

Between Constitutionalization and Fragmentation - Concepts and Reality of International Law in the 21st Century

I. Introduction: International Law, Constitutionalization, Fragmentation

According to a proverb attributed to Niels Bohr, “prediction is very difficult, especially about the future”. Public international lawyers, however, are used to impossible tasks. After all, to quote a famous Austro-English international lawyer, Hersch Lauterpacht, international law “is at the vanishing point of law”.¹ It is even more remarkable, then, that an important part of German doctrine does not only try to establish the legal nature of international law, but even transfers the strongest concept of a legal order to international law, namely constitutional law, in other words, the idea of an all-encompassing legal order regulating the spheres of international actors, and thereby not limiting itself to States, but piercing the veil of sovereign statehood to be directly applicable to individual human beings.² And indeed, we are witnessing a tremendous influence of international law on our daily lives, from the construction of bridges over our rivers³ to the treatment of foreigners abroad⁴ – a saga that

¹ H Lauterpacht, 'The Problem of Revision of the Law of War' (1952) 29 British Year Book of International Law 360, at 382.

² For recent contributions to the constitutionalization debate see the contributions to JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge UP, Cambridge 2009); J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford UP, Oxford 2009); B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, Leiden / Boston 2009), each with further references. The particular „German“ nature of the debate can be seen in the prominent position of constitutionalism in 10 presentations in a lecture series by the Max Planck Institute on the future of international law in 2007, see Vorlesungsreihe „Die Zukunft des Völkerrechtswissenschaft in Deutschland“, 67 ZaöRV (Heidelberg JIL) (2007) 585.

³ On the „Waldschloessen case“, see only German Federal Constitutional Court (Bundesverfassungsgericht - BVerfG), 2 BvR 695/07 of 29 May 2007, para. 35, http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html.

⁴ See only *LaGrand (Germany v. United States)*, Judgment, ICJ Reports 2001, p. 466; *Avena and other Mexican Nationals (Mexico v. U.S.)*, Judgment, ICJ Reports 2004, p. 12. For the most recent domestic decisions of the

now lasts for more than ten years. The relationship between the two European Courts, the European Court of Justice and the European Courts of Human Rights, with the German Federal Constitutional Court is increasingly keeping constitutionalists alert.

Nevertheless, besides the establishment of the World Trade Organization and the International Criminal Court, the past two decades have also seen the revival and then the erosion of the collective security system of the United Nations, and it is far from obvious that the rise of the Asian and Latin American powers Brazil, India, and, in particular, China will lead to a renewed international constitutionalism. On the other hand, whoever wishes to be a big player in the globalized world of today will sooner or later need to contribute to the establishment of structures that make the government, or rather governance, to solve its problems as effectively and efficiently as possible. It is in this constructive perspective in which I offer the following reflections.

I will begin with a brief description of the origin of global constitutionalism, in particular in German international law theory, and then move to the opposite thesis, namely that we are faced with a fragmented global order that reflects a dismemberment of any unified conception of a single world legal order towards a world of several and distinct actors that self-order their own legal realm without much need for a coherent overarching legal system. I will do so by confronting the constitutionalist arguments with an unruly and diverse international environment. At the end, please allow me to offer some moderating conclusions.

II. The Concept of Constitutionalization in Contemporary International Law

The origin of the constitutionalist school can be found not in the establishment of new institutional structures, but in the modernist formalism of the Kelsenian school.⁵ Their point is a purely formal one: there can only be one binding legal system at a time, and that law must be deduced from one single source, the “Grundnorm”. Otherwise law would lose its normative character. Thus, the unity of the legal order is the precondition of the legal

highest domestic courts on the matter, see *Medellín v. Texas*, 128 S.Ct. 1346 (2008); BVerfG, 2 BvR 2485/07 of 8 July 2010 – juris.

⁵ See H Kelsen, *Introduction to the Problems of Legal Theory* (1 edn Clarendon Press, Oxford 1992) 120-25 (English translation of the 1st ed. of 1934). For further literature on this and the following, see A Paulus, 'The International Legal System as a Constitution' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge UP, Cambridge 2009) at 69 (72 et seq.).

character of international law. In this regard, Kelsen's disciple Alfred von Verdross used, in the early 1920s, the term "Die Verfassung der Völkerrechtsgemeinschaft".⁶

