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The Transformation of International Law

By Antonio Segura-Serrano[*]

Abstract

Although this paper is entitled "The Transformation of International Law", it does not put forward any general thesis about the great changes that have occurred in recent years in this discipline. It seeks to make a critical reflection on the current constitutionalization debates that certainly abound within the international literature. In the first part, after devoting some paragraphs to the current context in the international community, the paper focuses on questions such as globalization and the rule of law. In the second part, the paper introduces the main different projects defending the process of constitutionalization of international law. The debate on the constitutionalization of international law undoubtedly has European roots, but there are some differences in the intellectual approach taken by the doctrine on this question. The third part sets out the reaction triggered by the project on constitutionalization. Together with the differences in constitutional law culture that may be found in a comparative examination, the paper analyzes the problem of translating the constitutional framework beyond the state. The recurring themes of hegemonic law and the fragmentation of international law are also addressed. In the last section, the paper will finally make a general assessment of the ongoing constitutionalization debate within the discipline.

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1. INTRODUCTION

Almost twenty years ago, Professor Weiler published an article called "The Transformation of Europe".[1] This landmark piece of work was devoted to building up a conceptual apparatus in order to understand the changes that were already taking place within the European Communities, later the European Union. The present work is also entitled "The Transformation of International Law". However, it does not seek to articulate any general thesis about the latest changes in international law. It rather seeks to be a critique of the mainstream constitutionalization debate in international law. The foremost proposition of this paper is that current international law can hardly be explained using the constitutional framework. Those who undertake the constitutionalization path do not offer in fact an exact account of what current international law is all about, but what they would like it to be, whatever the reasons behind that endeavor. In other words, they pursue the transformation of international law into something it is not yet, without prejudging the motives of their effort.

This article will start devoting some paragraphs to the current context in the international community, above all to the anxieties which have recently been at the heart of the academic debates. We will focus, albeit briefly, on questions such as globalization and the rule of law in order to put in perspective the core issue discussed in this paper. Secondly, we will introduce the main different projects defending the process of constitutionalization of international law. The debate on the constitutionalization of international law undoubtedly has European roots, but there are some differences in the intellectual approach taken by the scholarship on this question. Thirdly, we will search for the reaction triggered by the project on constitutionalization to bring it into the analysis and compare the different positions on this question. Together with the differences in constitutional law culture that may be found in a comparative examination, we will analyze the problem of translating the constitutional framework beyond the State. Also, no less important are the recurring themes of hegemonic law and the fragmentation of international law. In the last section, we will finally make a general assessment of the ongoing constitutionalization debate within the discipline.

[1] *See* J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

2. CURRENT ANXIETIES IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW

There are two distinct issues that dictate the international relations of the present and that generate the concerns and anxieties of international scholars. Those are the globalization trend and the huge power amassed by the US after the fall of the Berlin wall. In the first place, globalization has been said to reach everything and everywhere, from technology to economics, from North to South, etc., and it is a very well analyzed phenomenon. However, for the sake of our research we are interested in globalization mainly from a legal point of view. It is submitted that globalization has carried with it a process of de-constitutionalization of sovereign States' fundamental laws, which in turn may transform international law into a new global constitutional law. Secondly, if the US has reached an exclusive position in the last twenty years that situation should not be used to dismantle international law. However, the US has displayed in the last few years a rampant unilateralism, especially after September 11, 2001, which has caused concern among international law scholars who intend to promote a global legal order based on effective rules.

2.1 Globalization

The debate on globalization[2] and the resulting constitutionalization of international law have clear links with the debate relative to the so called "fragmentation" of international law.[3] It is said that the globalization phenomenon carries, together with the decay or modification of the nation-state role,[4] an evolution of the international system. This evolution would mean that the cooperation proposed as an alternative to mere peaceful co-existence,[5] has achieved such levels and is developed under such parameters that the traditional international structure has been overcome, and the international community has been reinforced as the end-result.[6]

After the fall of the Berlin wall, there has been an apparent transformation in the

[2] *See* Armid Von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885 (2004) (conveying that globalization is a much more worrying process in Europe than in the US).
[3] *See infra* § 4.4.
[4] *See* Mark. W. Zacker, *The Decaying Pillars of the Westfalian Temple: Implications for International Order and Governance*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 58 (James N. Rosenau & Ernst-Otto Czempiel, 1992); John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B. U. INT'L L. J. 433 (1997).
[5] *See* Wolfgang G. Friedmann, The Changing Structure of International Law (1964).
[6] See Bruno Simma and Andreas Paulus, The "International Community": Facing the Challenge of Globalization, 9 EUR. J. INT'L L. 266 (1998); Pierre-Marie Dupuy, International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions, 9 EUR. J. INT'L L. 278 (1998).

exercise of the state constitutional competences, which are now exercised to a large extent within a higher or external level. Indeed, competences such as those related to security policy, the protection of human rights, equality and solidarity policies, among others, are managed at the international or global level, through the decisions of international organizations or the conclusion of international treaties.

Although the international society has been characterized as a field less inclined to change as the process of constitutionalization would provoke,[7] some phenomena have been observed that lead to an erosion of state sovereignty[8] which produces a different, international legitimacy.[9] Among those observable facts affecting international law we could remind the abandonment of the sovereignty concept and the effectiveness in the exercise of power as legitimating factors;[10] the erosion of state consent after the legislative character of some Security Council resolutions;[11] the imposition of democratic institutions in the framework of state administration or reconstruction by international means.[12] This new context also affects the category of international legal subjectivity, as it entails now a higher implication of non-state actors, above all of NGOs and multinational companies, in the decision-making processes (through soft-law), as well as in the protection of their own interests (*ius standing* at several international bodies), especially in the environmental,[13] or the international trade[14] fields. Some authors have tried to systematize this type of change and have concluded that elements like the adjustment in treaty-structure and contents (not only political, but also more technical questions become important issues for the states because of the important subject-matters at stake), the increasing implication of state agencies in the

[7] *See* Serge Sur, *L'état entre l'éclatement et la mondialisation* [The State between explosion and globalization], 30 REVUE BELGE DE DROIT INTERNATIONAL [BELGIAN REV. INT'L L.] 5, 11 (1997) (stating that "État ou barbarie, telle est l'alternative simple que connaît la société internationale" [State or barbarism, that is the alternative that international society faces]).

[8] *See* Luis M. Hinojosa Martínez, *Globalización y soberanía de los Estados [Globalization and State Sovereignty]*, 10 REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES [ELECTRONIC REV. INT'L STUD.], 1, 8 (2005).

[9] *See* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004) (putting forward some elements for the analysis of a new international legitimacy in the globalization era). *See also* Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?* 10 IND. J. GLOBAL LEGAL STUD. 29 (2003).

[10] *See* Nico Schrijver, N., *The Changing Nature of State Sovereignty*, 70 BRITISH Y. B. INT'L L., 65 (1999).

[11] *See* Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

[12] *See* Jean D'Aspremont, *La création internationale d'États démocratiques* [The international creation of democratic States], 109 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [GEN. REVIEW PUB. INT'L L.] 889 (2005).

[13] For instance, the mechanism incorporated in the Aarhus Agreement, which allows non-State actors to take part in the procedure to seek information, although it is a limited mechanism, as only State Parties have access to the dispute settlement procedure set in the Agreement.

[14] For instance, the new avenue opened to non-State actors within the mechanism before the Dispute Settlement Body at the World Trade Organization thanks to the *amicus curiae* expedient, although the Apellate Body has reversed its position due to the criticism of some Member States.

international domain, together with the ever rising role of the private; they all mean that the State function in international law has been disaggregated.[15] Besides, as a consequence of the same process, international law has been "decentralized" or disaggregated too, in the sense that several international legal regimes of a specialized character have been created, which in turn has accelerated the mentioned fragmentation.[16]

If States are no longer in a position to exercise their state constitutional functions as was the case before, the question is whether that de-constitutionalization might be balanced through a process of constitutionalization of international law.[17] In addition, it has to be ascertained whether this constitutionalization may be the best answer to the concern about fragmentation.[18]

In this sense, some authors have recently crafted a conceptual apparatus supporting a constitutional international order. Starting from the process of legal and *de facto* denationalization provoked by globalization, which has led to the "internationalization" of constitutional law and the "constitutionalization" of international law, Cottier and Hertig have offered a view of constitutionalization which intends to be both descriptive and normative.[19] As other authors do, they make use of the accumulated experience regarding the European integration[20] and a specialized regime such as the World Trade Organization[21] in order to contest the traditional notion of constitutionalism as developed within the Nation State apparatus. They promote a "graduated approach" to constitutionalism,[22] reject the so

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[15] *See* Anne-Marie Slaughter, A New World Order (2004).
[16] See Christian Walter, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, 44 GERMAN Y. B. INT'L L. 170, 175, 178 (2001).
[17] See Anne Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, 19 LEIDEN J. INT'L L. 579, 580 (2006).
[18] *See* Jan Klabbers, *Constitutionalism Lite*, 1 INT'L ORG. L. REV. 31, 44-45 (2004) (conveying the idea that although constitutionalization projects are not necessarily bad, they are likely doomed to failure).
[19] *See* Thomas Cottier and Maya Hertig, *The Prospect of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. UNITED NATIONS L. 261, 268-272 (2003). *But see* Jeffrey L. Dunoff and Joel P. Trachtman, *A Functionalist Approach to International Constitutionalization*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 3, 4, 7 (Jeffrey L. Dunoff & Joel P. Trachtman, eds. 2009) (introducing a "taxonomic, rather than normative" approach to constitutionalization. Therefore, they do not take position on the utility or desirability of international constitutionalization; their construction builds along the lines of three axes that international law may exert in a constitutional fashion: enabling, constraining and supplemental constitutionalization).
[20] *See generally* John H.H. Weiler and Marlene Wind, European Constitutionalism beyond the State (2003).
[21] *See* Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006) (introducing, along six different constitutional dimensions, a normative individualist framework for evaluating constitutionalization at the WTO). For more critic views on constitutionalization at the WTO *see* DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION. LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM (2005) and Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2006) (stating that the anxieties that scholarship tries to avoid with the constitutionalization debate may trigger the opposite reaction).
[22] *See* N. Walter, *The EU and the WTO: Constitutionalism in a New Key*, THE EU AND THE WTO. LEGAL AND CONSTITUTIONAL ISSUES 31, 33 (G. de Búrca & J. Scott eds. 2001) (highlighting that constitutionalism will

called "statist" school and embrace a new reading of constitutionalization, also termed modern constitutionalization, understood mainly as a process or evolutionary constitution-making. In the new world where there are new polities and the state is no longer the only legal and political authority, multilevel governance, and the ensuing multilevel constitutionalization, organized within a five story house, is envisaged as the most desirable path to be followed. Of course, this kind of shared sovereignty model with different levels of governance will have to be presided by some principles regulating the relationship among those levels, the principle of supremacy of higher levels being the proof of a hierarchical or federal system.[23]

Connecting with this approach, Erika De Wet transmutes the abstract notion of constitutionalism to the post-national context with the aim of regaining control over decision-making processes taking place out of national borders. It is in this way that she employs the project on the constitutionalization of international law as the one that "*describe[s] a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community ("international polity") that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement*".[24]

This author's proposition departs from the German school that we will examine below. In her view, constitutionalization is a process which involves the re-organization and redistribution of competences between the subjects of the international legal order, structuring the international community, its value system and its ability to enforce its norms. The several sector-specific regimes existent in the international order do not oppose each other but work as complementing elements within a bigger whole, where the United Nations will play as the connecting factor.[25]

Building on these previous works, one of the latest proposals towards the constitutionalization of international law has come from a book written by Klabbers, Peters and Ulfstein. Despite the warnings to the contrary,[26] this is a normative project which puts

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work as a group of different factors which functions as "indices in terms of which degrees of constitutionalization can be measured").

