

## AT KING AGRAMANT'S CAMP - OLD DEBATES, NEW CONSTITUTIONAL TIMES

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### *Abstract*

The article explores the genesis of constitutionalism back to the science of international law during the inter-war years and offers a sketched genealogy of the fate of the constitutional idea from the Second World War to the emergence of a post-reconstructive doctrine in the post-Cold War era. To account for the contemporary hydra-like renewal of constitutional parlance in international law, a series of converging factors, namely fragmentation and deformalization, as well as the effects of empire and the illegitimacy of global governance on both domestic and international democratic grounds, are examined. The article goes on to argue that the terms of the debate which shaped the foundational period of contemporary international law appear today reversed in international legal scholarship and hints at how the field of international constitutionalism can be profitably enriched when set against the doctrinal background offered by the democratic debate in international law. The possibilities of this doctrinal cross-fertilisation are shown by reference to the three dimensions of emergence of the democratic principle which, I argue, is the wind rose of international law.

### 1 Introduction

Despite the disciplinary warning that the current "inflationary use of the word constitution entails the danger of its devaluation",<sup>1</sup> it is becoming increasingly difficult for international lawyers to blind themselves to the overlapping number of doctrinal trends that are currently making use of the constitutionalist vernacular in international legal literature. While each of these trends is contributing to the development of this area of studies, each of them is also seeking doctrinal pre-eminence within an emerging legal constitutionalist consensus that appears increasingly blurred in its contours and definition. Such a constant growth of international constitutionalist talk is, moreover, obscuring the reality that constitutionalist debates are not an exception to the *nihil novum sub sole* axiom as applied to the international legal order. The constant spurring of constitutionalist-oriented legal literature in the post-Cold war scenario, and the descent into oblivion of its doctrinal origins, have made the doctrinal state of the art in this area increasingly reminiscent of the confusion of King Agramant's Camp as depicted by Ariosto in *Orlando Furioso*. To help situate the contemporary rise of constitutionalist parlance in international law, an exploration of its early 20<sup>th</sup> century doctrinal precedents is offered. In this context, special attention is given to the constitutionalist strand shaped

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<sup>1</sup> Fassbender, "The Meaning of International Constitutional Law" in N. Tsagourias (ed), *Transnational Constitutionalism. International and European Perspectives* (2007) 307, at 312. See, also, Fassbender "The Meaning of International Constitutional Law" , in R.St.-J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 837, and Fassbender, "The UN Charter as Framework Constitution of the International Community" in H. Ruiz Fabri, E. Jouannet and V. Tomkiewicz (eds) *Select Proceedings of the European Society of International Law* 2006 (2008), 377, at 379.

by Kelsenian positivists during the inter-war years as this has been claimed as antecedent by those who have sought to resuscitate the hitherto "doctrinal and abstract" international constitutionalist discussion, a discussion which had been domestically compromised in the field of political theory for decades.<sup>2</sup> A brief notice of the doctrinal pedigree of the German international constitutional school in the foundational period of contemporary international law is complemented by reference to the works of the Spanish doctrine of international law during the interwar years and through the early stages of General Franco's regime. Such a reminder will precede a sketched genealogy of the fate of the constitutional idea from the Second World War's doctrinal aftermath up to the present. From this reconstruction, it is gleaned that the contemporary rise of international constitutionalist parlance is intrinsically connected to a "narrative of continuation with the past"<sup>3</sup> that favours a reading of international law as a "natural" evolution that develops from co-existence, to co-operation, through regional and global law, to constitutionalization. In this light, the constitutionalist renewal in international law can be seen as the post-Cold War international legal harvest of a series of normative developments sprung from the soil of the post-Second World War era, soil which had been nurtured by the debates of the inter-war years. A review of doctrinal history, however, is not enough to fully grasp the dynamics that have permitted such a trend, critically defined as a "weak reading of international constitutionalism"<sup>4</sup> because it is "rooted in positivism and determined not to lose touch with actual state practice"<sup>5</sup> in its pretension to blend the "normatively desirable and the normatively feasible",<sup>6</sup> to regain momentum in contemporary international legal literature. To gain a more accurate perspective of this doctrinal development, one needs to approach the hydra-like renewal of international constitutionalism as a corollary of the "post-realist age".<sup>7</sup> It is against the background of an epochal characterisation that mirrors the effects of the *ethos*<sup>8</sup> of international law in its constant flight for politics to extend the rule of law to the international plane in a liberal favourable post-Cold war globalised stage, that the second part examines how international legal constitutionalism has become a fashionable term of art for a wide-ranging set of ideas held together by the powerful rhetorical appeal of the constitutionalist vernacular.

Historically an "offspring of international institutionalization", international constitutionalism in the post-Cold War in part owes its exponential growth to the phenomenon of globalization. A number of converging factors backing up the contemporary reinforcement of constitutional talk in international law are, therefore, examined. First among them is the analysis of international constitutionalisation as a systemic counter-reaction to the worries engendered by the proliferation of specialised regimes in international law.<sup>9</sup> An evaluation of this factor is accompanied by a brief

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<sup>2</sup> Gordon J. Schochet, "Introduction: Constitutionalism, Liberalism, and the Study of Politics" in J.Roland Pennock & J.W. Chapman (eds) *Constitutionalism* (1979) pp.1-15, at 5.

<sup>3</sup> De la Rasilla del Moral, "International Law in the Historical Present Tense" 22 LJIL 3 (2009)

<sup>4</sup> Bryde, "International Democratic Constitutionalism" in R.St.-J. Macdonald and D.M. Johnston (eds.) *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 103, at 105.

<sup>5</sup> Fassbender, *supra* note 1, at 320.

<sup>6</sup> Von Bodagny, "The Telos of International Law: Christian Tomuschat's General Course and the Evolution of the Universalist Tradition" in P.-M. Dupuy et al. (eds.), *Common Values in International Law, Festschrift Christian Tomuschat* (2006), 703, at 721.

<sup>7</sup> Koskenniemi, *International Law in a Post-Realist Era*, 16 *Australian Yrbk Int'l L* (1995).

<sup>8</sup> Koskenniemi, *Entre engagement et cynisme: aperçu d'une théorie du droit international en tant que pratique*, in M.Koskenniemi, *La politique du droit international* (2007) 359.

<sup>9</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, International Law Commission, fifty-eight session, UN General Assembly, A/ CN.4/ L.682, (2006).

appraisal of a form of functional differentiation known as the fragmentation of international law.<sup>10</sup> It is also examined how, in regard to fears of fragmentation, the formal constitutionalisation of international law presents itself as a pre-emptive response to alternative constitutionalising vocabularies tackling the complexity of global governance as the "fragmented/societal model of constitutionalism" *pace* N. Luhmann.<sup>11</sup> Second among the selected converging factors behind the international constitutionalist renewal, I shall turn to its understanding as a reaction to empire<sup>12</sup> whose instrumentalist core is embedded in an on-going anti-formalist "turn to ethics" in international law.<sup>13</sup> The effects of empire, in association with a second form of functional differentiation - termed the deformalisation<sup>14</sup> of international law - will be examined. It will be argued that these act as a factor fostering the acceptance of a managerialist vocabulary<sup>15</sup> of compliance, legitimacy and cost-benefit analysis in a growing stepping over<sup>16</sup> of the discipline of international relations into the domain proper to international law. Finally, the constitutionalist renewal in international law will be approached as a follow-up to the perceived illegitimacy of global governance on both domestic and international democratic grounds.<sup>17</sup> The role played by the notion of legitimacy in the constitutional field shall, then, be set against the benchmark provided by three separate dimensions of the emergence of the principle of democratic governance in international law that will be respectively, identified as with its intra-state, the inter-state and the supra-state dimensions. Once these converging factors behind the hydra-like renewal of constitutional parlance in international law have been examined, I will briefly tackle the extent to which the terms of the debate during the inter-war years appear today reversed in a contemporary cross-bred transitional paradigmatic age that is evolving from an international legal order grounded on the myth of Westphalia to one where democracy stands as the elusive, yet insurpassable horizon, of international law for the 21<sup>st</sup> century.

## 2. International Constitutionalism as a continuation of a narrative with the past.

A simplified account of the pedigree of international legal constitutionalism might begin by describing a series of early constitutional visions of international law that were part of a broader doctrinal attempt to temper what were considered the "excesses" of the 19<sup>th</sup> century voluntarist theories of the positivist modern school and their "absolutist" theoretical justification of the state's freedom to bind itself externally and accidentally to international law. Against the backdrop of the burgeoning of nationalist sentiment in Europe leading up to the First World War, positivism<sup>18</sup> had given rise to a number of Hegelian-inspired theoretical understandings of the international legal order.<sup>19</sup>

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<sup>10</sup> Koskenniemi, *The Fate of Public International Law: Between Technique and Politics* 70 MLR (2007)1.

<sup>11</sup> Fischer-Lescano & Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" 25 *MJIL* (2003-2004) 999.

<sup>12</sup> Koskenniemi, *Constitutionalism as a Mindset: Reflection on Kantian Themes About International Law and Globalisation*, 8 *Theoretical Inquiries in Law* (2007) 12.

<sup>13</sup> Koskenniemi, "The Lady Doth Protest too Much" *Kosovo and the Turn to Ethics in International Law* 65 MLR (2002) 159.

<sup>14</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001)

<sup>15</sup> Koskenniemi, *Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism*, 7 *Associations Journal for Legal and Social Theory* 349 (2003), 349.

<sup>16</sup> Koskenniemi, *Formalismo, fragmentación y libertad. Temas kantianos en el Derecho internacional actual* 2 *Revista Internacional de Pensamiento Político* (2007) 209.

<sup>17</sup> Wolfrum, "Legitimacy in International Law from a Legal Perspective", in R. Wolfrum & V. Röben (eds.) *Legitimacy and International Law* (2008) 1.

<sup>18</sup> A. Truyol y Serra, *Historia de la Filosofía del Derecho y del Estado*. Vol. 3º *Idealismo y positivismo* (2004)

<sup>19</sup> *Ibid.*, at 297-313.