But, as we all know, a system of legal norms alone is not sufficient to establish a constitutional order. Institutions are needed to uphold the legal order. As a consequence of two World Wars, in what David Kennedy has called the "move to institutions",⁷ States established the League of Nations and then the United Nations to stabilize the international legal order and to allow for its peaceful change. But they did not rely on legal norms alone, but also on power. The result was to be a legal order backed by the force of the five policemen, the 5 victorious permanent members of the Security Council that were also the only legal possessors of the nuclear bomb. Their task was to keep all military conflict below nuclear Armageddon. But only after the end of the cold war, after the recognition of the primacy of "common values" over "class values", the United Nations could be hoped to finally fulfil its mission. The "new world order" heralded by George Bush the elder after the Iraq war⁸ should finally bring about the "end of history"⁹ as a history of armed confrontation between powers and ideas. The "Washington Consensus" around global capitalism and democratic values epitomized the new world.

In the meantime, the legal concepts that were to support the establishment of the new order were already in place. Core treaty law, in particular for "world order treaties" such as the UN Charter, but also the Non-Proliferation Treaty, should become binding on non-parties and should limit, by way of *jus cogens*,¹⁰ possible deviations by recalcitrant States, the "rogue States" or "States of concern". Obligations *erga omnes* give everybody the right to intervene in cases of serious violations of the basic values of the new "public" international order.¹¹ In

⁶ Av Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Julius Springer, Wien/Berlin 1926).

⁷ D Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 849.

⁸ Statements of September 11, 1990, January 29 and April 13, 1991, in: 2 *Public Papers of the Presidents of the United States: George Bush* 1219 (1990); 1 *Public Papers of the Presidents of the United States: George Bush* 79, 366 (1991); Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict, March 3, 1991, 27 *Weekly Compilation of Presidential Documents* 259 (January-March 1991). For early skepticism in this regard see G Abi-Saab, 'A "New World Order"? Some Preliminary Reflections' (1994) 7 *Hague Yearbook of International Law* 87

⁹ F Fukuyama, 'The End of History', 16 *National Interest* (1989) 3. Cf. F. Fukuyama, *The End of History and the Last Man* (1992).

¹⁰ The term is contained in the Art. 53 of the Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331. On *jus cogens* and obligations *erga omnes*, see only A Orakhelashvili, *Peremptory norms in international law* (Oxford UP, Oxford 2006); AL Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation' (2005) 74 *Nordic Journal of International Law* 297, with ample references.

¹¹ For the first use of the term in this sense, see *Barcelona Traction, Light and Power Company (Belgium v Spain)*, ICJ Reports 1970, p. 32, paras. 33-34; for its current regulation see Art. 48 and Commentary, in J

particular German scholars, such as Hermann Mosler,¹² Jochen Abr. Frowein,¹³ Bruno Simma¹⁴ and Christian Tomuschat¹⁵ constructed, in different shades, an “international public law” or “community interest” law around the proposition that certain basic values of the international community should be translated into an international law that went beyond traditional bilateralism and provided for means to solve global problems, such as the observance of minimum human rights and the preservation of the global environment.

But of course, such an order would also need a stick. The “end of history” did not materialize; indeed, the warming of the deep freezer of the cold war also awoke the old demons of nationalism and fascism. Fifty years after the liberation of Auschwitz, genocide was possible again, not only in Africa, but also in South Eastern Europe. The attempts to cope with this hydra without adequate military resources led to some of the biggest advances of community interest law in the past 20 years: the rise of international criminal law culminating in the establishment of the International Criminal Court, and the development of the concept of “Responsibility to Protect”, namely the promise in the Outcome Document of the 2005 Summit of Heads of State and Government of the United Nations to counter collectively and effectively war crimes, crimes against humanity, mass rape and genocide and to check the performance of States in the same task.¹⁶ In the Kosovo affair, the attempt to take the new law of tomorrow in one’s own hands, without waiting for a firm legal entrenchment of the so-called humanitarian intervention, was politically, as it seems, successful, but proved precarious at best as a new legal mechanism.¹⁷ Possibilities of abuse can be found in many places, not the least on the former Soviet territory.

But Kosovo also posed the “Gretchenfrage” how to relate the old institutions to the new interventionism, and how far law should be allowed to limit the ability of States to unilaterally enforce order. The genius of the unilateral use of force was out of the bottle, it seemed. Global

Crawford (ed), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge UP, Cambridge 2002), p. 276.

¹² H Mosler, 'The International Society as a Legal Community' (1974 IV) 140 *Recueil des Cours* 1.

¹³ JA Frowein, 'Konstitutionalisierung des Völkerrechts' (2000) 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 427

¹⁴ B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217.