[23] *See* Cottier & Hertig, *supra* note 17, at 282, 296, 300 (referring to those five levels as the communes, the cantons or sub-federal entities, the federal structure, regional integration and the global level), 299 and 307.

[24] *See* Erika De Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 53 (2006).

[25] *See id.*, at 56.

[26] *See* J. Klabbers, *Setting the Scene*, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1, 4-5 (J. Klabbers, A. Peters & G. Ulfstein 2009) (taking the precaution of stating that their approach is not completely normative but somehow in-between the strictly normative and the strictly descriptive and so defending that it is not only a project of some academic lawyers).

forward constitutionalization as the most likely framework for understanding a global constitutional community composed of individuals, States, international organizations, NGOs and business actors. However, these authors are aware of the most prominent obstacle that current international law presents in order to trigger the mentioned constitutionalization, namely the democratic deficit and the corresponding need to incorporate in the process the ultimate source of political authority, i.e. the individual. Therefore their response to the well-known question of the absence of a global *demos* consists of identifying a two-track approach (within and above States) to improve democracy (dual democracy) and devising several mechanisms through which democracy can hopefully be realized.[27]

Nevertheless, this kind of proposition does not raise complete agreement. Even though there is some appeal in the idea of unification derived from the constitution as a response to polarization, it is highly difficult taking into account the current conditions in the international society that there will be a re-constitutionalization in international law. Together with globalization, as a process of vertical disempowerment, fragmentation, as the result of the existent different regimes or horizontal decentralization, cannot lead but to a partial constitutionalization, a constitutionalization limited to each of those regimes.[28]

Be it as it may, the debate on the constitutionalization of international law is compelled to stay with us for a good while.[29]

2.2 The Rule of Law

From every point of view, international law has undergone throughout the 20th century a slow but steady process of advancement regarding international institutions. International law's noticeable expansion has led to a situation in which several fields of, not only technical, but also highly political nature are controlled by international regulation, as in the case of the protection of human rights, the environment, or economic relations. International Relations literature has recently embarked in the examination of this trend in detail and has finally come to label it as the "legalization" of international relations.[30] The

[27] *See* A. Peters, *Dual Democracy*, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 263, 301, 318 (J. Klabbers, A. Peters & G. Ulfstein 2009) (promoting the democratization of global governance in several ways, among others, the establishment of a Global Parliamentary Assembly at the United Nations and transnational referendums and consultations).
[28] *See* Walter, *supra* note 16, at 194.
[29] See Philip Allot, *The Emerging Universal Legal System*, 3 INT'L L. FORUM 12, 16 (2001) (asserting that "the problem of international constitutionalism is the central challenge faced by international philosophers in the 21st century").
[30] *See* Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

growing institutionalization of international law carries a parallel increase in the equality of all States, not only formal equality, but also material equality, not only equality before the law, but equality in law. For that reason, multilateral treaties that are undertaken today must overcome a more detailed examination regarding the position that every State adopts in relation with the corresponding agreement, and the classical reservations or special treatments that any State, and specially the US,[31] may try to obtain are more limited now too.[32]

This achievement explains why the exceptional condition the US has strived to warrant for itself with respect to very symbolic law-making treaties (*traités-lois*) like the Statute of the International Criminal Court, the Kyoto Protocol or the Ottawa Convention on Landmines has found so much resistance from the rest of States in the international community.[33] Exceptionality has been the argument put forward by the US to oppose equal and full application of those multilateral treaties, within which the Statute of the International Criminal Court should be highlighted, under the guise that, hypothetically, the US would precisely be the most affected State as it has usually deployed more military forces throughout the world.[34] As the US could not impose its national interests in the framework of this Statute, it has reacted through the adoption of a number of internal measures and also bilateral treaties that will make it more difficult to apply the Rome Statute.[35]

More generally, facing the growing institutionalization of international law, the US has found itself compelled to resist it and has used several courses to achieve what has been

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[31] *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) (highlighting the US practice on the formulation of reservations to treaties on the protection of human rights that establish the jurisdiction of the International Court of Justice for settlement of disputes).
[32] *See* Catherine Redgwell, *US Reservations to Human Rights Treaties: All for One and None for All?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 392, 408 (Michael Byers and Georg Nolte eds., 2003) (highlighting the negative observations made by the Human Rights Committee about the US reservations to the International Covenant on Civil and Political Rights).
[33] *See* Georg Nolte, *The United States and the International Criminal Court*, in UNILATERALISM AND US FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 71, 87-88 (David M. Malone & Yuen Foong Khong eds., 2003) (explaining how the final acceptance of the ICC by Security Council members like France and Russia was a reaction to the excessive unilateral US behavior, based on the self-perceived special position of this country); Peter Malanczuk, *The International Criminal Court and Landmines: What are the Consequences of Leaving the United States Behind?*, 11 EUR. J. INT'L L. 77 (2000) (comparing the US attitude in these cases and in human rights treaties and concluding that the US arguments are hypocritical, in part, and set a bad example); *See generally Symposium: The International Criminal Court*, 10 EUR. J. INT'L L. 93 (1999).
[34] *See* David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L., 12, 15 (1993) (asserting that US special responsibilities in international peace and security had to be factored into the functioning of the court).
[35] *See* Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683 (2003) (reviewing the US Administration's policy regarding the International Criminal Court and considering the side-effects of an aggressive unilateral attitude in this field).

called "the legalization of inequality".[36] Nevertheless, the international community of States, less willing to institutionalize traditional inequalities, like those erected at the time of the configuration of the Security Council or through the regime established in the Non-Proliferation Treaty, has refused to accept the influence the US has attempted to exert with the aim of reassuring its exceptionality.[37] When the US has not attained its objective of being constrained by treaties only to the extent it wished or deemed desirable, this country has repeatedly opted out.[38] However, as noticed by Byers, this would imply placing the US on the outskirts of the international community, as if it did not belong to the community of States at all.[39] Moreover, though the US has the right not to take part in an international treaty which does not match its national interest as any other State, its *multilatéralisme a la carte*, aside from the fact that it does not necessarily benefit to the long term US interest,[40] de-legitimizes the efforts it can exhibit in those multilateral frameworks.[41] Finally, as the epilogue to its negative reaction in the *Nicaragua* case of 1986,[42] the US has persisted in its unconstructive attitude towards international adjudication frameworks[43] and, after the *Avena* case,[44] it has denounced its acceptance of the jurisdiction of the International Court of Justice under the Consular Relations Convention.

As highlighted by Nico Krish in a number of very critical analysis, US recent practice exhibit an erosion of some of the central principles of international law, together with the abuse of the international community concept, or at least the use of this notion no more than to its private benefit.[45] Certainly, as it could be witnessed in the course of the nineties, the

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[36] *See* Nico Krisch, *More equal than the rest? Hierarchy, equality and US predominance in international law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 153 (Michael Byers & Georg Nolte eds., 2003); *See also* Bardo Fassbender, *Art. 2(1)*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY 68 (Bruno Simma ed., 2nd ed. 2002).

[37] *See* Pierre Klein, *The effects of US predominance on the elaboration of treaty regimes and on the evolution of the law of treaties*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 363, 371 (Michael Byers & Georg Nolte eds., 2003).

[38] *See* Steward Patrick, *Multilateralism and Its Discontents: The Causes and Consequences of US Ambivalence*, in MULTILATERALISM AND US FOREIGN POLICY. AMBIVALENT ENGAGMENT 1 (Steward Patrick and Shepard Forman eds., 2002).

[39] *See* Michael Byers, *The complexities of foundational change*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 1, 4 (Michael Byers & Georg Nolte eds., 2003).

[40] *See* Michael Byers, *International Law and the American National Interest*, 1 CHI. J. INT'L L. 257, 260 (2000).

[41] *See* Edward Kwakwa, *The international community, international law, and the United States: three in one, two against one, or one and the same?* in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 25, 53-55 (Michael Byers & Georg Nolte eds., 2003).

[42] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[43] *See* Andreas Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783 (2004) (offering several explanations on the most recent US defiant attitude towards international adjudication and concluding that the US judicial integration in the international legal community is a condition for American influence in it).

[44] *See* Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (March 31).

[45] *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the*

intent to apply US laws extra-territorially (the Helms-Burton and the D'Amato-Kennedy Acts)[46] and the corresponding imposition of penalties, though eventually ineffective, revealed a clear-cut purpose of breaking the principle of sovereign equality of States.[47] The following intervention in Kosovo on the part of NATO States led by the US was based on the need to avoid a humanitarian disaster.[48] This delegation or franchising system,[49] though finally effective, was interpreted as a breach of the rule of law in international law[50] using as an alibi the protection of essential values of the international community,[51] that is, those values identified by the west powers and singularly the US.[52] Likewise, the labeling of some countries as rogue States or even as States belonging to the axis of evil, while not deserving anything more than political consequences, in the legal terrain this classification has meant an exclusion of these States from the international system, as second-class, with immediate consequences concerning the revision of the State immunities doctrine,[53] and the doctrine on

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International Legal Order, 16 EUR. J. INT'L L. 369, 381 (2005) (demonstrating how dominant States have shown a pattern of instrumentalization and withdrawal concerning international law as the two poles of a hegemonic strategy); *See also* Krisch, *supra* note 36, at 141.

[46] See generally Brigitte Stern, *Vers la mondialisation juridique? Les lois Helms-Burton et D'Amato-Kennedy*, 100 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [GEN. REV. PUB. INT'L L.] 979 (1996); Vaughan Lowe, *United States Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46 INT'L & COMP. L.Q. 378 (1997).

[47] *See* Ugo Mattei and J. Lena, *U.S. Jurisdiction Over Conflicts Arising Outside the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 382 (2001) (suggesting that the surge of claims, with original factual connection abroad but brought to the US courts may be viewed as a sort of legal imperialism); *See also* Pierre-Marie Dupuy, *Comments on chapters 4 and 5*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 181 (Michael Byers & Georg Nolte eds., 2003).