According to these understandings, international law was either to be seen as "state external law"; as "a law of coordination" presided over by Kaufman's principle of "*nur, der, der kann, darf auch*";<sup>20</sup> as a product, in Jellinek's account, of the state's "self-commitment or self-limitation";<sup>21</sup> or, as conceptualised by Triepel, as a common will resulting from normative agreements (*Vereinbarung*). Shaped by an array of approaches to the science of international law that shared a common programmatic spirit, the debate among international legal scholars during the inter-war years regarded the nature and ultimate foundation of the binding character of international legal norms and led to the heyday of its consideration as the "ancillary stone of international law."<sup>22</sup> This foundational period of contemporary doctrine echoed the establishment of the League of Nations and its attempt at breaking history's narrative to allow for the transition from pre-institutional to an institutionalised international order.<sup>23</sup> The new doctrine sought to defend the primacy of international law over domestic law to smooth the accommodation of "unbridled sovereign autonomy" characterizing the pre-First World War era, which before had only been tamed by the exigencies of a strategically-concerted balance of power, so that a "social order among sovereigns could be achieved".<sup>24</sup> A continuation of the *locus classicus*' attempts at "squaring the circle of statehood and international law", such a progressive doctrinal mood acted to ground the "position of the State as integrally and necessarily part of an international order" against both a form of monist theory according primacy to municipal law and against some of the refashioned dualist theories of the time prominent among which was Anzilotti's normativist theory approach<sup>25</sup> which placed *pacta sunt servanda* as an a priori assumption to surpass voluntarism. This strand of thought that spread all over the European doctrinal stage is today known as the reconstructive doctrine.<sup>26</sup>

One strand of such a critique of sovereignty "joined French liberal solidarism with the sociological jurisprudence that developed in Germany in the 1920s".<sup>27</sup> Representative of the spirit of the epoch is the consciously anti-positivist "idiosyncratic legal monism"<sup>28</sup> of G. Scelle, whose sociological approach to international law imagined a global federalist utopia<sup>29</sup> founded on the notion of natural solidarity.<sup>30</sup> Other monist variants of international constitutionalism arising from traditions of domestic jurisprudence and political theory at the time, include the one championed by an Italian school with S. Romano's theory of institution<sup>31</sup> as its core which prolonged the tradition of Von Savigny's school in its identification of the international constitution with the normative translation of the (international) community's fundamental structure as a social fact.<sup>32</sup> During the inter-war years, when "the field [of international law] became professionalized and its basic concepts and structures were set in place"<sup>33</sup>, a common

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<sup>20</sup> E.Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus*, (1911).

<sup>21</sup> Koskenniemi, *supra* note 14, at 198-206.

<sup>22</sup> J.B.Whitton, "La règle "pacta sunt servanda", *RCADI* (1934), at 177.

<sup>23</sup> Kennedy, "The Move to Institutions" 8 *Cardozo LR* (1987) 841.

<sup>24</sup> *Ibid.*, at 834.

<sup>25</sup> Gaja, "Positivism and Dualism in Dionisio Anzilotti", 3 *EJIL* (1992) , 123-138.

<sup>26</sup> *Ibid.*, at 159.

<sup>27</sup> Koskenniemi, "History of International Law, World War I to World War II" *Max Planck Encyclopedia of Public International Law*, at 10-12.

<sup>28</sup> M. Koskenniemi, *supra* note 14, at 327-338.

<sup>29</sup> Jouanet, "L'idée de communauté humaine à la croisée de la communauté des Etats et de la communauté mondiale ", 47 *Archives de philosophie du droit* (2003) 191.

<sup>30</sup> Scelle, "Le droit constitutionnel international" in *Mélanges Carré de Malberg* (1933), 503.

<sup>31</sup> S. Romano, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del Diritto*, (1918)

<sup>32</sup> R. Kolb, *Théorie du ius cogens international: Essai de relecture du concept* (2001), at 103.

<sup>33</sup> Kennedy, *supra* note 23, at 846.

aim of much international legal writing was to establish the relevance of international law as a constraining factor in inter-state relations.<sup>34</sup> However, it would be in German-speaking academic quarters<sup>35</sup> where the attempt at overcoming positivism from within positivism itself would give way to the most influential effort to come to grips with the "sovereign question" from the perspective of contemporary constitutionalism. An analysis of international law's resulting self-constitutive bias towards community order as the monist (of the kind that accords primacy to international law)<sup>36</sup> grounding for an international constitutionalist perspective,<sup>37</sup> calls for a very brief reference to Kelsen's *Pure Theory of Law*.

As is widely known, H. Kelsen's monism in defense of the unity of national and international law under a single legal system was pursued as an "epistemological postulate"<sup>38</sup> to escape Austin's circularity problem.<sup>39</sup> In Kelsen, the derivation of the international legal system from a single normative non-will-based source becomes the core of its constitutional character. This explains why Kelsen could write about a "constitution in a logical sense"<sup>40</sup> at the top of a system of legal validity, or otherwise as the ultimate basis of obligation in a legal system empirically approached as one grounded on a concept of legal imputation that "avoids identifying law in terms of an intuitive correspondence with an idea of right".<sup>41</sup> The father of the logical or normativist strand of positivism, and neo-Kantian legal theorist, by leaving the realm of social relations in his quest to isolate the autonomous scientific character of law attempted to de-psychologize the "command theory" and its portrayal of international law as "positive morality". He did, however, so while remaining faithful to the Austin's notion of law as effectively backed by sanctions - a notion that underlies his view of positive law as a system of valid norms.<sup>42</sup> Moreover, to counteract the hypothetical nature of an international legal order perennially at the whim of the changing sovereign will of the state and the ensuing existence of mutually exclusive domestic orders<sup>43</sup> pursuant State solipsism,<sup>44</sup> Kelsen depicted his opting for international law as superior to domestic law as one that was ethically grounded. In theoretically dissolving the dogma of sovereignty - that he understood, as the main instrument of the imperialist challenge to the international legal order - which was, in his view, one of the more important outcomes of *Reine Rechtslehre* - Kelsen believed that a hitherto insurmountable obstacle to any attempt at the progressive centralisation of international law had been surmounted.<sup>45</sup> His conspicuous argument that, in opting for international law as superior to national law, he was respectively choosing objectivism, altruism and pacificism over subjectivism, egoism and imperialism is, furthermore, consistent with the general representation of the *telos* of international law as a progressive and liberal one.

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<sup>34</sup> Koskenniemi, *supra* note 27, at 10-12.

<sup>35</sup> Koskenniemi, "Georg Friedrich Von Martens (1756-1821) and the Origins of Modern International Law" NYU Institute of International Law and Justice Working Papers 1/2006, available at <http://www.ilj.org/publications/documents/2006-1-HT-Koskenniemi-web.pdf> (last visited October 2008)

<sup>36</sup> H.Kelsen, *General Theory of Law & State* (Ed. by J.Treviño) (2006), at 386. Somek, "Kelsen Lives", 18 *EJIL* 3 (2007) 409, at 422.

<sup>37</sup> D. Zolo, *Cosmópolis, Perspectiva y riesgos de un gobierno mundial*, (2000)

<sup>38</sup> Kelsen, *supra* note 36, at 373.

<sup>39</sup> C.Mieville *Between Equal Rights, A Marxist Theory of International Law* (2007), at 34-35.

<sup>40</sup> B.Fassbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective* (1998)

<sup>41</sup> Carty "The Continuous Influence of Kelsen on the General Perception of the Discipline of International Law", 9 *EJIL* (1998)

<sup>42</sup> Zolo, *supra* note 37, at 143.

<sup>43</sup> H. Kelsen, *La teoría pura del Derecho: introducción a la problemática científica del Derecho*, (1979), at 187.

<sup>44</sup> Kelsen, *supra* note 36, at 386.

<sup>45</sup> Kelsen, *supra* note 43, at 199.

Against this background, the monist approach of Alfred Verdross, who is retrospectively claimed as the forerunner of what is now called the "international community law school", did not, unlike that of the most conspicuous representative of the Vienna school's most prominent representative, rely on an unverifiable scientific *Grundnorm*<sup>46</sup> resulting from an attack on the irrational ideal of justice as a "subjective judgement of value." The Verdrossian approach, which resulted from a gradual departure from Verdross's earlier formal theoretical orientation to legal philosophy, amounted to a grounding of the theoretical foundations of international law on the normative idea of the moral unity of mankind, or otherwise on a natural law conception of "objective justice" as the ultimate source of law.<sup>47</sup>

Verdross's conception, which was informed by a universalistic tradition retraceable to the Spanish *Siglo de Oro*,<sup>48</sup> benefitted from the recuperation, by a generation of Spanish international scholars headed by Camilo Barcia Trelles<sup>49</sup> with the valuable help of J.B.Scott,<sup>50</sup> of the Salamanca school.<sup>51</sup> The marked relevance of anchoring the Christian community-oriented universalism of Vitoria, and especially that of Suarez,<sup>52</sup> in recovering the "humanist" interpretation of the Salamanca school as the founding fathers of international law,<sup>53</sup> for the resurgence of Verdross' neo-naturalist trend, should, however, not obscure the fact that a "scholastic" or medieval interpretation of Vitoria was also at the heart of Carl Schmitt's reconstruction of the European public order in terms of friend/enemy.<sup>54</sup> Although Schmitt's existentialism would be tempered on Christian ius-naturalist grounds in its Spanish domestic political reception, the very constitutive enshrining of a Spanish tradition of international law along such lines is found at the core of the Franco regime's main trump cards in foreign policy, namely the consideration of Spain as the last stronghold of Christian European values after the Second World War. The fact that C. Schmitt is a widely-recognised behind-the-scenes influence<sup>55</sup> on the political conceptual architecture of the Spanish authoritarian regime erected from the ashes of the Spanish Civil War, largely through the work of F.Javier Conde,<sup>56</sup> accounts for the doctrinal connection between Spanish and German international legal theorists that began during the inter-war years and extended far

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<sup>46</sup>Also D. Cass, *The Constitutionalisation of the World Trade Organisation: Legitimacy, Democracy and Community in the International Trading System* (2005) at 32-39.

<sup>47</sup> R. Kolb, *Les cours généraux de droit international public de l'Académie de la Haye*, (2004), 31.

<sup>48</sup> Legaz Lacambra "La influencia de la doctrina de Kelsen en la Ciencia Jurídica española" *Revista de estudios políticos*, N° 96, (1957), 29, at 39. Truyol y Serra, "Don Antonio de Luna García (1901-1967)", in *Estudios de Derecho Internacional Homenaje a D. Antonio de Luna* (1968).

<sup>49</sup> See, respectively, by C. Barcia Trelles, « F. de Vitoria et l'Ecole moderne du *Droit International* », *RCADI* t. XVII (1928). « Francisco Suarez (1548-1617) : les théologiens espagnols du XVIe siècle et l'école moderne du droit international » *RCADI*, (1933-I) 43.« Fernando Vázquez de Menchaca. L'école espagnole du Droit international du XVIe siècle », *RCADI* 67 (1939) 433.

<sup>50</sup> Brown Scott, "Asociación Francisco de Vitoria", 22 *AJIL* 1, (1928) 136.

<sup>51</sup> A. Verdross, *Derecho Internacional Público* (1955), at xii. A.Truyol y Serra, *Histoire du droit international public* (1995), at 150.

<sup>52</sup> Simma, « The Contribution of Alfred Verdross to the Theory of International Law » 6 *EJIL* 1 (1995) 33, at 40.

<sup>53</sup> Kennedy "Primitive Legal Scholarship" 27 (1) *Harvard ILJ*(1986) 1.

<sup>54</sup> Monereo, "Soberanía y orden internacional en Carl Schmitt" preliminary study to C.Schmitt *El Nomos de la Tierra en el derecho de gentes del "ius publicum europaeum"* (2002), at CXXI.

<sup>55</sup> López García, "La presencia de Carl Schmitt en España", 91 *Revista de Estudios Políticos* (1996) 139. See .Truyol y Serra, *supra* note 18, at 313.