¹⁵ C Tomuschat, 'Die internationale Gemeinschaft' (1995) 33 *Archiv des Völkerrechts* 1.

¹⁶ 2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 139. For an overview see I Winkelmann, 'Responsibility to Protect', *Max Planck Encyclopedia of Public International Law*, www.mpepil.com (2006).

¹⁷ See only B Simma, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1.

vigilantism could be the harbinger of new violence and of imperial overreach. Whereas, after the fateful day of September 11, 2001, Afghanistan could be interpreted as a measure of collective and individual self-defence against non-State actors and the State protecting them, the new Iraq war was a hardly-veiled attempt to change the existing legal order from a quasi-constitutional to a hegemonial one.¹⁸ From unilateralism in institutional guise, as in Afghanistan, we got into unilateralism without legal foundations. Whereas Kosovo could be interpreted as a struggle for new rules,¹⁹ Iraq symbolizes the naked ignorance of the existing legal order in the name of security with flimsy attempts of justification. This is not the way for constitution-making, and the attempts to modify the Charter system against the use of force have failed miserably.

Finally, after Iraq and after hegemony, we have witnessed the failure of Bretton Woods and are now seeing the establishment of a loose kind of world financial governance by the G-20 directorate. While US power should not lightly be discarded, and the United States has come back from behind several times before, we are witnessing a period of relative Western decline and Asian rise.

However, the new powers of the so-called BRIC states²⁰ do not appear to have much stomach for new constitutional orders. Rather, they speak the language of sovereignty and non-intervention and not of global constitutionalism and human rights. The delegalization of the G-20 appears as the antidote to traditional legalization and constitutionalism. Finally, the breakdown of the Copenhagen Conference shows the inability of the old system to effectively protect and promote community interests. Whither constitutionalism?

III. Fragmentation and the Complexities of 21st century international relations

Indeed, other writers point to cracks in the coherence of the international legal system. First of all, the State that the Second Senate of the Bundesverfassungsgericht has just recently considered to be a universal ordering principle,²¹ shows signs of weakness. “Failed States” such as Afghanistan, Yemen or Somalia, and the rise of private actors, such as multinational

¹⁸ See only AL Paulus, 'The War Against Iraq and the Future of International Law: Hegemony or Pluralism?' (2004) 25 Michigan Journal of International Law 691, with further references.

¹⁹ Cf. J Habermas, 'Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral' in R Merkel (ed), *Der Kosovo-Krieg und das Völkerrecht* (Suhrkamp, Frankfurt 2000) at 51-65.

²⁰ This acronym relates to Brazil, Russia, India, and China.

²¹ BVerfGE 123, 267, at 346 - Lisbon Treaty.

enterprises and investors, global banks “too big to fail”, Non-Governmental Organizations and philanthropists such as Bill Gates, but also mercenaries, terrorists or pirates seem to indicate a loss of control of States.

Legally speaking, the attempt to bring the whole of society under the single control of one (domestic or supranational) legal system is failing. Other principles of ordering, from supranationalism to private autopoiesis²² and global activism, take hold. States increasingly deal not with each other, but with investors or NGO activists. Amnesty international trumps the Human Rights Council.²³ Courts and tribunals proliferate,²⁴ but most of the new bodies, from the International Criminal Court to WTO Dispute Settlement, from ICSID via the International Chamber of Commerce to the European Court of Human Rights, adjudicate only one single issue area in a specialized legal régime that recognizes diverse legal actors. The central role of State institutions, namely the balancing of conflicting rights and interests, is vacant or only weakly institutionalized, such as in the UN or the International Court of Justice (ICJ). The lack of an effectively institutionalized representative of the common interests leads to an underrepresentation of the weak; strong legal institutions are in danger to beat weaker ones, as we have witnessed in the “trade &” debates over the limited scope of WTO law vis-à-vis issues of poverty, human rights, or the protection of the environment.²⁵

Of course, in a weakly institutionalized global system, such partial institutionalization is not necessarily bad – on the contrary, it is incontrovertible. Fragmentation confirms rather than contradicts the inevitable demand for law and binding adjudication on the basis of international law rather than power politics. It also testifies to the conformity of international legal ordering to longer term interests that see a win even in the threat of judicial loss. But the result is not a single coherent legal order, but panoply of legal orders serving eventually conflicting interests and considerations.

²² Cf. G Teubner and A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999.

²³ Cf. A-M Slaughter, *A New World Order* (Princeton UP, Princeton and Oxford 2004).

