At King Agramant’s camp: Old debates, new constitutional times

Ignacio de la Rasilla del Moral*

The article explores the genesis of constitutionalism in the science of international law during the interwar years and offers a genealogical sketch of the fate of the constitutional idea from the Second World War to the emergence of a postreconstruction 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, today appear 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-fertilization are shown by reference to three dimensions of emergence of the democratic principle, which, I argue, is the wind rose of international law.

1. Introduction

Despite the warning that the current “inflationary use of the word constitution entails the danger of its devaluation,”¹ it is becoming increasingly difficult for

* Ph.D. (Graduate Institute of International and Development Studies, Geneva), LL.M. ‘11 (Harvard Law School); Fellow of Royal Complutense College at Harvard University. At the time of writing, Visiting Fellow in Global Governance, Law and Social Thought at The Watson Institute for International Studies, Brown University. Email: ignacio.delarasilladelmoral@graduateinstitute.ch

international lawyers to blind themselves to the number of overlapping doctrinal trends currently making use of constitutionalist vernacular in international legal literature. While each of these trends contributes to the development of this area of studies, each of them also seeks doctrinal preeminence within an emerging legal constitutionalist consensus that appears increasingly blurred in its contours and definition. Such a constant growth of international constitutionalist talk, moreover, is obscuring the fact that constitutionalist debates are no exception to the *nihil novum sub sole* axiom as applied to the international legal order. The constant encouragement 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 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 twentieth-century doctrinal precedents is offered. In this context, special attention is given to the constitutionalist strand shaped by Kelsenian positivists during the interwar years, since this has been taken as an 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. 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 doctrinal fate of the constitutional idea from the Second World War’s aftermath to the present.

From this reconstruction, it may be gleaned that the contemporary rise of international constitutionalist parlance is connected, intrinsically, to a “narrative of continuation with the past” that favors a reading of international law as a “natural” evolution developing from coexistence, 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 interwar 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” because it is both “rooted in positivism and determined not to lose touch with actual state practice” and in its pretension to blend the “normatively desirable and the...
normatively feasible.” This trend, so defined, apparently seeks to regain momentum in contemporary international legal literature. To gain a more accurate perspective on this doctrinal development, one needs to approach the hydra-like renewal of international constitutionalism as a corollary of the “post-realist age.” It is against the background of this epochal development, mirroring the effects of the ethos of international law in its constant political drive to extend the rule of law to the international plane in a liberal post–Cold War globalised stage, that the second part of the essay 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. Therefore, a number of converging factors, backing up the contemporary reinforcement of constitutional talk in international law, are examined. First among them is the analysis of international constitutionalization as a systemic counter-reaction to the worries engendered by the proliferation of specialized regimes in international law. An evaluation of this factor is accompanied by a brief appraisal of a form of functional differentiation known as the fragmentation of international law. Also examined is how, with regard to the fears of fragmentation, the formal constitutionalization of international law presents itself as a preemptive response to the alternative constitutionalizing vocabularies tackling the complexity of global governance as the “fragmented/societal model of constitutionalism”—pace Niklas Luhmann.

Second among the selected converging factors behind the international constitutionalist renewal, I turn to its understanding as a reaction to empire whose instrumentalist core is embedded in an ongoing, anti-formalist “turn to ethics” in international law. The effects of empire, in association with a second form of functional differentiation—termed the deформalization of international law—will be

8 MARTTI KOSKENNIEMI, ENTRE ENGAGEMENT ET CYNISME: APERÇU D’UNE THÉORIE DU DROIT INTERNATIONAL EN TANT QUE PRATIQUE, IN LA POLITIQUE DU DROIT INTERNATIONAL 359 (2007).
10 Martti Koskenniemi, The Fate of Public International Law: Between Technique and Politics, 70 Mod. L. Rev. 1 (2007).
12 Martti Koskenniemi, Constitutionalism as a Mindset: Reflection on Kantian Themes about International Law and Globalisation, 8 THEORETICAL INQUIRIES IN LAW 12 (2007).
13 Martti Koskenniemi, The Lady Doth Protest too Much: Kosovo and the Turn to Ethics in International Law, 65 Mod. L. Rev. 159 (2002).
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Examined. It will be argued that these act as a factor fostering the acceptance of a managerialist vocabulary\textsuperscript{15} of compliance, legitimacy, and cost-benefit analysis in a growing intrusion\textsuperscript{16} 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.\textsuperscript{17} The role played by the notion of legitimacy in the constitutional field shall then be set against the benchmark provided by the three separate dimensions of the emerging principle of democratic governance in international law. These may be identified, respectively, as the intrastate, the interstate, and the suprastate dimensions. After examining these convergent factors underlying the hydra-like renewal of constitutional parlance in international law I will briefly tackle the extent to which the terms of the debate during the interwar years appear today reversed in a contemporary, cross-bred transitional paradigmatic age, which is evolving from an international legal order grounded in the myth of Westphalia to one where democracy stands as the elusive, yet unsurpassable horizon, of international law for the twenty-first century.

2. International constitutionalism as a narrative of continuation of 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. These were part of a broader doctrinal attempt to temper what were considered the “excesses” of the nineteenth-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 burgeoning nationalist sentiment in Europe, leading up to the First World War, positivism\textsuperscript{18} had given rise to a number of Hegelian-inspired, theoretical understandings of the international legal order.\textsuperscript{19} According to these interpretations, international law was seen either as “state external law”; as “a law of coordination,” presided over by Kaufman’s principle of “nur, der, der kann, darf auch”;\textsuperscript{20} as a product, in Jellinek’s account, of the state’s “self-commitment or self-limitation”;\textsuperscript{21} or, as conceptualised by Triepel, as

\textsuperscript{15} Martti Koskenniemi, \textit{Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism}, \textit{Associations Journal for Legal and Social Theory} 349 (2003).


\textsuperscript{17} Rudiger Wolfrum, \textit{Legitimacy in International Law from a Legal Perspective, in Legitimacy and International Law} 1 (Rudiger Wolfrum & Volker Roben eds., 2008).

\textsuperscript{18} Antonio Truyol y Serra, \textit{Historia de la Filosofía del Derecho y del Estado}, 3 IDEALISMO Y POSITIVISMO (2004).

\textsuperscript{19} Ibid., at 297–313.

\textsuperscript{20} \textsc{Erich Kaufmann}, \textit{Das Wissen des völkerrechts und die clausula rebus sic stantibus} (1911).