<sup>56</sup> F.J. Conde, *Teoría y sistema de las formas políticas* (1944) and F.J.Conde *Representación Política y Régimen Español* (1945)

beyond the Second World War.<sup>57</sup> Against the background of the German discipline's bitterness against the League of Nations after 1919, the neo-naturalist variant of the Vienna school runs parallel to Verdross's scholarly political ambiguities in defence of the *Anschluss* and his murky political allegiance to National Socialism.<sup>58</sup> Contextual historical episodes aside, the abstract idea of the moral unity of mankind, on which Verdross's monism was grounded, found itself associated, through the notion of international community, with the constitutional unity of a unique universal legal system. Such a system was originally posited as a hierarchical model constitutionally crowned by "a series of fundamental principles of international law determining its sources, subjects and execution, and the jurisdiction allocated to states"<sup>59</sup> which, although based on the principle of "pacta sunt servanda", referred back to "material considerations susceptible to translating ideas of justice and common good". For Verdross, the general principles of law, which in their international legal form, were for him a reflection of the legal conscience of the international community, became "a bridge between the pure natural law and the pure positive law".<sup>60</sup> The formal positivist Kelsenian international law's self-constitutive bias towards a community-order appears, thus, replaced in Verdross's thinking by an underlying theory of justice grounded on the realisation of universal communal values of Christian humanist inspiration.<sup>61</sup>

However, for the establishment of a positively mandated consensus-based international legal order - one which, according to a representative of the constitutionalist renewal, "must remain attuned to realities without, however, abandoning its normative pretence in lieu of a purely empirical description of factual patterns of behaviour"<sup>62</sup>, a series of normative developments, which would eventually amount to what R-J. Dupuy referred to as the "positivisation of natural law",<sup>63</sup> still needed, by that time, to be developed and conceptualised. That is, what Bianchi has recently defined as the "magic of *ius cogens*", and its "almost intrinsic relationship with human rights",<sup>64</sup> had yet to be "summoned" by international lawyers<sup>65</sup> in confluence with the enshrinement in case law of the notion of *erga omnes* and the gradual construction of the theoretical architecture of a system of aggravated responsibility for serious violations of norms of particular importance to the international community. Only then could the hierarchy of norms, thought to be a necessary ingredient in the process of the constitutionalization of international law, start to be fleshed out by the gradual emergence of a supra-positive public order of norms of

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<sup>57</sup> De la Rasilla del Moral "The Zero Years of Spanish International Law, 1939-1953" in E. Jouannet and Iulia Motoc (Eds.) *Les doctrines internationalistes durant les années du communisme réel en Europe* (Forthcoming, 2010)

<sup>58</sup> Carty "Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law" 6 *EJIL* 1 (1995) 78. Also Simma, *supra* note 52, at 36.

<sup>59</sup> For the evolving path of the definition of international constitution in Verdross's successive works, see B.Fassbender, *supra* 40, at 37-45.

<sup>60</sup> See Simma, *supra* note 52, at 49.

<sup>61</sup> Truyol y Serra "Esbozo de una sociología del derecho natural" *Revista de Estudios Políticos* 44 (1949) 15. García Arias, "Las concepciones iusnaturalistas sobre la fundamentación del Derecho internacional" in *Estudios de Historia y doctrina del Derecho internacional* (1964), 14.

<sup>62</sup> Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century : General Course on Public International Law" 281 *RCADI* (1999) 9, at 43.

<sup>63</sup> See René-Jean Dupuy's remarks at the meeting of the Committee of the Whole on 30 Apr. 1968 (UN Conference on the Law of Treaties, First Session Vienna, 26 Mar. – 24 May 1968, Official Records, Summary records of the plenary meetings of the Committee of the Whole, at 258, para. 74) quoted in Bianchi, "Human Rights and the Magic of *ius cogens*" 19 *EJIL* 3 (2008) 491, 492.

<sup>64</sup> Bianchi, *supra* note 63, at 495.

<sup>65</sup> On Verdross' influence on the conceptualization of *ius cogens* and an overview of its historical evolution, Shelton, "Normative Hierarchy in International Law" 100 *AJIL* 2 (2006), 291, at 297.

fundamental character reflective of a prioritization of humanist values and, thus, complete the squaring of the circle of statehood and international law initiated on critical neo-positivist formal grounds by Kelsen.<sup>66</sup> While the turn to natural law during the inter-war years "consolidated the profession's self-image as part of a historical continuum (...)", thus strengthening a "narrative that supported the profession's sense of historical mission",<sup>67</sup> for such effective conceptualisation to emerge, a natural moralising perspective of the Verdrossian kind that relied "on the self-evidence of natural law" to realize the unity of mankind, required a "critical and realistic monism" which would, complementarily, stress "the role of judicial practice in fixing its meaning".<sup>68</sup> Such was the approach proffered by yet another disciple of H.Kelsen, Hersch Lauterpacht.

Lauterpacht's contribution to the study of the science of international law has been approached as a hybrid of both traditionalism and a modernist sensibility that arose immediately following the First World War.<sup>69</sup> In his scholarly work from the '30s and '40s, his leaning towards a value-loaded substratum for international law differed from Kelsen's formalist value-free anti-sociolegal notion "in regard to the place of natural law for legal construction".<sup>70</sup> This was Lauterpacht's "political period" in which he openly defended peace as a legal postulate in international law, which he defined "as the law of the international community."<sup>71</sup> His support of the existence of a new doctrine of moderate natural law to replace voluntarism as the established dominant foundation of the science of international law,<sup>72</sup> gained momentum in the so-called human rights' period of his writing and made of him by making an important contributor to the universalistic human-rights focused natural law revival after the Second World War.<sup>73</sup> Sharing Kelsen's modernist nominalism, Lauterpacht attempted, on the other hand, to bring the anti-sovereign ethos of this epochal reconstructive doctrine to the terrain of an empirical critical approach to positivism as practice. Along these lines, Lauterpacht identified the problem of reliance on "self-judgement"<sup>74</sup> by sovereign states *vis-à-vis* international obligations as the basic obstacle for the realisation of a gradual transference of the rule of law to the international plane. Lauterpacht's strong stance against a state-centered dogmatic voluntarism required from him to demonstrate that the former was at variance with both logic - through the stressing of the *ad nauseam* regress basis of the consensual principle - and facts, given that domestic maxims and general principles are key to filling the gaps between consensual norms.<sup>75</sup> For Lauterpacht, "the establishment and the binding force of international law as a whole" are both "grounded in a factor superior to and independent of the will of states – a factor which gives validity to the law created by the will of the states. That superior rule is the objective fact of the existence of an interdependent community of states".<sup>76</sup> This was, for Lauterpacht, in appropriate cases "also a source which (...) gives rise to legal rights and duties independently of the will of the states".<sup>77</sup>

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<sup>66</sup> Also Simma, *supra* note 52 at 42.

<sup>67</sup> Koskenniemi, *supra* note 27, at 11.

<sup>68</sup> Koskenniemi, *supra* note 14, at 357.

<sup>69</sup> *Ibid.*, at 355-357

<sup>70</sup> *Ibid.*, at 356.

<sup>71</sup> H.Lauterpacht, *International Law. Collected Papers* (1979) at 49.

<sup>72</sup> Morgenthau, "Positivism, Functionalism and International Law" 34 *AJIL* (1940) 260, at 264.

<sup>73</sup> Lauterpacht, "The Grotian Tradition of International Law" 23 *BYIL* (1946) 1.

<sup>74</sup> Koskenniemi, *supra* note 14.

<sup>75</sup> *Ibid.*

<sup>76</sup> Lauterpacht, *supra* note 71, at 58

<sup>77</sup> *Ibid.*



Lauterpacht attempted to transform the moralising rhetoric of a human-beings based international legal order, from a factor which safeguarded a state-centered international community (as in the Verdrossian approach), into a dynamic conception of the latter in the service of the gradual ascendancy of a cosmopolitan federal system. In doing so, he marked the gap between a platonically conceived lodestar at the service of the status-quo, and the ambition of a progressive politics that, accordingly, sets out to combat the "scientific factuality"<sup>78</sup> of voluntarist positivism itself. Indicative of this underlying objective during his "political period" is Lauterpacht's proposal for the establishment of domestic enforcement mechanisms in the administration of international law. Such mechanisms would, in his view, convert the absolute sovereign freedom exercised by states in their conduct of foreign policy into a limited discretion in consonance with the completeness and unity of the law and its "priority over political will and political fact".<sup>79</sup> Indeed, the author's non-conformist embrace of a federalist ideal during his final *lustrum* on the ICJ's bench underlies his criticism of the self-judging reservations made by states to their declarations of acceptance of the Court's jurisdiction<sup>80</sup> as well as his defense of mechanisms for the protection of human rights at the international level.<sup>81</sup>

Thus, when seen from the perspective of the contemporary renewal of international constitutionalism, it may be noted how Verdross and Lauterpacht still remain lasting underlying influences behind two different perspectives among contemporary international lawyers on how to treat *ius cogens* norms and *erga omnes* obligations in international law. While both thinkers supported the internationalization of the domestic social contract, which is the drive animating the telos of the discipline, Lauterpacht, with his insistence on the democratic control of foreign policy, was truer to the domestic dimension of the former while Verdross remained attached to a status-quo Western-grounded form of religious morality. But for these latter notions to help refashion, each in its own manner, the discursive archetypes of the inter-war year debate into a progressive substantive meaning of international law as "the law of the international community",<sup>82</sup> a series of normative outcomes still needed, as already noted, to be developed and conceptualised by that time and age. These normative developments would arise against the background of a post-Second World War doctrinal landscape characterised by "a turn to pragmatism in modern doctrines".<sup>83</sup> This flight from theory<sup>84</sup> was reflected in an overall doctrinal loss of interest in the foundation of the binding character of international legal norms - a problem that, according to Roberto Ago at the time, "should be eliminated from the legal science".<sup>85</sup> What remained of the latter scientific problematic was, as explained by Koskenniemi, a "modern programme of reconciliation" which "takes place by a double denial" in which "modern lawyers advocate a movement away from both naturalism and positivism".<sup>86</sup> This turn to doctrine, characterised by a search for "an intermediate positioning", which "is precisely what provides the modern's argument identity"<sup>87</sup> saw itself framed by an

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<sup>78</sup> Koskenniemi, *supra* note 14

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, at 401.

<sup>81</sup> Lauterpacht, *supra* note 73.

<sup>82</sup> Lauterpacht, *supra* note 71, at 9.

<sup>83</sup> M. Koskenniemi, *From Apology to Utopia. Reissue with a New Epilogue* (2006), at 164.

<sup>84</sup> *Ibid.*, at 187.

<sup>85</sup> R. Ago, *Scienza giuridica e Diritto Internazionale*, Milan, 1950, at 99.

<sup>86</sup> Koskenniemi, *supra* note 24, at 164.

<sup>87</sup> *Ibid.*, at 167.

