cultural aspects of development', and others. See H Ruiz Fabri 'Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles' (2007) 111 *RGDIP* 43-87.

³⁷ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, UNTS 2226, No. 30619, p. 208. See, eg, preamble paras 9-11.

Beyond this, one treaty (or soft regime) may frustrate the goals of another one without there being strict conflict. For example, a more liberalized trade increases greenhouse gas emission levels due to the scale effect. Greenhouse gas-emitting states saddled with the legal obligation to maintain low tariffs under trade regimes may be tempted to avoid assuming significant commitments under climate change regimes because this may affect their competitiveness. Such strategic behaviour frustrates the ultimate goals of the UN FCCC even if no legal rule has been breached. Similar incompatibilities short of outright conflicts exist between investment protection and immunity of enforcement: When a foreign investor may not enforce a favourable arbitral award, e.g. through the attachment of State property in governmental non-commercial use, due to the international law of immunity, this frustrates the objectives of international investment law.

Fragmentation also engenders losses of legal certainty which is in turn an element of the (global) rule of law. The multiplicity of institutions (especially of courts and tribunals), and the diverging and possibly conflicting legal norms that are available to those bodies reduce the predictability and reliability of law application. The resulting insecurity is both procedural (e.g. relating to jurisdiction and admissibility of complaints) and substantive. Law-users may exploit the fragmentation (and the diverse institutional outlooks going with it) through forum shopping and regime shifting, based on the strategic consideration which forum and regime will respond best to their claims based on their parochial interest. Although especially international courts have developed some judicial techniques for dealing with procedural and substantive conflicts,³⁸ clear and foreseeable rules have not yet emerged.

More generally speaking, a potentially pernicious consequence is the loss of the unity³⁹ and coherence of international law. Granted, international lawyers should not fetishize coherence. Coherence is, as the ILC study points out, only 'a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so.'⁴⁰ On the other hand, a loss of coherence implies the loss of international law's quality as a legal order (or system). An agglomeration of isolated and diverse norms does not amount to a legal order. Recall that Herbert L A Hart had notoriously dubbed international law as 'rules which constitute not a system but a simple set'.⁴¹

³⁸ J Finke *Die Parallelität internationaler Streitbeilegungsmechanismen: Untersuchung der aus der Stärkung der internationalen Gerichtsbarkeit resultierenden Konflikte* (Dunker & Humblot Berlin 2004); J Crawford and P Nevill 'Relations between International Courts and Tribunals: The "Regime Problem"' in M A Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (CUP Cambridge 2012) 235-260.

³⁹ M Prost *The Concept of Unity in International Law* (Hart Oxford 2012).

⁴⁰ ILC May 2006 para. 491.

⁴¹ H L A Hart *The Concept of Law* (2nd ed Clarendon Press Oxford 1994 (orig. 1961)) at 234.

A legal order is present only when norms refer to each other (ordered norms). But legal order means not only ordered law but also order through law. These two dimensions are mutually reinforcing: The normative pull of international law is fortified by its stringency and consistency.⁴² Understanding this interrelationship means understanding why consistency is particularly important for international law (more than for domestic law): because its normative power is more precarious.

To conclude, what is at stake in fragmentation is unity, harmony, cohesion, order, and – concomitantly – the quality of international law as a truly normative order. Worries about this fact have been disparaged as a ‘postmodern anxiety’⁴³ in a world which has lost stable values. But is it not a justified concern is that international law could ‘no longer be a singular endeavor, (...) but merely an empty rhetorical device that loosely describes the ambit of the various discourses in question’?⁴⁴ Without some glue holding together the ‘special regimes’ and ‘institutional components’, writes Georges Abi-Saab, ‘the special regime becomes a legal order unto itself – a kind of legal Frankenstein’ that ‘no longer partakes in the same basis of legitimacy and formal standards of pertinence.’⁴⁵ So ultimately, at the bottom of the fragmentation debate lies, just like in the constitutionalization debate, a concern for a loss of legitimacy of international law, a loss which will ultimately threaten that law’s very existence.

3. Fragmented constitutionalization

3.1. Overview

The debate on constitutionalization suffers from the great variety of meanings assigned to the key terms. I will here use *constitutionalization* as the label for the evolution from an international order based on some organizing principles such as state sovereignty, territorial integrity, and consensualism to an international legal order which acknowledges and has creatively appropriated and – importantly – modified principles, institutions, and procedures of constitutionalism.

Global constitutionalism is an intellectual movement which both reconstructs some features and functions of international law (in the interplay with domestic law) as ‘constitutional’ and even ‘constitutionalist’ (positive analysis), and also seeks to provide arguments for their further development in a specific direction (normative

⁴² J Chevallier ‘L’ordre juridique’ in Centre universitaire de recherches administratives et politiques de Picardie (ed) *Le droit en procès* (1983) 7-49 at 8.

⁴³ M Koskenniemi and P Leino ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 533-79. Mario Prost speaks of ‘fragmentation *angst*’ (Prost (note 39), 192).

⁴⁴ M Craven ‘Unity, Diversity, and the Fragmentation of International Law’ (2005) 14 *Finnish Yearbook of International Law* 3-34 at 5 (emphasis added).

⁴⁵ G Abi Saab ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 *NYU J Int Law* 919-933 at 926.

analysis). The function of constitutional law normally is to found, to organize, to integrate and to stabilize a political community, to contain political power, to provide normative guidance, and to regulate the governance activities of law-making, law-application, and law-enforcement. The desired constitutionalist elements are notably the rule of law, containment of political and possibly economic power through checks and balances, fundamental rights protection, accountability, democracy (or proxies such as participation, inclusion, deliberation, and transparency), and solidarity.⁴⁶

Importantly, the constitutionalization of international law is accompanied and co-constituted by the *internationalization* (or globalization) of state constitutions consisting in the (re-)importation of international precepts (such as human rights standards) into national constitutional texts and case-law, which simultaneously brings about a 'horizontal' convergence of national constitutional law.⁴⁷

The scattered legal texts and the case-law together might form a body of *global*⁴⁸ *constitutional law*, a specific subset of law, drawing both on international law and on domestic law, which has a particular normative 'constitutional' status, and the above-mentioned specific 'constitutional' functions. This body is not united in one single document called world constitution. Global constitutional law consists of fundamental norms which serve a constitutional function for the international legal system at large, or for specific international organizations or regimes, and norms which have taken over or reinforce constitutional functions of domestic law.⁴⁹

Historically speaking, the constitutionalization debate engages false friends. Although the concept of a 'constitution of the international legal community' had been spelled out in the inter-war period by the Austrian Alfred Verdross,⁵⁰ that conceptualisation is not at the roots of the contemporary debate.⁵¹ In the 1990s, eminent German authors diagnosed an erosion of the consent principle (and hence

⁴⁶ Matthias Kumm and others have called the 'commitment to human rights, democracy, and the rule of law' 'the trinitarian mantra of the constitutionalist faith' (M Kumm, A Lang, J Tully and A Wiener 'How large is the world of global constitutionalism?' (2014) 3 *Global Constitutionalism* 1-8 at 3).

⁴⁷ A Peters 'The Globalisation of State Constitutions' in J Nijman and A Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (Oxford University Press Oxford 2007) 251-308.

⁴⁸ I use the term 'global' and 'international' interchangeably, although the former denotes better the multi-level quality of the body of constitutional law at stake.

⁴⁹ T Kleinlein and A Peters 'International Constitutional Law' in A Carty (ed) *Oxford Bibliographies in International Law* (Oxford University Press Oxford 2014) online publication at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0039.xml>.

⁵⁰ A Verdross *Die Verfassung der Völkerrechtsgemeinschaft* (Verlag von Julius Springer Wien 1926).

⁵¹ See E Lagrange 'Retour sur un "Classique"' (2008) 112 *RGDIP* 973-984.

an erosion of state sovereignty) and a rise of the 'international community';⁵² these writings are (maybe against the authors' intentions) in hindsight considered as initiators of the contemporary debate. In 2000, the German society of international law chose 'constitutionalization of international law' as one topic of its annual meeting.⁵³ In parallel, the controversies about the qualification of founding documents of international organisations as 'constitutions', gained momentum in the 1990s. These debates referred to the United Nations, the European Union, and the WTO. But the structural features of those regimes which are pinpointed as being 'constitutional' actually differ dramatically from organization to organization, and accordingly the meaning of 'constitutionalization' of the respective regimes differs widely as well (see in detail below sec. 3.2.).

Some variants of constitutionalism beyond the state are extremely diluted, when constitutionalism is considered not as a matter of positive norms and 'doctrine', but (only) as a discourse and a vocabulary with a symbolic value, as a constitutionalist 'imagination'.⁵⁴ Other strands of the debate relate less to international law proper but more to the constitutional law of states, constitutional comparison, borrowing, and migration. Two journals, the 'Journal of International Constitutional Law' (I Con, founded in 2002) and the 'Journal of Global Constitutionalism' (founded in 2011) are forums for this strand. To the extent that constitutionalization covers both international law and domestic law, and is to that extent inevitably a multi-level phenomenon⁵⁵ in which the various levels of law and governance may also compensate for each others' deficiencies ('compensatory constitutionalism'⁵⁶ or 'supplementary constitutionalism'⁵⁷), these discourses form part of the broader stream of constitutionalization, too.

The constitutionalization debate has been initiated in continental Europe.⁵⁸ The early debate was strong among German public lawyers due to their obsession with the state and initial doubts about severing the concept of the constitution from the

⁵² C. Tomuschat, 'Obligations Arising for States Without or Against their Will', (1993) 241-IV *Recueil des Cours* 209-240; B Simma 'From Bilateralism to Community Interests in International Law' (1994) 250-VI *Recueil des Cours* 217-384; Simma is a 'disciple' of Verdross.

⁵³ J A Frowein 'Konstitutionalisierung des Völkerrechts' (2000) 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 427-447.

⁵⁴ N Walker 'Constitutional and Pluralism in Global Context' in J Komárek and M Avbelj (eds) *Constitutional Pluralism in Europe and Beyond* (Hart Oxford 2011) 17-37, esp. at 50-61.

⁵⁵ T Cottier and M Hertig 'The Prospects of 21st Century Constitutionalism', (2003) 7 *Max Planck UNYB* 261-328 at 299, 301.

⁵⁶ A Peters 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 *Leiden Journal of International Law* 579-610.

⁵⁷ J Dunoff and J Trachtman 'A Functional Approach to International Constitutionalization' in J Dunoff and J Trachtman *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP Cambridge 2009) 3-35 at 14-18.

⁵⁸ J Klabbers, A Peters and G Ulfstein *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009, expanded ed. 2011).

state.⁵⁹ The discussion has meanwhile been picked up in the UK,⁶⁰ in the United States,⁶¹ and in Asia.⁶² The ideational background of the proponents of global constitutionalism may be a more or less openly catholic (neo-)jus-naturalism,⁶³ cosmopolitanism,⁶⁴ republicanism,⁶⁵ general systems theory,⁶⁶ discourse theory,⁶⁷ functionalism⁶⁸ and constitutional economics,⁶⁹ social constructivism,⁷⁰ social contract theory,⁷¹ critical legal studies,⁷² or agnostic. The co-existence of highly divergent sources of inspiration on the one hand creates the danger of empty talk that is only seemingly a real discourse on an agreed topic. On the other hand, the pluralism of outlooks underlying the debate might be more positively assessed as demonstrating that global constitutionalism does not need a particular ideational foundation, but can build on an overlapping consensus.