²⁴ Cf. Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford UP, Oxford 2003)

²⁵ Cf. AL Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization' in IF Dekker and WG Werner (eds), *Governance and International Legal Theory* (Martinus Nijhoff, Leiden, Boston 2004) 59 with further references.

In its 2006 report on the matter, the International Law Commission, under the able leadership of Martti Koskenniemi,²⁶ has shown ways of dealing with fragmentation, both by using traditional legal mechanisms such as *lex posterior* and *lex specialis* and by pointing to elements of hierarchy in the international legal system, from *jus cogens* to the prevailing force of obligations under the UN Charter (Article 103). Its main, and most innovative, point however was the showing of “coherence” as a means of bringing conflicting considerations together. In other words, while the ILC did not deny the absence of a single hierarchical world legal system, it nevertheless advocated the interpretation of international legal prescriptions “as if” they were part of a coherent whole. This “principle of systemic integration”²⁷ demonstrates a certain return to the ideas of the predecessors of the constitutional idea in international law. But the Commission converts Kelsen’s and Verdross’ universal pyramid of a hierarchical world law into a mere principle of interpretation. Universal constitutionalism in Kantian style is reconstructed into a “constitutional mindset” of the lawyer-alchemist.²⁸

IV. Conclusions

Nevertheless, by way of tentative conclusion, I would regard a “constitutional mindset” rather than a fixed “constitutional order” as the best response to the requirements of “Our Common Future”. The world state continues to suffer from the very same defects Immanuel Kant has pointed to more than 200 years ago²⁹: It would lack pluralism and is thus be too monolithic and strong, and it would lack the power to implement its orders and would thus be too weak. Rather, as much as we may have to live with fragmentation, we also should look for perspectives of re-integration. In the best of the constitutional tradition, law – and lawyers – need to strive for unity in diversity, to respect rights and to hold the exercise of every public power to account, be it from States such as the US in Guantánamo, or from international

²⁶ M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' (2006), UN Doc. A/CN.4/L.682.

²⁷ *Id.*, paras. 410-480.

²⁸ See M Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9.

²⁹ I Kant, 'Zum ewigen Frieden: Ein philosophischer Entwurf' in W Weischedel (ed), *Werke* (Wissenschaftliche Buchgesellschaft, Darmstadt 1983), at 208-213. I Kant, 'Die Metaphysik der Sitten' in W Weischedel (ed), *Werke* (Wissenschaftliche Buchgesellschaft, Darmstadt 1798), § 61, pp. 474-75.

organizations, such as the United Nations in form of the so-called terror lists lacking public scrutiny.³⁰

Our Common Future requires finding answers to global problems that go far beyond state borders, from global warming to global refugee flows, from genocide to global hunger and poverty. We will not tackle these problems without global institutions, be they weak or strong, more institutionalized or less. And in the absence of a global hegemon or a world State, we will remain in dire need of third party arbitration and adjudication between equals – and unequals.

For courts, this implies forgoing the old belief in legal and judicial hierarchies, towards a meaningful dialogue of Courts.³¹ No court, be it domestic, regional or global, be it of a general or of a limited nature, has only blue sky over it, in other words, is not subject to the determinations by others in at least a part of its jurisdiction. We need a jurisprudence of accommodation, not hierarchical ordering. And, of course, at a time when domestic, supranational and international decisionmaking is in need of democratic legitimacy, the mere reliance on technocratic expert knowledge will not suffice, whether in Stuttgart, Brussels or Washington. Thus, the question of democratic legitimacy of the exercise of inter- and supranational power will be both elusive and gain in importance. Subsidiarity is more a description of a problem than a recipe for a solution.³²

In a globalized but fragmented world, the very idea of a comprehensive, even totalizing constitution of any social realm may be bound to fail, domestically as well as internationally. Constitutionalization as a principle of legal ordering, however, continues to have great potential for the establishment of a rule of law rather than mere power.

³⁰ In this regard, cf. European Court of Justice, Case C-402/05 P, *Kadi v. Council*, [2008] 3 C.M.L.R. 41 (checking European human rights conformity of SC terror lists) on the one hand; European Court of Human Rights, *Behrami v France*, No. 71412/01, Grand Chamber judgment, 2 May 2007 (denying scrutiny of UNMIK activity in Kosovo).

³¹ Cf. A-M Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; A Voßkuhle, 'Der europäische Verfassungsgerichtsverbund', *NVwZ* 2010, 1.

³² For a more comprehensive discussion see A Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart, Oxford 2008) 193-213.