[48] See Nico Krisch, Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council, 3 MAX PLANCK Y.B. UNITED NATIONS L. 59, 81-83 (1999).

[49] *See generally* Dan Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (1999); Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by «Coalitions of the Able and Willing»*, 11 Eur. J. Int'l L. 541 (2000) (stating that the implied powers of the Security Council allow it to authorize the use of force by Member States, although this practice should be limited by a greater control); Linos-Alexandre Sicilianos, *L'autorisation par le conseil de sécurité de recourir à la force: une tentative d'évaluation [The Security Council authorization to the use of force: an evaluation essay]*, 106 Revue Générale de Droit International Public [Gen. Rev. Pub. Int'l L.] 5 (2002) (stressing the dangers of an *ex post* authorization together with possible Chapter VII distortions coming from the use of the implicit authorization theory).

[50] *See* Brad R. Roth, *Bending the Law, Breaking It or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold War Era*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 232, 233 (Michael Byers & Georg Nolte eds., 2003) (contrasting the interpretation based on the policy-oriented jurisprudence –bending the law, with the interpretation based on the moralistic positivism –breaking the law).

[51] The reintroduction of arguments flowing from Natural Law becomes evident and so does the connection with the New Haven School, which precisely has always presented human dignity as the ultimate value to which the entire decision-making process must refer in international law, *see* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM J. INT'L L, 866 (1990).

[52] See Martti Koskenniemi, "The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law, 65 THE MODERN L. REV. 159, 171 (2002).

[53] See L. M. Caplan, The Constitution and Jurisdiction Over Foreign States: the 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective, 41 VA. J. INT'L L. 369 (2001) (reviewing the State immunities doctrine as applied by US courts from both a constitutional and an international point of view).

State recognition (even if in this regard the US has not stand alone).[54]

Nevertheless, there is a field where the unilateralism and the hegemonic use of international law has been felt the most, and that was the principle on the prohibition of the use of force. The US has proceeded to an interpretation of the exceptions to this principle, particularly the one related to self-defense, in a way that aims to comprise the protection of nationals abroad, preventive self-defense, the response to terrorism and humanitarian protection. The most recent military actions, as in Afghanistan, here with the support of a Security Council Resolution,[55] but above all with the invasion of Iraq in 2003, in the light of the National Security Strategy prepared by the State Department, have shown the express will of the United States to widen the set of options for the use of force beyond what is strictly allowed by international law.[56]

In order to accomplish its objectives, and with the erosion of the international legality as the outcome we have just mentioned, the US has not hesitated to make recourse to the

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[54] *See* Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123, 147-153 (Gregory H. Fox & Brad R. Roth eds. 2000) (reviewing contemporary practice and concluding that, though there is not yet a rule on non recognition of non democratic governments, there is an increasing tendency to use democratic legitimacy as a policy element in the practice of recognizing States and governments).

[55] *See* Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001) (arguing that the United States' use of military force against the Taliban and Al Qaeda in Afghanistan is lawful under the United Nations Charter); *But see* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 997 (finding worrisome the broadening of the notion of self defense and demanding the application of international law principles in the use of force, based as much as possible on the adoption of collective measures in order to avoid anarchy); Olivier Corten & F. Dubuisson, *Opération «Liberté immuable»: Une extension abusive du concept de légitime defense [Operation «Enduring Freedom»: An abusive extension of the self-defense concept]*, 106 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [GEN. REV. PUB. INT'L L.] 51 (2002) (commenting on the several flaws posed by the application of the self-defense doctrine to this case, particularly the requirements of an initial armed attack, necessity and proportionality).

[56] *See* Miriam Sapiro, *Preempting Prevention: Lessons Learned*, 37 N.Y.U. J. INT'L L. & POL. 357, 367 (2005) (asserting that "[t]he Iraq experience may suggest that there is wisdom in preempting further talk of preventive self-defense"); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 183 (2nd ed. 2004) (analyzing in detail operation *Enduring Freedom* and the war in Iraq to conclude that the use of preventive self-defense remains extremely problematic); Thomas Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Use of Force?*, 27 HASTINGS INT'L & COMP. L. REV. 425, 428 (2004) (noting that under the US new doctrine not only is the moment for a military response is pushed back to an undefined earlier time, but also that it is for the U.S. government alone to determine whether a future threat is real and deserves reaction); Rüdiger Wolfrum, *The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7 MAX PLANCK Y.B. UNITED NATIONS L. 1, 33 (2003) (stating that there are good reasons, basically the need to avoid abuse, for not extending the right of self defense *de lege ferenda* so as to legitimize preventive use of force); Eyal Benvenisti, *The US and the Use of Force: Double-edge Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677, 691 (2004) (noting that while relaxing the doctrine of self-defense the new Bush doctrine has the effect of relaxing the concept of sovereignty); *But see* W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82 (2003) (supporting preemptive self-defense understood as preventive self-defense); Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L. & COMP. L.Q. 401 (2002) (showing hope in the fact that the US built in a coalition of forces before going it alone to Afghanistan, avoiding then plain unilateralism).

international organizations, many times unrestrictedly making use of them as mere instruments. Without doubt, the last decade has witnessed how the Security Council has increased its powers through the adoption of measures concerning humanitarian intervention in internal conflicts and the creation of important international organs like the Administrations in Kosovo and East-Timor and *ad hoc* Tribunals (but the US has opposed a permanent court like the one established by the Rome Statute[57]), a process that has reached its highest with Resolution 1373 (to combat terrorism), Resolutions 1422 and 1487 (to temporarily limit the jurisdiction of the International Criminal Court) and Resolution 1540 (to fight illicit traffic of mass destruction arms).[58]

Economic International Organizations, where the US has a weight according to its contribution, have managed to carry their aid task pre-conditioned to the adoption of good governance policies, which imply the implementation of political patterns that are democratic and liberal.[59] The key position within international organizations has been taken as an advantage by the US in order to move ahead its views in those frameworks, inhibit the rest of States, and at the same time place itself above the law.[60] In a smoother way, but also more effectively due to its invisibility, the US has moved forward its preferences regarding international regulation, by way of the elaboration of codes of conduct and international standards through intergovernmental agencies (think of the Basel Committee on banking supervision,[61] or the Working Group on Financial Action within the Organization for

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[57] *See* William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701 (2004) (asserting that the differences between the draft produced by the International Law Commission in 1994 and the final version of the Rome Statute, which in turn have allowed a greater independency of the International Criminal Court from the Security Council, have led the US to oppose it).

[58] *See* Talmon *supra* note 11, at 193 (suggesting that Security Council legislation can only be effective if it reflects the unanimous will of the UN community at large); JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 196 (2005) (stating that Resolutions 1373 and 1540 are "the closest thing we have in international institutional law to real "law-making"); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 905 (2002) (affirming that Security Council members were most likely unaware of the pioneering nature of Resolution 1373); Mathew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003) (underscoring that the Security Council can only use its Chapter VII powers in specific situations or conduct so that it acted *ultra vires* in Resolution 1373).

[59] *See generally* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003); Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U.J. INT'L L. & POL. 203 (2000); Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. INT'L L.J. 81 (1993).

[60] *See* José E. Álvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003) (reviewing recent Security Council Resolutions as examples of global hegemonic international law, that is, where there has been a hegemonic capture of the Security Council); Nico Krisch, *supra* note 36, at 156.

[61] *See* Delonis, R.P., *International Financial Standards and Codes: Mandatory Regulation without Representation*, 36 N.Y.U.J. INT'L L. & PO. 563 (2004) (stating that international institutions in this field overly exclude developing states and that this exclusion violates the norm of democratic governance); David Zaring,

Economic Cooperation and Development, OECD[62]) or private law groups, like the Internet Corporation on Assigned Names and Numbers (ICANN) in the case of the Internet,[63] which have strengthened the process of international regulation loaded with the US preferences in several fields.[64]

In other words, US dominance (and the dominance of US companies) in technological and emergent sectors make soft-law be one of the most relevant instruments of the American born liberal project, through which a silent but effective rule is fitted in international law, with no need for the corresponding consensus of the international community of States which is the recipient of that regulation. Warmly accepted by the political science discourse on responses to globalization, which insists on the need to reinforce good governance instead of government, soft-law becomes then an instrument benefiting the strategy of the only superpower that achieves, thanks to the privatization of international legislation, what would be more difficult to make accept by means of traditional instruments of international law-making.[65]

3. THE CONSTITUTIONALIZATION PROJECT

The project on the constitutionalization of international law launched as a byproduct of the historical context we are facing today, namely globalization, displays, however, clear European roots and has most vigorously been advanced by the internationalist scholars of

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International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations, 33 TEX. INT'L L.J. 287 (1998) (asking for a law of international administrative procedure to avoid abusive discretion by the financial non-governmental agencies); Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647 (2002) (presenting empirical research into why countries comply with international soft-law); Lawrence L.C. Lee, *The Basle Accord as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1 (1998) (reviewing the role of the Basle Accord in banking supervision and promoting the use of soft law's guidelines in rapidly developing fields such as international financial regulation or free trade, as soft law often attains legally binding force and becomes hard law).

[62] *See* the web page of this Working Group: http://www.fatf-gafi.org/pages/0,2966,en_32250379_32235720_1_1_1_1_1,00.html. On the OECD, *see generally* James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769 (2001) (making an account of the achievements and weaknesses of the OECD and its role in the next future).

[63] *See* Antonio Segura-Serrano, *Internet Regulation: A Hard-Law Proposal*, 12 JEAN MONNET WORKING PAPERS, ¶ 10 (2006) *available at* http://www.jeanmonnetprogram.org/papers/06/061001.pdf (introducing a critique of the current regulation on the Internet and proposing an alternative based on the concept of the Common Heritage of Mankind).

[64] *See* Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 205 (Michael Byers ed. 2000) (noting that the combination of both flexibility and informality of these networks "privileges the expertise and superior resources of United States government institutions in many ways").

[65] *See* Krisch, *supra* note 45, at 405.

German origin,[66] surely more influenced by the Kantian theories.

We can agree that world order conceptions existent in Europe have generally been divided along the following three lines. Firstly, in the United Kingdom, realism applied to international law has championed, which in turn has meant a permanent alignment with the US. The second vision on world order corresponds to France and rests on the creation and strengthening of a united Europe which will be able to achieve a power balance. In the third place, the model sustained by Germany consists of the establishment of a global legal community, a new polity, capable of structuring and managing the political power from shared common values.[67]

This latter project of reconfiguration of the international system has been translated to the current debate with the term of "constitutionalization". Its earliest traces were sketched in the first works of Verdross, Scelle or even Kelsen, and it is passionately defended by the German school very ably represented by Mosler, and above all today, Simma and Tomuschat among his disciples.