\textsuperscript{21} Koskenniemi, \textit{supra} note 14, at 198–206.
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 interwar years regarded the nature and ultimate foundation of international legal norms’ binding character; this led to the heyday of its consideration as the “ancillary stone of international law.”

This foundational period of contemporary doctrine echoed the establishment of the League of Nations and its attempt to break history’s narrative and to allow for the transition from a preinstitutional to an institutionalized international order. The new doctrine sought to defend the primacy of international law over domestic law in order to smooth the accommodation of the “unbridled sovereign autonomy” characterizing the pre–First World War era. Previously, such autonomy had been tamed only by the exigencies of a strategically organized balance of power, so that a “social order among sovereigns could be achieved.” This was a continuation of the locus classicus’ attempts at “squaring the circle of statehood and international law.” Such a progressive doctrinal mood sought to ground the “position of the State as integrally and necessarily part of an international order” both against 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 Dionisio Anzilotti’s normativist-theory approach that fixed pacta sunt servanda as an a priori assumption surpassing voluntarism. This strand of thought, which spread all over the European doctrinal stage, is today known as the reconstructive doctrine.

One strand of such a critique of sovereignty “joined French liberal solidarism with the sociological jurisprudence that developed in Germany in the 1920s.” Representative of the spirit of the epoch is the consciously antipositivist “idiosyncratic legal monism” of G Scelle, whose sociological approach to international law imagined a global federalist utopia founded on the notion of natural solidarity. Other monist variants of international constitutionalism, arising from traditions of domestic jurisprudence and political theory at the time, include that championed by an Italian school with Santi Romano’s theory of institution as its core. This variant prolonged the tradition of Friedrich Carl von Savigny’s school in

24 Ibid., at 834.
26 Ibid., at 159.
28 Koskenniemi, supra note 14, at 327–338.
29 Emmanuelle Jouannet, L’idée de communauté humaine à la croisée de la communauté des États et de la communauté mondiale, 47 ARCHIVES DE PHILOSOPHIE DU DROIT 191 (2003).
30 Georges Scelle, Le droit constitutionnel international, in MÉLANGES CARRÉ DE MALBERG 503 (1933).
31 SANTI ROMANO, L’ORDINAMENTO GIURIDICO: STUDI SUL CONCETTO, LE FONTI E I CARATTERI DEL DIRETTO (1918).
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its identification of the international constitution with the normative translation of the international community’s fundamental structure as a social fact. 12 During the interwar years, when “the field [of international law] became professionalized and its basic concepts and structures were set in place,” 13 a common aim of much international legal writing was to establish the relevance of international law as a constraining factor in interstate relations. 14 However, it would be in German-speaking academic quarters 15 where the attempt to overcome positivism from within positivism itself would give way—from the perspective of contemporary constitutionalism—to the most influential effort to come to grips with the “sovereign question.” An analysis of international law’s resulting self-constitutive bias toward community order, as the monist 16 grounding for an international constitutionalist perspective, 17 calls for a very brief reference to Hans Kelsen’s Pure Theory of Law.

As is widely known, Kelsen’s monism in defense of the unity of national and international law under a single legal system was pursued as an “epistemological postulate” 18 to escape Austin’s circularity problem. 19 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” 20 at the top of a system of legal validity or otherwise as the ultimate basis of obligation in a legal system, empirically approached and grounded on a concept of legal imputation that “avoids identifying law in terms of an intuitive correspondence with an idea of right.” 21 The father of the logical or normativist strand of positivism, as well as a 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 so, however, while remaining faithful to 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. 22 Moreover, to counteract the hypothetical nature of an international legal order perennially at the whim of the changing will of sovereign states and, thus, the existence of mutually exclusive domestic

13 Kennedy, supra note 23, at 846.
14 Koskenniemi, supra note 27, at 10–12.
17 Danilo Zolo, Cosmópolis: Perspectiva y riesgos de un gobierno mundial (2000).
18 Kelsen, supra note 36, at 373.
22 Zolo, supra note 37, at 143.
orders (a kind of national solipsism), Kelsen depicted his declaring international law superior to domestic law as one that was ethically grounded. In theoretically dissolving the dogma of sovereignty—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 centralization of international law had been surmounted. Moreover, his conspicuous argument that, in opting for international law as superior to national law, he was respectively choosing objectivism, altruism, and pacifism over subjectivism, egoism, and imperialism is consistent with the general representation of the telos of international law as a progressive and liberal one.

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 Kelsen, the Vienna school’s most prominent representative—rely on an unverifiable scientific *Grundnorm* resulting from an attack on the irrational ideal of justice as a “subjective judgment of value.” The Verdrossian approach, the consequence of a gradual departure from Verdross’s earlier formal theoretical orientation toward legal philosophy, amounted to a grounding of the theoretical foundations of international law on the normative idea of the moral unity of mankind or, alternatively, on a natural law conception of “objective justice” as the ultimate source of law.

Verdross’s conception, which was informed by a universalist tradition traceable to the Spanish Siglo de Oro, benefitted from the recuperation by a generation of Spanish international scholars headed by Camilo Barcia Trelles with the valuable help of J. B. Scott, of the Salamanca school. However, the marked relevance of anchoring the Christian community–oriented universalism of Vitoria and, especially, that of Suarez—in recovering the “humanist” interpretation of the Salamanca school as a founding source of international law—to the resurgence of Verdross’s

44 KELSEN, supra note 36, at 386.
45 KELSEN, supra note 43, at 199.
neonaturalist trend should 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. Although Schmitt’s existentialism would be tempered on Christian *ius*-naturalist grounds, in its Spanish domestic political reception, the very 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 depiction of Spain as the last stronghold of Christian European values after the Second World War. The fact that Schmitt is widely recognized as a behind-the-scenes influence on the conceptual architecture of the Spanish authoritarian regime, erected from the ashes of the Spanish Civil War—largely through the work of F. Javier Conde—accounts for the doctrinal connection between Spanish and German international legal theorists that began during the interwar years and lasted far beyond the Second World War.

Against the background of the German discipline’s bitterness against the League of Nations after 1919, the neonaturalist variant of the Vienna school runs parallel to Verdross’s scholarly ambiguities in defense of the Anschluss and his murky political allegiance to National Socialism. 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,” 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.” The self-constitutive bias of a formal positivist Kelsenian international law toward community order thus appears, replaced in Verdross’s thinking by an underlying theory of

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56 Francisco Javier Conde, *Teoría y sistema de las formas políticas* (1944) and *Francisco Javier Conde, Representación Política y Régimen Español* (1945).


