Fragmentation vs the Constitutionalisation of International Law

The current system of international law is experiencing profound transformations. Indeed, the simultaneous processes of globalization combined with the disintegration of international systems of governance and law-making pose complex challenges for legal scholarship. The doctrinal response to these challenges has been theorized within two seemingly contradictory discourses in international law: fragmentation and constitutionalisation.

This book takes an innovative approach to international law, viewing the processes of the fragmentation and constitutionalisation as being profoundly interconnected and reflective of each other. It brings together a select group of contributors, including both established and emerging scholars and practitioners, in order to explore the ways in which the problems of fragmentation and constitutionalisation are viscerally linked one to the other and thus mutually conditioning and stimulating. The book considers the theory and practice of international law looking at the two phenomena in relation to the various fields of international law such as international criminal law, cultural heritage law and international environmental law.

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<table>
<thead>
<tr>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Law in a Multipolar World</td>
<td>Edited by Matthew Happold</td>
</tr>
<tr>
<td>The Law on the Use of Force</td>
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</tr>
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<tr>
<td>The Right to Self-Determination Under International Law</td>
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</tr>
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</tr>
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</tr>
<tr>
<td>Criminal Responsibility for the Crime of Aggression</td>
<td>Patrycja Grzebyk</td>
</tr>
<tr>
<td>Regional Maintenance of Peace and Security under International Law</td>
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</tr>
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</tr>
<tr>
<td>Resolving Claims to Self-Determination Is There a Role for the</td>
<td>Andrew Coleman</td>
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<td>The Rise of Tamil Separatism in Sri Lanka</td>
<td>Gnanapala Welhengama and Nirmala Pillay</td>
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<tr>
<td>The United Nations and Collective Security</td>
<td>Gary Wilson</td>
</tr>
<tr>
<td>Justice for Victims before the International Criminal Court</td>
<td>Luke Moffett</td>
</tr>
<tr>
<td>Public-Private Partnerships and Responsibility under International Law</td>
<td>Lisa Clarke</td>
</tr>
</tbody>
</table>
Cultural Diversity in International Law
The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
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Wibke K. Timmermann

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Fragmentation vs the Constitutionalisation of International Law
A Practical Inquiry

Edited by
Andrzej Jakubowski and Karolina Wierczyńska
# Contents

*Notes on contributors*  
xii  
*Foreword*  
xvi  
*Acknowledgments*  
xviii  
*Select abbreviations*  
xix  
*Table of legislation*  
xxi  

**Introduction**  
1  
**ANDRZEJ JAKUBOWSKI AND KAROLINA WIERCZYŃSKA**  

## PART I  
**International constitutionalisation as a claim**  
13  

1  
**Constitutionalisation: a new philosophy of international law?**  
15  
**JERZY ZAJADŁO AND TOMASZ WIDLAK**  

2  
**From the internationalisation of national constitutions to the “constitutionalisation” of international law: the role of human rights**  
32  
**VASSILIS P. TZEVELEKOS AND LUCAS LIXINSKI**  

3  
**International constitutionalism, language in legal discourse, and the functions of international law scholarship**  
53  
**ROMAN KWIECIEŃ**  

4  
**The creeping constitutionalisation and fragmentation of international law: from ‘constitutional’ to ‘consistent’ interpretation**  
69  
**MAURIZIO ARCARI**
PART II
Fragmentation of international law as a challenge to its constitutionalisation 87

5 The paradoxes of fragmentation: does regional constitutionalisation constitute a fragmentation threat to the international legal order? 89
   FRANÇOIS FINCK

6 International constitutionalisation of protection of privacy on the internet: the Google case example 106
   KRYSYNA KOWALIK-BANCKZYK

7 The “revival” of sovereignty via the complementarity regime and the “doctrinal” idea of responsibility to protect; what about constitutionalisation? 118
   MARIA VARAKI

8 Fragmentation of the law of targeting: a comfortable excuse or a dangerous trap? 132
   PATRYCJA GRZEBYK

9 The Rome Statute and the debate surrounding the constitutionalisation, fragmentation and pluralisation of international criminal law 146
   KAROLINA WIERCZYŃSKA

PART III
Constitutionalisation through fragmentation 161

10 Justifying ‘fragmentation’ and constitutional reforms of international law in terms of justice, human rights and ‘cosmopolitan constitutionalism’ 163
   ERNST-ULRICH PETERSMANN

11 A constitutionalised legal order: exploring the role of the World Heritage Convention (1972) 183
   ANDRZEJ JAKUBOWSKI

12 Constitutionalisation through fragmented adjudication? 203
   MÓNICA AMBRUS
13 From fragmentation to coherence: a constitutionalist take on the trade and public health debates 222
CHIEN-HUEI WU

14 Access to environmental justice for NGOs: interplay between the Aarhus Convention, the EU Lisbon Treaty and the European Convention on Human Rights 244
MARJOLEIN SCHAAP - RUBIO IMBERS

15 The reconciliatory approach: how multilateral environmental agreements can harmonise international legal obligations 265
BRITTA SJÖSTEDT

Index 288
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Processes commonly associated with “global governance” or “globalization” affect the structures of public international law. In the heyday of the nation state, public international law was predominantly conceived of as the law located “in-between” states, where international legal arrangements were to fulfil a very specific function: enabling the translation of political disputes into legal claims – and thus the peaceful resolution of conflicts. This conceptualization of international law as a specific form of political self-constraint provides an inaccurate picture of today’s legal arrangements in several respects. International law faces important structural changes: from the advent of novel forms of warfare, the resurrection of targeted killings, and the managerial structures of governance across fields to the degradation of the global environment or the challenges posed by global economic crises. These challenges escape the constitutive confines of the state system and require new solutions.

For some, the legal system is in need of a new constitution and a new hierarchy of norms. Proponents of this thesis point to new supranational rules, human rights, transnational judicial cooperation, general principles of law and procedural guarantees. Since the 1990s, the use of constitutional language has gained increasing popularity in international legal parlance. The vocabulary of constitutionalism has been used in different contexts, from in-depth critiques of existing international law to analyses of international tribunals, the revitalization of international organizations, the self-understanding of European organizations or the development of core values in international law.

Others, however, witness a fragmentation of international law, arguing that the functional differentiation of international law challenges its unity and hierarchy. In this context, scholars have often pointed out the rise of managerialism and expert rule and the blurring line between public and private authority. While constitutionalisation builds on the uniforming aspects of globalization, fragmentation follows from the differentiation of functional systems, while managerialism challenges the formality of law as such.

Existing scholarship has long treated the processes of constitutionalisation and fragmentation as separate phenomena or as opposite lenses through
which to study the development of international law. Only recently has academic literature started to explore the possible interlinkages between the constitutionalisation, fragmentation and politicization of international law. This was also the main focus of the COST Action IS1003 “International Law between Constitutionalisation and Fragmentation. The Role of Law in the Post-national Constellation” – a vehicle that allowed for scientific collaboration between researchers from various European universities. In particular, the Action concentrated its investigative endeavours on the problems posed by the existing interplay between fragmentation, constitutionalisation and the politicization of international law, seeing these elements as different dimensions of a more systemic change taking place in the international legal order.

The current volume builds on this stream of literature and represents an important part of the research efforts that were undertaken within the COST Action IS1003. It offers a more contextualized perspective on the constitutionalisation and fragmentation discourse. At the same time, it highlights the close interconnectedness of the processes of constitutionalisation and fragmentation in international law. We are confident that the papers included in this volume will allow readers to look at certain developments in international law from fresh (and sometimes surprising) perspectives, contributing to the current academic discussion on the changing structure of international law.

Last but not least, we also would like to acknowledge the financial support provided by the Polish National Science Centre (NSC) within its Harmonia programme, which facilitated the participation of Polish researchers in the activities of the COST Action. In particular, the NSC co-financed the organization of the conference entitled “Constitutionalisation and Fragmentation of International Law Revisited”, held in November 2013 in Warsaw. This meeting became a basis for subsequent collaboration between its participants and eventually led to the publication of the present volume.