American-led "canonical turn to pragmatism".<sup>88</sup> Inspired by a sociological<sup>89</sup> and anti-formalist orientation, which was nurtured in the U.S., among other countries, during the inter-war years<sup>90</sup> and, against whose influence the dominance of positivism had precisely promised the lawyer a method that would permit him to evade the realities of politics,<sup>91</sup> this epochal "displacement of theory by more practical concerns was regarded as a significant advance over the inter-war years as well as over the nineteenth century".<sup>92</sup> Contributing to this "new practical spirit, an orientation to process and policy at once contextual, purposive and functional"<sup>93</sup> is the influential retrospective realist interpretation of the "apparently fantastic constructions of a legalism or idealism that had been oblivious to the 'realities' of power in the international world".<sup>94</sup> Such a "post-war sensibility realism", which was a reflection of the new predominant position of the U.S. vis-à-vis the earlier European scientific tendency to isolate the sphere of international law "from ethics and mores as well as "from the social sphere, comprehending the psychological, political and economics fields" and sociology",<sup>95</sup> set the ground for the constitution *pave* H.Morgenthau's writing since the outbreak of the Second World War of international relations as an academic field.<sup>96</sup> Morgenthau's critique of Geneva's negative metaphysicists<sup>97</sup> who, "not unlike the sorcerers of primitive ages, attempt to exorcise social evils by the indefatigable repetition of magic formulae",<sup>98</sup> and his sketch of a functional theory of international law<sup>99</sup> helped a policy-oriented jurisprudence to become the predominant method in the U.S. academy from the '50s onwards. This passage was characterised, as explained by Kennedy, by an "emerging disciplinary pragmatic and realist consensus focused on either the international legal process or the neither-public-nor-private world of transnationalism".<sup>100</sup> Indeed, previous efforts to address the pedigree of constitutionalism in international law have stressed the role of the transformational anti-formalism of the New Haven school<sup>101</sup> which highlighted "the role of international law as an instrument of desired world order objectives and distributing resources in accordance with community policies".<sup>102</sup>

The theoretical architects of the policy-oriented jurisprudence developed a distinctive approach that stressed the continuum, anti-formal and policy-process relationship between law - which they defined as the interlocking of authority with power<sup>103</sup>- and politics. Their perspective was, moreover, informed by an underlying call for ethical responsibility in the upholding of a number of goal-values pursuant to a contextual-

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<sup>88</sup> Koskeniemi, *supra* note 83.

<sup>89</sup> R. Soriano, *Sociología del Derecho* (1997)

<sup>90</sup> See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 127-131

<sup>91</sup> Carty "The Continuous Influence of Kelsen on the General Perception of the Discipline of International Law", 9 *EJIL* (1998), 344.

<sup>92</sup> Kennedy, "The International Style in Post-War and Policy", 7 *Utah LR* (1994), at 19.

<sup>93</sup> *Ibid.*, at 21.

<sup>94</sup> Koskeniemi, *supra* note 27, at 4.

<sup>95</sup> Morgenthau, *supra* note 72, at 267.

<sup>96</sup> Koskeniemi, *supra* note 14, at 413-509.

<sup>97</sup> Morgenthau, *supra* note 72, at 267.

<sup>98</sup> *Ibid.*, at 260.

<sup>99</sup> *Ibid.*, at 273.

<sup>100</sup> Kennedy "The Disciplines of International Law and Policy" *Leiden Journal of International Law* (1999) 9, at 34.

<sup>101</sup> A comprehensive critique can be found in B.S.Chimni, *International Law and World Order. A Critique of Contemporary Approaches* (1993), at 73-145.

<sup>102</sup> Koskeniemi, "Methodology" *Max Planck Encyclopedia of Public International Law*, at 19.

<sup>103</sup> R.Higgins, *Problems and Process. International Law and How We Use it* (1994), at 4.

dependent "comprehensive global processes of authoritative decision". The policy-oriented jurisprudence's commitment to the realization of a set of "goal values of international human dignity" is one that the New Haven school's approach justifies by developing a systematic and open training method for scientific interpretation of policy factors to assure the adequate fulfilment of the decision-making function.<sup>104</sup> Their analysis of international law as "not rules" but as a process-based "normative system harnessed to the achievement of common values"<sup>105</sup> is, in fully methodological contrasting terms to the earlier European formalist rule-approach constitutionalist perspective of German lineage.<sup>106</sup> The New Haven school's rules, which were informed by a sociological realist underlying call for ethical responsibility on the critical upholding of a number of values, has influenced, through the development of new theories of power, the contemporary call for the self-empowerment of experts.<sup>107</sup> However, the complex methodological peculiarities of the policy-oriented jurisprudence approach explain sufficiently why it is usually set aside from the main general international constitutional tradition of analytical positivism. A further underlying reason for this dissonance - leaving aside the fact that the New Haven school was historically labelled an apologist for U.S. foreign policy during the Cold War - is that, as presciently noted by Koskenniemi, even a world-order oriented instrumentalism of the kind that insists that "decisions be taken in accordance with the policy objectives of a liberal, democratic world community"<sup>108</sup> is "often opposed by a constitutional formalism that seeks not so much the streamlining of the law with the requirements of power, but rather limits to power from increasingly widespread hierarchically arranged legal rules."<sup>109</sup>

More aligned with such a European formalist strand is the constitutional debate arising in the 1950s around the constitutional nature of the UN Charter. This debate led to the formation of at least two main interpretive approaches to the UN Charter: a textual or objective approach which defended the contractual nature of the foundational treaty,<sup>110</sup> and a constitutional approach. This constitutional approach was upheld on the grounds of a subjective method, prominently advocated by E. Jimenez de Arechaga and<sup>111</sup> would find echoes in the ICJ's case law.<sup>112</sup> However, the practical implications of the debate for the interpretation of the UN Charter receded with the inclusion of the notion of *ius cogens* by Art. 53 of the 1969 Vienna Convention, and the establishment in its Art. 27 of the proviso that, even domestic constitutional law does not serve as a justification for non-compliance with international legal obligations.<sup>113</sup> These developments would be followed, soon after, by the ground-breaking reference to *erga omnes* obligations in the *Barcelona Traction* case,<sup>114</sup> as well as the parallel work of the I.L.C. and the notion of

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<sup>104</sup> H. D. Lasswell and M. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (1992)

<sup>105</sup> Higgins, *supra* note 103, at 1.

<sup>106</sup> B.Fassbender, *supra* note 40, at 45-50.

<sup>107</sup> Kennedy, *Of War and Law* (2006).

<sup>108</sup> Higgins, "Policy and Impartiality: The Uneasy Relationship in International Law", XXIII *International Organization*, 4 (1969) 914, at 922.

<sup>109</sup> Koskenniemi, *supra* 102, at 21.

<sup>110</sup> Rama-Montaldo, "Contribution of the General Assembly to the Constitutional Development and Interpretation of the United Nations Charter" in R.St.-J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 493, at 504-508.

<sup>111</sup> E. Jimenez de Arechaga, *Derecho constitucional de las Naciones Unidas* (1958)

<sup>112</sup> A.De Visscher, *Problèmes d'interprétation judiciaire* (1963)

<sup>113</sup> See Arts. 53 and 27 of the VCLT.

<sup>114</sup> *Case Concerning the Barcelona Traction Light and Power Company, Limited* (New Application: 1962) (Belgium v. Spain), Second phase, ICJ Reports (1970), paras. 34-35

international crimes – today a “stateless notion”.<sup>115</sup> Key in the normative developments emphasizing a “hierarchy of rules, rather than sources, on the basis of their content and underlying values”<sup>116</sup> was a parallel universalistic classical revival of natural law after the Second World War<sup>117</sup> that accompanied the gradual (yet slow) emergence of the new field of international human rights law.<sup>118</sup> This natural law revival would progressively ally itself with the re-emergence of the cosmopolitan faith triggered by the renewed move to international institutions in the war’s aftermath.

Beginning in the late 1950s, the welfare and development activities<sup>119</sup> of these institutions represented “the progressive overcoming of statehood by the economic and technical laws of a globalising modernity”.<sup>120</sup> The dramatic expansion of the field of international law due to its horizontal extension with the decolonization process, greater institutional vertical development and consonant widening of its scope through new related fields that were accompanied by a series of normative and jurisprudential developments in the 1960s and 1970s, fuelled, at the time, the gradual renewal of the German international constitutionalist tradition. This revival, which took place under the influence of the author of *Die Verfassung der Völkerrechtsgemeinschaft*<sup>121</sup> and his late joint work with Bruno Simma,<sup>122</sup> was to find itself associated with the school of the “doctrine of international community” that had already been championed by W. Friedmann, coiner of the term of “co-operative international law” in his *The Changing Structure of International Law*<sup>123</sup> in 1964. For Friedmann, such a structure included an international law of co-existence or co-ordination, horizontally dependent on the sovereign state *uti singuli*, and a new dimension of international law, which had evolved “from an essentially negative code of rules of abstention to positive rules of co-operation”<sup>124</sup> and organization that he interpreted as pace setters of the progressive realisation of a more perfected international community. In highlighting “the shift in the subject matter of international law” towards an “international law of welfare”,<sup>125</sup> Friedmann also championed a sociological inquiry into the interrelation between international law and international society and even produced a sketch of international constitutional law as a “new field of international law” consecrated to the study of international organizations.<sup>126</sup> The notion of constitutional international law was further enshrined by H. Mosler, who became one of the first proponents of the concept of international legal community to defend the existence of a common public order “not restricted to mere formal principles” but inclusive of “substantive principles of co-existence and co-operation” which “are to be found in the general consciousness of human values which are the ultimate goal of any legal order”.<sup>127</sup>

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<sup>115</sup> De la Rasilla del Moral, “Hobbes, Kant and the Likely Impact of the ILC Articles on State Responsibility” 11 *Revista Electrónica de Estudios Internacionales* (2006) 1.

<sup>116</sup> Bianchi, *supra* note 64, at 494.

<sup>117</sup> García Arias, “Las concepciones iusnaturalistas sobre la fundamentación del Derecho internacional” in *Estudios de Historia y doctrina del Derecho internacional* (1964) 14.

<sup>118</sup> Bernstorff “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Right in International Law” 19 *EJIL* 5 (2009) 903, at 905.

<sup>119</sup> Koskeniemi, *supra* note 10, at 1-2.

<sup>120</sup> *Ibid.*, at 14.

<sup>121</sup> A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926)

<sup>122</sup> A. Verdross & B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (1976)

<sup>123</sup> W. Friedmann, *The Changing Structure of International Law* (1964), at 60-68.

<sup>124</sup> *Ibid.*, at 62.

<sup>125</sup> *Ibid.*, at 66.

<sup>126</sup> *Ibid.*, at 153-159.