59 For the evolving path of the definition of international constitution in Verdross’s successive works, see Fassbender, *supra* note 40, at 37–45.

60 See Simma, *supra* note 52, at 49.
justice grounded on the realization of universal communal values of Christian humanist inspiration.  

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”) a series of normative developments still needed to be developed and conceptualized. Such a development would amount, eventually, to what R.-J. Dupuy referred to as the “positivisation of natural law.” That is, what Bianchi has recently described as the “magic of ius cogens” and its “almost intrinsic relationship with human rights” had yet to be “summoned” by international lawyers and joined with both 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, begin to be fleshed out by the gradual emergence of a suprapositive public order of norms of fundamental character reflective of a prioritization of humanist values. Only then could one complete the squaring of the circle of statehood and international law initiated on critical neopositivist formal grounds by Kelsen. While the turn to natural law during the interwar 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,” nonetheless, for such an effective conceptualization to emerge a natural moralizing perspective of the Verdrossian kind, which relied “on the self-evidence of natural law” to realize the unity of mankind, would require a “critical and realistic monism.” This monism would stress, complementarily, “the role of judicial practice in fixing its meaning.” Such was the approach proffered by yet another disciple of Kelsen’s, 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

64 Bianchi, supra note 63, at 495.
66 Also Simma, supra note 52 at 42.
67 Koskenniemi, supra note 27, at 11.
68 Koskenniemi, supra note 14, at 357.
immediately following the First World War. In his scholarly work from the ’30s and ’40s, his leaning toward 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.” This was Lauterpacht’s “political period,” when he openly defended peace as a legal postulate in international law, which he defined “as the law of the international community.” 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—gained momentum in the so-called human rights period of his writing and made him an important contributor to the universalistic human rights–faced natural law revival after the Second World War. Sharing Kelsen’s modernist nominalism, Lauterpacht attempted, on the other hand, to bring the antisovereign ethos of this epochal reconstructive doctrine to the realm of an empirical-critical approach to positivism as practice. Along these lines, Lauterpacht identified the problem of reliance on “self-judgement” by sovereign states vis-à-vis international obligations as the basic obstacle to the realization of a gradual transference of the rule of law to the international plane. Lauterpacht’s strong stance against a state-centered, dogmatic voluntarism required him to demonstrate that the former was at variance with both logic—through stressing 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. 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.” 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.”

Lauterpacht attempted to transform the moralizing rhetoric of a human being–based international legal order from something that 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” of voluntarist positivism itself. Indicative of this underlying objective, during his “political period,” is Lauterpacht’s proposal for the

69 Id. at 355–357
70 Id. at 356.
74 Koskenniemi, supra note 14.
75 Id.
76 Lauterpacht, supra note 71, at 58.
77 Id.
78 Koskenniemi, supra note 14.
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 consonant with the completeness and unity of the law and its “priority over political will and political fact.” Indeed, Lauterpacht’s nonconformist embrace of a federalist ideal during his final lustrum on the International Court of Justice’s bench underlies both his criticism of the self-judging reservations made by states in their declarations of acceptance of the Court’s jurisdiction as well as his defense of mechanisms for the protection of human rights at the international level.

Thus, when seen from the perspective of the contemporary renewal of international constitutionalism, it may be observed how Verdross and Lauterpacht remain lasting underlying influences behind two different views 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. However, for these latter notions to help refashion, each in its own way, the discursive archetypes of the interwar debate into a progressive, substantive meaning of international law as “the law of the international community,” a series of normative outcomes still had to be developed and conceptualized in manner suitable to the times. These normative developments would arise against the background of a post–Second World War doctrinal landscape characterized by “a turn to pragmatism in modern doctrines.”

This flight from theory was reflected in an overall loss of doctrinal interest in the foundational and binding character of international legal norms—a problem that, according to Roberto Ago at the time, “should be eliminated from the legal science.” What remained of the latter scientific problematic was, as explained by Martti Koskenniemi, a “modern programme of reconciliation” that “takes place by a double denial,” in which “modern lawyers advocate a movement away from both naturalism and positivism.” This turn to doctrine, characterized by a search for “an intermediate positioning,” which “is precisely what provides the modern’s argument identity,” saw itself framed by an American-led “canonical turn to pragmatism.” Inspired by

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79 Id.
80 Id. at 401.
81 Lauterpacht, supra note 73.
82 Lauterpacht, supra note 71, at 9.
84 Id. at 187.
86 Koskenniemi, supra note 1, at 164.
87 Id. at 167.
88 Koskenniemi, supra note 83.
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a sociological\textsuperscript{89} and antiformalist orientation, which was nurtured in the U.S., among other countries, during the interwar years\textsuperscript{90} and against the influence of which positivism had promised the lawyer a means of evading the realities of politics.\textsuperscript{91} 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.”\textsuperscript{92} Contributing to this “new practical spirit, an orientation to process and policy at once contextual, purposive and functional,”\textsuperscript{93} 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.”\textsuperscript{94}

This “post-war sensibility realism” was a reflection of the newly predominant position of the U.S. mind-set 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, policial and economics fields” and “sociology.”\textsuperscript{95} It laid the groundwork for the study of international relations as an academic field, including the work of Hans Morgenthau, in the period following the outbreak of the Second World War.\textsuperscript{96} Morgenthau’s critique of Geneva’s negative metaphysicians\textsuperscript{97} who, “not unlike the sorcerers of primitive ages, attempt to exorcise social evils by the indefatigable repetition of magic formulae,”\textsuperscript{98} and his sketch of a functional theory of international law\textsuperscript{99} helped a policy-oriented jurisprudence to become the predominant method in the U.S. academy from the ’50s onward. This passage was characterized—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.”\textsuperscript{100} Indeed, previous efforts to address the pedigree of constitutionalism in international law have stressed the role of the transformational antiformalism of the New Haven school\textsuperscript{101} that highlighted “the role of international law as an instrument of desired world order objectives and distributing resources in accordance with community policies.”\textsuperscript{102}