3.2. Fragmentation through constitutionalization of international organizations

Ironically, the topos of constitutionalization appeared in the law of international organizations whose founding documents have long been understood to be both

⁵⁹ Seminal D Grimm ‘Does Europe Need a Constitution?’ (1995) 1 *European Law Journal* 282-307.

⁶⁰ Walker (supra note 54).

⁶¹ J Dunoff and J Trachtman *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP Cambridge 2009).

⁶² T Mogame ‘Towards Jus Contra Oligarchiam: A Note on Critical Constitutionalism’ 55 (2012) *Japanese Yearbook of International Law* 371-402.

⁶³ AA Cançado Trindade ‘International Law for Humankind: Towards a New *Jus Gentium*’ (2005) 316 *Recueil des Cours* 9-444; R Domingo *The New Global Law* (UP Cambridge 2011). Verdross (note 50) would have to be counted here, too.

⁶⁴ Habermas used Kant’s concept of a ‘cosmopolitan status’ (*‘weltbürgerlicher Zustand’*) to demand the transformation of international law into a law of and for the global citizen (J Habermas ‘Does the Constitutionalization of International Law still Have a Chance?’ in id *The Divided West* (C Cronin ed and transl) (Polity Cambridge 2006) 115-210; D Archibugi *The Global Commonwealth of Citizens : towards Cosmopolitan Democracy* (2008); M Kumm ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State’ in Dunoff and Trachtman (note 61) 258-326; G Wallace Brown ‘The Constitutionalization of What?’ (2012) 1 *Global Constitutionalism* 201-228.

⁶⁵ A Emmerich-Fritsche *Vom Völkerrecht zum Weltrecht* (Duncker & Humblot Berlin 2007).

⁶⁶ G Teubner *Constitutional Fragments: Societal Constitutionalism in the Globalization* (Oxford University Press 2012).

⁶⁷ Kleinlein (note 5): Fusing Kant, Habermasian discourse theory and social constructivism, Kleinlein has elaborated a concept of constitutionalisation ‘in, not of international law’ (at 685). Here constitutionalisation is perceived as a process of identity change and self-entanglement of states and other international actors. The process of constitutionalisation has not brought about formally higher laws, but merely creates a burden of justification (ibid. 687).

⁶⁸ Dunoff and Trachtman (note 61).

⁶⁹ J P Trachtman *The Future of International Law: Global Government* (CUP Cambridge 2013), chapter 11: ‘International Legal Constitutionalization’ (253-287).

⁷⁰ O Diggelmann and T Altwicker ‘Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism’ (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 623–650.

⁷¹ M Rosenfeld ‘Is Global Constitutionalism Meaningful or Desirable?’ (2014) 25 *EJIL* 177-199.

⁷² C E J Schwöbel *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Leiden 2011). The author propagates an ‘organic constitutionalism’ as a ‘negative universal’ based on Ernesto Laclau and Jacques Derrida (esp. at 158-165).

treaties and constitutions⁷³ – and thus within sectoral, possibly fragmented regimes. The ICJ described the documents' hybridity as follows: 'From a formal standpoint, the constituent instruments of international organizations are multilateral treaties (...). But the constituent instruments of international organizations are also treaties of a particular type', with a 'character conventional and at the same time institutional'.⁷⁴

However, beyond the hybrid quality of the organizations' 'constitutional treaties',⁷⁵ the assessment whether some constitutionalization is taking place, in which features it lies, and whether this phenomenon is (or would be) laudable, wildly differs. A related issue is the constitutionalization of special branches of law populated by numerous organizations and treaty regimes, such as international environmental law⁷⁶ and of the ECHR as the Constitution of Europe.⁷⁷ Here, too, the actual constitutional features of the regimes are contested.

The United Nations

With regard to the United Nations, the Security Council is in the centre of attention. Bardo Fassbender's seminal essay⁷⁸ was motivated by the stalemated debate on the reform of the Security Council which is direly needed to improve both the effectiveness and the legitimacy of this body. Because the Council's legal authority to impose binding measures has in fact been exercised only after 1991 (when the P5

⁷³ A Peters 'Das Gründungsdokument internationaler Organisationen als Verfassungsvertrag' (2013) 68 *Zeitschrift für öffentliches Recht* 1-57; see also A Peters 'The Constitutionalisation of International Organisations' in N Walker, J Shaw and S Tierney (eds) *Europe's Constitutional Mosaic* (Hart Oxford 2011) 253-285.

⁷⁴ ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, para 19. This qualification related to the WHO-constitution. On the UN Charter as 'a treaty having certain special characteristics' (ICJ, *Certain Expenses of the United Nations (article 17, paragraph 2 of the Charter)*, advisory opinion of 20 July 1962, ICJ Reports 1962, 151 (157).

⁷⁵ See the official terms 'Constitution of the United Nations Educational, Scientific and Cultural Organization' of 16 November 1945 (UNTS 4, No 52); 'Constitution of the World Health Organization' of 22 July 1946 (UNTS 14, No 221); 'Constitution of the International Labour Organization' of 9 October 1946 (UNTS vol 38, No 583); 'Constitution of the Food and Agricultural Organization of the United Nations' of 16 October 1946 (UNYB 1946-47, 693); 'Constitution of the International Telecommunication Union' of 22 December 1992 (UNTS vol 1825, No I-31251). The aborted 'Treaty Establishing a Constitution for Europe' of 29 October 2004 had captured the hybridity in its official name (OJ 2004 C 310/1).

⁷⁶ L J Kotzé 'Arguing Global Environmental Constitutionalism' (2012) 1 *Transnational Environmental Law* 199-233. See sceptically D Bodansky 'Is there an International Environmental Constitution?' (2009) 16 *Indiana Journal of Global Legal Studies* 565-584.

⁷⁷ ECHR, case of *Loizidou v Turkey* (preliminary exceptions), Series A 310 (1995), para 75. See also ECHR, *Ireland v United Kingdom*, appl. no. 5310/71 (1978), at 82: 'Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"'.⁷⁸

⁷⁸ B Fassbender 'The United Nations Charter as the Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529-619; B Fassbender *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Leiden 2009). Fassbender first of all reads the UN Charter as the Constitution of the world (not only of the United Nations as an organisation), but seeks to reconcile his conception with that of a more inclusive global constitutional process, and considers the Charter as one part of that ongoing process (*ibid*, Columbia Journal, at 616-7).

stopped blocking the body by constantly threatening to veto decisions), the Council's potential to affect the liberty and well-being of natural persons materialized only then. This fact triggered the demand for checking the Council's powers. In this context, the rule of law-topos emerged with the establishment of the Criminal Tribunal for Yugoslavia (ICTY) by the Security Council. The argument of the appellant Tadic had been that the Yugoslavia Tribunal was illegal or not duly created by law, because it was not based on an international treaty. In order to refute the interlocutory appeal on jurisdiction, the Appeals Chamber resorted to constitutional arguments. In a section of the judgment entitled 'Question of constitutionality', the Chamber examined whether Chapter VII, notably Article 39 of the UN Charter, could form a legal basis of the tribunal. It emphasized that the Security Council is subject to the principle of legality, and is not a purely political organ. It is not 'legibus absolutus'.⁷⁹ However, the legal (or constitutional) limits of Security Council action are barely enforceable, in any case no judicial action is available against the Council as such. The constitutional limits identified in *Tadic* thus remain largely virtual.

Next, the Council's comprehensive economic sanctions against Iraq (1991-2003) which affected notably social rights of the Iraqi population was met with a growing belief that the Council was obliged or should be made to respect human rights.⁸⁰ Then, the Council's quasi law-making resolutions on financing terrorism (Res. 1373) and on weapons of mass destruction (Res. 1540) provoked the question whether that body possessed not only 'police'-powers but also law-making powers. That issue triggered a typically constitutional debate on the separation of powers within the organization.⁸¹ Finally and most importantly, the Council's targeted sanctions policy both against terror suspects and against illegitimate political leaders – which was actually designed to avoid the large scale human rights problems – risks to infringe procedural fundamental rights of targeted persons and deprives them of judicial review. This gave rise to a constitutional confrontation between the UN and the EU, with the ECJ insisting on upholding its regional constitutional human rights standard protecting targeted persons.⁸²

⁷⁹ ICTY, case No IT-94-1-AR72, *Prosecutor v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber of 2 October 1995, paras 26-28.

⁸⁰ F Megret and F Hoffmann 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibility' (2003) 25 *Human Rights Quarterly* 314-342.

⁸¹ S Talmon 'The Security Council As World Legislature' (2005) 99 *American Journal of International Law* 175-193; L M Hinojosa Martínéz 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political, and Practical Limits' (2008) 57 *ICLQ* 333-359; A Peters 'Art. 24' in B Simma et al (eds) *The Charter of the United Nations: A Commentary on the UN Charter* (Oxford University Press Oxford 2012), paras 66-80 with further references.

⁸² In ECJ, cases C-420/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the Court (Grand Chamber), ECR 2008 I-06351, paras 281-2, 316, 326, the assertion of a European Union constitutional order was an important discursive building block in the argument that the European courts must fully scrutinize the conformity of regulations which implement the United Nations' targeted sanctions with European fundamental rights, even if the courts' annulment of a regulation on the ground of its unconstitutionality inevitably leads to the EU falling short of compliance with Security Council resolutions.

The European Union

With regard to the EU, the first driver of constitutionalization was the ECJ. Already in 1963, the Court reclaimed the authority to determine in a central fashion the direct effect of EC (later EU) law (*van Gend & Loos*),⁸³ which it has since then generously accorded to numerous provisions of European primary and secondary law. In 1964, in *Costa v ENEL*,⁸⁴ the Court emphasized the detachment of the European legal order from general international law and established the supremacy of European law over the law of the member states (including over member states' constitutions).⁸⁵ In a somewhat circular way, the Court relied on the enhanced legal status of the individual as a subject of the European legal order, next to the member states, as being both cause and effect of these specific effects of European law.

In the 1980s and 1990s, scholars began to acknowledge these seminal judgments as 'constitutional moments',⁸⁶ and hotly discussed the role of the Court as a constitution-maker. In the following, the ECJ frequently used the constitutional vocabulary to protect and expand its judicial powers.⁸⁷ The most recent occurrence is the Court's resistance to the EU's accession to the ECHR. After the creation of a legal basis for such accession in the TEU (Art. 6(2) in the Lisbon version), the ECJ denied the compatibility of the 2013 draft accession agreement with EU law, based on constitutional considerations: 'The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal

⁸³ ECJ, case C-26/62, *Van Gend & Loos v Administratie der Belastingen*, 5 February 1963, ECR 1963, 1 at 12.

⁸⁴ ECJ, case C-6/64, *Costa v ENEL*, ECR 1964, 587 at 593.