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VU University Amsterdam
Prof. Łukasz Gruszczyński
Institute of Law Studies
Polish Academy of Sciences
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Andrzej Jakubowski and Karolina Wierczynska

Warsaw
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AJIL</td>
<td><em>American Journal of International Law</em></td>
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<td>BYIL</td>
<td><em>British Yearbook of International Law</em></td>
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<td>CAH</td>
<td>Crimes against Humanity</td>
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<td>CFI</td>
<td>Court of First Instance of the European Union</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CUP</td>
<td>Cambridge University Press</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EJIL</td>
<td><em>European Journal of International Law</em></td>
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<td>EJLS</td>
<td><em>European Journal of Legal Studies</em></td>
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<td>EU</td>
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<td>EUCFR</td>
<td>Charter of Fundamental Rights of the EU</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>GAL</td>
<td>Global Administrative Law</td>
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<td>GATT 1994</td>
<td>General Agreement on Tariffs and Trade 1994</td>
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<td>GYIL</td>
<td><em>German Yearbook of International Law</em></td>
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<td>HILJ</td>
<td><em>Harvard International Law Journal</em></td>
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<td>HRL</td>
<td><em>Human Rights Law</em></td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ Reports</td>
<td><em>International Court of Justice Reports of Judgments, Advisory Opinions and Orders</em></td>
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<td>ICL</td>
<td>International Criminal Law</td>
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<td>ICLQ</td>
<td><em>International and Comparative Law Quarterly</em></td>
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<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IEL</td>
<td>International Economic Law</td>
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<td><em>International Journal of Cultural Property</em></td>
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<td>IJHR</td>
<td><em>International Journal of Human Rights</em></td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td><em>International Legal Materials</em></td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>JICJ</td>
<td><em>Journal of International Criminal Justice</em></td>
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<td>LJIL</td>
<td><em>Leiden Journal of International Law</em></td>
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<td>MTN</td>
<td>Multilateral trade negotiations</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>Nijhoff</td>
<td>Martinus Nijhoff Publishers</td>
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<td>NJIL</td>
<td><em>Nordic Journal of International Law</em></td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>OIE WORLD</td>
<td>Organization of Animal Health</td>
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<td>OTP</td>
<td>Office of the Prosecutor (ICC)</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<td>PGs</td>
<td>Public goods</td>
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<td>PYIL</td>
<td><em>Polish Yearbook of International Law</em></td>
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<td>R2P</td>
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<td>RGDIP</td>
<td><em>Revue Générale de Droit International Public</em></td>
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<td>RS</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>Transatlantic Trade and Investment Partnership</td>
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<td>UN</td>
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<td>UN Charter</td>
<td>Charter of the United Nations</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>UNESCO</td>
<td>The United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UNMIK</td>
<td>United Nations Interim Administration Mission in Kosovo</td>
</tr>
<tr>
<td>UNTS</td>
<td><em>United Nations Treaty Series</em></td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>WHA</td>
<td>World Health Assembly</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>WHO FCTC</td>
<td>WHO Framework Convention on Tobacco Control</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>ZaöRV</td>
<td><em>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</em></td>
</tr>
</tbody>
</table>
### Table of legislation

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement between the European Union and the United States of America on</td>
<td></td>
</tr>
<tr>
<td>the Processing and Transfer of Financial Messaging Data from the European</td>
<td></td>
</tr>
<tr>
<td>Union to the United States for the Purposes of the Terrorist Finance</td>
<td>109</td>
</tr>
<tr>
<td>Tracking Program, Brussels, 28 June 2010</td>
<td></td>
</tr>
<tr>
<td>Agreement between the United States of America and the European Union on</td>
<td></td>
</tr>
<tr>
<td>the Use and Transfer of Passenger Name Records to the United States</td>
<td>109</td>
</tr>
<tr>
<td>Agreement Establishing the World Trade Organization, Marrakesh, 15 Apr.</td>
<td>223</td>
</tr>
<tr>
<td>1994</td>
<td></td>
</tr>
<tr>
<td>Agreement on the Application of Sanitary and Phytosanitary Measures,</td>
<td></td>
</tr>
<tr>
<td>Marrakesh, 15 Apr. 1994</td>
<td>212, 222</td>
</tr>
<tr>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights,</td>
<td>222</td>
</tr>
<tr>
<td>Marrakesh, 15 Apr. 1994</td>
<td></td>
</tr>
<tr>
<td>American Convention on Human Rights (Pact of San José), San José, 22 Nov.</td>
<td></td>
</tr>
<tr>
<td>1969</td>
<td>136–37</td>
</tr>
<tr>
<td>Charter of the United Nations, San Francisco, 26 June 1945</td>
<td></td>
</tr>
<tr>
<td>7, 27, 56, 62, 71–7, 80, 85, 97–8, 105, 124–25, 144–45, 148–51, 166–67,</td>
<td>135,</td>
</tr>
<tr>
<td>171, 174, 179, 267, 278, 280, 283, 285</td>
<td>136,</td>
</tr>
<tr>
<td>138, 143, 192, 226</td>
<td></td>
</tr>
<tr>
<td>Convention (I) for the Amelioration of the Condition of the Wounded and</td>
<td></td>
</tr>
<tr>
<td>Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949</td>
<td>135,</td>
</tr>
<tr>
<td>136, 138, 143, 192, 226</td>
<td></td>
</tr>
<tr>
<td>Convention (II) for the Amelioration of the Condition of Wounded, Sick</td>
<td></td>
</tr>
<tr>
<td>and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949</td>
<td>135,</td>
</tr>
<tr>
<td>136, 138, 143, 192, 226</td>
<td></td>
</tr>
<tr>
<td>Convention</td>
<td>Title</td>
</tr>
<tr>
<td>------------</td>
<td>-------</td>
</tr>
<tr>
<td>(III)</td>
<td>relative to the Treatment of Prisoners of War</td>
</tr>
<tr>
<td></td>
<td>for the Protection of Individuals with regard to Automatic Processing of Personal Data</td>
</tr>
<tr>
<td></td>
<td>for the Protection of the Marine Environment of the North-East Atlantic</td>
</tr>
<tr>
<td></td>
<td>for the Protection of the Ozone Layer</td>
</tr>
<tr>
<td></td>
<td>on Biological Diversity</td>
</tr>
<tr>
<td></td>
<td>on Long-Range Transboundary Air Pollution</td>
</tr>
<tr>
<td></td>
<td>on Stolen and Illegally Exported Cultural Objects</td>
</tr>
<tr>
<td></td>
<td>on the Conservation of European Wildlife and Natural Habitats</td>
</tr>
</tbody>
</table>
Table of legislation  xxiii


Decision on the Implementation of the WHO Framework Convention on Tobacco Control, Punta del Este, 19 Nov. 2010 ........................................................................................................ 223, 235


Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 Apr. 1994 ................. 222

Framework Convention on Climate Change, New York, 9 May 1992 .... 265


Statute of the International Criminal Court, Rome, 17 July 1998 ........................................................................... 9, 121, 139, 148, 193, 217

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations


United Nations Security Council Resolution 2150, 16 April 2014....... 126


WHO International Health Regulation, Geneva, 23 May 2005 ........... 225
Introduction

Andrzej Jakubowski and Karolina Wierczynska

The current system of international law is experiencing profound structural and dogmatic transformations. Indeed, the simultaneous processes of globalization combined with the disintegration of international systems of governance and law-making pose complex challenges for legal scholarship. The doctrinal response to these challenges has been framed within two influential theories in international law: fragmentation and constitutionalisation. These describe and analyze the trends affecting the international legal order, which are often considered to be opposite or separate tendencies. Fragmentation basically refers to the profound systemic rupture in the structure of international law, reflected in the lack of well-developed and established hierarchies or other techniques to deal with normative conflicts and tensions between general international law norms and its specialized regimes, as well as between those regimes inter se. In turn, the constitutionalisation thesis suggests that international law has reached a certain degree of autonomy and objectivity vis-à-vis state sovereignty. As such, international law is seen as recognizing and enforcing the common interest of humanity, thus transcending the particular interests of individual states. Hence it is argued that today’s international law possesses certain common constitutional features comparable to those characterizing national constitutional systems.

If nothing else, the concepts of fragmentation and constitutionalisation are at least two competing models of reasoning. As such, they constitute a valuable exercise in normative theory and contribute to understanding the ongoing changes in the structure of international law and international society. However, should they be seen as inherently contradictory doctrines, or are they rather profoundly interconnected, merely evidencing and interpreting various dimensions of such systemic changes? In fact, both fragmentation and constitutionalisation are arguably founded on the concept of unity in public international law, although they offer differing conceptualizations of

the remedies needed to counteract or alleviate a rupture of the international legal order.

The arguments on fragmentation, which begin from ‘a predetermined position on unity,’\(^3\) refer to the concepts of politicization, pluralization and regionalization of international law. Accordingly, fragmentation has generally posited that the expansion of international law into new areas has created problems of harmony between its different branches, institutions and norm-systems.\(^4\) Such threats to the coherence of the international legal order have usually been framed in terms of a deconstruction of the hierarchy of norms and the difficulty, due to the plurality of different regulatory contexts, in maintaining shared principles and interpretations across international law.\(^5\) Fragmentation is also seen as an effect of globalization, leading to a profound compartmentalization and functional specialization in international law. Moreover, fragmentation is usually perceived not only as a challenge to the coherence and unity of international law, but also as a contributing factor to its erosion.\(^6\) Yet at the same time there is no universally accepted legal definition of fragmentation and the debate itself often appears to be a search for a solution or compromise ‘on how the tension between unity and diversity is and should be managed’.\(^7\) Therefore, the prevailing doctrinal approach essentially focuses on remedies to the fragmentation process within international law’s various layers (normative, territorial, functional and structural), aimed at enabling a greater integration both at the level of international law-making as well as with respect to legal authorities.\(^8\) The suggested remedies are usually pragmatic in nature, often advocating ‘the politics of tolerance and pluralism’ rather than ‘universalist voices’ based on dogmatic ‘consistency’ stemming from ‘humanitarianism, human rights, trade or the environment’.\(^9\) In essence, they are designed to mitigate the

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3 See Prost (n 2) 15.
5 MA Young (ed), Regime Interaction in International Law Facing Fragmentation (CUP 2012); N Krisch, Beyond Constitutionalism. The Pluralist Structure of Postnational Law (OUP 2010).
fragmentation of international law, rather than to eliminate it and (re)build its unity and coherence. Importantly, certain trends towards the mitigation or ‘de-fragmentation’ of international law have been observed in the practice of international tribunals and that of national courts adjudicating claims based on international law. It has been noted that ‘both international and national courts have recognized that they do not operate in isolation from the larger international legal system, and have found various ways to counteract the process of fragmentation that may result from their jurisdictional limitations’.