\textsuperscript{89} Ramón Soriano, Sociología del Derecho (1997).
\textsuperscript{92} David Kennedy, The International Style in Post-War and Policy, 7 Utah L. Rev. 19 (1994).
\textsuperscript{93} Id. at 21.
\textsuperscript{94} Koskenniemi, supra note 27, at 4.
\textsuperscript{95} Morgenthau, supra note 72, at 267.
\textsuperscript{96} Koskenniemi, supra note 14, at 413–509.
\textsuperscript{97} Morgenthau, supra note 72, at 267.
\textsuperscript{98} Id. at 260.
\textsuperscript{99} Id. at 273.
\textsuperscript{100} David Kennedy, The Disciplines of International Law and Policy, 12 Leiden J. Int’l L. 9, 34 (1999).
\textsuperscript{101} A comprehensive critique can be found in B.S. Chimni, International Law and World Order: A Critique of Contemporary Approaches 73–145 (1993).
\textsuperscript{102} Martti Koskenniemi, Methodology, 19 Max Planck Encyclopedia of Public International Law.
The theorizing architects of the policy-oriented jurisprudence developed a distinctive approach that stressed the continuous, antiformal, and policy-process relationship between law—which they defined as the interlocking of authority with power—and politics. Their perspective, moreover, was informed by an underlying call for ethical responsibility in upholding a number of goals and values pursuant to contextual-dependent “comprehensive global processes of authoritative decision.” This 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 the scientific interpretation of policy factors so as to assure the adequate fulfillment of the decision-making function. Their analysis of international law as “not rules” but as a process-based “normative system harnessed to the achievement of common values” is set in fully contrasting methodological terms over and against the earlier European, formalist, and rule-based constitutionalist perspective of German lineage. The New Haven school’s rules, which were informed by an underlying sociological and realist call for ethical responsibility regarding 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.

However, the complex methodological peculiarities of this policy-oriented jurisprudence explain, sufficiently, why it is usually set apart from the main international constitutional tradition of analytical positivism. A further underlying reason for this dissonance—leaving aside the fact that the New Haven school was historically labeled 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” 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.”

Better 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, and a constitutional approach. This constitutional approach was

105 Higgins, supra note 103, at 1.
106 Fassbender, supra note 40, at 45–50.
109 Koskenniemi, supra note 102, at 21.
upheld on the grounds of a subjective method, prominently advocated by E. Jimenez de Arechaga;¹¹¹ it would find echoes in the International Court of Justice’s case law.¹¹² However, the practical implications of the debate for the interpretation of the UN Charter receded with the inclusion of the notion of *ius cogens* in article 53 of the 1969 Vienna Convention and with the establishment, in its article 27, of the proviso that even domestic constitutional law does not serve as a justification for noncompliance with international legal obligations.¹¹³ These developments would be followed, soon after, by the ground-breaking reference to *erga omnes* obligations in the Barcelona Traction case¹¹⁴ as well as the parallel work of the International Law Commission (ILC) and the notion of international crimes—today, a “stateless notion.”¹¹⁵ Key in the normative developments, emphasizing a “hierarchy of rules, rather than sources, on the basis of their content and underlying values,”¹¹⁶ was a parallel, universalist, and classical revival of natural law after the Second World War¹¹⁷ that accompanied the gradual, yet slow, emergence of the new field of international human rights law.¹¹⁸ This natural law revival would progressively ally itself with the reemergence 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 activities¹¹⁹ of these institutions represented “the progressive overcoming of statehood by the economic and technical laws of a globalising modernity.”¹²⁰ The dramatic expansion of the field of international law because of its horizontal extension with the decolonization process, greater institutional vertical development, and a concomitant widening of its scope (through new and related fields that were accompanied by a series of normative and jurisprudential developments in the 1960s and 1970s) fuelled the gradual renewal of the German international constitutionalist tradition. This revival, which took place under the influence of Verdross’s *Die Verfassung der Volkerrechtsgemeinschaft*¹²¹ and his late joint work with Bruno Simma,¹²² was to find itself associated with the school of the “doctrine of international community,” which had already been championed by W Friedmann, coiner of the

¹¹³ See arts. 53 and 27 of the VCLT.
¹¹⁶ Bianchi, supra note 63, at 494.
¹¹⁹ Koskenniemi, supra note 10, at 1–2.
¹²⁰ Id. at 14.
¹²¹ Alfred Verdross, *Die Verfassung der Volkerrechtsgemeinschaft* (1926).
term of “co-operative international law” in his *The Changing Structure of International Law*\(^{123}\) of 1964.

For Friedmann, such a structure included an international law of coexistence or coordination, 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,”\(^{124}\) and new organization that, taken together, he interpreted as pacesetters in the progressive realization of a more perfected international community. In highlighting “the shift in the subject matter of international law” toward an “international law of welfare,”\(^{125}\) 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.\(^{126}\) The notion of constitutional international law was further enshrined by H Mosler, who became one of the first proponents of the concept of an international legal community called to defend the existence of a common public order “not restricted to mere formal principles” but inclusive of the “substantive principles of co-existence and co-operation” that “are to be found in the general consciousness of human values which are the ultimate goal of any legal order.”\(^{127}\)

With the end of the Cold War and 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-constructive doctrine has been captured, succinctly, by 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.\(^{128}\)

Such a post–Cold War European reinforcement of this doctrinal “narrative of continuation with the past”\(^{129}\) is much informed by the natural teleology animating Kant’s 1784 *The Idea for Universal History with a Cosmopolitan Purpose*\(^{130}\) and, with it, the “ethos of the European Enlightenment that looked towards a universal federation of free republics.”\(^{131}\) 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

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\(^{124}\) Id. at 62.

\(^{125}\) Id. at 66.

\(^{126}\) Id. at 153–159.


\(^{128}\) Simma, supra note 52, at 44.


\(^{131}\) Koskenniemi, supra note 27, at 38.
in the early 20th century” 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.

Various German authors, by expanding the concept of the international constitution as coexistent with the international community, have contributed to the revamping of the constitutional debate in the early 1990s. In this work, C. Tomuschat figures prominently. Tomuschat’s perspective on international law as “the constitution of mankind” is seen, usually, 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 acknowledges that the radical indeterminacy of international law affects any consideration of its “bindingness.” In so doing, Tomuschat appears to be implicitly echoing the tension, deconstructed by postmodernist international legal theory, in the inescapable, simultaneous search for concreteness and normativity present in the structure of the international legal argument that was thought to have triggered an eclectic pragmatic functionalism in the post–Second World War doctrinal scenario. This same tension is seen in the correlate doctrinal flight from the very same focus on theory that the postmodernist turn in international law was to bring back to the fore from the mid-1980s onward. Tomuschat’s conception is seen, usually, as part of a German trend associated with a number of courses given by him at the Hague Academy, as well as with those taught by Frowein or Simma or, more recently, by P.-M. Dupuy, who distinguishes between formal unity, characteristic of the classical period, and substantive unity, as characteristic of the contemporary period. Bardo Fassbender, a very vocal

132 Id. at 4.
133 Kolb, supra note 32.
136 Tomuschat, supra note 62.
137 Koskenniemi, supra note 83.
proponent of this line of thought, has 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.”