⁸⁵ ECJ, case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR XVI (1970-1), 1125, para. 3.

⁸⁶ E Stein 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law* 1-27.

⁸⁷ ECJ, case 294/83, *Parti Ecologiste 'Les Verts' v European Parliament*, ECR 1986, 1339, para 23: By pointing out that the European Community is a 'legal community' whose Treaty is a 'constitutional charter', the Court was able to argue that neither the acts of the member states nor those of the institutions could escape judicial control, and could therefore draw the conclusion that parliamentary acts deploying legal effects must be subject to judicial review even without an explicit treaty basis. ECJ, Opinion 1/91 of 14 December 1991 delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the *European Economic Area* ["EEA I"], ECR 1991, I-06079, para. 21: the EC-Treaty represents, although it had been concluded in the form of an international agreement, the constitutional charter of a legal community. ECJ, opinion 2/94 of 28 March 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECR 1996, I-01759, paras 34-35: Here the Court found that the European Community was not competent to accede to the ECHR, because the general clause of Article 352 TFEU (then Article 235, later Article 308 EC Treaty) EC did not provide a sufficient legal basis. The reason why the general clause was not deemed sufficient was that the accession to the Human Rights Convention would 'engender a substantial change of the current regime ... because it would imply the insertion of the Community in a distinct institutional system.' Such a move would – according to the ECJ – 'involve a constitutional dimension' which would not be covered by the former Article 235 EC.

rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.⁸⁸

The accompanying debate related to the qualification of the successively amended founding documents as a constitution (or rather as a hybrid treaty-constitution) and to the possible legal consequences of such qualification. What mattered in practical terms was the relationship between EU-law and the law of the member states and the seat of the authority to define that relationship. One concept to describe the whole was the '*Verbundverfassung*' or 'multi-level constitution'.⁸⁹ In substance, the probably most important focus of the debate was the 'democratic deficit' of the increasingly powerful and law-generating EU.⁹⁰ The entire issue was somewhat muted by the rejection of the 'Treaty Establishing a Constitution for Europe' of 2004 by the populations of France and the Netherlands. It was exactly the label of constitution and its (in my view erroneous) association with statehood which was the main cause of its defeat.

The WTO

The WTO Appellate Body has stressed the 'contractual' (as opposed to any 'constitutional') character of the WTO Agreement.⁹¹ In scholarship, however,⁹² first, the judicialization of the dispute settlement mechanisms and the use of 'constitutional' balancing techniques have been regarded as the marker of constitutionalization.⁹³ A second item is the WTO-Agreement's function as a constrainer of protectionist measures adopted by members whose parliaments and executives are excessively lobbied by rent-seeking societal groups.⁹⁴ Finally, the need for the WTO-regime to integrate non-trade concerns, including the protection of human rights, labour rights, environmental concerns and animal welfare has been

⁸⁸ ECJ, opinion 2/13, 18 Dec. 2014, para. 158; see further paras 153-177.

⁸⁹ I Pernice 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703-750; A Peters *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot Berlin 2001).

⁹⁰ C Lord and E Harris *Democracy in the New Europe* (Palgrave Houndmills Basingstoke Hampshire 2006).

⁹¹ AB, *Japan – Taxes on Alcoholic Beverages* (4 October 1996) WT/DS8/AB/R, WT/DS 10/AB/R, WT/DS11/AB/R, at 15: 'The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitment they have made in the WTO Agreement.'

⁹² See for (different) mappings of the debate D Z Cass *Constitutionalization of the WTO* (Oxford University Press Oxford 2005); J Dunoff 'Constitutional Concepts: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *EJIL* 647-75, notably at 651.

⁹³ D Z Cass 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutionalization' (2001) 13 *EJIL* 39-77.

⁹⁴ See E-U Petersmann 'Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice' (2007) 10 *Journal of International Economic Law* 529, 533: 'the WTO guarantees of freedom, non-discrimination and rule of law – by enhancing individual liberty, non-discriminatory treatment, economic welfare, and poverty reduction across frontiers – reflect, albeit imperfectly, basic principles of justice.'

discussed under the heading of a constitutionalization of the WTO.⁹⁵ Only with regard to the latter focus, the quest for a constitutionalization of the WTO, or for the 'constitutional interpretation' of WTO-law⁹⁶ is indeed a reaction to regime fragmentation. In the WTO debate, lucid observers have pinpointed that what is at stake is ultimately the social legitimacy (acceptance) of the regime, and have disagreed whether and which kind of constitutionalization would alleviate or – on the contrary – exacerbate perceptions of illegitimacy.⁹⁷

This sectoral constitutionalization (of the UN, the EU, the WTO, the ECHR, etc.) to some extent manifests and reinforces fragmentation. With a view to the constitutionalization of the various regimes, Jan Klabbers has observed that '[f]ighting fragmentation by constitutionalism will, likewise, only result in deeper fragmentation, as the various competing regimes and organizations will be locked firmly in constitutional place – and in battle with each other'.⁹⁸

3.3. Non-state and private constitutionalization

The multiplication of transnational actors assuming a role both in the making and in the enforcement of international law has contributed to some kind of fragmentation, too. This phenomenon has in turn given rise to different types of constitutionalization, reacting to new law-producers and new forms of law. In the early phase of the 1990s, the focus was on NGOs which were regarded as quasi-representatives of an emerging civil society. The constitutional role attributed to them is participation (in international conferences and other bodies). Accordingly, 'participation' has emerged as one core constitutional principle of international law.⁹⁹ Concomitantly, the question of the legitimacy of those NGOs themselves popped up and triggered the demand for their internal constitutionalization (democratic structures, transparency, accountability, and so on).

Gunther Teubner has highlighted that the contemporary challenge for constitutionalism lies in privatization as much as in globalization. Constitutionalism must therefore move beyond the nation state, but in a double sense: into the transnational sphere and into the private sector. A multiplicity of civil constitutions

⁹⁵ T Cottier 'Limits to International Trade: The Constitutional Challenge' in The American Society of International Law (ed) *International Law in Ferment: A New Vision for Theory and Practice, Proceedings of the 94th Annual Meeting* (Washington DC April 5-8, 2000) 221.

⁹⁶ E-U Petersmann 'De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement' (2008-2009) 6 *Loyola University Chicago International Law Review* 209-248.

⁹⁷ See for the latter position R Howse and K Nicolaidis 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity' (2003) 16 *Governance* 73-94.

⁹⁸ Klabbers (note 3) 31-58 at 53.

⁹⁹ See., eg, UN ECOSOC, *Consultative Relationship between the United Nations and Non-governmental Organizations* (UN Doc A/RES/1996/31) (resolution passed at the 49th plenary meeting of 25 July 1996); CoE, *Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum* (November 2002).

are emerging through 'auto-constitutionalization', with constitutionalization meaning the juridification of reflexive social processes. This is the idea of 'societal constitutionalism', i.e. the acknowledgment that actors of civil society (both non-profit and business) are endowed with a natural authority to produce non-state law including constitutional law.¹⁰⁰ The current effort, shared by important international organizations (led by the UN and the OECD), to hold business 'responsible' for respecting international human rights (corporate social responsibility, human rights due diligence, self-regulation, labeling, and certification)¹⁰¹ is a significant continuation of global constitutionalization with regard to economic actors. This type of constitutionalization defies and erodes the public-private split by extending constitutional concepts (and bonds) to the private (economic) sphere.

Another facet of this extended constitutionalism is the relatively recent international organizations' battle against grand corruption,¹⁰² and worldwide rebellions against political regimes predominantly directed against the personal illicit enrichment of their leaders. These actions are motivated by the perception that corruption is one of the most important obstacles to development, and a direct antagonist of the rule of law.¹⁰³

Another important debate relates to the need to strengthen the rule-of-law elements in transnational diagonal arbitration through securing the structural and personal independence of decision-makers, improved review, limits on arbitrability, increased options for the state side to institute proceedings, increased attention to obligations of the private party to the proceedings, and the like. Finally, states and inter-governmental actors are pursuing objectives that are (ostensibly) in their (national) public interest on the supra-national plane with help of private actors and through the legal instruments of private law (such as private contract, concessions, and property titles), e.g. 'land-grabbing'. Because of the potentially detrimental effects of these activities for other states or their inhabitants these need to be regulated and contained, too.

¹⁰⁰ G Teubner 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, I-J Sand and G Teubner (eds) *Transnational Governance and Constitutionalism* (Hart Oxford and Portland 2004) 3-28.

¹⁰¹ The UN Guiding Principles on Human Rights and Transnational Corporations and Other Business Enterprises (2011), Report of the Special Representative of the Secretary-General with Guiding Principles in the Annex (UN-Doc. A/HRC/17/31) of 21 March 2011, endorsed by the UN Human Rights Council on 6 July 2011 (UN-Doc. A/HRC/RES/17/4); OECD Guidelines for Multinational Enterprises (2011), OECD Publishing (<http://dx.doi.org/10.1787/9789264115415-en>).

¹⁰² United Nations Convention against Corruption of 31 October 2003 (UNCAC), entered into force on 14 December 2005 (UNCAC), 2349 UNTS 41.

¹⁰³ Foreword by Secretary Kofi Annan to the UNCAC 2003: 'Corruption ... undermines democracy and the rule of law ... is a major obstacle to poverty alleviation and development.' See in this sense also the preamble of GA Res. 58/4 of 31 October 2003 (endorsing UNCAC), and the preamble of UNCAC itself.

All this shows that constitutionalism should no longer be confined to the traditional 'public' sphere, but that it may and must be extended to the business sphere, not blindly, but in a mitigated way, adapted to the specific logics of that sphere of society.¹⁰⁴ Against this background, attempts to re-ify a supra-national public-private split by insisting on 'international public authority' as a key concept to which the constitutional strings should be attached,¹⁰⁵ deserves careful reconsideration.

3.4. Interim conclusion: Constitutional fragments in a pluralist legal space

All phenomena sketched out so far in section 3 show that constitutionalization (if we want to speak of it) is itself fragmented. Global constitutionalism relates to multi-level governance (implying nested constitutional orders). It concerns various subfields ('regimes' or issue areas) of the law. There seem to be a special process of constitutionalization of the private sector. Besides, the various members of the global (constitutional) order, not only the nation states, but some international organizations may have their own 'sectoral' constitution (as described for the international organizations above in sec. 3.2.). All this also means that constitutional substance may be dispersed ('vertically') across different levels of the law, 'horizontally' across areas of the law, and across the public - private realms (sec. 3.3.).

This diagnosis precludes any conceptualization of constitutionalization as the emergence of a 'super-constitution' which would lie both 'above' domestic state constitutions and which would completely embrace all separate international regimes, too. Rather, we see constitutional fragments, firstly in different issue-areas of law and governance, secondly, in different geographic regions, and thirdly on different 'levels' of governance. These fragments interact with each other, sometimes converging but also conflicting.¹⁰⁶ Besides, the intellectual framework of constitutionalism is fragmented, too.