At the same time, the theoretical efforts to describe and explain societal changes affecting the unity of international law have been framed with more consistency within the concept of international or global constitutionalisation, seeing the phenomenon of globalization as a unifying factor in the international legal order rather than as a source of its fragmentation. Yet the vocabulary of parallel constitutional discourses has been applied to a great variety of contexts and dimensions of international law, and thus it too is characterized more by methodological and conceptual diversity than homogeneity or unity.

In the first place, the theory of constitutionalisation implicates a ‘de-constitutionalisation’ at the domestic level. In other words, national constitutional systems no longer regulate the entirety of governance and the exercise of governmental power, i.e. no longer retain total sovereignty. Thus alternative systems for providing basic constitutional guaranties have evolved, including those of powerful international organizations. This perspective is related to another context, wherein voices can be heard proposing analogies between domestic hierarchical constitutional systems and those laying beyond the state at the international level. These embrace various claims,
from compensatory constitutionalism to institutional constitutionalisation of the international legal order and system of justice (with reference to international adjudication).

The next context refers to normative constitutionalisation, which touches upon the foundations of the international legal order and the development of core values in international law. This has been discussed in relation to the consolidation of the catalogue of international *jus cogens* norms and the proliferation of obligations *erga omnes* – giving a normative power to the values and interests commonly shared by the international community as a whole.\(^{16}\) In this regard, the claims to constitutionalisation are mostly founded on the value and objective of promotion and protection of human dignity, traversing various layers and regimes within the body of international law. This aspect is sometimes referred to as the humanization of international law.\(^{17}\) Such new developments within the body of public international law raise questions about the generation of global normativity beyond the nation state. In light of the growing number of ‘constitutional’ international legal norms, in part arising from world order treaties and the constitutional nature of universal organizations (in particular the United Nations and the legislative activity of the Security Council), one may legitimately speak of corresponding limitations on state sovereignty.

Last but not least, the constitutionalisation thesis has been addressed in relation to social constitutionalism, which uses the concept of ‘community’ at both the domestic and global governance levels to identify the holders of constituent and constituted power within a constitutional legal order.\(^{18}\) In other words, constitutionalisation is seen through the lens of governance and the protection of various social relations emerging at the international level, beyond the realm of state sovereignty, with particular focus on the international community.\(^{19}\)

The above-mentioned approaches to international constitutionalisation recognize that the effective protection and enforcement of universally

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18 CEJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Nijhoff 2011); A O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014).
recognized constitutional values may create inevitable tensions and conflicts within the decentralized system of international decision-making, on the one hand, and within the normative hierarchy of the international legal order on the other. The constitutional approach postulates that these tensions and conflicts can be alleviated by a more profound reform of the international legal order than by the pragmatic solutions propagated by the fragmentation scholarship. Such reformist theses, largely grounded on moral considerations, perceive a constitutional order, with its hierarchically supreme constitutional principles, as a remedy to the deficits engrained in the very essence of international law, that is, its decentralization and diversity and state-oriented paradigm. Thus, the constitutionalisation may be seen not only as an ongoing process within the international legal order, but also as a solution to counteract or alleviate its rupture.

The core idea of this volume is to offer a ‘practical inquiry’ into the fragmentation-constitutionalisation debate. It aims to contextualize these theoretical positions, which often may seem merely abstract or purely dogmatic, at the substantive level. Indeed, the diverse contributions presented in the volume do not develop or adhere to any of these singular positions on the constitutionalisation and fragmentation of international law, nor do they treat them as fully autonomous theories of international law. Rather, they recognize them as scholarly narratives, used in different ways and contexts and to different extents in order to describe and explain the complexity of the current developments in the international legal order. Moreover, fragmentation and constitutionalisation are seen as interconnected, or even dependent on one another. In fact, some of the authors of this book seem to share the arguments voiced by Jeffrey L. Dunoff and Joel P. Trachtman and present fragmentation as an inherent element of, or even a basis for, constitutionalisation within the practice of international law. Viewed through such a prism, the nature of the interplay between fragmentation and constitutionalisation is analyzed both with regard to international legal scholarship and within distinct areas of the practice of international law. In fact, this practical aspect of the analysis facilitates understanding of the mechanisms mitigating or counteracting the fragmentation of international law and drives all the contributions to this volume, offering insights in relation to various factual and legal contexts.

The volume is divided in three parts, addressing the use of constitutionalisation and fragmentation theories in specific contexts and by determinant actors. The four contributions in Part I – International constitutionalisation
as a claim, deal with the foundations of the constitutionalisation thesis in international law scholarship and legal philosophy. They proceed from a more general perspective on constitutional discourses and explore the reasons and purposes of constitutional claims, critically assessing their relevance to the general understanding of various axiological, normative and societal changes in the international legal order. Jerzy Zajadło and Tomasz Widłak, in Constitutionalisation: a new philosophy of international law?, perceive constitutionalisation is an intellectual movement fostered by academics rather than lawmakers. They argue that it has indeed both an interpretative (descriptive) as well as constitutive (creational) potential. Since the concept of constitutionalisation is extremely value-laden, it may result in constructing reality by building ‘a particular intellectual framework upon the fabric of international law.’ Yet the effects of constitutionalisation may also have a profound impact on the very essence of international law as a normative category, but only if such a process is accompanied by the evolution of international society towards a ‘true’ (more coherent) international community.

In the next chapter, From the internationalisation of national constitutions to the ‘constitutionalisation’ of international law: the role of human rights, Vassilis Tzevelekos and Lucas Lixinski also link constitutionalisation with the formation of a more homogenous international community ‘as to its core values and their collective protection.’ They argue that by instituting a number of changes of systemic proportions in the international legal order, the internationalization of national constitutions has led to the ‘constitutionalisation’ of international law, highlighting the fact that international law has always contained some general ‘constitutional’ features that are particular to its systemic physiognomy. Tzevelekos and Lixinski focus on human rights and explain how this special branch of international law expands beyond the so-called ‘humanization of the international law narrative’ and acts as an important ingredient in a number of other narratives, such as the constitutionalisation of international law and others comparable to it, like legal pluralism and fragmentation. With respect to the systemic changes that the internationalization of human rights has brought to the order of public international law, the examples given are those of collective enforcement at the decentralized level for the protection of common interests/values and the idea of the responsibility of states to act in a protective manner, linked with the principle of due diligence, as well as the so-called ‘positive effect’ that human rights develop. They conclude that the ‘constitutional’ changes brought into international law by human rights have prepared that order to effectively accommodate further areas of national (constitutional) law aimed at safeguarding values that societies see as vital.

The other two chapters in Part I provide more critical, polemic responses to the constitutional theories in international law. Roman Kwiecię, in International constitutionalism, language in legal discourse, and the functions of international law scholarship, focuses on the weaknesses in the constitutionalist approach which justify scepticism about the constitutionalisation of
international law, whether considered as a legal process within international society or as a research agenda. He points out three main sources giving rise to scepticism with respect to the constitutional argument: i) such theses can fail to explain the contemporary world in its moral and political diversity, since they are based on a ‘homogeneity of values and political aims’; ii) due to its inherent limitations constitutionalisation may not necessarily contribute to the stronger protection of human rights envisaged by international constitutionalists; and iii) international law does not seem to have reached the level of universality, unity and coherence to allow for its constitutionalisation. Against the background of these observations, Kwiecień argues that rather than its constitutionalisation, contemporary international law requires structural and systemic changes in order to enhance its effectiveness. In this regard, he opts for a systemic approach to international law since the desired aim of the constitutionalist doctrine (the constitutionalisation of international law) is not possible without certain systemic features (coherence, unity, universality). In turn, Maurizio Arcari, in his chapter entitled The creeping constitutionalisation and fragmentation of international law: from ‘constitutional’ to ‘consistent’ interpretation, considers the different interpretive methods used to deal with the phenomena of the constitutionalisation and fragmentation of international law. He explains that while the technique of ‘constitutional’ interpretation has traditionally been developed and applied with reference to the UN Charter, the expansion of other constitutionally-oriented regimes, at both universal and regional levels, has increased the threat to the coherence of the international legal order. In this respect he examines the principle of systemic integration as a legal panacea for the coordination of the different normative layers of international law. Insofar as systemic integration aims at minimizing normative conflicts and is predicated on the presumption of compatibility between the different rules at stake, it can be posited that the principle of ‘consistent interpretation’ represents one of its fundamental conceptual underpinnings. However, consistent interpretation as a legal technique has been traditionally reserved for a constitutional legal environment, and thus its application at the international level is likely to produce unintended ‘constitutionally-oriented’ legal effects. Arcari observes that the various interpretive methods considered operate, through the dynamic of reciprocal interferences, in a ‘creeping’ fashion to promote, rather paradoxically, both the constitutionalisation and fragmentation of international law. As such, they are symptomatic of legal pluralism and of the complexities that characterize modern international law.