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.”

Fassbender, who identifies the “UN Charter as the (substantive and formal) constitution of the international community,” has expressly located his efforts within what he defines as Tomuschat’s school and its emphasis on “the nonconsensual character as the principal feature of international constitutional rules.”

This postreconstructive functionalist doctrine benefits from the gradual transposition of *ius cogens* norms to fields other than the law of treaties including the domestic legal sphere. It also benefits, from the enshrinement of *erga omnes* obligations, understood as obligations toward the international community as a whole within a system of aggravated responsibility for serious violations of norms of particular importance to the international community. Moreover, in a global landscape of almost complete membership by all states in the UN, the doctrine’s appeal is enhanced by article 103 of the UN Charter as “a rudimentary mandatory hierarchical structure of the international legal system which is no longer at the disposition of national law and the nation state.” The recognition of the existence of suprapositive norms since the 1990s has also become more preponderant through international and national judicial sanctions, a phenomenon that has confirmed the gradual integration of these sanctions, which had previously been proposed mostly in international legal scholarship, into the traditional system of consent-based sources of international law while, at the same time, marking the limits of their scope within the latter.

Building on the state-centered, hierarchical backbone of formal constitutionalism, this trend attempts to add a number of substantively informed, nonconsensual rules to the systemically required, formal core of what has been termed, traditionally, the “necessary law of nations,” metarules, or secondary rules upheld by the rule of recognition. In so doing, 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.”

144 Fassbender, *supra* note 1, at 320.
145 *Id.* at 308.
147 Also Fassbender *supra* note 1, at 313.
148 *Id.* at 317.
other words, in defending the enshrinement of a general category of nonconsensual norms, the new doctrine puts forth the argument that a general exception has now been added, definitively, to a number of other 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.”154 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, namely, 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.”155

The international community school has been defined, critically, as a “weak reading of international constitutionalism”156 because it is “rooted in positivism and determined not to lose touch with actual state practice”157 in its pretension to blend the “normatively desirable and the normatively feasible.”158 In this way the international community school comes to fruition in a series of post–Cold War normative outcomes grown in the soil of the post–Second World War era, which was nurtured by the scholarly debates that took place during the interwar years.

3. The post–Cold War setting

3.1. International institutionalization

The intensification of constitutionalist talk in international law has been examined, so far, solely in terms of a “narrative of continuation with the past” in theoretical pursuit of the Kantian cosmopolitan lodestar. This narrative has thrived in a liberal culture aspiring to universalize the rule of law in the so-called postrealist age159 of the post–Cold war era, an era that responds to the telos of a project that looks forward to crossing another conceptual threshold through the efforts of international lawyers “to move away from diplomacy and politics”160 and to enhance the rule of law beyond domestic settings. The contemporary appeal of this constitutionalist talk accords with the great boost that results from the increasing institutionalization of the

154 Id. at, 221.
157 Fassbender, supra note 1, at 320.
158 Von Bodagny, supra note 7, at 721.
159 Koskenniemi, supra note 4.
160 Koskenniemi, supra note 10, at 15.
international plane and from the parallel increase in the process “of legal and de facto
denationalisation” brought about by the ensuing “transfer of policies traditionally
regulated by domestic law to international or supranational governance structures
of regimes.”161 Legitimacy queries, which have arisen in connection with the prob-
lematic adaptation of the state-centered, consent-based Westphalian model to an
increasingly supranationalized post–Cold war setting, have become an inextricable
part of today’s international constitutional debate. Moreover, the effects of global-
ization on international law, including the forms of functional diversification known
as fragmentation and deformalisation, have multiplied the challenges162 faced by an
international constitutional perspective that travels in the same bandwagon with
today’s ever-expanding international institutionalization. However, before exam-
ining 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
remarkable phenomenon of regional integration in the last two decades and, espe-
cially—within this framework—to the “spill over effect of the European debate.”163
As if reflecting Friedmann’s characterization in 1964 of regional groupings “as pace
setters that will furnish models of integration that Mankind may later use on a uni-
versal level when it has reached a corresponding degree of community values and
purposes.”164 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.”165 While the European constitutionalist scene is not 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,”166 the constitutional rhetoric—early on
heralded by the European Court of Human Rights and the jurisprudence of the Euro-
pean Court of Justice (ECJ)—appears today completely normalized167 and, within this
polito-legal realm,168 an accepted feature of the mainstream.

However, two provisos usually accompany the appraisal of the international
constitutional plane, when it is approached from the perspective of the debate on

161 Cottier & Hertig, supra note 152, at 269.
162 Nico Krisch & Benedict Kingsbury Introduction: Global Governance and Global Administrative Law in the
164 Friedmann supra note 124, at 63.
165 De Wet, supra note 164, at 52–53.
166 Cottier & Hertig, supra note 152, at 283–298.
167 For, e.g., “. . . 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,” see Cris
Shore, Government Without Statehood? Anthropological Perspectives on Governance and Sovereignty in the
European constitutionalization. It is, in the first place, generally agreed that—although “less-developed and unsettled”\textsuperscript{169}—“the discourse on international constitutionalism is gaining momentum, [although] it is still in its infancy and appears rather slippery.”\textsuperscript{170} Second, it is also usually noted that “the constitutionalization of the EC/EU is hardly suitable as a model for world-wide constitutionalism,”\textsuperscript{171} or, to put it differently, that both should be seen as “two separate polities, each having their particular constitutional ethos.”\textsuperscript{172} Nonetheless, cross-bred constitutionalist frameworks offer great potential for creatively analyzing the nature and terms of the constitutional debates within both contexts\textsuperscript{173} as each mirrors the increasing hybridization that characterizes the exploration of diverse accounts of constitutionalism beyond the state.\textsuperscript{174}

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, from 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,\textsuperscript{175} a variable number of organs are entitled to interpret an organization’s constitutive documents. Interpretation by other plenary organs or arbitral tribunals most often is done according 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”\textsuperscript{176} interpretation of texts in international law should be distinguished from the rhetoric, which, historically, has employed constitutional analogies with regard to international organizations. This latter type of constitutional approach to the law of international organizations has been termed the field of “micro-constitutionalist analysis.”\textsuperscript{177} Various classic debates bear witness to this traditional field of international constitutionalist interest. Among them, reference should be made to those tackling hierarchy issues between organs within a specific international organization; those referring to the delimitation of powers between international organizations and their member states; those touching upon questions of hierarchy between universal institutional frameworks and regional bodies; and those exemplifying the relationship between organs with a specific, similar functional range.