But is the notion of constitutional fragments, of fragmentary constitutionalisation, and of fragmentary constitutionalism not a contradiction in terms (or at least a dilution which renders the words almost meaningless)? When notably different

¹⁰⁴ H Muir Watt 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347-427 esp. at 426: '[T]here is no reason in law that economic power beyond the state should not be disciplined, that private rule-making authority should not be made accountable, or indeed that the global commons be constantly abused. However, a reversal of current trends on all these points means that private international law may and must come out of the closet and reappropriate its political function.' The author proposes to step up the 'governance potential' of private law notably through the *ex post* mechanism for securing accountability and legitimacy: the imposition of a duty to compensate (id. at 417-18).

¹⁰⁵ A von Bogdandy et al. (eds) *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer Heidelberg 2010).

¹⁰⁶ 'In the sea of globality, only islands of the constitutional will emerge (...) constitutional fragments have been developed for particular policy areas' Teubner (note 66) at 52). The 'constitutional totality breaks apart and can then only be replaced by a form of constitutional fragmentation' (Ibid., at 51).

organizations have their own constitution, how can they still be members of a global constitutional order? Can constitutionalization and constitutionalism only be uniform and complete, or not be at all? Indeed, traditional Continental and US-American constitutionalism tended to be holistic in a dual sense, namely that one single constitutional document was supposed to provide a both harmonious and complete legal and political basis for societal life.

However, in the multilevel governance arrangements, and under conditions of globalization (including large scale privatization/outsourcing and mass migration), these traditional constitutional features have waned. First, even state constitutions do not govern or regulate all governance acts unfolding effects for their citizens and within their territorial borders. Second, within constitutional states, the sub units, e.g. states within in federal states, or local communities, have their own constitutions. Third, in culturally diverse societies the value-bases of shared, implicit norms carrying the legal constitution are crumbling, too. This means that, in terms of normative substance, constitutionalism (even *within* states) is no longer 'the empire of uniformity' as James Tully put it in his seminal work. Constitutionalism has been reconceptualized by Tully so as to 'recognize and accommodate cultural diversity'.¹⁰⁷ So while it is true that the very idea of 'fragmented' (i.e. multiple and multi-level) constitutionalism implicitly gives up the claim to totality, this idea better describes real-life phenoma (even within states) than the more traditional holistic notion of constitution.

These three points are relevant for global constitutionalism as well. Compared to domestic constitutionalism in its current actually existing form, the existence, growth, and sometimes regression of multiple constitutions and of fragmented constitutional law can also be reasonably deemed to constitute processes of constitutionalisation, and to manifest constitutionalism.¹⁰⁸ What is more, I submit that the above-mentioned multiple and fragmented processes of constitutionalization do not always and inevitably cancel each other out but are apt to co-exist, to reinforce each other and even to compensate mutually each others' deficiencies.¹⁰⁹ From that perspective, it becomes less important on which normative 'level' some basic constitutional principles, for example fundamental rights norms, are formally codified.

¹⁰⁷ J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP Cambridge 1995) at 58 and 1.

¹⁰⁸ Cf. Aiofa O'Donoghue, *Global Constitutionalism in the Constitutionalisation of International Law* (Cambridge: CUP 2014), at 144: 'If constitutionalisation is coupled with global legal pluralism or fragmentation it may support the proposition that constitutionalisation can occur at different paces within different sectors of international law.'

¹⁰⁹ See above text with note 56.

Notably James Tully's pluralist recasting is relevant for global constitutionalism. Taking into account the extreme diversity of societies worldwide, global constitutionalism is, if at all, conceivable only as *pluralist constitutionalism*.¹¹⁰ I use 'pluralism' as a label for a normative position which, firstly, welcomes the multiplicity, diversity, and overlap of legal (sub-)orders, of rules and principles, of sources of authority, of norm-producing actors and institutions in various sectors, which, secondly, accepts that levels of governance that stand in a non-hierarchical relationship to each other (absence of a meta-norm, overarching *Grundnorm*, or the like, to resolve the competing claims for validity, authority, supremacy), and which thirdly welcomes the plurality of values and perspectives espoused by the multiple actors. This type of pluralism may go hand in hand with constitutionalism.

Pluralism does not require 'that each good should be pursued by an autonomous regime. It may well turn out that a relatively consolidated form of global constitutionalism, rather than unregulated global legal pluralism, is the best way to ensure a healthy pluralism of human values. Value fragmentation does not dictate institutional fragmentation'.¹¹¹

Most importantly, 'pluralism' alone is not sufficient as a guide-line for ordering a society, because it does not say anything about its own limits. Some additional principles, whether democracy, individual freedom, equality, or mutual respect, etc. are needed, otherwise, 'global legal pluralism might end up consecrating a ruthless world governed (...) by "nothing other than the advantage of the stronger" ' law-applying institution.¹¹² Therefore, constitutional principles and procedures are needed to constructively deal with pluralism (and with fragmentation), notably to protect the weaker actors in international relations. To these we now turn.

4. Constitutionalizing Fragmentation

This section describes how the fragmentation of international law is continuously being more or less successfully constitutionalised with help of novel principles, procedures and institutions dealing with discrepancy, collisions, and conflict. I will first turn to the traditional devices of conflict resolution that are geared at binary ('either – or') solutions, leading the application of one norm over a potentially conflicting other norm stemming from a different source or regime.

¹¹⁰ A Peters 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse' (2010) 65 *Zeitschrift für öffentliches Recht* 3-63, at 50-61. See also for 'constitutional pluralism' J Komárek and M Avbelj (eds) *Constitutional Pluralism in Europe and Beyond* (Hart Oxford 2011); J L Cohen *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP Cambridge 2012) at ix, 45, 70, and passim.

¹¹¹ T Isiksel 'Global Legal Pluralism as Fact and Norm' (2013) 2 *Global Constitutionalism* 160-195 at 190.

¹¹² *Ibid.*, at 195 (internal citation omitted).

4.1. Binary and 'horizontal' techniques of conflict-resolution

The first set of traditional juridical principles for resolving conflicts among norms are the priority of the *lex specialis* (the treaty that deals more specifically with a matter shall prevail),¹¹³ and the priority of the *lex posterior* (the treaty later in time shall prevail).

In the international legal system, in which norms are produced in a decentralized way, both the speciality-rule and the later-in-time-rule seems less adequate than in a domestic system,¹¹⁴ for two principal reasons: First, the later rule (the later treaty) may have been created by totally different actors than the earlier one, and therefore its making does not imply a decision to supersede or undo the prior norm (which might still be favoured by its actual creators). A second reason is that the different treaties pursue different objectives, and therefore it can hardly be said that they relate to the same 'subject matter' – although this would be a pre-condition for applying either the *lex specialis* or the *lex posterior* rule.¹¹⁵

Also, principles developed in the field of conflict of law (private international law) have been relied on for deciding which treaty to apply over another one.¹¹⁶ Moreover, the choice-of-law-principles could be used for resolving 'diagonal conflicts' between special international law on the one hand, and domestic law of a different field on the other, e.g. conflicts between WTO procurement law and domestic environmental law.¹¹⁷ The private international law-model is heterarchical in a double sense: Not only are there a plurality of law-appliers (e.g. domestic courts) which do not stand in a hierarchical relationship to each other, but moreover they each apply their own collision rules which do not necessarily coincide.

A similar principle has been developed for dealing with discrepancies between international law and domestic law, namely the principle of the prevalence of any

¹¹³ See on the application of this technique to conflicting international treaties S A Sadat-Akhavi *Methods of Resolving Conflicts between Treaties* (Nijhoff Leiden 2003) 244-47. He gives as one example the 1962 Convention on the Liability of Operators of Nuclear Ships which contains more specific provisions on collisions of nuclear vessels than the 1910 Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels.

¹¹⁴ Cf. Trachtman (note 69) at 229.

¹¹⁵ Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford: OUP 2014), at 329.

¹¹⁶ C Joerges, P Kjaer and T Ralli 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation' (2011) 2 *Transnational Legal Theory* 153-165. According to Joerges, '[t]he normative basis for understanding conflicts law as a constitutional form with democratically grounded validity claims stems from the proposition that states must acknowledge or establish a law that provides a forum for foreign demands and manifests deference through transnational rules.' (ibid at 153). See also R Michaels and J Pauwelyn 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in T Broude and Y Shany *Multi-Sourced Equivalent Norms in International Law* (Hart Oxford 2011), 19-44. See for the more sophisticated explanation of the conflict of laws analogies, with further references, Pulkowski (note 115), at 329-335.

¹¹⁷ R Krämer *Die Koordinierung zwischen Umweltschutz und Freihandel im Mehrebenenrechtsverbund am Beispiel des Vergaberechts* (Mohr Siebeck Tübingen 2014).

higher domestic standard (enshrined, e.g., in Art. 5(2) CCPR, Art. 53 ECHR, or in Art. 2(1) of the WHO FCTC¹¹⁸). This principle could be applied *mutatis mutandis* to the relations between different treaty regimes. Its use would result in the application of only one provision and not the other, but this prevalence would not depend on the formal source of the provisions at stake, but on their contents.

All these traditional conflict resolutions maxims lead to an ‘either – or’-application of norms, i.e. they constitute a relationship of mutual exclusiveness of treaties. They may be considered as manifestations of a global constitutionalism but only in its loosest sense: Gunther Teubner writes that this ‘strictly heterarchical conflict resolution’, coming in two forms – either internalizing disputes into the decisions of the regimes or externalizing them to ‘inter-regime negotiations’ – constitutes the only available ‘meta-constitutionalism’ of the international realm.¹¹⁹

4.2. Hierarchy

The second traditional conflict resolution is hierarchy. In a system of normative hierarchy, the higher norm is applied, and the other not at all; this device is therefore as ‘binary’ as the ones described in the preceding section. Establishing a normative hierarchy is at first glance the quintessentially constitutional technique, because supremacy is the single feature most often associated with a constitution; constitutional law normally is ‘higher law’. For this reason, it had been suggested that *ius cogens* or other norms equipped with priority (notably the UN Charter and SC resolutions, due to Art. 103 UN Charter) might be properly understood to form the international constitution.¹²⁰

However, hierarchy has only an extremely limited scope of application in international law, as shall be briefly recalled. Empirical study of different branches of international law shows that a ‘trumping’ impact of hierarchically superior norms is limited.¹²¹ In practice, notably *ius cogens* plays a much softer, non-hierarchical role, e.g. as a guideline for the interpretation of other norms.¹²² The precedence of the UN-Charter over conflicting obligations of the member states is mitigated by the legal presumption of an absence of conflict,¹²³ by the intrinsic exception of *ius cogens* to the prevailing effect of the Charter,¹²⁴ and by the reluctance to accord precedence to the

¹¹⁸ WHO Framework Convention on Tobacco Control of 22 June 2003, in force since 27 February 2005.

¹¹⁹ Teubner (note 66) 152-53 (internal references omitted).

¹²⁰ See in detail Kleinlein (note 5), Ch. 5.

¹²¹ E De Wet and J Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (University Press Oxford Oxford 2012).

¹²² A Bianchi ‘Human Rights and the Magic of Jus Cogens’, (2008) 19 *EJIL* 491-508.