Even if this European vision is mostly based on the notion of the international community as the essential core from which an international constitutional law may be created,[68] there is another facet or (to avoid upsetting sensibilities) project akin to the one just described which centers around the idea of a constitution understood as a compulsory legal framework of the international society.[69]

The third possibility which is examined in this paper calls itself the "Global

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[66] See Hélène Ruiz Fabri and Constance Grewe, La constitutionnalisation a l'épreuve du droit international et du droit européen [The constitutionalization tested against international and European law], in LES DYNAMIQUES DU DROIT EUROPÉEN EN DÉBUT DE SIÈCLE, ETUDES EN L'HONNEUR DE JEAN CLAUDE GAUTRON [THE DYNAMICS OF EUROPEAN LAW AT THE BEGINNING OF THE CENTURY, STUDIES IN HONNOUR OF CLAUDE GATRON] 189, 196 (2004) (presenting a succinct description of the German school).

[67] Armin Von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 HARV. INT'L L.J. 223 (2006). See also Armin Von Bogdandy & Sergio Dellavalle, Universalism and Particularism as Paradigms of International Law, IILJ Working Paper 2008/3.

[68] *See* Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 209-240 (1993); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 217 (1994); Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 345 (1994); Bruno Simma and Andreas Paulus, *The «International Community»: Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 266 (1998); *See also* Jonathan Charney, *International Law-Making in a Community Context*, 2 INT'L LEGAL THEORY 38 (1996).

[69] See Pierre-Marie Dupuy, The Constitutional Dimension of the UN Charter Revisited, 1 MAX PLANCK Y.B. UNITED NATIONS L. 1 (1997); Bardo Fassbender, The United Nations Charter as Constitution of the International Community, 36 COL. J. TRANSNAT'L L. 529 (1997-1998); Bardo Fassbender, 'We the Peoples of the United Nations' - Constituent Power and Constitutional Form in International Law, in THE PARADOX OF CONSTITUTIONALISM – CONSTITUENT POWER AND CONSTITUTIONAL FORM 269 (Martin Loughlin and Neil Walker eds. 2007); BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY (2009).

Administrative Law" project, a kind of "third way" which also seeks to interpret the processes that are taking place as a result of global governance although not going as far as proposing a constitutional framework of understanding.

3.1 Constitutionalism based on values: the German School

The German school can actually be traced back to Verdross who wrote as long ago as 1926, a book titled "The Constitution of the International Legal Community". In this book, he stated that the constitution of the international community was made up of those rules and principles so fundamental for international law that they determined its sources, subjects, application and the allocation of jurisdiction between States.[70] Also in 1976, in a book published by Verdross and co-edited with Simma, the constitutional law of the international community was identified with the Charter of the United Nations,[71] and the concept of constitution was used in a normative sense. More recently, Tomuschat has taken the lead in the German school on the international community, understood as a community based on an agreement about applicable rules and common values.[72] Consensus on the existence of a number of elementary rules engenders international law and order, and that law buttresses the feeling of attachment to and even the existence of an international community as an "overarching system that embodies a common interest of all States and, indirectly, of mankind".[73]

Tomuschat has put up his constitutional edifice of international law starting somehow from Hart's division between primary and secondary norms. Indeed, in Tomuschat's opinion, the rules that make up the constitution of any kind of government system are those relating to the classical legislative, executive and judicial functions.[74] The question lies then in testing out whether the international community may identify itself with a government system

[70] *See* ALFRED VERDROSS, DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT [THE CONSTITUTION OF THE INTERNATIONAL LEGAL COMMUNITY] (1926). *See also* Stefan Kadelbach and Thomas Kleinlein, *International Law – a Constitutional for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 GERMAN Y.B. INT'L L. 303, 304, 330 (2008) (confirming that current debates on the constitutionalization of international law are stirred up particularly by Europeans, above all by Germans, and that this is a value-oriented approach).

[71] *See* Alfred Verdross and Bruno Simma, Universelles Völkerrecht. Theorie und Praxis [International Law. Theory and Practice] 5 (1976).

[72] There is agreement on this point with other literature *see* George Abi-Saab, *Whiter the International Community?* 9 EUR. J. INT'L L. 251 (1998).

[73] *See* Tomuschat, *supra* note 68, at 227.

[74] See Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law, 281 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 305-433 (1999).

regulated by a constitution as previously defined. His answer is affirmative.[75]

Nevertheless, together with these fundamental rules of a formal character that define for instance the subjects or the sources of international law, there are other norms of a material character, as those establishing sovereign equality of States, the outlawing of the use of force, the ban on intervention, which all add to the international constitutional law.[76] This body of basic norms (from which sovereign equality is the Grundnorm) that States are bound to abide by the rules of the game, with or without their explicit will, is what may be called as the constitution of the international community.[77] As can be inferred, Tomuschat does not give too much weight to the formal instrument by which those principles are erected, so according to him it is in no way mandatory to make recourse to the Charter of the United Nations as an inevitable element of his construction.[78] In this author's view, the rest of the norms in international law are to a greater or lesser extent disposable, but rules of a constitutional character are not. In this vein, Tomuschat approaches the normative value of constitutional rules and principles to imperative or *ius cogens* norms. The latter are considered by Tomuschat as legal rules placed hierarchically above the rest, giving way to a kind of "meta-rules" which, together with *erga omnes* obligations, shape or embody the international public order.[79]

However, hierarchy is still very much underdeveloped in international law.[80] For one reason, because the existence of few imperative norms do not end up being definitive, taking into account their low practical relevance,[81] in spite of some cases of judicial success in its application.[82] Moreover, international law fails to have enough mechanisms to address the

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[75] *See* Tomuschat, *supra* note 68, at 236.
[76] *See* Tomuschat, *supra* note 74, at 161.
[77] *See* Tomuschat, *supra* note 68, at 211; *See* PHILLIP ALLOTT, THE HEALTH OF NATIONS. SOCIETY AND LAW BEYOND THE STATE 297 (2002) (distinguishing in a similar way between constitutional international law and public international law).
[78] *See* Fassbender, *supra* note 69, at 550.
[79] *See* Tomuschat, *supra* note 74, p. 85; *See also* Christian Tomuschat and Jean M. Thouvenin, The Fundamental Rules of the International Legal Order. Ius Cogens and Obligations Erga Omnes (2006) (making clear already in the title of this co-edited book what his ideas are about the constitutional norms of the international system).
[80] *See* Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L., 2006, pp. 483-529; Martti Koskenniemi, *Hierarchy in International Law: A Scketch*, 8 EUR. J. INT'L L. 566 (1997).
[81] See Andreas Paulus, Ius cogens in a Time of Hegemony and Fragmentation. An Attempt at a Re-appraisal, 74 NORDIC J. INT'L L. 297, 330 (2005). But see Alexandre Orakhelashvili, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 EUR. J. INT'L L. 59 (2005) (insisting on the actual legal force of the ius cogens norms and their ability to impose legal limitations to the activities of the Security Council).
[82] *See* Case C-402/05 P and C-415/05 P, Kadi and Al Barakaat v. Council, 2008 E. C. R. 6351 (the first two decisions adopted by the Court of First Instance in this case were based on purported norms of *ius cogens*; however, in the appeal the European Court of Justice decided on the basis of EU human rights standards,

multiplicity of law-making layers existent nowadays.[83] Nevertheless, the bulk of the scholarship writing recently keeps on making recourse to the intrinsic value that the principle of hierarchy has for the entire normative system, which is intended to be articulated in a constitutional manner,[84] hierarchy that should protect those fundamental values of the international society.[85]

From the philosophical sphere, Habermas has also supported the constitutional role of international law in order to organize power in the international plane. With the title "Has the constitutionalization of international law any chance yet?", Habermas takes position in favor of Tomuschat's thesis (as opposed to the other three visions of international law, namely, the classical one based on the plurality of sovereign States, the liberal one subjected to US hegemony, or the one advancing the termination of any kind of public power), because it is the most persuasive both from a conceptual and normative point of view.[86] The project then consists of the edification of a public order that will effectively protect the universal principles and will help solve global problems (basically, collective security, protection of human rights[87] and environment). Sovereignty is not an unlimited principle, nor is it indivisible (as federal States like the US and Germany can show), although the international society has not achieved the level of development necessary for a proper federalization. It is for this reason that States, lacking another more democratic legitimacy, still are the essential instrument to make the international society move forward, while the supranationalism embedded as a *telos* in this project of constitutionalization entails a progressive decrease of

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thereby reinforcing international law's fragmentation); *see* Luis M. Hinojosa Martínez, *Bad Law for Good Reasons: The Contradictions of the* Kadi *Judgment* 5 INT'L ORGANIZATIONS L. REV. 339, 349, 344 (2008) (discussing the real possibilities of the *ius cogens* concept, used as a legal limitation to the Security Council discretion, and criticizing the European Court of Justice decision in *Kadi* as dualist); Joseph Weiler, *Editorial*, 19 EUR. J. INT'L L. 895-96 (2009) (portraying the decision of the ECJ as an example of isolation, just as the Medellin case in the US Supreme Court); Daniel Halberstam and Eric Stein, *The UN, the EU, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT L. REV. 13, 71-72 (2009) (stating that Security Council measures may be subjected to indirect review for compatibility not just with *ius cogens* norms but with customary international human rights law as well; and that the ECJ in *Kadi* took the path of particularistic constitutional resistance).

[83] *See* Walter, *supra* note 16, at 201.

[84] *See* De Wet, *supra* note 26, at 57 (highlighting the only emergent hierarchy existing today in international law as a tool to assert the presence of a group of values that might pave the way to an international constitutional order).

[85] *See* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 292, 323 (2006) (concluding that every improvement regarding normative hierarchy in international law must be welcomed, as it implies the avowal of the link between law and ethics).

[86] *See* Jürgen Habermas, Der gespaltene Westen [The Divided West] 184-185 (2004).

[87] See Erika De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L L. 611 (2006) (examining the significance of human rights protection as an essential content for the value system of the international public order).

the State role in the creation and application of international law and global order.[88]

The relative success of this school of the "international community" lies in the fact that, without abandoning the mainstream,[89] it holds up a progressive project which in turn pursues a certain transformation in international law and society. Rooted in positivism and resolute not to lose sight of international practice, but defending an idealist project of a neo-Kantian style, the members of this substantial German School look for a transformation of the international system towards higher efficacy and cohesion.[90] In the end, the international community is nowadays half-way between the traditional model of sovereign and autonomous States and the opposed model of a hierarchical structure and a centralized power,[91] that is, it is in full evolution and the project advanced by this school implies furthering that integrationist spirit. But, following the fundamental hypothesis of "legal physics" proposed by Abi-Saab,[92] we agree in that the international community needs to affirm itself into something more than a mere constitutional value. It has to provide itself with other constitutional qualities, like the organizational function, which is absent today as there are no international institutions that represent it and act on behalf of it.[93]

3.2 Constitutionalism based on the UN Charter

There are other authors in Europe like Dupuy who prefer to identify the constitution of international law with the historical moment in which the United Nations is created,[94] proposition which is agreed upon by others like Fassbender,[95] and even the American internationalist Tom Franck.[96] In this sense, the constitution of international law in a formal

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[88] *See* Bogdandy, *supra* note 67, at 239-241. *But see* Neil Walker, *Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law*, EUI Working Papers Law No. 2005/17, at 3 (affirming that Habermas defends the current approach to international law and global order, rather than a new beginning).