<sup>127</sup> H. Mosler, *The International Society as a Legal Community*, 140 *RCADI* (1974), at 98

With the end of the Cold War, mirroring the multifaceted impact on international legal scholarship of the revival of the international liberal political project, there has been a notable increase in the international community literature. The spirit of this post-reconstructive doctrine has been summarily captured by B. Simma, who has noted that:

"In contemporary international law the universalistic blueprint originally drawn up by natural law philosophy is slowly but steadily being turned into a reality. Thus, positive international law is moving in the direction of the 'ought' delineated by the school to which Verdross adhered. It is currently involved in a fundamental process of transformation from a mere *ius inter potestates* to a legal order for mankind as a whole".<sup>128</sup>

Such a post-Cold War European reinforcement of this doctrinal "narrative of continuation with the past"<sup>129</sup> is much informed by the natural teleology animating Kant's 1784 *The Idea for Universal History with a Cosmopolitan Purpose*<sup>130</sup> and with it the "ethos of the European Enlightenment that looked towards a universal federation of free republics".<sup>131</sup> Moreover, it might be seen as exemplary of how "post-Cold War lawyers have unearthed agendas that were at the centre of the legal developments in the early 20th century"<sup>132</sup> as shown by the assertive attitude of a number of international community-oriented authors regarding the constitutional character of both formal and substantive principles and fundamental rules of international law.<sup>133</sup>

Among a number of German authors who, by expanding the concept of the international constitution coexistent with that of international community, have contributed to revamp the constitutional debate in the early 1990s, figures C. Tomuschat.<sup>134</sup> Tomuschat's perspective of international law as "the constitution of mankind"<sup>135</sup> is usually seen as part of a contemporary constitutional trend whose authors are more assertive about the constitutional character of the substantive principles of the international community than were their predecessors. In contrast to a natural law approach of the Verdrossian kind, Tomuschat's functionalist-grounded constitutionalist perspective is one that admits the radical indeterminacy of international law as one affecting the consideration of its "bindingness".<sup>136</sup> In doing so, Tomuschat appears to be implicitly echoing the tension, deconstructed by post-modernist international legal theory, of the inescapable simultaneous search for concreteness and normativity present in the structure of the international legal argument<sup>137</sup> that was thought to have triggered an eclectic pragmatic functionalism - helped in its development by the spurring of international institutions - in the post-Second World War doctrinal scenario, as well as a correlate doctrinal flight from the very same focus on theory<sup>138</sup> that the post-modernist turn<sup>139</sup> in international law was to bring back to the

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<sup>128</sup> Simma, *supra* note 52, at 44.

<sup>129</sup> Koskenniemi, *Why History of International Law Today?* 4 *Rechtsgeschichte* (2004), 61.

<sup>130</sup> Kant, "Idea for a Universal History with a Cosmopolitan Purpose" in I.Kant, *Political Writings* (1991) 41.

<sup>131</sup> Koskenniemi, *supra* note 27, at 38.

<sup>132</sup> *Ibid.*, at 4.

<sup>133</sup> R. Kolb, *supra* note 32.

<sup>134</sup> C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law" 281 *RCADI* (1999) 9, at 43.

<sup>135</sup> C. Tomuschat, "Obligations Arising for States without or against Their Will" 241 *RCADI* (1993) 195.. See also Tomuschat, "World Order Models: A Disputation with B.S. Chimni and Yasuaki Onuma" 8 *International Community Law Review* 4 (2006), p.71-79

<sup>136</sup> "C. Tomuschat, *supra* note 62.

<sup>137</sup> M. Koskenniemi, *supra* note 83.

<sup>138</sup> Oriol Casanovas, *La vuelta a la teoría*, in M. Pérez González (Ed) *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor Don Manuel Díez de Velasco* (1993), 179.

fore from the mid-1980s onwards. Tomuschat's conception is usually seen as part of a German trend associated to a number of courses given by him at the Hague Academy,<sup>140</sup> as well as those imparted by Frowein<sup>141</sup> or B.Simma or, more recently by Dupuy,<sup>142</sup> who distinguishes between formal unity - characteristic of the classical period - and substantive unity as a characteristic of the contemporary period.<sup>143</sup> Bardo Fassbender, a very vocal proponent of this line of thought has, indeed, highlighted how an internal tension in the work of the school "causes a certain doctrinal improvisation, and even an indecisiveness, that cannot satisfy those looking for a clear and convincing theoretical foundation upon which the concept of an international constitution could rest."<sup>144</sup> In his own work, Fassbender has attempted to enshrine a "sub-discipline of international law" under the label of the "constitutional law of the international community".<sup>145</sup> Fassbender, who identifies the "UN Charter as the (substantive and formal) constitution of the international community,"<sup>146</sup> has expressly located his efforts within what he defines as Tomuschat's school<sup>147</sup> and its emphasis on "the non consensual character as the principal feature of international constitutional rules".<sup>148</sup>

This functionalist post-reconstructive doctrine benefits from the gradual transposition of "*ius cogens*" norms to fields other than the law of treaties including in the domestic legal sphere<sup>149</sup> as well as by the enshrinement of *erga omnes* obligations understood as obligations towards the international community as a whole within a system of aggravated responsibility for serious violations of norms of particular importance to the international community.<sup>150</sup> Moreover, in a global landscape of almost complete membership by all states in the UN, its appeal is enhanced by Article 103 of the UN Charter as "a rudimentary mandatory hierarchical structure of the international legal system which is not no longer at the disposition of national law and the nation state".<sup>151</sup> The recognition of the existence of supra-positive norms has also gained preponderance through international and national judicial sanctioning since the 1990s, a phenomenon that has confirmed their gradual integration, which had previously been proposed mostly in international legal scholarship, into the traditional system of consent-based sources of international law, while also marking the limits of their scope within the latter.<sup>152</sup>

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<sup>139</sup> See, introductorily, Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 *EJIL* 1 (1991).

<sup>140</sup> B.Simma, "From Bilateralism to Community Interest in International Law" 250 *RCADI* (1994) 345.

<sup>141</sup> J.Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law" 248 *RCADI* (1994) 345.

<sup>142</sup> P-M. Dupuy, "L'Unité de l'ordre juridique international: cours général de droit international public" *RCADI* (2000).

<sup>143</sup> Jouannet, "Universalism and Imperialism: The True-False Paradox of International Law?" 18 *EJIL* (2007) 379. See, as well, Koskeniemi, "International Law in Europe: Between Tradition and Renewal" 16 *EJIL* (2005) 113, and P-M. Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskeniemi" 16 *EJIL* (2005) 113.

<sup>144</sup> Fassbender, *supra* note 1, at 320.

<sup>145</sup> *Ibid.*, at 308.

<sup>146</sup> Fassbender, "The United Nations Charter as Constitution of the International Community" 36 *Columbia Journal of Transnational Law* (1998), at 529..

<sup>147</sup> Also Fassbender *supra* note 1, at 313.

<sup>148</sup> *Ibid.*, at 317.

<sup>149</sup> A.Orakhelashvili, *Peremptory Norms of International Law* (2006)

<sup>150</sup> C.Tams, *Enforcing Obligations Erga Omnes in International Law* (2005)

<sup>151</sup> Cottier & Hertig, "The Prospects of 21<sup>st</sup> Century Constitutionalism," 7 *Max Planck Yearbook of the United Nations* (2003) 261, at 271.

<sup>152</sup> See De la Rasilla del Moral, "Nihil Novum Sub Sole since the West-African Cases?. On *Ius-Standi*, the ICJ and Community Interests" 10 *International Community Law Review* (2008) 171.

Building on the state-centered hierarchical backbone of formal constitutionalism, this trends attempts to add a number of substantively-informed non-consensual rules to the systemically required formal core of what has been traditionally termed the "necessary law of nations", meta-rules, or secondary rules upheld by the rule of recognition. In doing so, the international community school claims that the progress of international legal practice has overcome the "radical inconsistency said or felt to exist in the conception of a state which is at once sovereign and subject to law."<sup>153</sup> Or, in other words, in defending the enshrinement of a general category of non-consensual norms, it sustains that a general exception has now been definitively added to a number of exceptions that long ago were, according to Hart, already "enough to justify the suspicion that the general theory that all international obligation is self-imposed has been inspired by too much abstract dogma and too little respect for the facts".<sup>154</sup> The gap between the consecration of such a general category and the gradual overcoming of another classic conceptual predicament faced by those defending the ontological character of international law – in other words, the lack of a system of organized sanctions in the international sphere – is bridged by these authors' conviction that "the development of the concept of fundamental norms logically calls for centralized and institutionalised mechanisms to ensure their respect and enforcement".<sup>155</sup>

This is, in its shortest version, how the international community school (one that has been critically defined as a "weak reading of international constitutionalism"<sup>156</sup> because it is "rooted in positivism and determined not to lose touch with actual state practice"<sup>157</sup> in its pretension to blend the "normatively desirable and the normatively feasible")<sup>158</sup> harvests on a series of post-Cold War normative outcomes grown upon a soil of the post-Second World War era that was nurtured by the scholarly debates that took place during the inter-war years.

### 3. The Post-Cold War Setting

#### 3.1. International Institutionalization

The intensification of constitutionalist talk in international law has been so far examined in single terms as a "narrative of continuation with the past" in theoretical pursuance of the Kantian cosmopolitan lodestar. This narrative has thrived in a liberal culture aspiring to universalise the rule of law in the so-called post-realist age<sup>159</sup> of the post-Cold war era, which is one that responds to the *telos* of a project that looks forward to crossing another conceptual threshold through the effort of international lawyers "to move away from diplomacy and politics"<sup>160</sup> and to enhance the rule of law beyond domestic settings. The contemporary appeal of constitutionalist talk concords with the great boost stemming from the increasing institutionalization of the international plane and from the parallel increase in the process "of legal and de facto denationalisation" brought

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<sup>153</sup> H.L.A. Hart, *The Concept of Law* (1961), at 215

<sup>154</sup> *Ibid.*, at, 221.

<sup>155</sup> Gowlland-Debbas, "Introduction", in Gowlland-Debbas (ed.) *United Nations Sanctions and International Law* (2001), 27. See also, C.Tomuschat & J.M.Thounevin (eds.) *The Fundamental Rules of the International Legal Order* (2006)

<sup>156</sup> Bryde, "International Democratic Constitutionalism" in R.St.-J. Macdonald and D.M. Johnston (eds.) *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 103, at 105.

<sup>157</sup> Fassbender, *supra* note 1, at 320.

<sup>158</sup> Von Bodagny, *supra* note 7, at 721.

<sup>159</sup> Koskenniemi, *supra* note 4.

<sup>160</sup> Koskenniemi, *supra* note 10, at 15.

about by the ensuing "transfer of policies traditionally regulated by domestic law to international or supranational governance structures of regimes".<sup>161</sup> Legitimacy queries, which have arisen in connection to the problematic adaptation of the state-centered consent-based Westphalian model to an increasingly supra-nationalized post-Cold war setting, have become an inextricable part of today's international constitutional debate. Moreover, the effects of globalisation on international law, including the forms of functional diversification known as fragmentation and deformalisation, have multiplied the challenges<sup>162</sup> faced by an international constitutional perspective that travels in the same bandwagon with today's ever-expanding international institutionalization. However, before examining how constitutional responses have developed in their attempt to come to terms with these latter phenomena, a word is warranted on the structural effects that the increase in international institutionalization has had on the development of the constitutional arena in recent times.