¹²³ ECtHR, 7 July 2011, *Al-Jedda v. UK*, No. 27021/08, para. 102.

¹²⁴ Dissenting Opinion Judge E. Lauterpacht, in *Case Concerning Application of the Convention on the Prevention and Punishment on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 8th April 1993, ICJ Reports 1993, 3, para. 100: ‘[t]he relief which Article 103 of the Charter may give the Security Council in

Charter over contrary customary law (as opposed to countervailing ‘agreements’ which are mentioned in Art. 103¹²⁵).

A different type of hierarchy is foreseen by ‘more favourable provision’-clauses. Various human rights treaties and also the Cartagena Protocol on Biosafety explicit state that if a different treaty in a related matter sets a different standard, the higher standard shall prevail.¹²⁶ This type of ‘relative’ priority is laudable from a constitutionalist perspective because it allows for a race to the top.

An institutional supplement to normative hierarchy would be the establishment of a hierarchical judicial system in international law. Most institutional propositions seeking to counteract fragmentation have favoured the ICJ.¹²⁷ In fact, the so-called World Court has the broadest subject matter jurisdiction (not limited to a special area of international law), even if it neither has the broadest membership nor the most developed case law (there is low density due to the small quantity of cases). One proposal was to introduce a reference procedure by granting the ICJ jurisdiction to render advisory opinions requested by other international tribunals, possibly through the UN Security Council or the General Assembly.¹²⁸ Thereby, the ICJ would acquire a ‘quasi-constitutional role in the international order by identifying those elements which ensure the unity and coherence of the international legal system.’¹²⁹ Not only the rendering of Advisory Opinions but already the anticipation of them by other courts and tribunals might prompt those to ‘consider the issues before them not only from within the mindset of their particular regime, but also from an external frame of reference.’ In such ‘a model of reflexive engagement’, the ICJ could play a more important role in connecting different regulatory regimes.¹³⁰ However, this proposal was a political non-starter.¹³¹

case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *ius cogens*’. See also Decision of the Swiss Federal Tribunal (*Bundesgericht; BGer*), BGE 133 II 450 (2007) – *Nada v Seco*, E. 6.2.

¹²⁵ A Peters ‘Art. 25’ in B Simma, D-E Khan, G Nolte and A Paulus (eds) *The Charter of the United Nations: A Commentary on the UN Charter* (Oxford University Press Oxford 2012), paras 209-211 with further references. R Liivoja ‘The Scope of the Supremacy Clause of the United Nations Charter’ (2008) 57 *ICLQ* 583-612.

¹²⁶ See Art. 53 ECHR; Art. 53 EU Fundamental Rights Charter of 12 December 2007 (OJ C 303, p. 1); Art. 2(4) Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, UNTS 2226, No. 30619, p. 208.

¹²⁷ See, eg, Charney (note 7), 371, suggesting that the ICJ keep its ‘intellectual leadership role in the field’.

¹²⁸ The inspiration for this institutional proposal is the ECJ competence to give preliminary rulings under Art. 267 TFEU, and to which domestic courts of last instance must turn.

¹²⁹ Casanovas (note 32) 246-47.

¹³⁰ A Lang ‘The Role of the International Court of Justice in a Context of Fragmentation’ (2013) 62 *ICLQ* 777-812 at 808.

¹³¹ Critical of the proposal R Higgins *The ICJ, the ECJ, and the Integrity of International Law* (2003) 52 *ICLQ* 1-20, at 20. See also the pragmatic criticism by K Oellers-Frahm ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’ (2001) 5 *Max Planck UNYB*

To conclude, a clear (substantive, procedural, or institutional) hierarchy which could resolve normative conflicts has not really emerged, and a further future maturation seems unlikely.¹³² Hence, a 'hierarchical' type of global constitutionalism, and a hierarchy-based technique for the constitutionalisation of fragmentation seems unavailable.¹³³

4.3. *The principle of constitutional tolerance*

A number of fairly novel principles and procedures used in treaty provisions themselves, and by law-appliers may be gathered under the heading of 'constitutional tolerance'.¹³⁴ This tolerance may be viewed as an extrapolation of the idea of *marge d'appréciation* to relations between different international treaty regimes. Constitutional tolerance means to let the 'other' regime's rule stand, and to tolerate the 'other' monitoring body's assessment.

Just as the traditional margin of appreciation, this type of tolerance is apt to accommodate fragmentation and pluralism by granting a leeway, a space in which cultural, political, and regional differences might play. This technique is motivated by constitutional considerations, namely the insight that the 'closer' institutions are better equipped and more legitimated to apply the law (including the norms of a 'foreign' regime) than those which are further away from the substantive matter. The ECtHR expressed this as follows: 'The national authorities have a direct *democratic legitimation* and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.'¹³⁵

A related principle is *mutual recognition*, based on the idea of a functional equivalence of the norms originating from different sources.¹³⁶ Mutual recognition can be reasonably applied to inter-regime relations. This means that different standards, e.g. of fair trial, in different regimes (e.g. in the UN as opposed to in the EU) should be mutually recognized as long as a minimal threshold is not undercut. But this approach fits only when the norms in question do not point into opposite directions (for example the free importation of animal products versus import restrictions on the basis of animal cruelty concerns), but when they strive towards the same goal but

67-104: especially tribunals outside the UN system can hardly be linked to the ICJ, and even the if procedural rules were changed, the ICJ would be flooded.

¹³² Cf. ILC May 2006, para. 493: 'the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level. But (...) *no homogenous, hierarchical meta-system is realistically available to do away with such problems.*' (emphasis added)

¹³³ This does not exclude the existence and further growth of international (or global) constitutional law which does not enjoy formal supremacy, and which in that respect resembles more the constitutional law of the United Kingdom, Israel, or other states with only partly codified constitutional law.

¹³⁴ Cohen (note 110) at 73.

¹³⁵ ECtHR, *Hatton v. UK*, No. 36022/97, 8 July 2003, para. 97 (emphasis added).

¹³⁶ See for this type of approach the German Constitutional Court, BVerfGE 73, 339 et seq. (1986) – *Solange II*, for conflicts between EU law and national human rights protection.

with different nuances (e.g. protection of property, but in different degrees). For example, the ECtHR stated in *Bosphorus* that an international organization (in that case the EU) must 'protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides ... By "equivalent" the Court means "comparable".'¹³⁷ The idea of mutual acknowledgement of functional equivalence could be extended beyond the protection of fundamental rights to other constitutional standards, such as the standards of democracy and of the rule of law. Of course the question remains where this standard lies and most of all who defines it.

4.4. Techniques of rapprochement

In contrast to all techniques mentioned up to now, newer techniques and procedures to deal with potential discrepancies or even conflict of international norms stemming from different regimes all have in common that they seek to bring in line, to reconcile, or 'integrate' different regimes, thereby avoiding the binary choice to apply one provision and not the other. Put differently, these techniques are geared towards the *cumulative application* of norms arising from different regimes.

Treaty and customary provisions

The clearest manifestation of this new approach is found in the three principles enounced in Article 20 of the UNESCO Convention on Diversity of 2005 whose heading is: 'Relationship to other treaties: mutual supportiveness, complementarity and non-subordination'.¹³⁸ These three principles seek to avoid the binary 'either - or'-approach and instead favour the combined and cumulative application of the UNESCO Convention and other treaties.

'Notwithstanding-clauses' in the style of Art. 2(3) of the Cartagena Protocol¹³⁹ may ultimately work in the same direction, namely that of cumulative application and mutual harmonization.¹⁴⁰ Cross-referrals such as Art. 6(2) and 22(3) of the CCPR (mentioning other human rights treaties) have a similar effect. Furthermore, Art. 44 and 46 CCPR and Art. 24 CESCRC seek to prevent impairment of the functions of UN organs and bodies dealing with human rights through the entry of the force of the two Human Rights Covenants. Another example is Article 104 NAFTA, which seeks to promote the reconciliation of potentially conflicting obligations arising out the free

¹³⁷ ECtHR, 30 June 2005, *Bosphorus v Ireland*, No. 45036/98, para. 155. The Court went on: But 'any such finding of equivalence could not be final and would be susceptible to review [by the Court itself] in the light of any relevant change in fundamental rights protection.' (ibid).

¹³⁸ See in this sense also Cartagena Protocol on Biodiversity, preamble indent 9: 'recognizing that trade and environment agreements should be mutually supportive.'

¹³⁹ Art. 2(3): 'Nothing in this Protocol shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, ... '.

¹⁴⁰ However, these clauses can also, inversly, be understood as establishing exclusivity.

trade agreement on the one hand and environmental and conservation agreements on the other hand, by explicitly prescribing a balancing approach (albeit with a heavy thumb on the scale in favour of trade).¹⁴¹

Reconciliatory principles that are applicable across the board smooth out tensions and frictions. For example, the principle of sustainable development is intended to reconcile the frictions notably between the international law of development and international environmental law.¹⁴² Or, the antagonist legal concepts of sovereignty/non-intervention on the one hand and human rights/human security on the other hand are synthesized in the soft law concept of responsibility to protect (R2P). However, the application of these reconciliatory principles cannot in itself resolve any concrete normative conflict but can only prevent the total eclipsing of one of the regimes or principles involved. A related phenomenon is the acknowledgment that international human rights matter for basically all issue areas and subfields of international law. This insight continues to motivate both formal revisions of special norms so as to accommodate human rights concerns, and novel interpretations.¹⁴³ Such ‘mainstreaming’ also has a ‘de-fragmentation’ effect.¹⁴⁴

Dirk Pulkowski has demonstrated that a small number of basic concepts of international law (such as ‘sovereignty’, the ‘right to have human rights’, or specific provisions of the VCLT or the UN charter) should be understood as ‘*constitutive rules*’ which create the very possibility of meaningful legal discourse. These will engender ‘communicative compatibility’ rather than legal unity.¹⁴⁵ Again, this is a different, intuitively constitutionalist take for dealing with fragmentation.

An important phenomenon are *references* in international treaties (or in the case-law; see on ‘judicial dialogue’ below) to *general* international law (possibly fundamental and thus to some extent ‘constitutional’ principles), and *cross-references* to other (*special*) treaties or regimes. A historical example is Article 1 of the Havana Charter for an International Trade Organization of 1948 which referred to the UN Charter’s

¹⁴¹ Art. 104 NAFTA: ‘1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in [CITES, Montreal Protocol, Basel Convention, and other agreements] such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.’

¹⁴² ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports 1997, p. 7, at 78. M-C Cordonier Segger and A Khalfan *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press New York 2004).

¹⁴³ Menno T. Kamminga, Martin Scheinin (eds) *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press 2009).

¹⁴⁴ O’ Donoghue (note 108), at 96: ‘Human rights often act as a core normative structure within an ever-fragmenting regime.’