[89] This mainstream is made up by the position adopted by other authors of European or other origin, *see e. g.* Abi-Saab, *supra* note 72; ANTONIO CASSESE, INTERNATIONAL LAW (2005); Declaration of President Bedjaoui, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 13 (July 8), at 226.

[90] *See* Bardo Fassbender, *The Meaning of International Constitutional Law*, in TOWARDS WORLD CONSTITUTIONALISM. ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY, 837, 846 (Ronald S.J. Macdonald & Douglas M. Johnston eds. 2005).

[91] *See* Tomuschat, *supra* note 74, at 90.

[92] *See* Abi-Saab, *supra* note 72, at 256 (asserting that there has to be a parallelism between legal norms and institutions; to every level of legal density there has to correspond a certain level of institutional density which allows the application of those norms in a satisfactory manner).

[93] *See* Walter, *supra* note 16, at 195.

[94] See Pierre-Marie Dupuy, L'unité de l'ordre juridique international. Cours général de Droit international public [The Unity of the International Legal Order. General Course of Public International Law], 297 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 215 (2002).

[95] *See* Bardo Fassbender, *supra* note 69, at 573.

[96] *See* Thomas M. Franck, *Is the UN Charter a Constitution?* in NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL (Jochen A. Frowein ed.) 95 (2003).

meaning can be traced back to the enactment of the Charter of the United Nations. This written text plays the role of constitutive document in the same manner as do national fundamental laws. Moreover, the United Nations may be labeled as the first international organization having almost universal membership and made up of organs which operate as the international community's own institutions.[97] In these authors' view, it is true that the Charter of the United Nations does not qualify as a self-sufficient text, and so there are other international texts that need to be taken into account because of their constitutional character, like the Vienna Convention on the Law of Treaties, the International Covenant on Civil and Political Rights or the Genocide Convention, that may thus be interpreted as bylaws of the Charter or as embedded/integrated in the Charter.[98] However, this proposal has been very much criticized as displaying an artificial character and because it has to be admitted that there is not yet in international law a constitutional text which is sufficient and all-inclusive.[99]

But from this approach, the formal aspect of the constitutionalization that the Charter written in San Francisco conveys is not the only one that has to be retained. On the contrary, and more importantly, this text also involves the endorsement of a material constitution. In Dupuy's opinion, the Charter should not be interpreted as a mere constitutive act through which rights and obligations are erected and competences are distributed. Quite the opposite, the United Nations' Charter amounts to a twofold normative text, because from a legal point of view it introduces itself as the fundamental law of the system and from the political point of view it emerges as a moral compromise, undertaken on a number of important values, which intended to overturn the situation in point reached at World War II.[100]

Beyond the characterization of the UN Charter as the managerial constitution of the international community legal order, Dupuy strongly highlights the role of its substantive norms (basically, articles 1 and 2) which transmute it in a material constitution and at the same time make of it the cornerstone of the international legal system's unity.[101] In addition, in accepting the function of the *ius cogens* as a vehicle towards the establishment of a normative hierarchy and an international public order,[102] this author approaches to a large extent the thesis supported by the German school.

The rest of the European scholarship, specially the French, does not share many of the postulates advanced by the international community school and specially the thesis on the

[97] *See* Bardo Fassbender, *supra* note 69, at 567-568.
[98] *See id.*, at 585, 588.
[99] *See* Peters, *supra* note 17, at 598.
[100] *See* Dupuy, *supra* note 94, at 221-222.
[101] *See id.*, at 236.
[102] *See id.*, at 280.

constitutionalization of international law. Some have even blamed it because of carrying with it the oversimplification of the concept of constitution and have tried to explain it as a reaction to the question of the unity of international law.[103] In addition, other authors like Koskenniemi are critical of this project. Although not as distant as they may appear at first sight, they have censored the German school because it hides the accomplishment of a hegemonic project. The effort towards the strengthening of *ius cogens* norms, universal jurisdiction, and international law in general is only the ultimate hegemonic technique chosen by the old Europe in an attempt to get back part of the control in a new power configuration.[104] In this author's view, the debate about the constitutionalization of international law is far from the idea of constitutionalism in domestic law, as there is no true *pouvoir constituant*. At best, if the latter can be found in the current international arena it would be empire, and the constitution thus organized would be not of an international but of an imperial character.[105] However, if the debate about the constitutionalization of international law has some apparent value, it is to oppose an uninhibited de-formalization of international law,[106] precisely in those instances in which a higher legitimacy is sought to break international legality.[107] Although the discourse about the constitutionalization of international law has a value-laden content, it is an approach that preserves the rule of law in a formal sense, providing legal certainty.[108]

3.3 Global Administrative Law

The project about Global Administrative Law (GAL), which has it roots in the work of Prof. Benedict Kinsbury, at NYU, is devoted to elaborating a framework of understanding to address the current global governance. In their view, global governance must be understood as administration, and this administration can be analyzed using legal tools already extant in administrative law. There is agreement in international relations scholarship that transnational regulation is looming and that it encompasses formal self regulation by

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[103] *See* Ruiz Fabri & Grewe, *supra* note 66, at 200-201.
[104] *See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFFAIRS 197, 201 (2004); Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 121 (2005); Ruiz Fabri & Grewe, *supra* note 66, at 202-203 (also detecting in this constitutional conception a political project which intends to benefit a particular legal statute).
[105] *But see* Koskenniemi, *supra* note 104, at 206, 213-214 (promoting awareness about the responsibility that international law assumes in order to overcome the dangers associated with empire and to create an authentic universal legal community).
[106] *See* HABERMAS, *supra* note 86, at 115.
[107] *See* Martti Koskenniemi, The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960, 488-494 (2001).
[108] *See* Peters, *supra* note 17, at 610.

industry associations; hybrid private-private or public-private regulation (through partnerships or mutual recognition agreements); network governance by state officials; and inter-governmental organizations with direct or indirect regulatory power. Transgovernmental regulation and administration designed to address the consequences of globalized interdependence is growing exponentially in fields like banking and financial regulation, environment, development, telecommunications, labor standards and even security. These consequences cannot be addressed effectively by national regulatory measures, the very fact that explains the emergence of transnational systems of regulation. These regulatory structures and the ongoing responses to the demands for transparency, consultation, participation, reasoned decisions and accountability are giving way to a growing body of principles, and practices that can be framed in terms of administrative law.[109] They talk of administrative and regulatory functions inasmuch as there are no legislative or primarily adjudicative bodies involved at the global level. The aim would be building up a unity between otherwise disparate areas of governance and utilizing administrative law to check and steer the exercise of power in the global, therefore performing a similar function as regards government power.[110]

This approach is not go without problems. Global rules and standards determine the content of much domestic regulation and ultimately affect the ability of the domestic constitutional and administrative checks. The legitimacy problems raised by the shift of power from domestic to global are not yet resolved. And, in fact, the GAL project encounters criticism regarding legitimacy,[111] as it may convey a simultaneous justification for global governance.

But what is of importance for us is that the proponents of GAL have also defended this approach as an alternative to constitutionalization of international law. If constitutionalization is not all the way wrong, it would require a huge institutional change. More importantly, the societal basis of current world order, fragmented and culturally diverse, does not allow itself to be organized in a quasi-federal manner.[112] On the contrary GAL should be taken as a less holistic, less pretentious effort, and so a more realistic option,

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[109] *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).
[110] See also Nico Krisch and Benedict Kingsbury, Introduction: Global Governance and Global Administrative Law in the International Legal Order, 17 EUR. J. INT'L. L. 1 (2006).
[111] See Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 GERMAN L. J. 1375, 1393 (2008).
[112] *See* Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, LSE Law, Society and Economic Working Papers 10/2009, at 10, *available at:* http://ssrn.com/abstract=1344788.

to understand and react to global governance. GAL, with its more limited approach in order to focus on particular elements of global governance, especially accountability, makes it a more suitable proposal to engage in analytical and normative discourse to address global governance. However, introducing GAL as an alternative to constitutionalization raises normative problems, mainly related to the legitimacy of this new discourse. Putting GAL at work might have the end-result of branding as law what amounts to no more than a bunch of variegated regulatory practices, which are devoid of the transparency and participation (democracy) that rule-making requires,[113] and may better be explained as administrative rationality.[114] Furthermore, if we take GAL to its ultimate consequences we may end up dismissing international law *tout court*.

4. THE LEGITIMACY OF THE CONSTITUTIONALIZATION PROJECT OR WHY INTERNATIONAL LAW AS IT IS TODAY SHALL PREVAIL

4.1 Diverging Constitutional Law Cultures

Before turning to the question of how the elements of a classical doctrine of constitutional law can be translated to the international field, it would be useful to check the response this project has received in the US. Not surprisingly, it should be highlighted that there is no such debate about the constitutionalization of international law in the US. Of course, questions like globalization, the rule of law and unilateralism are the focus of the American scholarship as much as they are overseas, but constitutionalization is not regarded as a more or less natural process stemming from the current context in the international community. On the contrary, the effort undertaken to transpose the constitutionalization framework to the international realm is not shared by the American scholarship. Ultimately, from a political and strategic point of view, constitutionalization is regarded from the US with suspicion as a maneuver intended to bridle the only superpower, which precisely has itself embarked on a unilateral and hegemonic spiral in the last few years.

American exceptionalism is not a new concept, which could be traced back to Alexis de Tocqueville, meaning that there is a shared view (in and out of the US) about the "macro-

[113] *See* Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 995 (2005). *See also* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006) (criticizing GAL as mainly a Western construct that may impact unfavorably on developing economies); *But see* Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009) (highlighting the relationship between public law and private ordering in GAL).

[114] *See* Alexander Somek, *Administration Without Sovereignty*, University of Iowa Legal Studies Research Paper 09-04, at 8, *available at* http://ssrn.com/abstract=1333282.

differences" between the US and other constitutional systems.[115] From a theoretical point of view and beyond more rudimentary criticism about the effects of international law on domestic law,[116] the opposition here is between US constitutional law and international law:[117] as stated by Kahn, American ideas about "popular sovereignty" are difficult to reconcile with an international community built on the idea of overriding universal human rights.[118] If universal rights can not trump the idea of self-government, that is, if international law can not trump national politics, then establishing a single international order is incompatible with American hegemony.[119] In other words, the starting point for American constitutionalists is the identification of the classical constitutionalization doctrine with the "embodiment of a particular nation's democratically self-given legal and political commitments", using Rubenfeld's words.[120] In this author's view, the above-mentioned understanding contrasts with the European one which is the result of the situation existing in the aftermath of World War II. For Europeans, "the fundamental point of international law, and particularly of international human rights law, was to check national sovereignty, emphatically including national popular sovereignty",[121] which had led to the war. On the contrary, for Americans, international law and multilateralism were understood to be for the rest of the world, but not for America.