The constitutionalist renewal in international law owes a great deal to the great development known by the phenomenon of regional integration in the last two decades and especially, within this framework, to the "spill over effect of the European debate".<sup>163</sup> As, if echoing Friedmann's characterization in 1964 of regional groupings "as pace setters that will furnish models of integration that Mankind may later use on a universal level when it has reached a corresponding degree of community values and purposes",<sup>164</sup> the European debate is generally portrayed as one that has "illustrated the significance of constitutionalism as a frame of reference for a viable and legitimate regulatory framework for any political community, including those beyond a post-national setting".<sup>165</sup> While the European constitutionalist scene is not one totally free from the legacy of the "statist" school in its analysis of the question "as to whether the EU has, or is capable of having a constitution",<sup>166</sup> the constitutional rhetoric, early on heralded by the European Court of Human Rights and the ECJ's jurisprudence, appears today completely normalised<sup>167</sup> and mainstreamed within this politico-legal realm.<sup>168</sup> However, two provisos usually accompany the appraisal of the international constitutional plane when it is approached from the perspective of the debate on European constitutionalisation. It is, in the first place, generally agreed that although one "less-developed and unsettled",<sup>169</sup> "the discourse on international constitutionalism is gaining momentum, but it is still in its infancy and appears rather slippery".<sup>170</sup> Secondly, it is also usually noted that "the constitutionalization of the EC/EU is hardly suitable as a model for world-wide constitutionalism"<sup>171</sup> or, to put it differently, that both should be seen as "two separate polities, each having their particular constitutional

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<sup>161</sup> Cottier & Hertig, *supra* note 152, at 269.

<sup>162</sup> Krisch & Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", 17 *EJIL* (2006) 1, at 1.

<sup>163</sup> De Wet, « The International Constitutional Order » 55 *ICLQ* 51, at 53

<sup>164</sup> W. Friedmann *supra* note 124, at 63.

<sup>165</sup> De Wet, *supra* note 164, at 52-53.

<sup>166</sup> Cottier & Hertig, *supra* note 152, at 283-298.

<sup>167</sup> For, e.g., Shore "inventing complex epithets and neologisms that purport to capture the essence of the EU's elusive yet evolving political system has become a minor industry for political scientists" Shore, "Government Without Statehood? Anthropological Perspectives on Governance and Sovereignty in the European Union" 12 *European LJ* (2006) 709, at 717.

<sup>168</sup> J.H.H.Weiler & M.Wind *European Constitutionalism Beyond the State* (2003)

<sup>169</sup> Cottier & Hertig, *supra* note 117, at 272.

<sup>170</sup> Tsagourias, "Introduction – Constitutionalism: A Theoretical Roadmap" in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives* (2007) at 7.

<sup>171</sup> Peters, "Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and Structures", 19 *LJIL* (2006) 579, at 595.



ethos".<sup>172</sup> Nonetheless, cross-bred constitutionalist frameworks offer a great creative potential for analysing the nature and terms of the constitutional debates within both contexts<sup>173</sup> as they mirror the increasing hybridisation that characterises the exploration of diverse accounts of constitutionalism beyond the state.<sup>174</sup>

Moreover, international organizations have also historically tended to attract constitutional methods of interpretation when elucidating the meaning of the inter-state compacts that form their constitutive charters. These methods are borrowed by analogy to domestic constitutional settings and cover the same range of doctrines of constitutional interpretation used in the domestic sphere. Insofar as the institutional law (or "laws" by other accounts) of international organizations,<sup>175</sup> a variable number of organs are entitled to interpret an organisation's constitutive documents. Interpretation by other plenary organs, tribunals or arbitral instances is generally done pursuant to the specific dispute settlement provisions in each foundational treaty. Despite its interconnectedness, the strictly derivational constitutional label attached to the "better described as an art and not as a science"<sup>176</sup> interpretation of texts in international law should be distinguished from the rhetoric that has historically surrounded the use of constitutional analogies in connection to international organizations. This latter type of constitutional approach to the law of international organisations has been termed the field of "micro-constitutionalist analysis".<sup>177</sup> A number of classic debates bear witness to this traditional field of international constitutionalist interest. Among them, a reference should be made to those tackling hierarchy issues between organs within a specific international organisation; those referring to the delimitation of powers between international organisations and their member states; those touching upon questions of hierarchy between institutional universal frameworks and regional bodies; and those exemplified in the relationship between organs with a specific similar functional range.

Even when made the object of a specific field of inquiry under the name of international constitutional law by W. Friedmann in the 1960s,<sup>178</sup> this formal type of constitutionalist terminology in connection to international organizations has not been devoid of criticism. Thus, for J. Alvarez, "neither logic, function, text or history support constitutional analogies as applied to the UN Charter";<sup>179</sup> such an "inappropriateness of domestic constitutional analogies" is, according to this author, all the more true of other international organizations.<sup>180</sup> For Alvarez, although the "presence and persistence of constitutional analogies remains a firm part of real world legal practice",<sup>181</sup> the resilience of constitutional analogies is only sustained by their pedigree as an argumentative strategic practice in academic quarters, among policy makers, and among international adjudicators.<sup>182</sup> Constitutionalism, thus, appears, in this understanding, as barely more than the product of international lawyers' professional bias inspired by the *telos* of the

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<sup>172</sup> Tsagourias, "The Constitutional Role of General Principles of Law in International Law and European Jurisprudence" in N. Tsagourias (Ed.), *Transnational Constitutionalism: International Law and European Perspectives* (2007) 71, at 85.

<sup>173</sup> *Ibid.*, at 9.

<sup>174</sup> *Ibid.*, at 4.

<sup>175</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), at 33.

<sup>176</sup> *Ibid.*

<sup>177</sup> Dupuy, *supra* note 143, at 228.

<sup>178</sup> W. Friedmann, *The Changing Structure of International Law* (1964), at 153-159.

<sup>179</sup> Alvarez, "Constitutional Interpretation in international organizations" in J-M.Coicaud & V. Heiskanen *The Legitimacy of International Organizations* (2001), at 104.

<sup>180</sup> *Ibid.*, at 109

<sup>181</sup> *Ibid.*, at 10.

<sup>182</sup> *Ibid.*, at 110.

discipline against an ever-present *Realpolitik* status quo. Alongside this perspective, the parallel contemporary trend towards the constitutionalization of treaty-regimes, although considered partly misdirected against overzealous organizations, and critically captured in its contemporary version in terms of "constitutionalism lite",<sup>183</sup> has been catalogued as "the subject of the first serious political debate on international organisations",<sup>184</sup> the merit of which lies partly in "that it takes organisations out of the occasionally somewhat stultified legal world of competences and *ultra vires* considerations" and opens the field of international organizations to considerations associated with the protection of fundamental rights and democratization.<sup>185</sup> The field of "micro-constitutional analysis" and the field of "macro-constitutional analysis" appear, indeed, bridged by A. Peters' appraisal of the WTO as pioneer of both types of approach.<sup>186</sup> This author points to four factors fostering the constitutionalization of WTO law. These are the legalisation of dispute settlement, the principles of most-favoured nation and national treatment, the fact that international trade rules overcome political process deficiencies, and the option of directly applying GATT rules.<sup>187</sup> Her perspective should, however, be seen within the on-going multifaceted debate on the possibility, desirability, and practical implications of the constitutionalization of the WTO<sup>188</sup> and, by extension, other international organizations.

### 3.2. Fragmentation

The burgeoning of constitutional talk within international law has, furthermore, been fostered by its association with anxieties<sup>189</sup> related to the challenge posed by the impact of globalization on international law and the side-effects on international law of "one of the features of late international modernity", which is "functional differentiation" understood as the "increasing specialization of parts of society and the related autonomization of those parts".<sup>190</sup> One form of such functional differentiation is embodied in the potentially conflicting diversification and expansion of international law brought about by the proliferation of international institutions dealing with specialised sectors such as, among others, trade, environment, human rights, security law, European law and international criminal law. This phenomenon has fostered an increase in self-contained regimes while reinforcing their sense of relative autonomy. If the proliferation of self-contained regimes has been identified as the "normative technical cause" of the debate on the fragmentation of international law, its "institutional cause" has been identified with the multiplication of international jurisdictions and the ensuing risk of contradictory international jurisprudence.<sup>191</sup> Defined as the doctrinal debate par excellence of the globalization age,<sup>192</sup> there is an almost unanimous doctrinal agreement that the risk of fragmentation of international law brought by the "emergence of specialized and (relatively) autonomous rules or rule-

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<sup>183</sup> Klabbbers "Constitutionalism Lite" 1 *IOLR* (2004) 31, at 35.

<sup>184</sup> Klabbbers, "Introduction" in J.Klabbbers (ed) *International Organisations* (2005), at xv.

<sup>185</sup> *Ibid.*, at xvi.

<sup>186</sup> Peters, *supra* note 172.

<sup>187</sup> Peters, *supra* note 172.

<sup>188</sup> For an overview of the debate, see: Cottier & Hertig, *supra* note 152, at 272-275

<sup>189</sup> Koskenniemi, & Leino, "Fragmentation of International Law? Postmodern Anxieties, 15 *LJIL* (2002) 553.

<sup>190</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, International Law Commission, fifty-eight session, UN General Assembly, A/ CN.4/ L.682, 4 April 2006, specially at 11.

<sup>191</sup> Dupuy, "Un Débat Doctrinal à l'Ere de la Globalisation: Sur la Fragmentation du Droit International » 1 *EJLS* (2007)1, at 4.

<sup>192</sup> *Ibid.*, at 2.

complexes, legal institutions and spheres of legal practice"<sup>193</sup> is one of the factors to which the international constitutionalist discourse owes its contemporary renewal.<sup>194</sup>

The difficulties arising for international law from the splitting of law into functionally defined regimes "each geared to further particular types of interests, and managed by narrowly defined expert competence",<sup>195</sup> has recently been the object of a highly remarked ILC study-group report. After the sounding of the alarm by two consecutive annual reports by ICJ Presidents,<sup>196</sup> the group was established to examine these difficulties; the selected chair was M. Koskenniemi.<sup>197</sup> The manner in which the phenomenon of fragmentation has "started to reverse established legal hierarchies in favour of the relevant bias in the relevant functional expertise"<sup>198</sup> is shown by the three forms of fragmentation – which are reflective of the phenomenon in both "its legislative and institutional form".<sup>199</sup> These are the practices of open (although rare) challenging of general international law by means of heterodox interpretations put forth by the new specialised institutions (e.g. Tadic case), the embodiment of solid exceptions by specialised regimes to general international law (e.g. human rights bodies' competence stretching beyond state consent) and the opposition of particular regimes among themselves.<sup>200</sup> The danger looming behind this phenomenon is that of "conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law".<sup>201</sup> In other words, "the rationale for the Commission's treatment of fragmentation is that the emergence of new and special types of law, "self-contained regimes" and geographically or functionally limited treaty-systems creates problems of coherence in international law."<sup>202</sup> Against this background, the report reaffirmed, as is widely known, that international law is a legal system and, as such, one respondent to systemic exigencies that account for the unity of international law. The report's conclusion has been translated in colloquial scholarly terms to mean that "you cannot just remove one of its fingers and pretend it is alive. For the finger to work, the whole body must come along".<sup>203</sup> The response given by the ILC to fragmentation via the "examination of techniques to deal with conflicts (or prima facie conflicts) in the substance of international law"<sup>204</sup> "suggest that system and hierarchy are intrinsic to juristic thought, and thus also to international law".<sup>205</sup> This reaffirmation of formal unity allows for the linking of the constitutionalist field with what one may loosely be defined as the hierarchy of international norms' dimension of constitution-related general discourse. As such, it has been interpreted as an advance from earlier debates on the existence of normative hierarchies in international law vis-à-vis disputes

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<sup>193</sup> ILC Report, *supra* note 191, at 11.

<sup>194</sup> Peters, *supra* note 172, at 587.