Part II – Fragmentation of international law as a challenge to its constitutionalisation, contains contributions exploring the claims for international

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23 Charter of the United Nations, signed on 26 June 1945, entered into force on 24 October 1945 (1 UNTS XVI), amended in 1963 (557 UNTS 143), in 1965 (638 UNTS 308), and in 1971 (892 UNTS 119).
constitutionalisation tested against particular challenges which arise as a result of the alleged fragmentation within selected areas of international law and its practice. These contributions encompass interpretations of the challenges and threats to the unity and coherence of international law and offer some tentative responses on how they can be overcome. In fact each chapter in this part of the book analyzes whether the constitutional theory may aid in overcoming the collisions between distinct regimes and prevent further erosions within the system of international law. In The paradoxes of fragmentation – does regional constitutionalisation constitute a fragmentation threat to the international legal order? François Finck focuses on the question of ‘regional constitutionalisation’, specifically the international regimes founded on a geographical basis, in opposition to international legal regimes governing certain areas of international law. By using examples concerning the relations between the European Union (EU) and the European Convention on Human Rights and the decisions of United Nations’ organs, he tries to demonstrate that while in fact regional constitutionalisation only realizes some core constitutional functions at a regional level, at the same time it challenges the global governance system. Finck argues that this challenge in turn forces the global governance level to adopt at least some ‘constitutional’ elements, albeit in a rudimentary manner. European law is also the point of reference for Krystyna Kowalik-Bańczyk who, in her chapter entitled International constitutionalisation of protection of privacy on the internet – the Google case example, deals with individuals’ right to privacy as perceived by the EU legislation and the jurisprudence of the Court of Justice of the European Union (CJEU). The judgment of the latter in the Google Spain case\textsuperscript{24} is taken as an example of European influence on the way privacy is protected worldwide, thus highlighting the possible unification of its definition and methods of protection. She argues that the Google case may also be echoed in the US approach to privacy issues, perhaps leading to the working out of a common US/EU denominator, at least for the issue of the right to be forgotten, which she assesses as a first step towards an international constitutionalisation of Internet users’ rights.

The remaining three chapters in Part II take into account international criminal law and international humanitarian law. They discuss certain similarities and common trends characterizing these branches of international law, which can be framed within the vocabulary of both fragmentation and constitutionalisation. The authors aim to demonstrate and reconcile paradoxes that might stem out from the adoption of such perspectives, against the background of more general questions relating to international law and politics, international justice, and the general interest of humanity. Maria Varaki, in The ‘revival’ of sovereignty via the complementarity regime and the ‘doctrinal’
idea of responsibility to protect?, deals with the notion of sovereignty. In fact, this ‘S’ word is a starting point for her analysis of the complementarity regime of the Rome Statute\(^\text{25}\) (Article 17) and the so-called ‘doctrine of responsibility to protect’, which focuses on the concept of state sovereignty as a source of primary responsibility and action in the field of accountability and prevention of gross violations of human rights and humanitarian law. By examining the two cases of Syria and Libya, Varaki underlines a certain transformation of the notion of state sovereignty, where state consent remains paramount, with the state playing a contradictory but eminent role in the terrain of global governance when issues of human rights and international crimes are at stake.

In the next chapter, titled *Fragmentation of the law of targeting – a comfortable excuse or dangerous trap?*, Patrycja Grzebyk deals with the law of targeting and offers a critical analysis of the fragmented nature of international humanitarian law. By referring to the various regimes of international law (humanitarian law, international criminal law and human rights) that set the rules on targeting, she assesses both the positive and negative consequences of such a functional fragmentation on the practice of those engaged in hostilities, as well as on the judicial assessment of responsibility of states and criminal responsibility of individual perpetrators. In such a context, Grzebyk ponders what remedies might be used, including the arguments on constitutionalisation, to alleviate or overcome the defects in the fragmented law on targeting.

Karolina Wierczynska, in *The Rome Statute and the debate surrounding the constitutionalization, fragmentation and pluralisation of international criminal law*, demonstrates how the simultaneous use of different doctrinal narratives might, in fact, be useful in describing and explaining the complex reality of international criminal justice. She argues that certain features of the International Criminal Court (ICC)’s legal regime might be interpreted through a ‘constitutional’ prism, whereas other of its characteristics could be definitely viewed through the lenses of fragmentation and/or diversification of international law, especially when referring to the decentralization of International Criminal Law (ICL). In addition, she points out that the ‘pluralist’ perspective can also provide valuable insights, as the Rome Statute can, on the one hand, be seen as linking criminal justice with, for example, human rights values, while on the other its complementary character demands deference towards national systems of justice and some leniency in the context of national procedures. Thus, the differing narratives of ‘constitutionalisation’ and ‘fragmentation’ do not result in opposite conceptualizations of the ICC, but conversely offer interconnected and complementary insights on the ICC’s legal position and its functioning within the international legal order. Her observations constitute an excellent link to the next part of the book.

Part III, *Constitutionalisation through fragmentation*, critically discusses current developments in various areas of international law which are deeply affected by the process of fragmentation. In such a context, the contributions explore whether the analyzed practices might not also be perceived as leading to a greater coherence and/or constitutionalisation of international law. In this vein, they attempt to conceive of fragmentation as a part of or vehicle for the constitutionalisation of international law, identifying the roles of various actors and mechanisms involved in the processes of de-fragmentation and the constitutionalisation of international law. Ernst-Ulrich Petersmann, in *Justifying ‘fragmentation’ and constitutional reforms of international law in terms of justice, human rights and ‘cosmopolitan constitutionalism’*, endeavours to demonstrate that the ‘fragmentation’ of international law among states through democratic and judicial control of multilevel governance of international public goods (PGs) is often a necessary strategy for reforming the power-oriented UN and WTO legal regimes for the benefit of citizens. He further argues that justice and human rights require integration of the competing private and public, national and international approaches to international economic law on the basis of a ‘cosmopolitan constitutionalism’ aimed at protecting the rights of citizens as ‘constituent powers’ *vis-à-vis* abuses of limited governance powers over the collective supply of PGs. Power-oriented ‘management approaches’ must be ‘constitutionalised’ through functionally limited ‘multilevel constitutionalism’, empowering citizens through cosmopolitan rights and judicial remedies to hold governments accountable for their failures to protect transnational ‘aggregate PGs’. This reference to common goods is also reflected in Andrzej Jakubowski’s chapter entitled *A constitutionalised legal order – exploring the role of the World Heritage Convention (1972)*. He deals with international cultural heritage law, sometimes perceived as a specific branch of international law, internally fragmented into functionally diversified sectors (e.g. intangible cultural heritage, world heritage, import and export restrictions on cultural property) and greatly affected by the exclusive interest of states and unequal power/knowledge relations between experts’ and human communities’ interests. Against this general background, he explains that the international legal protection of cultural heritage is currently being re-conceptualized and is becoming treated as an international common good, perceived as an essential element for the full realization of all human rights, including cultural rights. Taking the example of the 1972 World Heritage Convention, Jakubowski seeks to identify which elements of its legal regime are the most plausible candidates to obtain the status of ‘universal’ or ‘constitutional’ principles of the international legal order. This analysis aims to demonstrate whether and how different ‘fragmented’ practices of international law may contribute to the consolidation of universal regime for the protection of cultural heritage globally. In turn, Mónika Ambrus, in *Constitutionalisation through fragmented adjudication?*, deals with the ‘structural fragmentation’ of international law caused by its proliferation, that is, the situation when (quasi) judicial bodies
working within the same field of law use different approaches to address a similar concept/problem. She argues that the impact of such proliferation on the substantive fragmentation of international law still lacks a consistent and systematic analysis which relies on a comparative assessment of different aspects of judicial decision-making. In order to gain insights into the actual effects of proliferation (i.e. fragmented adjudication) on the substantive fragmentation of international law, Ambrus explores the extent of divergence/convergence in judicial practices in relation to procedural norms, on the one hand, and substantive norms on the other, in terms of both structural and sectoral fragmentation.