According to this view, international constitutionalism, which is based on universal human rights, opposes what is termed as "democratic constitutionalism", which protects constitutional rights to the extent that "they represent the nation's self-given law, enacted through a special, democratic, constitutional politics".[122] That explains why Europeans see human rights and international law as transcending national politics, whereas American constitutionalism rather sees human rights as a malleable body that may democratically differ from one nation to another.[123] If "international law is antidemocratic", due to the opacity, remoteness from popular or representative politics, elitism and unaccountability of current

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[115] *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 8 JEAN MONNET WORKING PAPER, ¶ 6 (2008), *available at* http://www.jeanmonnetprogram.org/papers/08/080701.pdf.
[116] *See* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003).
[117] *Cf.* Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 257 (2003) (highlighting, as a constitutional lawyer, that there is not necessarily a confrontation between the US constitutional law and international law regarding sovereignty and the democratic self-governance of the people of the United States).
[118] See Paul W. Kahn, American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order, 1 CHI. J. INT'L L. 1, 2-6 (2000).
[119] *See id.*, at 16-18.
[120] *See* Jed Rubenfeld, *The Two World Orders*, 27 WILSON. Q. 28 (2003).
[121] *See* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1986 (2004).
[122] *See id.* at 1994
[123] *See id.* at 2004.

international organizations, and "there is no world democratic polity today",[124] the US is right in remaining committed to self-government and resisting international governance. Therefore, US unilateralism in international relations appears as the best answer taking into account US constitutional law arguments.[125]

If this account of US constitutionalism is accurate, then it will be difficult to introduce the idea of the constitutionalization of international law in this country. Looming differences regarding constitutional theory confront both sides of the Atlantic and make any approach on this issue very difficult.[126] More nuanced approaches argue that, though there are large differences with regard to the substance of rights, the structure of US constitutional rights is very similar to other constitutional texts, specifically the European model, and so the models are eventually not so diverging.[127]

4.2 The Problem of Translation

In the present section we will try to focus on the question of translation, i.e. the transposition of the key normative concepts associated with constitutionalism from a state-centric setting to a supranational or post-national setting. We will do it in briefly, as the theoretical questions involved here cannot be treated *in extenso* within the limits of this work. Moreover, even though there are differences between constitutionalism, constitutionalization and other related terms, for our purposes we will use all of them interchangeably.[128]

Although the translation of constitutionalism to the post-national setting would seem initially problematic, there is some scholarship which questions "the artificial supremacy of national constitutionalism and argue for a new form of constitutionalism".[129] From this view, constitutionalism should be delinked from the nation-State paradigm in order to arrive at a different conception of constitutionalism. What is needed is a kind of deconstruction of constitutionalism which in turn may lead to the extended application of its ideals, i.e. "the balancing of diverse and often conflicting interests and fears".[130]

It is important to note that there are different approaches to translation. On the one

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[124] *See id.* at 2017-2018.
[125] *See id.* at 1991.
[126] *But see* Peters, *supra* note 17, at 583 (affirming that it is not a question of diverging constitutional cultures, i.e. American *versus* European, but a question of diverging transnational ideologies).
[127] *See* Gardbaum, *supra* note 115, at 10.
[128] *See* J.H.H. WEILER, THE CONSTITUTION OF EUROPE, viii (1999) (reviewing the multiple dictionary definitions of the word "constitution", all of them ultimately relevant to any research of this kind).
[129] *See* Miguel Poiares Maduro, *Europe and the Constitution: What if This Is as Good as It Gets?*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind eds.), 74 (2003).
[130] *See id.* at 75.

hand, nobody is claiming that, in order for a process of international or supranational constitutionalization to arrive at its destiny, it is necessary to replicate completely the constitutional framework found in domestic legal systems. One could even argue that a minimum translation is fair enough to call the operation a true process of constitutionalization. That is, as long as one could detect a fundamental scheme wherein powers are divided, normative constraints on behavior are introduced and a balancing of fundamental interests is articulated, as in the case of the UN Charter or the WTO, it would be possible to call it a constitutionalized setting.[131] So, generally speaking, the process of translation must be admitted as a possibility that has to be contextualized in every setting, but which is in abstract a feasible operation.[132]

On the other hand, of course, the devil is in the detail. Once the process of translation is carefully analyzed, constitutionalization turns out to be very difficult to validate. If we take the examples of the EU and the WTO, we can figure out how difficult is the operation of testing whether the international field is in the process of constitutionalization. Regarding the EU, the outstanding work of Weiler has served to demonstrate that the EU already has a constitution,[133] although this is not the written constitution recently rejected, nor a constitution similar to national constitutions. This in turn leads to the question whether the EU needs a Constitution.[134] With regard to the WTO, the work of Jackson has been most influential in order to affirm the constitutionalization of the WTO.[135] However, Deborah Cass has undertaken the effort of contrasting the constitutionalization of the WTO with what she calls the "received account" of constitutionalization.[136] According to her, none of the three claims of WTO constitutionalization (institutional managerialism, rights-based constitutionalization and judicial norm generation) meet the six core elements of

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[131] See Joost Pauwelyn, The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System by Deborah Cass, 100 AM. J. INT'L L. 986, 989 (2006).
[132] *See* Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind) 27, 33 (2003) (highlighting the significance of constitutionalism, firstly, as a symbolic frame of reference -which is linked, not only to a group of *substantive* institutional values, but also to a *procedural* value, and secondly, as a normative frame of reference; and proposing, based on the co-ordinates of social cohesion, material well-being and personal freedom, a framework through which the operation of translation could be carried out). *See also* Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV., 317 (2002) (proposing criteria to reconceptualise contemporary constitutionalism).
[133] *See* J.H.H. Weiler, *In defence of the Status Quo: Europe's Constitutional* Sonderweg, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind) 7, 10 (2003) (stating that it was a combination of a confederal institutional arrangement and a federal legal arrangement which made up this special constitution of Europe).
[134] *See* J.H.H. Weiler, *Does Europe Need a Constitution?* 1 EUR. L. J., 219 (2005).
[135] *See* J.H. Jackson, The World Trade Organization: Constitution and Jurisprudence (1998).
[136] *See* Deborah Cass, The Constitutionalization of the World Trade Organization. Legitimacy, democracy, and Community in the International Trading System, 95 (2005).

constitutionalization as developed in national constitutional thinking.

In constitutional law theory, there exists an array of characteristics which could be called typical of western constitutionalism, as this has historically[137] developed in America and Europe.[138] Some of them have already been mentioned in this work, i.e, whether there is a written constitution that offers positivity (the UN Charter); whether there is separation of powers, legislative, executive and judiciary; whether there is a minimal protection of human rights, and so on.[139] What the research shows in the first place is that the problem of translation is inescapable, that is, no author has tried to de-link the constitutionalization of international law from the previous experience in domestic settings. As it happens, the result of this contrast has been that international law hardly displays the typical characteristics of the constitutional law tradition and so the process of translation of most of them, even if appropriately modified to the international field, is really difficult or just not possible.[140] Nevertheless, there seems to be a crucial theoretical problem when trying to translate the constitutional phenomenon to the international domain. It seems that there cannot be a constitutionalization process unless the polity, the *demos*, the political community which is been constitutionalized demonstrates an unequivocal intention to attain that goal. This leads us to the question of *who* is the political community in the international field, is it the community of States or the community of individuals? Of course, most international law scholars (including me) believe there is no question of talking about an international

[137] *See e.g.* Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191 (1995) (reviewing the different historical types of constitution making).

[138] As is well known, besides a material constitution (organization of powers and distribution of competences), there is a formal constitution (the written act), all of which has to completed with the protection of human rights and individual liberties, as it can be deduced from article 16 of the French Declaration of 1789. Moreover, the constitution is also normative which means it determines the conditions for the creation of other norms (Hart's secondary norms). *See e.g.* GEOFFREY R. STONE [ET AL.], CONSTITUTIONAL LAW, 6th ed. (2009); BERTRAND MATHIEU & MICHEL VERPEAUX, DROIT CONSTITUTIONNEL [CONSTITUTIONAL LAW] (2004) (for US and French textbooks reflecting mainstream views on constitutional law).

[139] *See* Douglas M. Johnston, *World Constitutionalism in the Theory of International Law*, in TOWARDS WORLD CONSTITUTIONALISM. ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 3, 17 (Ronald S.J. Macdonald & Douglas M. Johnston eds. 2005) (compiling a list of ten heterogeneous propositions that the concept of constitution evokes).

[140] See A. Paulus, *The International Legal System as a Constitution*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 69, 88 (Jeffrey L. Dunoff & Joel P. Trachtman, eds. 2009) (admitting that international law does not meet the precise content of an ideal-type constitution even if a constitutional development would be welcome); Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 381, 387-389 (Jeffrey L. Dunoff & Joel P. Trachtman, eds. 2009) (highlighting that if constitutionalization of international law is to mean anything of value it has to be thick constitutionalization - with its procedural and material elements. However, international constitutionalization does not meet the requirements of 'a self-constitutive process by a democratic constituent power').

community which is not composed of States, i.e. governments.[141]

However, the issue is that if we want to talk about the constitutionalization of international law, then it is no longer possible to sustain the idea of community of States. A true *demos*, a true polity can only be composed of individuals, who all united, as a *pouvoir constituant*, decide their destiny as a community through their political representatives. As Weiler has highlighted,[142] this is not the case in current international law, as it only takes into account individuals as objects, but not as subjects in law. A bing-bang movement is needed in order to change current international law's substantive and structural understandings which may lead to a real constitutionalization.[143] But then we would be witnessing a global constitutional law very different from the international law we know.

4.3 Hegemonic Law

Together with the theoretical problems associated with the endeavor of transposing the constitutional pattern to the international field, there arises another central problem, for practical purposes, which we will call hegemonic law. Hegemonic law is the label used to criticize the legal approach adopted by the US in several fora which mark, so it is regarded, a sharp rupture with the previous practice. Hegemonic law can be identified with the devaluation of equal sovereignty of all States from a formal and material point of view; with the substitution of agreements based on client-like relations for agreements based on reciprocity; with the backing of new rules that promote the interests of the hegemonic State and at the same time the rejection of those that it feels uncomfortable with; and with the preference of informal or customary rules whose breach is introduced as the formulation of a new rule.[144]

Unilateralism is not a feature which may be singled out in relation to just one State,

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[141] See Andreas L. Paulus, Die internationale Gemeinschaft im Völkerrecht [The International Community in International Law] (2001).