<sup>195</sup> Martti Koskenniemi, *supra* note 12, at 13

<sup>196</sup> Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 26 October 1999. See, also, Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000. Available at <http://www.icj-cij.org/icjwww/ipresscom/iprstats/htm>

<sup>197</sup> ILC Report, *supra* note 191, at 12.

<sup>198</sup> Koskenniemi, *supra* note 10, at 1-2.

<sup>199</sup> ILC Report, *supra* note 191, at 12.

<sup>200</sup> Koskenniemi, « Droit international et hégémonie » in M.Koskenniemi, *La Politique du droit international* (2007), 304.

<sup>201</sup> ILC Report, *supra* note 191, at 11.

<sup>202</sup> *Ibid.*, at 14.

<sup>203</sup> Koskenniemi, "International Law: Constitutionalism, Managerialism and the Ethos of Legal Education" 1 *European Journal of Legal Studies* (2007) 1, at 10.

<sup>204</sup> ILC Report, *supra* note 191, at 17.

<sup>205</sup> Koskenniemi, *supra* note 10, at 16.

about the systemic existence of the latter.<sup>206</sup> The report's decision to grant the ICJ's plea for unity, represented by the finding that there are no legal regimes outside general international law, brings to bear formal normative constitutionalization as a response to fragmentation's differentiation. The reporting's findings, however, should not obscure the fact that they constitute something of a pyrrhic victory when seen against Koskenniemi's background analysis.

According to Koskenniemi, the emergence of multiple specialised regimes implies that the political conflict about the "question of significance" - which is not intrinsic, but dependent on the interests and preferences from which one examines the question to know which is "the regime most relevant, or specific, to a matter"<sup>207</sup> - transforms itself into a conflict of jurisdictions, a struggle for institutional hegemony. This is due to the emergence of multiple anti-formal expert regimes, each of which seeks "to make its special rationality govern the whole, to transform its preference into the general preference".<sup>208</sup> The fact that "fragmentation becomes struggle for institutional hegemony"<sup>209</sup> is, according to Koskenniemi, underwritten by an integrative systemic vision of international law which says that "no more than that whatever decision, it should be made by legal institutions, in particular institutional settings populated by public international lawyers".<sup>210</sup> While the Commission decided to leave the question of institutional competencies (the competence of various institutions applying international legal rules and their hierarchical relations *inter se*) "as one best dealt with by the institutions themselves" and to focus, instead, on the substantive question,<sup>211</sup> in practice "the agreement that some norms *simply* must be superior to other norms is not reflected in any consensus in regard to who should have a final say on this".<sup>212</sup> In Koskenniemi's analysis, the superiority of some norms over others does not imply a consensus on a hierarchy between the various legal regimes, nor a consensus on the hierarchy of institutions representing general international law vis-à-vis other forms of institutionalised structural bias. The reaffirmation of the unity of the international legal system as an attempt to control fragmentation in both "its legislative and institutional form,"<sup>213</sup> is, thus, not considered effective against a "natural development"<sup>214</sup> that "reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques".<sup>215</sup>

In order to grasp the full dimensions of the effect of the Commission's decision to grant the ICJ's plea for unity - which is formal in its suggestion that "no special regime is to be understood as independent of international law"<sup>216</sup> - on the spread of international constitutional vernacular in international law, it is necessary to examine how the reaffirmation of the unity of the international legal system finds itself playing a rhetorical keystone role vis-à-vis empire, and the influx on the equation of delegalisation as a

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<sup>206</sup> Paulus "The International Legal System as a Constitution" in J.L.Dunoff & J.P.Trachman (eds.) *Ruling the World. Constitutionalism, International Law and Global Governance* (2009) 69, at 82.

<sup>207</sup> Koskenniemi, *supra* note 10, at 16.

<sup>208</sup> *Ibid.*, at XXX.

<sup>209</sup> Koskenniemi, *International Law and Hegemony: A Reconfiguration* 17 *Cambridge Review of International Affairs* 117 (2004), at 205-206.

<sup>210</sup> Koskenniemi, *supra* note 10, at 18.

<sup>211</sup> ILC Report, *supra* note 191, at 13.

<sup>212</sup> Koskenniemi, *supra* note 10, at 18.

<sup>213</sup> ILC Report, *supra* note 191, at 12.

<sup>214</sup> *Ibid.*, at 15.

<sup>215</sup> *Ibid.*, at 14.

<sup>216</sup> *Ibid.*, at 11.

form of functional differentiation pursuant to the effects of globalisation on international law. But, before dealing with a normatively value-oriented constitutionalism, which is one interpreted to be supported, yet not without debate,<sup>217</sup> by normative formal hierarchies, it might be worthwhile to refer to what appears as the doctrinal opposite variety of unity in connection to the phenomenon of fragmentation of international law. This, which presents itself, as a variant of the hydra-like renewal of constitutionalist vernacular in contemporary international law, is the parallel evolutionary development of transnationalism and regime theory, otherwise systems-theoretical perspectives in this area - a line of thought pertaining to the "fragmented/societal model of constitutionalism" à la Teubner and Fischer-Lescano *pave* the sociology of N.Luhmann with their extension of constitutionalism beyond purely intergovernmental relations to "a multiplicity of civil constitutions".<sup>218</sup> Against what it perceives as the "wholly unrealistic attempt to create a hierarchy within the fragmentation of global law",<sup>219</sup> a chimera which, following the de-centering of politics, is seen "as by far the most advanced statement" of legal pluralism,<sup>220</sup> this approach sees in the constitutionalization of autonomous sub-systems of world society the only "damage limitation" available. Faced with inter-regime conflicts between the currently proliferating sectoral regimes, the best law can offer, for these authors, is, therefore, to accept its epiphenomenality in acting as "a gentle civiliser of social systems"<sup>221</sup> for the sake of "intra-regime responsiveness to the immediate human and natural environment".<sup>222</sup> An example of the application of this approach would likewise go maintain that in the era of globalisation, due to the transition from government to governance conceived "as the horizon of all possibilities for self-determination" in a heterarchical world, self-determination's of regimes is assuming the rank of a foundational constitutional principle of global governance.

Their questioning of whether one can actually talk of one international community and one international value system and their understanding of transnational regimes as bound to replace territorial states confronts the stress of this approach on auto-poietic regulatory systems with the state-centered international constitutionalism of "the hierarchical/political model" à la Tomuschat, Fassbender or Dupuy. The latter is identified with an international community school that pre-empts the latter and pretends to maximise in a vocabulary of constitutionalism the post-Cold war harvest of the doctrinal seeds planted and cultivated since the end of World War II on the soil nurtured by the inter-war years' debate. Two other converging factors lie behind the hydra-like renewal of constitutionalist parlance in international legal doctrine: the strengthening of the vernacular vis-à-vis the emergence of Empire as well as the sword of Damocles posed in opposition to its very substantive pretensions by the phenomenon of deformalisation in international law. These factors will now be examined.

### 3.3. Constitutionalism as Reaction to Deformalisation and Empire

Together with fragmentation, a second form of functional diversification fostered by the spur given to the pre-eminence of the rule of law on the international law plane in the

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<sup>217</sup> Warning against the "messianic dimension" of the discourse, R. Kolb, *supra* note 32.

<sup>218</sup> Teubner "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?" In C.Joerges *et al.* (eds.) *Transnational Governance and Constitutionalism*, (2004) 2, at 8.

<sup>219</sup> Fischer-Lescano & Teubner, *supra* note 11, at 1037.

<sup>220</sup> Koskenniemi, *supra* note 12, at 22

<sup>221</sup> Fischer-Lescano & Teubner, *supra* note 11, at 1045.

<sup>222</sup> *Ibid.*, at 1037.

image of liberal Western domestic politics, is the deformalisation of international law. Deformalisation has been understood as "the process whereby the law retreats solely to the provisions of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions and balancing interests".<sup>223</sup> As already seen in the context of fragmentation, "the proliferation of new regimes - even when they are based on formal international law rule-making (...) - lead into contextual *ad-hocism* that further strengthens the position of functional experts."<sup>224</sup> If the emergence of anti-formalist expert regimes goes hand-in-hand with the phenomenon of the emergence of multiple specialised regimes and corresponding worries about fragmentation, the roots of the phenomenon of deformalisation might be retraced more profoundly to the post-Cold War's *zeitgeist* insofar as, as explained by Koskenniemi, the latter "emerge(s) from the sense that traditional diplomats' law is failing to manage the problems of a globalising world due to its excessive formality and rigidity and its failure to adapt to new regulatory needs. A shift is thus required from formal rules and institutions to the objectives or values "behind" them".<sup>225</sup> Concomitant to what was defined, a decade ago, as the "turn to ethics" in international law, deformalisation is, thus, a consequence of the "the takeover of the managerial mindset (which) is reflected in the transformation of the vocabularies of power. The language of law is replaced by an idiolect of transnational regimes that enforce the most varied kinds of guidelines, directives, *de facto* standards, and expectations, so as to guarantee optimal effects".<sup>226</sup> Moreover, such a gradual acceptance of a managerialist vocabulary<sup>227</sup> of compliance, legitimacy, cost-benefit analysis *et al.*, reflects a growing spill-over of the discipline of international relations<sup>228</sup> into the domain proper to international law pursuant to a pedigree of anti-formalism which has been retraced back to the post-Second World War era. In this understanding, deformalisation reveals itself both allied with Empire, understood as "as the emergence of patterns of constraint deliberately intended to advance the objectives of a single dominant actor, either through the law or irrespective of it",<sup>229</sup> as well as with any instrumental-value hegemonic pursuit by relative dominant actors thus, explaining why, in Koskenniemi's view, constitutionalism "may equally consolidate types of authority that seek to perpetuate Europe's comparative advantage".<sup>230</sup>

Against this background, the granted plea for unity against the worries brought about by fragmentation has understandably allied itself with a rhetoric mostly heralded by international lawyers from Europe in favour of constitutionalisation. This can be seen as a politico-emotional reaction to what is perceived as the lawless imperialism of U.S. neoconservatives and the defence of the UN's role in international legal governance at a time defined by J.Habermas as "one witnessing the advocacy of the liberal ethos of a superpower as an alternative to law".<sup>231</sup> Constitutional talk is intrinsically connected with the foregrounding of the UN Charter as the constitution of the international community

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<sup>223</sup> Koskenniemi, *supra* note 12, at 13.

<sup>224</sup> Koskenniemi, *supra* note 10, at 9.

<sup>225</sup> Koskenniemi, *supra* note 10, at 9.

<sup>226</sup> *Ibid.*, at 13-14

<sup>227</sup> Koskenniemi, "Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism" 7 *Associations Journal for Legal and Social Theory* 349 (2003) 349.

<sup>228</sup> Koskenniemi, "Formalismo, fragmentación y libertad. Temas kantianos en el Derecho internacional actual" 2 *Revista Internacional de Pensamiento Político* (2007) 209.

<sup>229</sup> Koskenniemi, *supra* note 12.

<sup>230</sup> M.Koskenniemi, *supra* note 83, at 616.