\textsuperscript{169} Cottier & Hertig, supra note 117, at 272.
\textsuperscript{172} Nicholas Tsagourias, \textit{The Constitutional Role of General Principles of Law in International Law and European Jurisprudence, in Transnational Constitutionalism: International and European Perspectives} 71, 85 (Nicholas Tsagourias ed., 2007).
\textsuperscript{173} \textit{Id.} at 9.
\textsuperscript{174} \textit{Id.} at 4.
\textsuperscript{177} Dupuy, supra note 143, at 228.
Even when made the object of a specific field of inquiry in the name of international constitutional law by Friedmann in the 1960s, this formal type of constitutionalist terminology in connection with international organizations has not been free of criticism. Thus, for J Alvarez, “neither logic, function, text or history support constitutional analogies as applied to the UN Charter”; such “inappropriateness of domestic constitutional analogies” is, according to this author, all the more true of other international organizations. For Alvarez, although the “presence and persistence of constitutional analogies remains a firm part of real world legal practice,” the resilience of constitutional analogies is sustained only by their strategic use in argumentation in academic quarters, among policy makers, and among international adjudicators. Thus, constitutionalism appears, in this understanding, as barely more than the product of international lawyers’ professional bias inspired by the telos of the discipline against an ever-present realpolitik status quo.

Alongside this perspective, the parallel contemporary trend toward the constitutionalization of treaty regimes—although considered partly misdirected against overzealous organizations and critically captured in its contemporary form as “constitutionalism lite”—has been characterized as “the subject of the first serious political debate on international organizations.” The merit of this trend lies partly in “that it takes organizations 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. Indeed, the field of “micro-constitutional analysis” and the field of “macro-constitutional analysis” appear to be bridged by A Peters’s appraisal of the World Trade Organization (WTO) as a pioneer of both types of approach. This author points to four factors fostering the constitutionalization of WTO law. These are the legalization of dispute settlement, the principles of most-favored nation and national treatment, the fact that international trade rules overcome political process deficiencies, and the option of directly applying the rules of the General Agreement on Tariffs and Trade (GATT). Peters’s perspective, however, should be seen within the ongoing multifaceted debate on the possibility, desirability, and practical implications of the constitutionalization of the WTO and, by extension, other international organizations.

179 José Alvarez, Constitutional Interpretation in international organizations, in The Legitimacy of International Organizations 104 (Jean Marc Coicaud & Veijo Heiskanen eds., 2001).
180 Id. at 109.
181 Id. at 10.
182 Id. at 110.
184 Id. at xvi.
185 Peters, supra note 171.
186 Id. at 171.
187 For an overview of the debate, see Cottier & Hertig, supra note 152, at 272–275.
3.2. Fragmentation

Additionally, the burgeoning of constitutional talk within international law has been fostered, further, by its association with anxieties related to, first, the challenge posed by the impact of globalization on international law and, second, the side effects on international law of “one of the features of late international modernity,” namely, “functional differentiation,” understood as the “increasing specialization of parts of society and the related autonomization of those parts.” One form of such functional differentiation is embodied in the potentially conflictive diversification and expansion of international law brought about by the proliferation of international institutions dealing with specialized 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, thus, the ensuing risk of contradictory international jurisprudence. Defined as the doctrinal debate par excellence of the globalization age, there is an almost unanimous agreement that the risk of fragmentation of international law, brought about by the “emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice,” is one of the factors to which the international constitutionalist discourse owes its contemporary renewal.

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,” has been the object, recently, of a highly remarked ILC study group report. After the sounding of an alarm by two consecutive annual reports by ICJ presidents, the ILC group was established to examine these difficulties; Martti Koskenniemi was appointed chair. The manner in which the phenomenon of fragmentation has “started to reverse established legal hierarchies


192 Id. at 2.

193 ILC Report, supra note 191, at 11.

194 Peters, supra note 171, at 587.


197 ILC Report, supra note 191, at 12.
in favour of the relevant bias in the relevant functional expertise.”198 is shown by the three forms of fragmentation (which are reflective of the phenomenon in both “its legislative and institutional form”).199 These are the practices of an open (although rare) challenge to general international law by means of heterodox interpretations put forth by the new, specialized institutions (for example, the Tadic case); the embodiment of solid exceptions by specialized regimes to general international law (for example, human rights bodies’ competence stretching beyond state consent); and the opposition of particular regimes among themselves.200 The danger looming behind this overall phenomenon is that of “conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.”201 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.”202

Against this background, the report reaffirmed, as is widely known, that international law is a legal system and, as such, one responsive to systemic exigencies that account for the unity of international law. The report’s conclusion has been translated in more colloquial 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.”203 The response of the ILC to fragmentation, via the “examination of techniques to deal with conflicts (or prima facie conflicts) in the substance of international law,”204 “suggest[s] that system and hierarchy are intrinsic to juristic thought, and thus also to international law.”205 This reaffirmation of formal unity allows for the linking of the constitutionalist field with what may be defined, loosely, as the hierarchy of international norms’ dimension of constitution-related general discourse. As such, this has been taken as an advance from earlier debates on the existence of normative hierarchies in international law vis-à-vis disputes regarding the systemic existence of the latter.206 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 the fore formal normative constitutionalization as a response to fragmentation’s differentiation. The report’s findings, however, should not obscure the fact that they constitute something of a pyrrhic victory when seen against Koskenniemi’s background analysis.