The final three contributions to Part III consider the interrelationship between various seemingly fragmented branches or ‘sectors’ of international law and analyze how they are, or should be, reconciled and approached in order to achieve a more coherent system for the protection of certain universal ‘constitutional’ values. Chien-Huei Wu, in From fragmentation to coherence: aconstitutionalist take on the trade and public health debates, locates trade and public health in the context of fragmentation and argues for a constitutional construction of the relationship between the WTO and WHO. Accordingly, he explores different areas where trade and public health cross paths, such as food safety, communicable diseases, non-communicable diseases and access to medicine. Wu proposes four concrete approaches to resolve the problems arising from such fragmentation: interpretative, legislative, human rights, and the global principle of subsidiarity. He argues that these four approaches should then be linked by a constitutionalist approach toward international law, thus calling for a more consistent global constitutional order. In the next chapter, Access to environmental justice for NGOs: interplay between the Aarhus Convention, the EU Lisbon Treaty, and the European Convention on Human Rights, Marjolein Schaap - Rubio Imbers explores the interplay of the three treaty regimes binding all EU Member States and takes as a point of departure the (procedural) right of access to environmental justice for NGOs as guaranteed by the Aarhus Convention. She examines how this right is shaped in Europe, considering the complex relationship between the three conventions, with each having its own oversight mechanism and with no clear hierarchy established. By recounting the recent case law of the CJEU and the European Court of Human Rights, she attempts to answer the question whether this interaction between the treaty regimes and overlapping mandates may lead to a constitutionalisation of the right of access to environmental justice for NGOs, or at a minimum lead to further development of the right at stake. Britta Sjöstedt’s contribution, entitled The reconciliatory approach: how multilateral environmental agreements can harmonize international legal obligations, concludes the discussion offered in this volume with an analysis of global responses to trans-boundary environmental problems. Indeed these pose a specific challenge to the international legal system, as they often demand
instruments providing for collective and far-reaching measures on a global scale. Such measures may collide with other areas of international law, including trade law, human rights law and international humanitarian law, which may give rise to conflicting behaviours. Arguably, the particular structure of environmental treaties, also referred to as multilateral environmental agreements (MEAs), allows their treaty institutions to adopt a ‘reconciliatory approach’. The article describes how normative and institutional interactions take place under MEAs for the purpose of avoiding conflicts and tensions with other international legal obligations, while at the same time furthering the common concern to mitigate global environmental problems by going beyond the traditional mechanisms of treaty interpretation. By recounting the practice of protecting natural world heritage sites in the war-torn Democratic Republic of the Congo (DRC), Sjöstedt argues that the ‘reconciliatory approach’ may contribute to overcoming the fragmentation of international law.

The analyses presented in this volume are by no means exhaustive. Still, by demonstrating how the parallel debates of fragmentation and constitutionalisation materialize in various substantive legal contexts, they contribute to an understanding of the international legal discourse and the interactions between different spheres and actors. In fact the topics selected and included in this volume refer to highly significant areas of international law, on which general conclusions can be drawn about the practice of international law with respect to the fragmentation and constitutionalisation debates. Moreover, the variety of areas of international law analyzed in the book offer new contextual dimensions to the discussion, such as environmental or cultural issues, illustrating various aspects of the operationalisation of the fragmentation-constitutionalisation debate in the practice of international law.
Part I

International constitutionalisation as a claim
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1 Constitutionalisation
A new philosophy of international law?

Jerzy Zajadło and Tomasz Widłak

1 Introduction: is constitutionalisation in need of revision?

At the beginning of our analysis of the problem of the constitutionalisation of international law, we would like to make three reservations. The first two of these to the original title for the research project proposed to us by the editors of this volume (‘Constitutionalisation and Fragmentation of International Law Revisited’), which preceded its publication. This formulation raised substantial doubts, but at the same time it has given us food for thought as the starting point for this reflection.

First of all, a hidden normative claim had been included that the right time had come to revisit, or consider afresh, the notions of both the constitutionalisation and the fragmentation of international law. While distancing ourselves from the part of this thesis pertaining to fragmentation, which may indeed have recently undergone a revision, or at least a transformation, we wish to direct our attention to the somewhat more perplexing concept of the constitutionalisation of international law. We simply believe that there is as yet nothing to be ‘revisited’ as far as global constitutionalism is concerned. This contribution will sustain the view that the discussion on the constitutionalisation of international law has not yet matured to a point that allows definite conclusions amounting to any sort of possible revision of its central theses.1 Instead, the debate on constitutionalisation may just have placed itself in the very starting blocks before taking a definite leap towards a more robust development as a meaningful doctrinal tool or perhaps even a new philosophy of international law. It is indeed an intellectual movement driven by academics rather than lawmakers, and it has both interpretative (descriptive) as well as constitutive (creational) potential. Let us quote the following opinion of Anne Peters: ‘The constitutionalisation process of international

1 There are, however, also different opinions. For example T Kleinlein concludes that: ‘The debate on constitutionalisation seems to have reached certain conclusions that may no longer be seriously challenged’, T Kleinlein, ‘On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State’ (2011) 21 EJIL 1083.
law is mainly driven by academics and to some extent by international courts, not by governments and treaty-makers.\(^2\) Also, she points out:

Global constitutionalism is an intellectual movement which both reads (or reconstructs) some features of the status quo of international relations as ‘constitutional’ and ‘constitutionalist’ (positive analysis), and also seeks to provide arguments for their further development in a specific direction (normative analysis).\(^3\)

Secondly, we interpret the conjunction ‘and’ in the above-mentioned formulation as pointing towards certain normative theses that we support: namely that the two processes of constitutionalisation and fragmentation are parallel and to a substantial degree autonomous in relation to each other.\(^4\) These are not necessarily two opposite ends of the same process (if they were, the formulation would read, for example, ‘from fragmentation to constitutionalisation’\(^5\)). Likewise, international law itself is not and does not have to be torn between the two; the question is not about ‘international law between constitutionalisation and fragmentation’. Therefore, we interpret the use of the word ‘versus’ in the title of this volume (‘Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry’) not as suggesting any antagonism between the two but rather as a reference to them being dynamically interconnected with a substantial degree of autonomy towards each other. This allows us to focus our inquiry on constitutionalisation but without denying in any way the link between the two notions.

The last reservation (by no means the least, however) is that our comments are not made from the point of view of scholars of international law, or to put it differently, from the inside of the discipline, but rather from the perspective of legal philosophers, or from the outside of the doctrine of international law. Our methodological point of departure can be described as that of the philosophy of international law, which we believe is at present one of the most dynamic and transformative areas of law and philosophy. For that reason, it is not only international lawyers who are interested in the robust processes represented by the constitutionalisation of international law; as will become evident in this chapter, legal, social and political philosophers are also interested. To mention just one example at this point (but a very significant

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3 Ibid., 119.
4 See in that regard recent research on the relation between fragmentation and constitutionalisation as relatively autonomous concepts: R Deplano, ‘Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry’ (2013) 6 *EJLS* 67.
example) that demonstrates the centrality of the problems of international law in the modern philosophy of law: one of the most influential contemporary American legal philosophers, the late Professor Ronald Dworkin, recently devoted his last paper (published post mortem) entirely to the key problem of the grounds of international law. Clearly, one prima facie observation is undeniable: something is happening with and within international law, and moreover that something should be written with a capital ‘S’. The statement seems to be widely accepted in the doctrine of public international law, since the dramatic changes of the last two or three decades in the functioning and merits of international law are quite evident. However, we believe that this may not be just a substantial change in the content of international law but rather a qualitative shift in paradigms. In that regard, constitutionalisation can serve not only as an exemplification or expression of this change, but also as a point of departure in constructing an entirely new philosophy of international law.

2 Constitutionalisation, constitution and sovereignty in international law

For a long time philosophy has been committed to a certain provocative question – do the language and concepts we use only reflect a state of affairs, or can they also construct reality? Notwithstanding the answer given, there is no doubt that the question has a particular significance in relation to the language used in the public sphere, which also includes the study of law. In reference to the topic of this paper, one may of course ask about the possibilities, meanings and effects of the application of the term ‘constitutionalisation’ in the area of international law. Nagging doubts about the use of language, which keep tormenting philosophers, appear to be particularly relevant at this point – the phenomenon of ‘global’ and ‘postnational’ constitutionalism lies exactly at the intersection of ‘the law and the language’, and is connected with the ‘problem of translation’. Moreover, the historical development of international law and its scholarly study shows some specific features. For example, Stephen Beaulac draws attention to this process by referring to the immense transformative power that the word ‘sovereignty’ has had over the centuries. In his opinion, it is the concept of centralised power first created

6 R Dworkin, ‘A New Philosophy for International Law’ (2013) 41 Philosophy & Public Affairs 1; Professor Dworkin died on 14 February 2013. The title of his article served as an inspiration for the authors in their work on this chapter.

7 R Sarkowicz and J Stelmach, Teoria Prawa [Theory of Law] (Wydawnictwo Uniwersytetu Jagiellońskiego 1998) 39. The authors point in that regard, on the one hand, to L Wittgenstein, and on the other to BL Whorf, E Sapir and W von Humboldt.


9 N Walker, ‘Postnational Constitutionalism and the Problem of Translation’ in JHH Weiler and M Wind (eds), European Constitutionalism Beyond the State (CUP 2003).
by Jean Bodin (in the sixteenth century) and then extrapolated by Emerich de Vattel (in the eighteenth century) to the external ground of international relations that has shaped the paradigm of *ius inter gentes*.\(^\text{10}\) Of course, this is not to say that the historical role of this specific kind of linguistic determinism should be exaggerated, but it is difficult not to agree – at least to some extent – with the opinion that it was a revolution in ideas that led to a revolution in terms of sovereignty, which in turn shaped the state system that defines the world politics of the present day.\(^\text{11}\) Contrary to appearances, this has a very close connection with the problem of the modern constitutionalisation of international law, because in philosophy, politics and international relations theory so far it has been precisely the principle of sovereignty that has been recognised as the constitutional foundation of the international community.