<sup>231</sup> Habermas, "Does the Constitutionalization of International Law Still Have a Chance?" in J.Habermas *The Divided West* (ed. and transl. by Ciaran Cronin) (2006)115, at 116.

supplemented by other constitutional by-laws specifically dealing with the international legal regime for the protection of human rights. However, the usefulness of the formal version of constitutionalism - otherwise one that "suggests that system and hierarchy are intrinsic to juristic thought" while "a battle European jurisprudence seems to have won"<sup>232</sup>— has been seriously doubted against the background of the "institutional hegemonic struggle" from which fragmentation derives. Even more serious doubts are raised when one tackles, from the perspective of the phenomenon of deformalisation, the fact that the reaffirmation of the unity of the international legal system finds itself playing a key role in conceptions of a post-national constitutional value-ridden order that attempts to flesh out its architecture with a normatively purposive bias. As noted on grounds of the paradox of objectives by Koskenniemi "the undoubted increase of law into the international world (legalisation) does not translate automatically into a substantive constitution in the absence of that sense of shared project or objective. If deformalisation has set the house of international law on fire, to grasp at values is to throw gas on the flames".<sup>233</sup> The evolution towards new vocabularies of international law grounded on international relations is, according to this view, prone to channel new forms of lego-material domination which, as such, find fertile ground in the solipsist character of sectoral regimes in international law. Being each of these regimes ridden by its own hegemonic substantive *telos* as channeled through de-formalized instrumental vocabularies, jurisdictional conflict and a struggle for institutional hegemony is likely to arise. These struggles and conflicts will occur in a transnational sphere which is gradually becoming more impermeable to contestation by a lego-formal rationality of sovereign-states which, paradoxically enough "stands as an obscure representative of an ideal against disillusionment with global power and expert rule"<sup>234</sup> today.

### 3.4 Legitimacy

The development of a democratic focus in international law allows can be framed as an area of evolution within the international constitutionalist field. The already extensive scope of the present inquiry does not allow for a comprehensive discussion of the ways in which the peculiarities of the multifaceted democratic debate in international law may be transferred to the constitutional arena. Yet, the juxtaposition of some background on this debate with an examination of the role played by democracy in international constitutionalism provides a guidepost for distinguishing a number of schools of international constitutionalist thought. Thus, the sovereigntist pretensions of the neoconservative theory of international law, so extensively examined in the post-9/11 legal literature,<sup>235</sup> can be said to represent the "core of the skeptic's challenge"<sup>236</sup> to the constitutionalist understandings of international law. When seen from the perspective of the democratic debate in international law, the neoconservative challenge can be as a school of thought closely related to the intra-state dimension of the emergence<sup>237</sup> of the

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<sup>232</sup>Koskenniemi, *supra* note 10, at 18.

<sup>233</sup> *Ibid.*, at 16.

<sup>234</sup> Koskenniemi, "What Use for Sovereignty Today?" *Asian Society of International Law on-line papers* (2009), at 8. Available at <http://www.asiansil-tokyo2009.com/pdf/PlenarySession1/Koskenniemi%20final.pdf>

<sup>235</sup> De la Rasilla "Apuntes críticos para una teoría neoconservadora del Derecho internacional" in 20 *RQDI* 1 (2008) 165.

<sup>236</sup> Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State" in J.L.Dunoff & J.P.Trachtman *Ruling the World: Constitutionalism, International Law and Global Governance* (2009), 258, at 261.

<sup>237</sup> See introductorily De la Rasilla del Moral, "The Boy Who Cried: Wolf! The Dimensions of Emergence of the Right to Democratic Governance and the Fundamentals of International Law: An Introductory Overview" Paris Agorae, *ESIL Web Publications*, pp. 1-18.

democratic principle in international law. In its most basic version, such position is founded on grounds of the sacrosanct democratic character of the U.S' Constitution in the pursuit of unbound national interests against any pretensions of legitimacy of an international law composed by non-democratic states and non-legitimised state actors. In this light, neoconservative theory can be seen as a mere political nationalistic radicalisation of what has been, in softer or stronger liberal forms, the general orientation of liberal internationalist schools of international law in the U.S. and part of Western Europe since the early 1990s. Critics' efforts have been decisive in tracing a highly qualified doctrinal map of these diverse schools by academically labeling them under the banner of "liberal anti-pluralism"<sup>238</sup> or "liberal millenarism".<sup>239</sup> A number of trends ranging from the "Kantian theory of international law",<sup>240</sup> to the "democratic entitlement school",<sup>241</sup> and including "the liberal internationalist dual agenda",<sup>242</sup> post-cold war realist variants of the "New Haven School",<sup>243</sup> "Rawlsian Liberalism"<sup>244</sup> or "liberal cosmopolitanism"<sup>245</sup> have in common their persuasive support – which is, incidentally, one not devoid of a sound international legal basis in practice –<sup>246</sup> of the emergence of a right of intrastate democratic governance in international law. However, as is widely known, the democratic principle of international law does not exhaust its potential by distinguishing between states in terms of the domestic form of government or, if preferred, the democratic principle in international law is not limited to its intra-state dimension of its emergence. It would suffice in order to illustrate this point to refer, in passing, to a number of schools of thought that are more affected by the supra-state dimension of the emergence of the democratic principle in international law. These include a series of perspectives ranging, among others, from the administrative global law project<sup>247</sup> to the cosmopolitan democratic project of creating global democratic international institutions,<sup>248</sup> to those other perspectives now captured under the label of "compensatory constitutionalism".<sup>249</sup> Finally, a third dimension of the emergence of the democratic principle of international law is the classic inter-state dimension of the principle. The legal goal of the inter-state democracy project can be equated with the aspiration to make a reality the rule "one state, one vote" and thereby with that of procedurally according the same weight to every state's vote within the international law-making process. Inspired by the principle of individual electoral equality within domestic popular sovereignty-based democratic systems, this doctrine, which purports to transpose democracy as a constitutive principle to inter-state relations is, occasionally, presented as the synthesis of the principles of equal sovereignty of states, self-determination of peoples, and distributive justice.<sup>250</sup> As such, it is retraceable

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<sup>238</sup> G.Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order* (2004)

<sup>239</sup> S.Marks, "The End of History? Reflections on Some International Legal Theses" (1997) 8 *EJIL* 449.

<sup>240</sup> F. R.Tesón, "The Kantian Theory of International Law" (1992) 92 *Columbia LR* 53.

<sup>241</sup> T.M.Franck, "The Emerging Right to Democratic Governance", (1992) 86 *AJIL* 46.

<sup>242</sup> A.M.Slaughter, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *AJIL* 205.

<sup>243</sup> M.W.Reisman, « Sovereignty and Human Rights in Contemporary International Law » (1990) 84 *AJIL* 886.

<sup>244</sup> J.Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (1999)

<sup>245</sup> K.C.,Tan "International Toleration: Rawlsian versus Cosmopolitan" 18 *LJIL* (2005) 685.

<sup>246</sup> De la Rasilla del Moral "Una introducción al Derecho internacional de la democracia" 10 *Mexican Ybk IL* (2010) (Forthcoming)

<sup>247</sup> Kingsbury, Krisch and Steward, "The Emergence of Global Administrative Law" 68 *Law and Contemporary Problems* (2005) 15

<sup>248</sup> See e.g. Archibugi, Held and, Martin, *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (1998)

<sup>249</sup> Peters, *supra* note 172.

<sup>250</sup> Pinto "Democratization of International Relations and Its Implications for Development and Application of International Law" 5 *Asian Ybk IL* (1995) 111, at 113



to the horizontal extension of the international community of states brought about by the decolonization process in the sixties that was given governmental backing in political terms in the 1970 Lusaka Declaration issued by the third conference of the non-aligned movement which flagged the democratization of international relations understood as "an imperative necessity of our times" due to the "tendency on the part of some of the big powers to monopolize decision-making on world issues which are of vital concern of all countries".<sup>251</sup> This anthropomorphic-inspired goal to democratize international relations through state majoritarian formulae, that is closely associated with the New Economic International Order<sup>252</sup> and, as such, a component of a broader "have not" agenda,<sup>253</sup> can be framed as a procedural strategy adopted by the Third World States in their attempts to use sovereignty, understood, in the academic discourse of the time, as "the hard long prize of their own struggle for emancipation" or "the legal epitome of the fact that they are masters in their own house",<sup>254</sup> to develop a new international law. Briefly exposed, these three general dimensions of the emergence of the democratic principle in international law could well be employed as benchmarks in examining the fundamental role played by the legitimacy/democratic equation in any discussion of international constitutionalism in contemporary international law.

#### 4. Conclusion

Alongside the image of constitutionalism as a narrative of continuation with the past whose profile has been boosted in recent literature among other converging and parallel factors, as a reaction to "fragmentation, deformalisation and empire", it may be, to conclude, worthwhile recalling Koskenniemi's insight on "how the force and the apparent novelty of today's fragmentation has obscured the degree to which it captures a classical international law problem". Indeed, according to Koskenniemi, the question "how is law between sovereign states possible?" is not too different from the question "how is law between multiple regimes possible?"<sup>255</sup> because of "how especially European international lawyers have sought to combat through the vocabulary of constitutionalism" the fact that public international law has been "sliced up into regional or functional regimes that cater for special audiences with special interests and special ethos"<sup>256</sup> that are "broken down into boxes, each of them (...) solipsistic and imperialistic".<sup>257</sup> While Koskenniemi's dual examination of both fragmentation and the phenomenon of deformalization casts doubt on the adequacy of a value-ridden constitutionalization of international law, the fact remains that the classic inter-war year debate on "how is law between sovereign States possible" appears today reversed in the contemporary global governance setting affected by the phenomena of functional diversification. In this new scenario, international constitutionalism appears re-staged as a state-centered counter-reaction to the problem brought about by the proliferation of specialised regimes in international law acting solipsistically and empire-like. It is, in fact,

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<sup>251</sup> Lusaka Declaration on Peace, Independence, Development, Co-Operation and Democratization of International Relations, Third Conference of Non Aligned Countries 10 *International Legal Materials* (1971) 215, at 217

<sup>252</sup> Dias, "The NIEO Revisited", *The Sri Lanka JIL* (1996) 27.

<sup>253</sup> Doxey "Strategies in Multilateral Diplomacy: The Commonwealth, Southern Africa and the NIEO", 35 *International Journal* (1979-1980) 329, at 334.

<sup>254</sup> Abi-Saab "The Newly Independent States and the Rules of International Law: An Outline" 8 *Howard LJ* (1962) 95, at 103.

<sup>255</sup> Koskenniemi, *supra* note 10.

<sup>256</sup> Koskenniemi, *supra* note 204, at 2.

<sup>257</sup> *Ibid.*, at 4.

the same state solipsism against which Kelsen reacted in his attempt to come to grips with the "sovereign question" and to enshrine in international law a normativist grounded self-constitutive bias in favour of a community-based order. The reversion is complete when one analyses how, on the other hand, legal pluralism, traditionally characterised by its state-centered approach, re-appears in today's debate as an anti-state regime-centered legal pluralism. It is against the background of the reversal of the terms of this fundamentally conforming debate, that one might better appreciate the different uses to which the notions of legitimacy and democracy have been put by different schools and trends of thought in the contemporary cross-bred space offered by the constitutionalist field and, thus, to appreciate how, in contrast to Kelsen's time, democracy is today the wind rose of international law.