¹⁴⁵ Pulkowski (note 115), at 238-271 (quotation at 239, examples for constitutive rules at 268-69). ‘[I]nstitutional facts created through international law provide the commonalities of meaning that make continued normative action possible.’ (ibid., at 270).

objective of attaining economic and social progress and development.¹⁴⁶ In current international law, Art. 1 of the Cartagena Protocol refers to Principle 15 of the Rio Declaration of 1992 which embodies the precautionary approach. The UNCLOS preamble affirms 'that matters not regulated by this Convention continue to be governed by the rules and principles of general international law' (last indent). MARPOL and MSC regulations on sea pollution and safety of ships are generally accepted 'international rules and standards' in the sense of Art. 211 and 217-220 UNCLOS.¹⁴⁷ A final example are the references to labour provisions stemming from various ILO conventions, so far in nearly 40 bilateral trade law agreements, some of which actually incorporate these standards directly.¹⁴⁸ In the absence of a central institution which would authoritatively interpret such cross-referenced and 'borrowed' clauses, the spectre of divergent and thus 'fragmented' interpretation arises. This leads us to the interpretative devices.

Interpretation maxims

Two principal interpretation maxims are being used by law-applying bodies to avoid conflict in the first place by harmonizing the various international rules rooted in different regimes.

Presumption of non-deviation

The first technique is a presumption of non-deviation.¹⁴⁹ For example, the ECtHR has established a presumption that there is no conflict between a state's obligation to carry out a Security Council resolution and respect for human rights guaranteed by the ECHR: '[T]he Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.'¹⁵⁰

¹⁴⁶ Art. 1: 'The parties to this Charter undertake in the fields of trade and employment to cooperate with one another and with the United Nations. For the Purpose of realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter.'

¹⁴⁷ The UNCLOS provisions deal with maritime pollution and accidents. Cf. A Boyle and C Chinkin *The Making of International Law* (OUP Oxford 2007) at 132.

¹⁴⁸ See Jordi Agustí-Panareda, Franz Christian Ebert, Desirée LeClercq, *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System* (Background paper: social dimensions of free trade agreements)(International Labour Office March 2014).

¹⁴⁹ See already ICJ, *Right of Passage over Indian Territory* (preliminary objections) (Portugal v. India), ICJ 1957, 125, 142: 'It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.'

¹⁵⁰ ECtHR, 7 July 2011, *Al-Jedda v UK*, No. 27021/08, para. 102; see also ECtHR (Grand Chamber), *Nada v Switzerland*, No. 10593/08, 12 Sept. 2012, paras 169-172 and 197.

Another example is the management of the tension between the law of immunities and the human right of access to a court under Art. 6 ECHR. In the *Srebrenica*-case, the ECtHR found that the human right had been restricted in a proportionate manner and not violated. This result was not owed to a normative hierarchy, but the ECtHR reached it through the interpretation of the human rights provision ‘in harmony’ with pre-existing ‘generally recognized rules’ of international law, based on the presumption that the state parties of the ECHR did not want to depart from their previous obligations under general international law (namely the obligation to grant immunity to the United Nations).¹⁵¹ (In contrast, the Dutch Supreme court had taken a hierarchy-based approach and had relied on Art. 103 UN Charter to justify an ‘absolute’ immunity of the United Nations.¹⁵²)

The presumption of conformity faces the same objection that was raised against the *lex posterior* rule: Without an identity of law-makers, the presumption has no basis in their actual intentions.

Systemic interpretation

The currently most discussed ‘de-fragmentation’ technique is the systemic interpretation of international norms.¹⁵³ For treaty interpretation, Art. 31(3) lit. c) VCLT prescribes that ‘[t]here shall be taken into account: (...) c) any relevant rules of international law applicable in the relations between the parties.’ International law-applying bodies have often practised harmonious interpretation, while not necessarily relying on Art. 31(3) lit. c) VCLT.¹⁵⁴ Since the prominent discussion of that ‘master-key’ to the house of international law¹⁵⁵ in the ILC fragmentation report of 2006, parties to disputes more often rely on that VCLT-provision, and it is now often quoted in decisions. Arguably, Art. 31 VCLT allows and even mandates treaty-interpreters to take into account of all kinds of ‘rules of international law’, not only other treaty norms but also customary norms¹⁵⁶ and possibly even soft law.¹⁵⁷

¹⁵¹ ECtHR, *Stichting v others of Srebrenica and others v The Netherlands*, no. 65542/12 2013, 11 June 2013, para. 139.

¹⁵² Supreme Court of the Netherlands, *Mothers of Srebrenica v the State of the Netherlands and the United Nations*, 13 April 2012, para. 4.3.6.

¹⁵³ See for a monographic treatment, e.g. Gabriel Orellana Zabalza, *The Principle of Systemic Integration: Towards a Coherent International Legal Order* (Münster: Lit Verlag 2012).

¹⁵⁴ ICJ, *Case Concerning Oil Platforms (Islamic Republic Iran v. USA)*, ICJ Reports 2003, 161 et seq., para. 41: Article XX of the bilateral treaty on friendship between the USA and Iran had to be interpreted (relying, *inter alia*, on Art. 31(3) c) VCLT, in the light of general international law, to the effect that the ‘measures’ there precluded an unlawful use of force by one party against the other.

¹⁵⁵ This term was coined by now ICJ-judge Hanquin Shue when she still was an ILC member in debates in the ILC, quoted in ILC report May 2006, para. 420.

¹⁵⁶ See for the interpretation of a bilateral treaty under consideration of a norm of customary law (the requirement to conduct an environmental impact assessment): ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, para 204.

¹⁵⁷ J Klabbbers ‘Reluctant Grundnormen: Articles 31 (3) (c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’ in M Craven et al (eds) *Time, History, and International Law* (Martinus Nijhoff Leiden 2007) 141-161 at 159.

Importantly, reliance on such ‘outside’ norms does not constitute an unlawful extension of the limited jurisdiction of the monitoring bodies,¹⁵⁸ because these norms are not applied ‘directly’ but only ‘indirectly’, as interpretative devices for the proper construction of the regime-specific rules.¹⁵⁹ ‘Systemic integration’ is adequate for the application of customary rules as well, for example for the identification of the scope of state immunity under consideration for human rights.¹⁶⁰

The precondition of Art. 31 VCLT and its underlying principle, namely that the rule be ‘applicable to the relations between the parties’, has infamously been construed narrowly by the WTO *Biotech* panel. That panel noted that the Cartagena Protocol, on which the European Community as a respondent had relied for interpreting the pertinent WTO Agreements, was in fact ‘not applicable’, because the Protocol had not been ratified by a number of WTO members, including the complaining parties to the dispute (USA, Argentina, and Canada).¹⁶¹ The *Biotech* panel’s parallelism requirement (finding that a treaty norm can only be taken into account as an interpretative guideline in a WTO-related dispute when *all* parties to that dispute – or even all parties to the WTO Agreement which must be interpreted – have ratified that other treaty) would render Art. 31(3) VCLT largely meaningless. This approach would make other treaties non-usable for the interpretation of treaties with a broad membership, such as the WTO-Agreement (which moreover has also non-state members which cannot accede to most other international treaties). The narrow reading would in addition have the paradoxical result that the more universal a treaty is, the smaller the chance that it could ‘meet’ other treaties would be. The *Biotech* decision has largely been appraised as a political decision to ‘keep out’ international environmental law from WTO law and as expressing a political preference for free trade. The better and meanwhile prevailing view is that it is not necessary that all states in the organisation/treaty are also parties to the other treaty to make the latter usable, if they are not involved in the dispute.¹⁶²

¹⁵⁸ But see in this sense judge Buergenthal in his separate opinion to the ICJ *Oil Platforms* judgment (supra note 154), (para. 22).

¹⁵⁹ Cf. J Pauwelyn, ‘Fragmentation of International Law’ in R Wolfum (ed) *Max Planck Encyclopedia of Public International Law* (OUP online Oxford 2006), para. 34.

¹⁶⁰ R van Alebeek ‘Jurisdictional Immunities of the State (Germany v. Italy): On Right Outcomes and Wrong Terms’, (2012) 55 *GYIL* 281-317 at 301.

¹⁶¹ WTO, *EC – Measures Affecting the Approval and Marketing of Biotech Products* (29 June 2006), Panel-Reports, WT/DS 291–293/R, paras 7.49 – 7.95, notably para. 7.75.

¹⁶² The WTO Appellate Body in the *Airbus* case moved away from the *Biotech* approach, possibly under the influence of the ILC report (WTO AB, *European Communities and certain Member States – Measures affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paras 839-855). It conceded that a bilateral 1992 agreement between the US and the EC was applicable between the parties, because ‘the parties’ in Art. 31(3)c) VCLT meant parties to the dispute (not necessarily all WTO parties), but that its provision was not ‘relevant’, and therefore did not have to be taken into account for interpreting the term ‘benefit’ in Art. 1.1.(b) of the SMC Agreement (paras 839-855).

The next question is what ‘taking into account’ actually means. Arguably, this means that the interpreter must engage in rational balancing – which might be considered as a typically constitutional technique.¹⁶³ For example, when an investor claims a violation of the ‘fair and equitable treatment-standard’ embodied in a BIT, the tribunals must determine the fairness and equitableness through balancing the legitimate expectations of the investor against other rules and principles of international law, including human rights law.¹⁶⁴

This observation dovetails with the ILC’s overall assessment of the ‘principle of systemic integration’ (manifest in Art. 31(3) lit. c) VCLT) as a constitutionalist device: ‘The principle of systemic integration (...) articulates the legal-institutional environment in view of *substantive preferences, distributionary choices and political objectives*. This articulation is (...) important for the critical and constructive development of international institutions (...). To hold those institutions as fully isolated from each other (...) is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a *general, public interest*. Without the principle of “systemic integration” it would be impossible to give expression to and to keep alive, any *sense of the common good of humankind*, not reducible to the good of any particular institution or “regime”.’¹⁶⁵

Procedures

Judicial dialogue

The most discussed ‘procedure’ or vessel for promoting the substantive rapprochement of different regimes as described above is judicial dialogue. This is itself informal but could be encouraged and facilitated through institutional formats. Judicial dialogue basically means courts’ mutual attentiveness to each other’s case-law and cross-citations.

Importantly, the ‘global community of courts’ would need to encompass not only international courts and tribunals but also domestic ones applying international and foreign law in order to bring about a ‘global’ jurisprudence.¹⁶⁶ It has been claimed that such an ‘interjudicial dialogue (...) has the potential to preserve the unity of the

¹⁶³ van Aaken (note 1) 483–512, at 501-506.

¹⁶⁴ See references to the case-law above in notes 28-30.

¹⁶⁵ ILC 2006, para. 480 (emphases added).

¹⁶⁶ A-M Slaughter ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191-219. See for an empirical investigation in the different issue areas or regimes of international law Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts in the (De-)fragmentation of International Law* (Hart 2012).

international legal system in face of fragmentation'.¹⁶⁷ Moreover, the dialogue could be conducted by other international bodies, beyond the judiciaries, as well.