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198 Koskenniemi, supra note 10, at 1–2.
199 ILC Report, supra note 191, at 12.
200 Martti Koskenniemi, Droit international et hégémonie, in MARTTI KOSKENNIELI, LA POLITIQUE DU DROIT INTERNATIONAL 304 (2007).
201 ILC Report, supra note 191, at 11.
202 Id. at 14.
204 ILC Report, supra note 191, at 17.
205 Koskenniemi, supra note 10, at 16.
206 Andreas Paulus, The International Legal System as a Constitution, in Ruling the World?: Constitutionalism, international Law, and Global Governance 69, 82 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009)
According to Koskenniemi, the emergence of multiple specialized regimes implies that the political conflict regarding the “question of significance”—which is not intrinsic but dependent on the interests and preferences with which one examines the question as to how we know which is “the regime most relevant, or specific, to a matter”\textsuperscript{207}—transforms itself into a conflict of jurisdictions, a struggle for institutional hegemony. This is due to the emergence of multiple antiformal expert regimes, each of which seeks “to make its special rationality govern the whole, to transform its preference into the general preference.”\textsuperscript{208} The fact that “fragmentation becomes [a] struggle for institutional hegemony”\textsuperscript{209} is, according to Koskenniemi, underwritten by an integrative systemic vision of international law, which says “no more than that whatever [the] decision, it should be made by legal institutions, in particular institutional settings populated by public international lawyers.”\textsuperscript{210} While the commission decided to leave the question of institutional competences (namely, 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:\textsuperscript{211} that is, “the agreement that some norms simply must be superior to other norms [which] is not reflected in any consensus in regard to who should have a final say on this.”\textsuperscript{212} In Koskenniemi’s analysis, the superiority of some norms over others implies neither a consensus on a hierarchy between the various legal regimes nor a consensus on a hierarchy of institutions representing general international law vis-à-vis other forms of institutionalized 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,”\textsuperscript{213} is not considered effective against a “natural development”\textsuperscript{214} that “reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques.”\textsuperscript{215}

In order to grasp the full dimensions 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”)\textsuperscript{216} on the spread of the 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 key rhetorical role vis-à-vis empire and to examine, as well, the impact on the equation of deormalization as a form of functional differentiation pursuant

\textsuperscript{207} Koskenniemi, supra note 10, at 16.
\textsuperscript{208} Id. at 23.
\textsuperscript{210} Koskenniemi, supra note 10, at 18.
\textsuperscript{211} ILC Report, supra note 191, at 13.
\textsuperscript{212} Koskenniemi, supra note 10, at 18.
\textsuperscript{213} ILC Report, supra note 191, at 12.
\textsuperscript{214} Id. at 15.
\textsuperscript{215} Id. at 14.
\textsuperscript{216} Id. at 11.
to the effects of globalization on international law. However, before dealing with a normative, value-oriented constitutionalism—which is one supportable interpretation though not beyond debate\textsuperscript{217}—by way of normative formal hierarchies, it might be worthwhile to refer to what seems the doctrinal opposite to unity in connection to the phenomenon of fragmentation of international law. What presents itself as a variant on the hydra-like renewal of constitutionalist vernacular in contemporary international law, is the parallel evolutionary development of transnationalism and regime theory and other systems-theoretical perspectives in this area. This latter development is a line of thought pertaining to the “fragmented/societal model of constitutionalism” à la Fischer-Lescano and Teubner (putting aside the sociology of Luhmann), with their extension of constitutionalism beyond purely intergovernmental relations to “a multiplicity of civil constitutions.”\textsuperscript{218} This particular view naturally perceives the “wholly unrealistic attempt to create a hierarchy within the fragmentation of global law”\textsuperscript{219} to be a chimera, which, following the decentering of politics, is seen, rather, “as by far the most advanced statement” of legal pluralism.\textsuperscript{220} In fact, this approach sees in the constitutionalization of autonomous subsystems of world society the only “damage limitation” available. Faced with inter-regime conflicts among the proliferating sectoral regimes, the best law can offer, for these authors, is, therefore, to accept its epiphenomenality in acting as “a gentleciviliser of social systems”\textsuperscript{221} for the sake of “intra-regime responsiveness to the immediate human and natural environment.”\textsuperscript{222} An example of the application of this approach would maintain that in the era of globalization—because of the transition from government to governance conceived of “as the horizon of all possibilities for self-determination” in a heterarchical world—the self-determination of regimes is assuming the position of a foundational constitutional principle of global governance.

Fischer-Lescano and Teubner’s questioning of whether one actually can speak of just one international community and just one international value system, along with their understanding of transnational regimes as destined to replace territorial states, highlights the stress of this approach on autopoietic regulatory systems when confronted with the state-centered international constitutionalism of “the hierarchical/political model” à la Tomuschat, Fassbender, or Dupuy. The latter are identified with an international community school that preempts the former and purports to maximize, in a vocabulary of constitutionalism, the post–Cold War harvest of the doctrinal seeds planted and cultivated since the end of World War Two on the soil nurtured by the interwar years’ debates.

\textsuperscript{217} Warning against the “messianic dimension” of the discourse, see Kolb, supra note 32.
\textsuperscript{218} Gunther Teubner \textit{Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?}, in \textit{TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM} 2, 8 (C. Joerges et al. eds., 2004).
\textsuperscript{219} Fischer-Lescano & Teubner, supra note 11, at 1037.
\textsuperscript{220} Koskenniemi, supra note 12, at 22.
\textsuperscript{221} Fischer-Lescano & Teubner, supra note 11, at 1045.
\textsuperscript{222} Id. at 1037.
Two other converging factors lie behind the many-headed renewal of constitutionalist parlance in international legal doctrine: the strengthening of that vernacular vis-à-vis the emergence of empire and the sword of Damocles poised in opposition to the vernacular’s very substantive pretensions by the phenomenon of deformalization 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 is the deformalization of international law. This development has been fostered by the preeminence given to the rule of law in a vision of international law made over in the image of liberal Western domestic politics. Deformalization 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.” 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.” If the emergence of antiformalist expert regimes goes hand-in-hand with the emergence of multiple specialized regimes and corresponding worries about fragmentation, so the roots of deformalization might be retraced, more profoundly, to the post–Cold War’s zeitgeist. This may be the case 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.”

Concomitant with what was referred to, a decade ago, as the “turn to ethics” in international law, deformalization is a consequence, it seems, 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.” Moreover, such a gradual acceptance of a managerialist vocabulary of compliance, legitimacy, cost-benefit analysis, and the like reflects a growing spillover of the discipline of international relations into the domain proper to international law, pursuant to a pedigree of antiformalism that

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223 Koskenniemi, supra note 12, at 13.
224 Koskenniemi, supra note 10, at 9.
225 Koskenniemi, supra note 10, at 9.
226 Id. at 13–14.
has been retraced back to the post–Second World War era. In this understanding, deformalization reveals itself both allied with empire, understood “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,”229 as well as with any instrumental-value, hegemonic pursuit by relatively dominant actors, thus explaining why, in Koskenniemi’s view, constitutionalism “may equally consolidate types of authority that seek to perpetuate Europe’s comparative advantage.”230

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 favor of constitutionalization. This can be seen as a political and emotional reaction to what is perceived as the lawless imperialism of U.S. neoconservatives and the defense of the UN’s role in international legal governance at a time defined by Jürgen Habermas as “one witnessing the advocacy of the liberal ethos of a superpower as an alternative to law.”231 Constitutional talk is intrinsically connected with the foregrounding of the UN Charter as the constitution of the international community, supplemented by other constitutional bylaws specifically dealing with the international legal regime for the protection of human rights. However, the usefulness of the formal version of constitutionalism—one that “suggests that system and hierarchy are intrinsic to juristic thought,” which is “a battle European jurisprudence seems to have won”232—has been seriously doubted when seen 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 postnational, constitutional, value-ridden order that attempts to flesh out its architecture with a normatively purposive bias.