[142] See J.H.H. Weiler, The Geology of International Law – Governance, Democracy and Legitimacy, 64 HEIDELBERG J. INT'L L. 547, 558 (2004).

[143] *See* Armin Von Bogdandy & Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, IILJ Working Paper 2008/3, at 52 (recognizing that the current international community does not equate to *the people* and so it is not democratic in the same sense). *But see* Peters, *supra* note 27, at 263 (theorizing in favor of a global *demos* in the global constitutional community, composed of the individuals and States alike, which in turn would overcome the democratic deficit); *See* Paulus, *supra* note 141, at 72 (stating that there are two levels of analysis in international law, the interstate and the inter-individual, and that international law cannot be called 'constitutional' until it reaches the second); *see also* Emmanuelle Jouannet, *L'idée de communauté humaine à la croisée de la communauté des États et de la communauté mondiale [The Idea of Human Community at the Crossroads of the Community of States and the Global Community]*, 47 ARCHIVES DE PHILOSOPHIE DU DROIT 191 (2003).

[144] *See* Detlev Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843-848 (2002).

nor is it an attribute unknown before our time.[145] Nevertheless, there has recently been an apparent increase in unilateralist practices, as attested by the literature,[146] which have been correlated to a large extent by the US activities on several fronts within the international system.[147]

It is a fact that the US amounts today to the one and only big global superpower.[148] Some understand this situation as one that generates immediate consequences, for the US has a special responsibility towards the international community due to this exclusive position it occupies in the international system.[149] On the other hand, the understanding the American scholarship has of the international community is far from what many would expect from the big superpower and, for sure, does not match with the idea of international community put forward by the German school. Different schools in the US may vary significantly from each other, starting with the New Haven realist school, across the institutionalism of regime theories, to the more recent neo-liberal one, but when seen through the lens of the globalization issue, they all share to a greater or lesser extent two basic elements that may be neatly identified. On the one hand, the increasing exaltation of the international community but just understood as made up of individuals, whose freedom of action and protection of basic rights should stir all international activities. This inner mindset explains the subsequent distinction between liberal and illiberal States and societies, according to their attitude towards democratic principles that authors with a clear-cut liberal tendency promote,[150] and the justification of the intervention principle applied only on the latter States.[151]

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[145] *See* Nathaniel Berman, *Intervention in a "Divided World": Axes of Legitimacy*, 17 EUR. J. INT'L L. 744-745 (2006) (underscoring from the point of view of the critical movement that, in fact, the international events after 9/11 do not amount to a fracture, as the idea of a coherent and legitimate internationalism, inherent to an integrated international community, is more the result of a dream or an illusion than reality).

[146] See Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19, 21 (2000) (identifyng a recrudescence of unilateral practices even before the events following the terrorist attack of 9/11, specially on the part of the US); Christine Chinkin, *The State that Acts Alone: Bully, Good Samaritan or Iconoclast?* 11 EUR. J. INT'L L. 31, 38 (2000) (underscoring that there is no dichotomy between unilateral and multilateral action when the latter can be manipulated by a single strong actor); But see Michael W. Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000) (arguing for unilateral action as an alternative to the authoritative decision process when substantive criteria are fulfilled).

[147] See S.V. Scott, Is There Room for International Law in Realpolitik? Accounting for the US "Attitude" towards International Law, 30 REV. INT'L STUD. 71 (2004).

[148] *See* Joseph Nye, The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone 1 (2002) (comparing the current power of the US with that of the Roman Empire).

[149] *See* Phillip Allot, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391 (1997-1998).

[150] *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 1995; Fernando Tesón, *The Kantian Theory of International Law*, 92 COL. L. REV. 96 1992; *See also* THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6-11 (1995) (accepting somehow a value content in his concept of international legitimacy).

[151] *See* Patrick Capps, *The Kantian Project in Modern International Legal Theory*, 12 EUR. J. INT'L L. 1003

On the other hand, there is the resistance concerning the creation of strong international institutions. Global problems demand global solutions, but there is no proposal intended to address those problems on the basis of the establishment of proper international institutions. This leads to the description of problems without trying to provide the corresponding answers (governance without government) or, alternatively, to the return to the State as the only institution with democratic legitimacy commissioned to supply security and social solidarity.[152]

It is true that the Critical Legal Studies movement has condemned the structural empire which results from the neo-liberal globalization led by the US, but it is no less true that critical literature rejects the dominant idea about the international community as a hypocritical line of reasoning coming from Europeans. Therefore, they only call for an "authentic" international community which manifests itself through the combination of several anti-imperialist strategies.[153]

That the big superpower only makes recourse to international law when the latter favors its national interests does not amount to a more or less accurate description of reality. The critical turn comes when this assertion is vigorously transformed into a normative proposal by part of the emerging literature in the US, which may be ascribed to the rational choice theory.[154] For these rationalists, the legalization, institutionalization or constitutionalization of international law, understood as a proposition originating in Europe, deserve a deeply negative evaluation and international law is characterized as one more out of the several instruments States have at their disposal in the arena of international politics, in the purest American realist style. Therefore, international law will merely have the level of relevance the most powerful States wish, according to its national interest, which means negating its legal character once again. The ultimate objective of hegemonic international law

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(2000) (noting that the theoretical apparatus built by authors like Tesón promotes unilateralism and intervention in non-democratic States).

[152] *See* Andreas Paulus, *The influence of the United States on the concept of the "international community"*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 57 (Michael Byers and Georg Nolte eds., 2003).

[153] *See* Martti Koskenniemi, *Comments on Chapter 1 and 2*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 91 (Michael Byers and Georg Nolte eds., 2003).

[154] *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); R. H. Pildes, *Conflicts Between American and European Visions of Law: The Dark Sides of Legalism*, 44 VA. J. INT'L L. 145 (2003-2004); Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA J. INT'L L. 113 (2003-2004); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAND. L. REV. 1901 (2002-2003); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); C. A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

is none other than placing hegemony above law.[155]

4.4 Unity and Fragmentation of International Law

The third important problem that constitutionalization has to face is fragmentation. Indeed, the constitutionalization debate could be interpreted as a reaction against the rampant fragmentation of international law and the proliferation of adjudicative bodies that scholars have recently witnessed within this area of law.

Some internationalists have lately displayed an enormous effort in order either to show and address the dangers coming from a "relative normativity" in the international legal order,[156] or to demonstrate the unity of international law. That is, the latter argue that international law works as a more or less complete legal system and, in any case, is adequate taking into account the specific characteristics of the social base in which it has to function. For instance, firstly Abi-Saab and then, more insistently, Pierre-Marie Dupuy, have devoted themselves to the task of revealing the unity and coherence of international law rules. Starting from formalist methodological conceptions such as those represented by Kelsen, the institutionalized international community exposed by Santi Romano and the analytical theory distinguishing between primary and secondary norms proposed by Hart (whose concept of law is explicitly defended), Abi-Saab and Dupuy insist on the possibility of amalgamating those conceptions to re-frame international law as a system. Secondary norms, including rules of recognition, rules of change and rules of adjudication, though less developed than in domestic systems, do not lead to a "primitive" system, as was characterized by Hart,[157] but reflect power relations of the society from which they emerge. The absence of formal structures that allow the centralization of power (in the international system we cannot speak of de-centralization, as that would imply previous centralization, non-existent as is well known) is due to the atomization or absence of a more developed solidarity or social will. The examination of secondary norms in the legislative, executive and adjudicative areas offers the exact measure regarding the evolution of the international order as a legal system.[158] According to Dupuy, it must exist and indeed there does exist an international

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[155] *See* John Bolton, *Is There Really "Law" in International Affairs?* 10 TRANSNAT'L. L. CONTEMP. PROBS. 1, 7 (2000) (stating that the absence of legitimately authoritative legal sources and democratic institutions, *inter alia*, makes it impossible for international law to be really law).

[156] See P. Weil, Towards Relative Normativity in International Law?, 77 AM. J. INT'L L. 413 (1989); Prosper Weil, Le droit international en quête de son identité. Cours général de Droit international public [International Law in Search of its Identity. General Course of Public International Law], 237 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 47 (1992).

[157] *See* H.L.A. Hart, The Concept of Law, 209 (1961).

[158] *See* Georges Abi-Saab, *General Course of Public International Law*, 207 COLLECTED COURSES OF THE

legal system. However, this system is not based on a formal conception of Law, as in Joseph Raz's conception.[159] It rather implies a bunch of secondary substantive norms, of material content, as axes for the existence of the international system.[160]

This substantive unity of international law, which finds its constitutive moment in the United Nations Charter,[161] is based, as mentioned before, on the existence of rules like the prohibition of the use of force, the proscription of genocide, the principle of non-intervention, and the protection of human rights, *inter alia*.[162]

In this sense, it is said that the emergence of specific international legal systems does not necessarily mean a rupture in the unity of international law because its hierarchical superiority will keep that unity.[163] From the nomogenetic point of view, the existence of different regulatory regimes does not inevitably lead to the breaking of international law integrity, because the relationship between these sub-system's norms and general international law norms proper is structured according to the principle of *lex specialis*.[164] Furthermore, regarding the application of international law rules, the appearance of new adjudicative bodies and control systems is a positive outcome. It improves the efficiency of international law and frees it from one of its longstanding criticisms, that is, the absence of compulsory adjudication. The more adjudication instances the better. States will be able to solve their disputes within these institutions, or else by having recourse to diplomatic negotiations, but anyway having them as the ultimate assurance for complying with international law.[165]

ACADEMY OF INTERNATIONAL LAW 105-126 (1987).

[159] *See* Joseph Raz, The Concept of a Legal System. An Introduction to the Theory of a Legal System, second ed., 1980.

[160] See Pierre-Marie Dupuy, The Danger of Fragmentation or Unification of the International Legal System and the ICJ, 31 NYU J. INT'L. L. & POL., 794 (1999).

[161] *See* Pierre-Marie Dupuy, *The Constitutional Dimension of the UN Charter Revisited*, 1 MAX PLANCK YEAR BOOK OF UNITED NATIONS LAW, 1 (1997).

[162] *See* Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Problem?*, 31 NYU J. INT'L. L. & POL., 689 (1999) (questioning whether an approach on the identity and the structure of international law as the one developed by Dupuy is rigorous enough to be compatible with more formalistic approaches like the one developed by Raz).

[163] *See* Dupuy, *supra* note 94, at 59-91.

[164] *Ibid.* at 432 (negating the autonomous and self-contained character of these subsystems and trying to demonstrate, through the examples offered by the European Communities and the World Trade Organization, their relationship with general international law as specialized regimes that do not oppose each other, but that are integrated within international law).