It has also been pointed out (albeit more with regard to national courts) that the idea of a 'dialogue' is conceptually flawed because courts do not cite one another for the purpose of communicating (but for quite other reasons), and empirically false because only some very few prestigious courts are cited.¹⁶⁸ Also, it is far from clear whether international courts are prepared to cooperate, or whether the prevailing behaviour is jealous protection of their jurisdiction.¹⁶⁹

Against this skepticism, it must be noted that as a matter of fact, cross-citations by international courts do occur, and probably increasingly. For example, the European Court of Human Rights regularly applies international human rights norms other than the ECHR (the Children's Rights Convention, the Refugee Convention, the CCPR, the CAT), the law on state immunity, IHL, and provisions of 'general' international law (law of treaties and norms on the ICJ procedure).¹⁷⁰ Inversely, the ICTY relied, in its early decision on torture, on the ECtHR-case law. In doing so, the Tribunal acknowledged that the broad concept of torture as used in human rights law might not be adequate in the field of international humanitarian law and for a criminal law definition which must satisfy strict standards of legality.¹⁷¹ The UNCTAD global principles on responsible sovereign lending and borrowing practices have been invoked in an arbitration involving sovereign debt.¹⁷²

The WTO Appellate Body famously stated that the GATT 'is not to be read in clinical isolation from public international law.'¹⁷³ In the dispute settlement body's practice, ideas and norms from other regimes have in fact been 'imported' into the trade system.¹⁷⁴ Inversely, an 'export' of WTO-norms to other regimes has also been taking

¹⁶⁷ WW Burke-White 'International Legal Pluralism' (2003-04) 25 *Michigan Journal of International Law* 963-979 at 973.

¹⁶⁸ D S Law and W-C Chang 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523-577.

¹⁶⁹ See for an infamous example of parochialism in the context of the plurality of dispute settlement institutions the *Mox Plant* case. Here the ECJ found that Ireland had not fulfilled its duty to cooperate loyally with the EU (then EC) and thereby violated various provisions of the then EC Treaty, by instituting a proceeding concerning maritime pollution arising from an English power plant against the UK under ITLOS without consulting with the EC organs beforehand (ECJ (Grand Chamber), case C-459/03 *Commission EC v Ireland*, ECR 2006, I-4635).

¹⁷⁰ M Forowicz *The Reception of International Law in the European Court of Human Rights* (UP Oxford 2010).

¹⁷¹ ICTY, Trial Chamber II, *Prosecutor v Krnojelac* Case No. IT-97-25-T (15 March 2002), para. 181.

¹⁷² ICSID, *Ambiente Ufficio S.P.A. and others (case formerly known as Giordano Alpi and others) (claimants) and the Argentine Republic (respondent)*, Case no. ARB/08/09, decision on jurisdiction and admissibility (8 febr. 2013), dissenting opinion of Santiago Torres Barnardéz, para. 330.

¹⁷³ WTO AB, *United States – Standards for reformulated and conventional gasoline*, WT/DS2/9, 20 May 1996, p. 17.

¹⁷⁴ For example, WTO AB, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), 12 Oct 1998, paras. 127-131 brings the 'objective of sustainable development' to bearing for the interpretation of Art. XX GATT, *inter alia* by citing UNCLOS.

place. A recent analysis of the influence of WTO rules and case law on regional and international dispute settlement in international economic law (investment law and non-WTO-trade law) has found that substantive WTO rules (the WTO *acquis*) has 'overwhelmingly' been used by trade and investment courts/tribunals.¹⁷⁵ The reason for referencing the WTO seem to be both 'functional closeness' of the issue areas, the 'authority' of the WTO in international economic law, and the judges and arbitrators' 'interest in maintaining to normative and inter-regime coherence, which might very well be intrinsic to legal reasoning itself.'¹⁷⁶

Such cross-references and resort to the surrounding 'general' international law have the effect of lining different treaties up with each other and/or to direct them towards respect of shared principles. For example, the principle of national treatment exists both in WTO-law and investment law, and cross-citations have the effect of consolidating its meaning in the sense of a shared content.

In judicial practice, the 'systemic outlook' has been asked for by some judges.¹⁷⁷ The ILC study on fragmentation put it thus: 'that conflicts between specialized regimes may be overcome by law, even as the law may not go much further than *require a willingness to listen to others, take their points of view into account and to find a reasoned resolution* at the end.'¹⁷⁸

On a more abstract level, what is happening here, and what should be welcomed and encouraged, is the *internalization of an outside perspective*. Gunther Teubner observes that the differentiation and autonomization of 'systems' (which seems to include the various international treaty regimes) has resulted in a 'network architecture' of transnational regimes. The important analytical and normative point now is that 'each regime needs to combine two contradictory requirements': All regimes spell out their own vision of a global public interest (from their own perspective), while all regimes 'at the same time take account of the whole by transcending their individual perspective.' 'Each regime must create the overarching *ordre public transnational* from its own perspective', a 'shared horizon of meaning' needs to be constructed, a 'counterfactual assumption of a *common normative core*'.¹⁷⁹ It seems fair to say that this 'common core' is a kind of constitution.

¹⁷⁵ G Marceau, A Izquierri and V Labonovoy 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation' (2013) 47 *Journal of World Trade* 481-575 at 512-530, quote at 529.

¹⁷⁶ *Ibid* at 495, 529, 531.

¹⁷⁷ ICJ, *Whaling in the Antarctic (Australia v. Japan)*, judgment of 31 March 2014, sep. op. Judge Cançado Trindade, para. 25

¹⁷⁸ ILC May 2006 para. 487 (emphasis added).

¹⁷⁹ Teubner (note 66) at 160-61.

Non-judicial 'regime interaction'

A pragmatic approach to curb the negative effects and make most productive use of the potential benefits of fragmentation lies in the practice of the bodies of treaties or organizations to entertain contacts all the while renouncing on laying down guidelines for the resolution of potential conflicts. The only minimal prerequisite for coordination and possibly cooperation seems to be information-exchange – potentially with a view to identify possible common goals (or sub-goals) and shared principles. This phenomenon of institutional contact has been called 'regime interaction'.¹⁸⁰

A number of 'integration rules'¹⁸¹ envisage this type of interaction.¹⁸² For example, Art. 3(5) SPS-Agreement foresees that '[t]he Committee on Sanitary and Phytosanitary Measures (...) shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.' Another example is the Memorandum of Understanding Between the Secretariat of the Convention on Biological Diversity and the World Intellectual Property Organization (WIPO) of 2002, with the objective to enhance institutional cooperation on indigenous traditional knowledge, an issue which concerns both intellectual property and the conservation of biological diversity.¹⁸³

At the occasion of the signing of the WTO-Agreement, the ministers adopted the 'Decision on Trade and Environment', with which they established a WTO Committee on Trade and Environment (CTE), on the basis of the consideration 'that there should not be, nor need be, any policy contradiction between upholding and safeguarding a (...) multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, Desiring to coordinate the policies in the field of trade and environment, (...)'¹⁸⁴ (15 April 1994). The CTE practices cooperation and information exchange with UNEP and the bodies of the multilateral environmental agreements (MEAs).¹⁸⁴

In the field of sustainable development, both the Agenda 21 of 1992 and the 2002 World Summit on Sustainable Development (WSSD)¹⁸⁵ seek to 'encourage interaction

¹⁸⁰ M A Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (CUP Cambridge 2012). Regime interaction relies on the parallel membership of states in different regimes and on 'autonomous' institutional interactions.

¹⁸¹ Petersmann (note 96) at 238.

¹⁸² See further examples in J Dunoff 'A new approach to regime interaction' in Young (note 180) 136-174 at 160-66 (such as interaction of the ITU with the ICAO and of the WTO with ILO).

¹⁸³ WIPO Doc. WO/CC/48/2 (2002) of 24 July 2002, Annex I.

¹⁸⁴ WTO CTE, *Existing Forms of Cooperation and Information Exchange between UNEP/MEAs and the WTO*, 16 January 2007, WTO Doc. TN/TE/S/2/Rev.2.

¹⁸⁵ Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF. 199/20 (2002), p. 6 (69), Title XI(F), 'Role of International Institutions'.

and cooperation between the United Nations system and other intergovernmental and non-governmental subregional, regional and global institutions and non-governmental organisations in the field of environment and development',¹⁸⁶ notably with international financial organisations. Or, to give another example, the FAO and CITES secretariats cooperate with regard to the listing of endangered marine species.¹⁸⁷

An important observation is that this interaction may shape and develop international norms beyond the consent of member states.¹⁸⁸ That law-developing activity therefore requires an additional basis of legitimacy. That basis can be (and is in fact already) created through *participation* (state parties, stakeholder and experts) and *information/reason-giving*.¹⁸⁹ While this framework for regime interaction falls short of 'substantive' constitutionalism, it does amount to a *procedural constitutionalization*, based on procedural principles of inclusion and transparency.

Again, the constitutionalist perspective helps to understand and possibly develop the interaction of regimes not as a managerial problem but as a political issue. However, the quest for respect of at least the mentioned procedural principles has been disparaged as a part of an inevitably hegemonizing strategy employed by the protagonists of one regime (e.g. trade) over another (e.g. species protection) to falsely represent that regimes' objectives as universal, in order to swallow up the competing ones.¹⁹⁰ But this is a one-sided interpretation of the phenomenon. To the contrary, the principles of inclusion and transparency¹⁹¹ are precisely apt to counteract the dominance of that regime which is in political terms more powerful than the competing one.

These principles, procedures, and institutions described in this section, mostly the principles of constitutional tolerance (subsec. 3) and all techniques of rapprochement (subsec. 4) may appropriately be called 'constitutional' elements of the international legal order, because they seek to create compatibility, not only in a 'negative' sense of preventing legal conflicts, but also in a supportive ('positive') sense for the achievement of the objectives of other treaties.

¹⁸⁶ Para 38.8 of Agenda 21, Report of the United Nations Conference on Environment and Development, Adopted at Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/26/Rev. 1. See also para. 38.41, Chapter 38 is entitled 'international institutional arrangements'.

¹⁸⁷ M A Young, *Trading Fish, Saving Fish: The Interaction Between Regimes in International Law* (CUP Cambridge 2011) 154-186 with further references.

¹⁸⁸ Young (note 187) 255-56.

¹⁸⁹ Young (note 187) 279-80.

¹⁹⁰ M Koskenniemi 'Hegemonic Regimes' in Young (note 180) 305-324 at 320-21.

¹⁹¹ A Bianchi and A Peters (eds) *Transparency in International Law* (CUP Cambridge 2013).

5. Politization

A common core concern in both debates (on fragmentation and constitutionalization) is 'politics', 'politization',¹⁹² or the lack of both. In the context of fragmentation, the lack of an 'international political society' is deplored. '[T]he various regimes or boxes – European law, trade law, human rights law, environmental law, investment law and so on' pursue what Martti Koskenniemi has called 'managerialism': 'Each regime understood as a purposive association and each institution with the task of realising it. There would be nothing irregular here if that process were controlled by law emanating from *something like an international political society* determining the jurisdiction of each regime. (...) But there is no global legislative power, no world government under which the WTO could be seen like a global ministry of trade, the Kyoto process as activities of a global environmental ministry or trials of war criminals as something carried out by a global executive arm. (...) *Differentiation does not take place under any single political society*. Instead it works though *a struggle in which every interest is hegemonic*, seeking to describe the social world through its own vocabulary so that its own expertise and its own structural bias will become the rule.'¹⁹³ From this perspective, 'managerialism' (or: 'executivism' or 'functionalism') seems bad, first, because it does not contemplate the common good of the *whole* society, and second because decisions and reactions are dictated by a putative 'logic of functions'. The antidote to this would be 'politization', understood as human activities (communicative and others) seeking to bring about the appropriate (fair; good; legitimate) collective action, institutions, and procedures to regulate the social condition and shared problems on the basis of the perception that choices can and must be made (as opposed to purely 'automatic' and constrained reactions). The most important legal vessel to constitute, channel, and shape such politization would be, I submit, constitutional law.