As noted by Koskenniemi, in describing paradoxical objectives, “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.”233 The evolution toward new vocabularies of international law grounded on international relations is, according to this view, likely to channel new forms of lego-material domination, which, as such, find fertile ground in the solipsistic character of sectoral regimes in international law. Given that each of these regimes is ridden by its own hegemonic substantive telos, as channeled through deformalized instrumental vocabularies, it follows that jurisdictional conflict and a struggle for institutional hegemony is likely to arise. These struggles and conflicts will

229 Koskenniemi, supra note 12.
230 Koskenniemi, supra note 83, at 616.
231 Jürgen Habermas, Does the Constitutionalization of International Law Still Have a Chance?, in THE DIVIDED WEST 115, 116 (Ciaran Cronin ed. & trans., 2006).
232 Koskenniemi, supra note 10, at 18.
233 Id. at 16.
occur in a transnational sphere that is gradually becoming more impermeable to contestation by the lego-formal rationality of sovereign states that, paradoxically enough, "stands as an obscure representative of an ideal against disillusionment with global power and expert rule" today.

3.4. Legitimacy

The development of a democratic focus in international law can be outlined and framed as a definable area of evolution within the international constitutionalist field. The already extensive scope of this inquiry does not allow for comprehensive discussion of the ways in which the peculiarities of the multifaceted democratic debate in international law may be transferred to the constitutional arena. Still, juxtaposing some background on this debate with an examination of the role played by democracy in international constitutionalism will provide 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, can be said to represent the "core of the skeptic’s challenge" to the constitutionalist understandings of international law. When seen from the perspective of the democratic debate in international law, the neoconservative challenge, as a school of thought, may be closely related to the intrastate dimension of the emergence of the democratic principle in international law. In its most basic version, such a position is founded on the sacrosanct democratic character of the U.S. Constitution in pursuit of unbounded national interests and is set against any assertions of legitimacy on the part of an international law composed by nondemocratic states and nonlegitimized state actors. In this light, neoconservative theory can be seen, merely, as a political and nationalistic radicalization of what has been, in weaker or stronger liberal forms, the general orientation of liberal internationalist schools of international law in the U.S. and parts 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 banners of “liberal anti-pluralism” or “liberal millenarism.”

trends, ranging from the “Kantian theory of international law,”\(^\text{240}\) to the “democratic entitlement school,”\(^\text{241}\) to “the liberal internationalist dual agenda,”\(^\text{242}\) to post–Cold War realist variants of the “New Haven School,”\(^\text{243}\) and “Rawlsian Liberalism”\(^\text{244}\) or “liberal cosmopolitism,”\(^\text{245}\) all have in common their persuasive support—which is, incidentally, not devoid of a sound international legal basis in practice\(^\text{246}\)—for the emergent 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 their domestic form of government; or, if preferred, the democratic principle in international law is not limited to the intrastate 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 deeply affected by the suprastate dimension of the emergence of the democratic principle in international law. These schools represent a series of perspectives ranging from the administrative global law project,\(^\text{247}\) to the cosmopolitan democratic project of creating global democratic international institutions,\(^\text{248}\) to those other perspectives now captured under the label “compensatory constitutionalism.”\(^\text{249}\)

Finally, a third dimension of the emergence of the democratic principle of international law is the classic interstate version of the principle. The legal goal of the interstate democracy project can be equated with the aspiration to make the rule “one state, one vote” a reality and accord, thereby, the same weight to each state’s vote within the international lawmaking process. Inspired by the principle of individual electoral equality within popular sovereignty-based democratic systems, this doctrine, which purports to transpose democracy as a constitutive principle to interstate relations, is sometimes presented as the synthesis of the principles of the equal sovereignty of states, the self-determination of peoples, and distributive justice.\(^\text{250}\) As such, it is traceable to the horizontal extension of the international community of states brought about by the decolonization process in the 1960s, which had been given governmental backing in political terms by the 1970 Lusaka Declaration issued by


\(^{248}\) See, e.g., *Political Community: Studies in Cosmopolitan Democracy* (Daniele Archibugi, David Held, & Martin Kohler eds., 1998).

\(^{249}\) Peters, supra note 171.

the third conference of the nonaligned movement. This process rendered conspicuous the democratization of international relations understood as “an imperative necessity of our times,” given 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.”

This anthropomorphic-inspired goal to democratize international relations through state majoritarian formulas—closely associated with the New Economic International Order and, thus, as a component of a broader “have not” agenda—can be understood as a procedural strategy adopted by Third World states. It represents 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 as “the legal epitome of the fact that they are masters in their own house,” to develop a new international law. Briefly examined, these three general dimensions to the emergence of the democratic principle in international law could well function 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

In addition to the image of constitutionalism, as a narrative of continuation with the past, the profile of which has been boosted in recent literature, with other converging and parallel factors, as a reaction to “fragmentation, deformalisation and empire,” it may be—to conclude—worthwhile recalling Koskenniemi’s insight as to “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?”

This second question becomes more pressing and visible 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,” which are then “broken down into boxes, each of them . . . solipsistic and imperialistic.” While Koskenniemi’s dual examination of fragmentation and deformalization casts doubt on the adequacy of a value-ridden constitutionalization of


255 Koskenniemi, supra note 10.

256 Koskenniemi, supra note 203, at 2.

257 Id. at 4.
international law, the fact remains that the classic interwar-years debate on “how is law between sovereign states possible” appears, today, reversed in the contemporary global-governance setting as it is affected by the phenomena of functional diversification. In this new scenario, international constitutionalism appears restaged as a state-centered counterreaction to the problem brought about by the proliferation of specialized regimes in international law acting solipsistically and empire-like. It is, in fact, 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 favor of a community-based order. The reversion is complete when one analyses how, on the other hand, legal pluralism, traditionally characterized by its state-centered approach, reappears in today’s debate as an antistate, 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.