From this point of view, the contemporary doctrinal phenomenon under discussion here is actually an attempt to shift this paradigm. The main objective of contemporary proponents of the constitutionalisation of international law is a broad acknowledgment of the statement that it is not sovereignty, or, being more precise, not primarily sovereignty, that should form the basis of the ‘constitution of the international community’.\(^\text{12}\) Paraphrasing a famous saying by Cicero, ‘where there is a society, there is the state, and there is the law’ (*ubi societas, ibi civitas, ibi ius*); one may say that if the international community is no longer merely a mechanical collection of sovereign entities, but has evolved into a structurally complex community based on generally accepted axiology, then sooner or later a constitutional basis for its existence and functioning must be built (*ubi societas, ibi communitas, ibi constitutio*).\(^\text{13}\)

If we recall the controversy associated with the process of the constitutionalisation of European Union law,\(^\text{14}\) then it is easy to imagine the difficulties piling up before lawyers who are trying to convey this concept in relation to the even broader and far more precarious area of international law. Some lawyers may even have the impression that it is, *prima facie*, oxymoronic to think about a combination of the instruments of constitutional law on the one hand and international law on the other. This is even more likely to be true because

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\(^\text{12}\) Ibid., 10–27; see also C Reus-Smit, ‘International Law’ in J Baylis and S Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (6th edn, OUP 2014) 274.


\(^\text{14}\) See e.g. the articles of D Grimm, J Habermas, JHH Kompens and U Di Fabio published under the title ‘Czy Europa potrzebuje konstytucji? [Does Europe Need a Constitution?]’ (2005) 1 Nowa Europa. Przegląd Natoliński 17.
the word ‘constitutionalisation’ has a relatively well defined and commonly accepted meaning in the field of municipal law, where it is connected with an idea of the transmission of the constitution (as the supreme legal act) and its values onto the entire system and legal order. However, in the context of international law a completely different sense of this word is relevant – the development of international law towards a constitutional system. On the other hand, in recent years one can witness the gradual expansion of the relationships between constitutional law and international law; Brun-Otto Bryde very aptly referred to this process as ‘the internationalisation of constitutional law’ and the ‘constitutionalisation of international law’. Anne Peters points to a slightly different aspect of this relationship. According to her, the processes of globalisation have caused the deconstitutionalisation of national legal systems, and, therefore, a reverse process at the international level can act to compensate for this loophole.

3 Connotations of constitutionalisation in international law

When the word ‘constitution’ appeared from time to time in international law, especially in the titles of treaties setting up and defining the structure and functioning of international organisations, no attention was paid to it. In particular, there were no attempts to construct a philosophy of an international legal constitutionalism sui generis on this basis. However, as far as the process of constitutionalisation is concerned, the case is about something different altogether in terms of quality. As long as the terminology of constitutions was involved only to the point of naming international agreements, it was difficult to couple it with the concept of constitutionalism as a manifestation of a certain ideology or normative political theory. Nevertheless, the situation has changed radically because the statutes of international organisations have developed clearly constitutional elements, as was the case with the transformation of the GATT into the WTO. There is no doubt that the issue of constitutionalisation is, on the one hand, one of the most controversial questions and, on the other hand, a widely and fervently debated issue in the

16 B-O Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts [Constitutionalisation of International Law and Internationalisation of Constitutional Law]’ (2003) 42 Der Staat 61; see also Knauff (n 15) 482ff.
18 E.g. the International Labour Organization (ILO), World Health Organization (WHO), United Nations Education Science and Culture Organization (UNESCO).
19 For more on this topic see e.g. DZ Cass, The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System (OUP 2005).
contemporary study of international law. In the initial phase, the problem was raised mainly in German scholarship, but it has now grown to be a subject of wider interest. However, even the declared proponents of this concept are well aware of its controversy, and some of them even end the titles of their works on the subject with a question mark. For example, Anne Peters juxtaposes a number of arguments for and against the constitutionalisation of international law that are present in the literature: the former refer to 'protection against uncontrolled de-formalisation of international law', 'compensation for the process of deconstitutionalisation [of municipal law – authors] caused by globalisation and global governance’ as well as the ‘critical potential of the concept’; whereas the latter include accusations (which these authors are trying to fend off) such as a ‘lack of constitutional mythology [or a revolutionary pedigree – authors]’, ‘excessive expectations’, ‘unrealism’, ‘the [apparent – authors] end of politics’, ‘anti-revolutionism’, ‘constitutional imperialism’, ‘Eurocentrism’ and ‘anti-democratic juristocracy’.

Indeed, it is very difficult to analyse and give an unequivocal evaluation of the phenomenon of the constitutionalisation of international law. There are a number of reasons for this. First, the treatment of the problem depends on whether we consider the constitutionalisation of international law

as the actual process that takes place in the normative dimension or, alternatively, only as a certain *de lege ferenda* projection constructed by some scholars.\(^24\) Some alternative explanations propose a middle way between these two positions; for example, they view the constitutionalisation of international law as a hermeneutical device. This means that the process may be seen as an attempt to assume a constitutional pre-understanding (*Vorverständnis*) when interpreting international law, or as an attempt to bestow a certain cognitive constitutional framework on international law without actually changing the law *de lege lata*.\(^25\) Recently, it has also been pointed out that constitutionalism goes well with constructivist theories of international relations that help to define it as a mindset shared between subjects that works as a powerful tool for arguments in the legal discourse on legitimacy deficits at the level of exercising authority beyond the state.\(^26\) Secondly, the issue is clearly of an interdisciplinary nature, because it is discussed not only by scholars of international law but also by constitutionalists, as well as by political philosophers, legal philosophers, sociologists and theorists of international relations. Thirdly, in this debate, alongside the term ‘constitutionalisation’ one will also find related terms such as ‘constitution’ and ‘constitutionalism’; as a result we have to deal with a specific transfer to the field of public international law of the methodological instruments that have been developed for an entirely different branch of the law.\(^27\) Fourthly and finally, the term has not been created, and does not operate, in a vacuum. On the one hand, contrary to all appearances, the constitutionalisation of international law has a fairly long history (most notably one should mention Alfred Verdross and his students,\(^28\) as well as the New Haven school\(^29\)). On the other hand, the constitutionalisation of international law is today primarily a result of other processes or of reactions to them; these processes include fragmentation, globalisation,\(^30\) hierarchy (verticalisation)\(^31\)

\(^24\) See Chapter 2 in this book.

\(^25\) For more on that issue, see T. Widłak, ‘Konstytucjonalizacja prawa międzynarodowego jako narzędzie hermeneutyczne’ [Constitutionalisation of International Law as a Hermeneutical Device], in A Samonek (ed), *Teoria prawa między nowoczesnością a ponowoczesnością* [Theory of Law Between Modernity and Postmodernity] (Wydawnictwo Uniwersytetu Jagiellońskiego 2012); Klabbers, Peters and Ulfstein (n 21) 348.


\(^29\) Fassbender (n 21) 28–41.

\(^30\) See e.g. DJ Bederman, *Globalization and International Law* (Palgrave Macmillan 2008).

and the privatisation\textsuperscript{32} of international law. One of the leading protagonists of the idea of constitutionalisation, Jan Klabbers, rightly notes that constitutionalisation, fragmentation and verticalisation are the ‘holy trinity of international legal debate in the early 21st century’.\textsuperscript{33}

4 Constitutionalisation and the transformation of international law

The constitutionalisation of international law is part of a broader phenomenon that can be summarised in the following questions: does the contemporary paradigm of international law undergo axiological and normative transformations and, if so, why, and in what ways? If one gives a positive answer to the first of these questions, there are, \textit{prima facie}, three positions that can be taken towards the issue:

1) Even if any changes, such as in relation to the concept of state sovereignty being the fundamental category of international law, are observable, these should not affect the substance of international law as a normative category, and especially should not lead to any transformation of its consensual nature or any changes in other aspects of the phenomenon of the law (its creation, application, interpretation, validity or compliance). From this point of view we are just dealing with a normal evolutionary development of international law, which is of the same nature as a development in any other branch of the law such as administrative, civil, criminal, constitutional law, etc. As a result, many hard-line international legal scholars\textsuperscript{34} as well as some political philosophers\textsuperscript{35} warn us against fiddling with the essence of international law by means of constitutionalisation, because this apparently violates the ‘critical mass’ of international law;

2) The scale of the process is so far-reaching that it affects the very essence of international law as a normative category. The result is that we should, on the one hand, develop a new philosophy of international law,\textsuperscript{36} and, on the other hand, verify the current position of the philosophy of law \textit{in genere} towards the very essence of international law \textit{in specie}, because in both aspects the current state of affairs does not reflect the scale of the progressive qualitative changes (for example, the fact that the ultimate goal of the exercise of national sovereignty should be the good of