A related theme is the insistence on the 'political' cause of fragmentation, namely its (again 'hegemonic') exploitation by powerful states (see above sec. 2.2.). Along this line it could be said that the specific lines of fragmentation and unity have '*ideological markings*'. Attempts to unify international law would only 'alter the terms by which difference is already expressed and articulated and refragment the terrain along different lines'¹⁹⁴ (and thus merely express different politics).

¹⁹² See for the concept of 'politization': Michael Zürn/Matthias Ecker-Ehrhardt 'Politisierung als Konzept der Internationalen Beziehungen', in: *ibid.* (eds), *Die Politisierung der Weltpolitik* (Frankfurt am Main: Suhrkamp 2013), 7-35.

¹⁹³ M Koskenniemi 'International Law: Between Fragmentation and Constitutionalism', Canberra, 27 November 2006, paras 12-14, (emphases added) (The Australian National University <http://cigj.anu.edu.au/cigj/link_documents/KoskenniemiPaper.pdf>).

¹⁹⁴ Craven (note 44) 3-34 at 34.

A third variant of the topic of ‘politics’ emerged in reaction to the initial focus on international courts and their possibly diverging case-law which highlighted the predominance of courts in the international legal process. This diagnosis has been met with the argument that deep normative conflicts arising from the fragmentation of international law could and should be resolved ‘politically’ (by the global law-makers which are still mainly the states) and not ‘technically’ (by international courts and tribunals).¹⁹⁵ The concern that global constitutionalism is too a-political, or pretends to be above politics, exactly mirrors those debates. The constitutionalization discourse (pushed by judges and stylized by academics) condones (according to its critics) an impoverished, legalist, and in that sense a-political conception of constitution.

The call for de-fragmentation and constitutionalization *through global ‘politics’* must be taken seriously. However, it suffers from the ambiguity of the terms ‘politics’ and ‘political’. International law might be said to be ‘too political’ in the sense that the law often just follows the power-relations between states and stems no strong normativity against politics. From that perspective, a relative ‘de-politization’ of international relations (through constitutionalization) is beneficial, because the introduction of constitutional principles contributes to the stability of expectations, legal certainty, and to equal treatment of the relevant actors.

Rather, what is properly meant with the lack of ‘politics’ or of ‘politization’ both in dealing with fragmentation and in constitutionalization is the lack of an international political process that would be *democratic* in a much stronger sense than it is now. So the pertinent point is that global governance suffers from democratic deficits and – to some extent correspondingly – from too powerful courts.

Importantly, global constitutionalism unveils precisely those deficits by introducing the constitutional vocabulary. The constitutional paradigm also inspires and eventually facilitates the search for remedies. The remedy against a too ‘legalist’ and too ‘judicial’ process of constitutionalization is not to stop that process, but to democratize it.¹⁹⁶ Overall, because constitutional law is a branch of law which is very close to politics, and constitutionalism is also a political, not simply an a-political, project (although it does suggest that there is a sphere ‘above’ everyday politics), the

¹⁹⁵ ILC May 2006, para. 484: ‘(...) priorities cannot be justifiably attained by what is merely an elucidation of the process of legal reasoning. They should reflect the (political) preferences of international actors, above all States. Normative conflicts do not arise as technical “mistakes” that could be “avoided” by a more sophisticated way of legal reasoning. New rules and legal regimes emerge as responses to new preferences, and sometimes out of conscious effort to deviate from preferences as they existed under old regimes. They require a *legislative, not a legal-technical response*’ (emphasis added).

¹⁹⁶ Anne Peters, ‘Dual Democracy’, in: Anne Peters, Jan Klabbers and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2011), 263–341.

call for constitutionalization and global constitutionalism can trigger contestation and politics instead of just pre-empting it.

6. Conclusions

International law is in fact less fragmented than suggested by the overflowing discourse. Empirical findings on the scarcity of conflicts, the prevailing scheme of parallelism and reconciliation of norms from different regimes, and the migration of norms from one regime to another suggest that the problems of fragmentation have been overstated. The diversification of international legal regimes should be welcomed as manifesting a political will of law entrepreneurs and the capacity of international law to address global problems. The emergence of special fields within international law has been a necessary response to the complexity of global society (independently of the possibility of exploitation by states with huge personal resources to negotiate and manage the multiple regimes). Although the lack of a central lawmaker has (inevitably) led to the existence of multiple legal regimes with overlapping but not identical memberships, whose main objectives often stand in tension, the law-apppliers (both treaty bodies and court) are careful not to contradict each other. The actual instances of completely irreconcilable norms and case-law or of divergent interpretations of cross-cutting norms by different courts and tribunals have been exceedingly rare.¹⁹⁷

This state of affairs is due to approaches which may be qualified as *intuitively constitutionalist*. For example, ICJ Judge Greenwood declared in a recent affair: 'International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others. It is a single unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.'¹⁹⁸ We have seen in section 4 that constitutionalism offers procedures and mechanisms to coordinate the working of specialized international legal bodies, to reconcile diverging rationales of the special branches of international law, and that it offers some direction for resolving normative conflicts. However, traditional mechanisms of ordering (such as hierarchy) have been largely

¹⁹⁷ Compare ICTY, Appeals Chamber, *Prosecutor v Dusko Tadic*, IT-94-1-A [Merits], 15 July 1999, para. 117 to ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), ICJ reports 2007, 91, para. 406 on the notion of 'control' in terms of Art. 8 of the ILC Articles on State Responsibility. While the *Tadic* tribunal had relied on 'overall control', the ICJ asked for 'effective control.' The legal context and purpose for identifying 'control' differed in both cases (for establishing state responsibility or individual responsibility). Therefore, there was no outright contradiction.

¹⁹⁸ ICJ, *Ahmadou Sadio Diallo (Republik Guinea v. Democratic Republic Congo)* (compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), judgment of 19 July 2012, Declaration of Judge Greenwood, para. 8. See for further positive assessments of the multiplicity of international courts by judges themselves R Higgins 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *ICLQ* 791-804; B Simma 'Fragmentation in a Positive Light' (2004) 25 *Michigan Journal of International Law* 845-847.

replaced by new mechanisms of stabilisation. The quest for constitutionalization is, from that perspective, a call for improving the strategies of coordination of different legal fields and levels of law, for refining the techniques for the avoidance of conflict, and for designing clever mechanisms for resolving the unavoidable ones, in the absence of a clear normative hierarchy. In terms of a constitutional mindset, the relevant actors seem to be willing 'to justify interpretations of regional, global, or relevant domestic law in general rather than parochial terms',¹⁹⁹ and, importantly, to internalize specific outside perspectives. The constitutionalist paradigm furnishes a yardstick for assessing the effectiveness and legitimacy of those mechanisms.

In result, the current state of international law can be appropriately described as an 'ordered pluralism',²⁰⁰ 'unitas multiplex',²⁰¹ or 'flexible diversity'.²⁰² As Mario Prost writes: 'The discourse on fragmentation should be taken with a pinch of salt and with some critical distance.' And when Prost finds that '[o]ur traditional concern for doctrinal purity should not distract us from more meaningful conversations about *the substance and direction of the law*',²⁰³ he voices a constitutionalist concern.

Fragmentation and constitutionalization: Both phenomena and debates reflect each other. Under the premiss that '[t]here is no God's Eye Point of view that we can know or usefully imagine; there are only the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve',²⁰⁴ global governance, its institutions, the legal acts produced by those institutions, and policy results, frictions, and conflicts created by the multiplicity of sites, actors, and acts, may be viewed from different perspectives, as manifesting constitutionalisation *or / and* fragmentation. For example, the ICTY *Tadic* decision on jurisdiction is, as already mentioned, a hallmark of 'constitutionalist' jurisprudence, because it underlined that the UN Security Council is subject to legal limits.²⁰⁵ At the same time, this decision can be considered a hallmark of fragmentation, because the ICTY here asserted that '[i]n international law, every tribunal is a self-contained system'.²⁰⁶ We (as scholarly observers) do not have access to 'global governance' as an 'objective reality', it remains unseizable.

Related to this shift of 'episteme', and equally important, is modernity's pluralism of values. The acknowledgment and espousal of this pluralism, in turn, has led to

¹⁹⁹ Cohen (note 110) at 73.

²⁰⁰ M Delmas-Marty *Le pluralisme ordonné* (2006).

²⁰¹ Prost (note 39) 191.

²⁰² R Hofmann 'Concluding Remarks' in A Zimmermann and R Hofmann (eds) *Unity and Diversity in International Law* (2006) at 491.

²⁰³ Prost (note 39) at 210.

²⁰⁴ Hilary Putnam, *Reason, Truth and History* (Cambridge UP 1997, orig. 1981), at 50.

²⁰⁵ ICTY, *Tadic* jurisdiction (note 79) with accompanying text.

²⁰⁶ *Ibid.*, para. 11.

widespread and deeply felt concern for the legitimacy of the international legal system and its institutions, once the belief in state sovereignty as the necessary and sufficient basic principle had got lost. Importantly, both debates (the fragmentation debate and the constitutionalization debate) have grown out of this concern, but their analyses and normative suggestions depend on the speakers' *Vorverständnis* and outlook. Some strands of global constitutionalism seek to regain that legitimacy by shifting the *Letztbegründung* from state sovereignty to human self-determination (rights, welfare, and democracy),²⁰⁷ by identifying and criticizing constitutional deficits of the international order, and finally by reformulating constitutionalist principles and helping to implement them. From the other side, the fragmentation debate, notably in its second phase, has identified legitimacy deficits arising from internal contradictions and norm conflicts. It is submitted here that the coordinating procedures, devices, and institutions which are currently developed and used manifest the constitutionalist concern for the legitimacy of international law, too.

So overall, both debates turn around international law's legitimacy – in the sense of an external standard of propriety and fairness –, all the while there is a broad range of views about the content of that standard, ranging from internal consistency and state equality (as most highlighted in the fragmentation debate) to democratic principles (as often analysed in the constitutionalization debate).

The most important contribution of both debates (global constitutionalism and the fragmentation discourse) is not to gloss over, deny, or de-politize conflicts over values, principles, and priorities among international actors and participants in the global legal discourse, or to impose certain legal concepts in a hegemonic fashion. Instead, global constitutionalism (just as Benvenisti's and Down's contribution to the fragmentation debate) has exactly pinpointed the politics that are at stake. The lens of global constitutionalism, if conceived as a genuinely pluralist framework, allows to accept and re-assess fragmentation as a positive condition which manifests and facilitates the realization of the constitutional values of critique and contestation.

²⁰⁷ A Peters 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513-544.