[165] *See* Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 101-382 (1998) (defending proliferation and demonstrating that, except some cases, the application of important international legal doctrines by those tribunals has not lead to very different results that might put the coherence of international law at risk). *See also* Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L. L. & POL., 698-699 (1999) (stating that proliferation shows a desire of the international community to address different domains of the international activity in a functional and specialized

However, this proliferation of adjudicative bodies of universal character might be the starting point towards a situation of real danger to the unity of international law. Though fragmentation of international law in some degree has been a traditional fear within the scholarship, the first institutional denunciations were formulated from the very Presidency of the ICJ. Indeed, the Presidents of the ICJ, namely Judge Schwebel[166] and Judge Guillaume,[167] and in a more nuanced fashion, Judge Jennings, [168] made an effort to show the risks latent under the proliferation trend. President Guillaume presented his claim even in the General Assembly.[169] Nevertheless, a subsequent ICJ President, Judge Higgins, did not agree with this claim.[170]

The ILC Report[171] on the fragmentation of international law is profoundly inspired by the general conception on the discipline that its author Marti Koskenniemi has had. According to this scholar, the claims made about the dangers derived from fragmentation, and advanced by some ICJ judges and academics, are nothing but a reflection of the anxieties

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manner).

[166] In 1999, in his speech before the United Nations General Assembly President Schewel, addressing the proliferation of international tribunals, and as a way to avoid conflicts and preserve the unity of international law, introduced the idea of creating some mechanisms that would allow demanding an advisory opinion from the ICJ, available at http://www.icj-cij.org/icjwww/ipresscom/iprstatement.htm.

[167] See Gilbert Guillaume, The Future of International Judicial Institutions, 44 INT'L & COMP. L. QUARTERLY, 861-862 (1995); Gilbert Guillaume, La Cour internationale de justice. Quelques propositions concrètes à l'occasion du Cinquantenaire [The International Court of Justice. Some concrete Proposals on the Occasion of its Fiftieth Anniversary], 100 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [GENERAL REVIEW OF PUBLIC INTERNATIONAL LAW], 331 (1996) (conveying his anxieties due to the important proliferation of international tribunals, focusing especially in the cases of the Law of the Sea and Criminal Courts and the almost non extant international reaction to this situation).

[168] *See* Robert Y. Jennings, *The Role of the International Court of Justice*, 68 BRITISH Y.B. INT'L L., 59-60 (1997) (advising that the assumption of specific approaches from the several international tribunals might prompt such a variety that international law may end up fragmented and unmanageable).

[169] Before the Plenary at the UN General Assembly, and the Sixth Commission, President Guillaume reiterated his position about the confusion generated by the proliferation of tribunals and the risk of *forum-shopping*, presenting again the solution consisting of an advisory opinion to the ICJ, available at http://www.icj-cij.org/icjwww/ipresscom/iprstatement.htm.

[170] *See* Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L. QUARTERLY 122 (2001) (stating that "we thus today have a certain decentralisation of some of the topics with which the ICJ can in principle deal […] I think this is an inevitable consequence of the busy and complex world in which we live and is not a cause of regret. I do not agree with the call of successive Presidents, made at the UN General Assembly, for the ICJ to provide advisory opinions to other tribunals on points of international law. This seeks to re-establish the old order of things and ignores the very reasons that have occasioned the new decentralisation"),

[171] The debate about the fragmentation of international law was initiated at the International Law Commission (ILC) with the Hafner Report called "Risks Ensuing from Fragmentation of International Law", *see International Law Commission. Report on the work of its fifty-second session*, U.N. GAOR, 55th sess., Supp. (No. 10), at 326, U.N. Doc. A/55/10 (2000) (a summary of this Report can be seen in Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004). The ILC has finally produced a report, within a Group presided by Martti Koskenniemi, *see Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, U.N. GAOR, 58th sess., at 1, U.N. Doc. A/CN.4/L.682 (2006).

generated by the globalization process and post-modernism.[172]

Koskenniemi, who masters a deep knowledge of international law history, believes that the systemic approach of German scholarship, which has always tried to elevate international law to the category of a complete legal system, thereby replicating domestic legal systems and their function (and at the same time doing away with the characterization of international law as a primitive system, in Hart's terms) has encountered current international reality. European scholars have utilised categories of rules such as *ius cogens*, *erga omnes* obligations and others, together with the idea of a constitutionalized system (first around the League of Nations and afterwards around the United Nations), in order to build up a complete international law, similar to domestic legal systems. But globalization and post-modernism in the form of legal pluralism have also influenced the international legal order so that nomogenesis in international law has undergone a process of specialization and de-formalization. The fear about the rupture of the unity of international law provoked by these *self-contained regimes*, which may lead to a different and even contradictory application of international law, not as a result of a bad legal technique, but as the outcome of different political agendas (there are hegemonic battles within each sub-sector of the international legal system), might be logical and even a fear to be shared. But there is nothing that can be done to avoid that end result.[173]

The ILC Report, somehow toned down to take into account the personal stance of the author,[174] assumes that fragmentation is consubstantial to the evolution of the international society and, so to speak, unavoidable. We should not work against this trend, not only because is unnecessary, but because it is useless. Phenomena such as self-contained regimes or regionalism are neither negative in themselves nor reversible. However, this does not mean we should not make an effort towards establishing, ordering, and clarifying the relationships between these present regimes within international law in order to solve possible conflicts, in a way and with an aim which is appropriate to legal thinking. In my view, this unavoidability may be the reason why the ILC does not address institutional fragmentation and limits itself

[172] *See* Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L. L. 553 (2002).
[173] *Id.* at 556-562.
[174] *See* Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L. L., 999, 1003-1004 (2004) (stating that, as the President of the ILC Study Group on Fragmentation, Koskenniemi has toned down his previous position in order to alleviate anxieties generated by post-modernism. Nevertheless, they think fragmentation cannot be solved from a legal point of view, or even from a political point of view, as it is the result of profound contradictions between colliding sectors of global society, so the only ambition must be managing it on the basis of a conflict of legal logic in order to make those regimes minimally compatible).

to making an effort to clarify the extant tools in international law to solve material fragmentation.[175] On the other hand, there is the principle of harmonization,[176] which could be based on the presumption that, in principle, there are no conflicts among rules in international law, and in the maxim which says that general consent of states does not emerge to create rules incompatible with extant obligations.[177]

In a recent work, Martineau has examined how the rhetoric of fear of fragmentation emerges in times of anxiety, whereas faith in it is proper of times of confidence. The puzzling question is what the political motivations and the end-results pursued are when proposing one discourse or the other in a given context such as the current one, which could be labeled as a time of anxiety or confusion. Normally, a supporter of the unity of international law will work against fragmentation, but there is much to be said about the politics of fragmentation.[178]

5. CONCLUSIONS

As noted by David Kennedy, the constitutionalization of international law has to be made as much as discovered and there is much to be said about the stakes everyone has in the reinterpretation and the remaking of global governance.[179] As this paper has tried to demonstrate, current debates on the constitutionalization[180] of international law have a distinctive European flavor, and reflect a political agenda not necessarily shared by other jurists, certainly not by the mainstream US scholarship. Furthermore, many theoretical and practical difficulties arise in the task of transposing constitutional law institutions and

[175] *See* Koskenniemi Report, *supra* note 144, at 10 (contending that, regarding material fragmentation, there exists in international law legal devices that help avoiding conflicts of rules and establishing relationships among different rules of the legal order and their treatment as a part of the system. These legal tools can be summarized in the following: the use of the principle of *lex specialis*; *lex posterior*; *lex superior*; and the principle of systemic interpretation, which in turn determine the extant relationship between specific and general law; previous and subsequent law; the hierarchy of norms; and the relationships connecting law and its broader normative context, respectively).
[176] *Id.* at 27. *See also* Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265 (2009) (downplaying the risks associated with fragmentation and proliferation).
[177] *See* Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India), 1957 I.C.J. 142 (26 April).
[178] See Anne-Charlotte Martineau, The Rhetoric of Fragmentation: Fear and Faith in International Law, 22 LEIDEN J. INT'L L. 1 (2009).
[179] *See* D. Kennedy, *The Mistery of Global Governance*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 37, 39, 56 (Jeffrey L. Dunoff & Joel P. Trachtman, eds. 2009) (stating that "some would gain and some would lose" in this desired process of constitutionalization of international law).
[180] *Cf.* Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 9, 16-23 (2007) (using the constitutionalization debate to equally address the mistakes made by legal formalism and its current substitute, the managerial mindset, which is at odds with the rule of law understood from a Kantian perspective as project of "freedom").

concepts to the international field. Diverging constitutional law cultures, the problem of translating constitutional law language concepts to the international setting, hegemonic law and the traditional fragmentation of international law, somewhat highlighted by the proliferation of international tribunals, make it very difficult to uphold the existence of a constitutional order in the international plane that would replicate the national constitutional order as sought by the mainstream European school.

And there is the question of why the debate about the constitutionalization of international law has emerged exactly now.[181] To a large extent, the current situation of international relations and international law, where globalization is pushing back the ability of the State to accomplish its functions, and when the recent and rampant unilateralism from the US has fatally undermine international cooperation, may explain this wanted trend towards constitutionalization.[182] In fact, in the seemingly desperate effort displayed by the European discourse in order to find out (or to put in motion) a constitutionalization process within the international law domain there may be a more straightforward explanation: effectiveness. In other words, behind this attempt there may very well be just an anxiety to construe an international law with "real teeth".

Achieving the "rule of law" in the international realm has always been a main objective for internationalist scholars. From its very beginning, there has been a focal aim within this discipline, an aspiration shared by all participants, that is, having an international law like any other law, isolated from politics, and truly mandatory.[183] In the end, this assertion would lead us to the never-ending problem relating to the very existence of international law, the so called issue about the *fondamentation du droit international*, (after all, it could be that the discipline has not achieved a post-ontological age), a problem that will not be dealt with in this paper. Seen through this lens, the constitutionalization debate might be interpreted as the counter-reaction of a large part of the discipline at a time when it has experienced much stress.

More recently, some authors have tried to pull back a little from the proposal of the constitutionalization project, stating that it should be understood as a mind-set rather than a

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[181] *See* Dunoff, *supra* note 21, at 663; Jeffrey L. Dunoff, *Why Constitutionalism Now? Text, Context and Historical Contingency of Ideas*, 1 J. INT'L L. & INT'L RELATIONS 191, 198 (2005) (stating that, within the trade law sector but also within international law in general, there is an explanation behind the turn to constitutionalism which could be labeled as the ambition to remove world politics from the domain of international law, very much under pressure in the recent years; a turn which is self-defeating though).
[182] *See* Klabbers, *supra* note 18, at 47 (highlighting the use of constitutional language as an element of legitimacy).
[183] *See* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 401 (1999-2000).

program aiming at the full constitutionalization of international law. This sounds more realistic indeed but it also sounds the demise of the promise of the constitutionalization of international law. In this sense, the constitutional reading of international law would amount to no more than a call for the regular application and the due effectiveness of a legal order.