\textsuperscript{33} J Klabbers, ‘Setting the Scene’ in Klabbers, Peters and Ulfstein (n 21) 1.
\textsuperscript{34} JL Goldsmith and EA Posner, \textit{The Limits of International Law} (OUP 2005).
\textsuperscript{36} S Besson and J Tasioulas (eds), \textit{The Philosophy of International Law} (OUP 2010); see also J Zajadło, ‘Filozofia prawa międzynarodowego? [Philosophy of International Law?]’ (2007) 2 Państwo i Prawo 16.
A new philosophy of international law? 23

all humanity). This view is represented both by some international legal scholars (especially representatives of German science such as Hermann Mosler, Jochen Frowein, Bruno Simma, and Christian Tomuschat37), as well as some political philosophers;38

3) The scale of these phenomena is so far-reaching that we should not be limited to a change in the philosophy of international law and in the relation of the philosophy of law to international law. According to some authors, we are dealing, on the one hand, with a paradigmatic crisis in international law,39 and, on the other, with such a new and substantially different entity in terms of normative categories that we should perhaps talk about the creation of a completely new law, a law that is sometimes referred to as global law or, in a slightly different perspective, the law of humanity. Although this should not replace the classical international law, it can be complementary to it and create a sort of ‘superstructure’ for it. The qualitative change lies primarily in the fact that it is not the sovereign states that are placed at the centre of this new system, but rather human beings and the international community as a whole. In this case, too, one can point to lawyers40 as well as philosophers41 as the proponents of the approach.

The problem of the constitutionalisation of international law is discussed primarily in the context of the second of the positions mentioned above. The supporters of this view argue that it is a specific process that cannot be assessed only from the perspective of terminology simply borrowed from the dogmatic constructs of constitutional law. As a result, in the case of global constitutionalism such concepts as ‘constitution’ and ‘constitutionalism’ take a slightly different or completely different meaning.42 This is admitted even by the authors, who refer directly not only to the ‘constitutionalisation of international law’, but simply to ‘international constitutional law’. For example, Brado Fassbender believes that the United Nations Charter can indeed be perceived as a kind of ‘constitution of the international community’; however, at the same time he defines this as an autonomous phenomenon and warns against the simplified search for analogies with the ‘constitution’ for the purposes of national law.43 The heart of the matter

37 Fassbender (n 21) 41–51.
43 Fassbender (n 21) 170.
is not so much the ‘constitution in a formal sense’ but rather a series of events that are evidence of certain constitutional processes taking place in the international community. These processes include, among others, the progressive legalisation of international relations,\textsuperscript{44} the development of an international judiciary, the humanisation and/or moralisation of international law, an increasing number of \textit{jus cogens} (or peremptory) norms, an increasing number of international obligations \textit{erga omnes}, the hierarchisation of international law, the supranational role of the Security Council, international agreements (sometimes called world order treaties) that have the character of mini-constitutions, etc.\textsuperscript{45} These elements taken individually are insufficient to allow one to speak persuasively about the constitutionalisation of international law – for example, legalisation, understood as an extension of the volume of the legal regulation of international relations, is only a quantitative change and nothing more. However, the same legalisation when combined with the other processes and phenomena mentioned above creates not only a new quantity, but indeed also a new quality.

The constitutionalisation of international law so conceived is by no means homogeneous and does not constitute a static phenomenon, but rather is diverse and dynamic and takes place in very different aspects of international law, from its creation, application and interpretation, to the system of its institutions, the issue of legal subjectivity, and the structure of the international community, its system of values, and its organisational and procedural rules. In this sense, constitutionalisation is the process of implementing a normative political theory (constitutionalism), which will perhaps result in the creation of a normative structure (a constitution). The essence of this phenomenon is, however, very differently conceived. As already mentioned above, some authors believe it to be the common denominator of the actual processes that are taking place in the contemporary international community; for others, it is the basis for building new hermeneutical rules of interpretation of international law; and for yet others it creates a horizon for the \textit{de lege ferenda} perspective of the international order. With such diverse approaches, it is difficult to predict what the fate of this concept will be. It seems, however, that we are dealing with a process that it will be challenging to stop, because it is accompanied by the above-mentioned evolution of international society towards a true international community. In other words, using the terminology of the English school of international relations, just as once there was a move from a realistic (coexistence) to a pluralistic (co-operation) model in international society, so we are witnessing the rise of a solidarist (cosmopolitan) model,\textsuperscript{46} for the problem of the constitutionalisation of international law is closely associated with cosmopolitism, especially in contemporary political

\textsuperscript{44} See e.g. JL. Goldstein and others (eds), \textit{Legalization and World Politics} (MIT Press 2001).
\textsuperscript{45} T Widlak, ‘From International Society to International Community’ (n 13); Diggelmann and Altwicker (n 22) 625–628.
philosophy. In passing, it should be noted, however, that there has also been criticism of these assumptions for forcing the predominance of a particular orthodox liberal-democratic vision of constitutionalism with an almost religious zeal that in fact threatens fundamental values such as constitutional pluralism as well as the neutrality of constitutional ideas.

5 Fuller vs. Hart: constitutionalisation as the systematisation of international law

The change in the philosophical and legal understanding of the nature of international law certainly encourages the discussion of the constitutionalisation of international law. For many years, the paradigm in force was the one proposed by Herbert LA Hart – according to him, international law is indeed law, but law only in terms of a set of primary rules. It does not constitute a fully-fledged system of law because it lacks secondary rules. In recent years, however, in the philosophy of law there has been a shift away from this paradigm in the direction of the proposals of Hart’s main opponent – Lon L Fuller. Fuller himself wrote relatively little about international law, but he also never questioned its juridical character. On the contrary, he was even fascinated by some elements of it, such as the horizontal process of its creation, the mutual and consensual nature of its legal commitments, its interactive nature and diversity, and the informality of its sources. However, he also had some doubts, mainly concerning the ineffectiveness of the system of international justice – that is, to some extent, the rules of adjudication in Hart’s terminology. In the final instance, however, while recognising the incompleteness of international law as a system, Fuller saw the possibility of applying the principle of the rule of law to the international legal system. A recourse to Fuller’s concept means that international law is indeed created in the horizontal plane rather than the vertical one, but this

47 The typical example of this may be given by J Habermas, who infers the constitutionalisation of international law from J Kant’s cosmopolitanism – see J Habermas, ‘Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?’ in J Habermas (ed) Die gespaltene Westen (Suhrkamp 2004).
52 The only text in which Fuller made comments about international law is The Forms and Limits of Adjudication; this was published in 1959 and in its original form was a lecture given at a meeting of the American Society of International Law under the title Adjudication and the Rule of Law. Its final version was published only after Fuller’s death in 1978 in 92 Harvard Law Review 353). The details of this interesting case, together with the private correspondence between Fuller and President Richard Nixon is given by K Knop in ‘The Hart-Fuller Debate’s Silence on Human Rights’ in P Cane (ed), The Hart-Fuller Debate in the Twenty-First Century (Hart 2010).
does not necessarily imply that it cannot be considered in terms of a system. On the contrary, it can be subjected to the same criteria for evaluating the so-called internal morality of law as are applied in the process of the assessment of municipal law.\textsuperscript{53} From this point of view, there is only one step needed to systematise, and therefore international law is constitutionalised in the process of resolving the conflict between its legality and its legitimacy.\textsuperscript{54}

Indeed, all three concepts discussed here – constitution, constitutionalism and constitutionalisation – are, to varying degrees, connected with the concept of the system, and separately from it they are essentially meaningless.\textsuperscript{55} Therefore, even if international law does not yet constitute a system, the ultimate goal of constitutionalisation as the process of the implementation of the principles of constitutionalism is an attempt to confer such a feature upon it. Therefore, first of all one must determine exactly what these principles are. In this context, Jeffrey L Dunoff and Joel P Trachtman have formulated the following catalogue: the creation of the institutions of authority and their horizontal and vertical allocation, the supremacy of constitutional norms, a qualified mode of change, the guarantee of the fundamental rights of the individual, the control of the constitutionality of the law, and accountability and democracy.\textsuperscript{56} Indeed, clearly this is all about the basic foundational rules of constitutionalism as formulated on the grounds of national law. The best proof of these tendencies is the fact that in 2012 Cambridge University Press started to issue a new scientific journal with a very characteristic title: ‘Global Constitutionalism – Human Rights, Democracy and the Rule of Law’.\textsuperscript{57} The transfer of these principles – human rights, democracy and the rule of law – to the grounds of international law and the understanding of the process of constitutionalisation requires, however, some findings about terminology as well as some systemic and functional assumptions to be made in advance.

First of all, the authors who refer to this concept define the nature and the scale of the necessary appropriation of the constitutional terminology in very different ways. Otto Diggelmann and Thomas Altwicker indicate the existence of three basic strategies for the ‘legitimization of the constitutional language in international relations’: the semantic strategy, the correspondence strategy and the ethical and pragmatic strategy.\textsuperscript{58} The semantic strategy is simply a direct borrowing of the constitutional terminology, with an adjustment \textit{mutatis mutandis} to the specifics of international law. It requires, however, the assumption that there is an international community that


\textsuperscript{54} Brunnée and Toope (n 51).

\textsuperscript{55} Diggelmann and Altwicker (n 22) 629.


\textsuperscript{58} Diggelmann and Altwicker (n 22) 632–640.
ought to be based on constitutional principles corresponding to the law’s structural and axiological needs. This version – in its various mutations – is referred to by such authors as Bado Fassbender, Bruno Simma, Christian Thomuschat, and Ronald St J Macdonald. The correspondence strategy is based on a search of the international sphere for constitutional functions, features and content. Unlike the semantic strategy, it does not require any transformations of the classical constitutional language to be made, but instead it applies this language directly to the above-mentioned features, elements and content. The use of different variants of this strategy is attributed to authors such as Brun-Otto Bryde, Daniel Thürer, Erika de Wet, Anne Peters, and Pierre-Marie Dupuy. The last strategy is to extend the legal discourse to arguments of ethical rationality (the state on its own identifies itself with the international constitutional order – this is favoured by, for example, Jürgen Habermas) or pragmatic rationality (it is practical reason that points to the need for a global constitution – a proponent of this view is Angelika Emmerich-Fritsche).

Secondly, the particular strategy for dealing with constitutional terminology does not by itself determine the nature of the phenomenon under analysis. Therefore, Christine EJ Schwöbel has recently described four different models of global constitutionalism: social, institutional, normative and analogous.59 The first of these, represented in the works of Günther Teubner and Andreas Fischer-Lescano, generally separates the issue from the realm of the state and moves it entirely to the level of global civil society.60 The second model, represented in the work of Brado Fassbender, is primarily a search for the central seat of power at the global level that is legitimised through institutionalisation – the major point of focus here is the United Nations and the constitutional nature of the UN Charter. The third of the above-mentioned models, normative constitutionalism, underlines the exceptional role, the binding force and the position within the hierarchy of international legal norms of the *jus cogens* (peremptory) norms of international law as the fundamental and, therefore, constitutional standards (this type of global constitutionalism is represented in the works of Erika de Wet, Angelika Emmerich-Fritsche and Michael Byers61). Last but not least, analogous constitutionalism, represented in the works of Mattias Kumm and Robert

Uerpmann,\textsuperscript{62} is primarily focused on demonstrating the similarities between intra-national and international constitutionalism.

Thirdly, depending on the strategy for the transplantation of terminology and the global constitutionalism model chosen, various functions and/or objectives of the constitutionalisation of international law can be highlighted. The literature on this subject indicates, \textit{inter alia}, such objectives as: the allocation of the centre of power and the delimitation of its competence, the legal regulation of the functioning of the international community and the search for legitimacy in international law.\textsuperscript{63}

Fourthly, manifestations of the constitutionalisation of international law as they are variously understood may take place at different levels. They may in fact relate to international law as a whole or to its general principles, but they may also refer to some of its regimes or parts (such as human rights, international trade law, criminal law, law of the sea, etc.), or they may only have a regional (e.g. European) dimension.\textsuperscript{64}

6 Towards a philosophy of the constitutionalisation of international law?

Constitutionalisation is a term ‘equally attractive as mysterious’.\textsuperscript{65} International constitutionalism, in turn, has for some time now been admitted as a subject of analysis by lawyers, philosophers, political scientists, sociologists and theorists of international relations, but at the same time it remains an ‘unsolved riddle’.\textsuperscript{66} Returning to the question posed at the outset of this chapter, the attempt to answer can be summarised in the following way: the concept of the constitutionalisation of international law both reflects and at the same time shapes reality. In this context, the latter role seems to be particularly interesting, as it seems to confirm the immense power of words and/or ideas in the field of international law that is mentioned above. We have already indicated the importance of the concept of sovereignty in the history of international relations. At this point, one can take into account yet another, more recent, example – the concept of the Responsibility to Protect (R2P).\textsuperscript{67} What only yesterday seemed like an elusive daydream of a group of intellectuals has today become an official doctrine of the United Nations, and tomorrow will possibly mature into a binding norm of law. The constitutionalisation of international law may, perhaps, follow the same path. What today seems to be an exaggerated theoretical generalisation of


\textsuperscript{63} Schwöbel, \textit{Global Constitutionalism in International Legal Perspective} (n 21).

\textsuperscript{64} Knauff (n 15) 456, 475.

\textsuperscript{65} Ibid.


\textsuperscript{67} For more on that issue, see G Evans, \textit{The Responsibility to Protect. Ending Mass Atrocity Crimes Once and for All} (The Brookings Institution Press 2008); also see Zajadło, ‘Koncepcja odpowiedzialności za ochrońcę’ (n 46).
certain objective phenomena is tomorrow likely to become a binding normative paradigm, because, in the words of Anne Peters who is paraphrasing Immanuel Kant, ‘there is nothing more practical than a good theory’. In this respect, international law indeed demonstrates a certain particularity – ‘it is what international lawyers make of it’.69

Obviously, it was not the purpose of this chapter to conduct a comprehensive analysis and evaluation of the concept of constitutionalisation as a new philosophical proposal for international law. Because of editorial limitations, we were forced to leave out a number of issues and phenomena that are being discussed in the global debate on the subject, such as the so-called problems of constitutional multi-levels, or constitutional pluralism related to fragmentation as the other side of the ‘constitutional coin’. We have also abstained from undertaking any sort of final assessment of this phenomenon from the point of view of the methodology of law. It is, however, difficult not to agree with Jörg Kammerhofer in his argument that the use of, for example, Kelsen’s pure theory of law in the problem of the constitutionalisation of international law raises certain methodological problems, since it forces one to acknowledge the debate as being of a more political than legal character.70 This does not change the fact that the voice of a more geographically diverse doctrine of international law has somehow been missing from this discussion – particularly because the observations above are made by a theorist and philosopher of the law, not a scholar of international law. However, the issue raises a plethora of theoretical as well as practical problems that must be of interest to both theorists and dogmatists all over the globe. One of the examples of this kind of problem is the question of the collision of laws.71 Constitutionalisation and fragmentation, in this context, are not just about the continuing dispute between monists and dualists with regard to the relationship between domestic law and international law. On the contrary, they are also about the problem of competition between and within supranational normative systems. It is not by accident that one of the most important monographs on the constitutionalisation of international law begins with an analysis of the high-profile judgments in the Yusuf and Al Barakaat and Kadi cases, because they are ‘a microcosm of some of the most fundamental disputes in modern international law’.72

69 M Koskenniemi, From Apology to Utopia. The Structure of International Legal Argument (CUP 2005) 615.
7 Conclusion: constitutionalisation as the new philosophy for international law

The aim of this chapter was to introduce the reader to the philosophical map of the discussion on constitutionalisation and the potentially transformative power of constitutionalisation for the structure and essence of international law. As expected from the introduction to this contribution, the phenomenon of the constitutionalisation of international law is far from being a definite doctrine or even a compact theory. It lacks one clear formulation or dominating current that could at this point be ‘revisited’ or restated. Nevertheless, its descriptive and creative potential is notable, and it may play a role in setting the course for the transformation of international law in the twenty-first century.

We believe that the notion of ‘constitutionalisation’ is first and foremost that of a transformative process. Its effect, however, may not necessarily be an explicit change in the wording of international law as it stands – in fact, this is rather unlikely. The notion of constitutionalisation is extremely value-laden and, given the use of an appropriate strategy for transplanting the constitutional terminology at hand, it may well end up constructing reality by building a particular intellectual framework upon the fabric of international law. For instance, the constitutional interpretation of international law explicitly introduces and sanctions the normative hierarchy in the doctrine on the sources of international law, and for the first time aims to treat the jus cogens doctrine seriously. Moreover, it is capable of embracing what have been called ‘community interests’73 or ‘public interest norms’,74 which are often included in the neglected erga omnes rules. Last but not least, in this understanding constitutionalisation facilitates the international project by appealing to the systemic nature of international law and thereby remediing the potential defects of fragmentation. Therefore, we believe that, of the three general approaches to the issue of constitutionalisation, the middle position is the most pragmatic and desirable. It acknowledges the transformative momentum that international law arguably has today, and sees constitutionalisation as a reformatory but not a revolutionary solution.

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Timothy Dunne, writing about new ways to conceptualise international society, told a story from Albert Einstein’s life: ‘“Professor Einstein, do you realize that this is the same exam paper that you set last year?”’, asked the examination officer. “Ah”, began the reply, “the questions are the same, it’s the answers that have changed”.75 This anecdote could be used in an equally

73 See U Fastenrath and others (eds), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (OUP 2011).
74 Peters, ‘Compensatory Constitutionalism’ (n 17) 601.
apt way to illustrate the development of the idea of the constitutionalisation of international law from the time of Alfred Verdross until now. Indeed, the questions are the same, but the answers have radically changed. One of the questions concerns the ultimate purpose of the constitutionalisation of international law. Paraphrasing Jose Alvarez,\(^7\) we could say that for an optimist it is ‘the virtue of the Law’s Empire’, but for a pessimist it is ‘the peril of the Empire’s Law’.