FRAGMENTATION AND CONSTITUTIONALISATION OF INTERNATIONAL LAW: A THEORETICAL INQUIRY

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A growing body of interdisciplinary scholarship addresses the issue of global constitutionalism. Scholarly contributions analyse the allocation of power within rule-systems of international law, how it affects subsequent international practice and its connection with political institutions. This article questions the validity of the use of constitutional concepts as a means for interpreting international law. An argument is made that current contributions on international constitutionalism are grounded on unstated assumptions. It is maintained that in order to restore coherence and unity within the international legal system, interpretations of international law should be carried out through interpretive means that are specifically conceived for international law. This article shows that although constitutionalism may be featured as an autonomous concept of international law, it is not able to restore coherence and unity within the international legal system. Therefore, it cannot be regarded as a remedy to the phenomenon of fragmentation.

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I. INTRODUCTION

It is widely recognised that international law is becoming increasingly fragmented into various fields governed by own principles and rules. Known as the phenomenon of fragmentation, such a functional specialization is generally regarded as a characteristic of modern international law. From international legal perspective, there are two main methodological approaches to fragmentation. The first one is represented by the Report on Fragmentation of the International Law Commission (ILC) of 2006.[1] It establishes a set of basic guidelines on normative conflicts and is entirely based on provisions of the Vienna Convention on the Law of Treaties (VCLT) of 1969.[2] The second one is represented by the idea of constitutionalisation of international law. This is a theoretical approach and refers to the process of constitutionalisation of both the entire international legal system and functional regimes of international law.

Existent approaches to fragmentation aim at restoring coherence and unity within international law. Although there is no universally accepted definition of either fragmentation or international law,[3] proponents of the constitutionalisation of international law assume that fragmentation is a characteristic of modern international law. However, the main problem associated with the idea of constitutionalisation is that, in light of the uncertainty surrounding the phenomenon of fragmentation, the ultimate purpose of scholarly contributions on constitutionalisation becomes questionable. Such contributions fail to provide any terminological or theoretical justification for the use of constitutional language in international law. Equally they do not provide any definition of fragmentation, which is the problem they are trying to redress. An argument is therefore made that although the nature of contested concepts can be maintained in relation to any key concept in law in general, and international law in particular, conceptions of international constitutionalism turn out to be grounded on unstated assumptions.

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[1] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682.

[2] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1969) 8 ILM 679 (VCLT).

[3] Tai-Heng Cheng, 'Making International Law without Knowing What It Is' (2011) 10 Washington University Global Studies L Rev 1.

This article questions the validity of the use of constitutional concepts as a means for interpreting international law in general, and restoring coherence and unity within international law in particular. By pursuing a theoretical inquiry into the structural nature of international law, it aims to establish whether constitutional interpretations of international law are able to address concerns of coherence of conflicting provisions of international law and, therefore, represent a remedy to the phenomenon of fragmentation. To that end, the analysis is articulated into two strands. On one hand, it provides an account of existent conceptions of global constitutionalism. For the purpose of this article, the inquiry is limited to conceptions of constitutionalism beyond the state and does address issues of comparative constitutional law. On the other hand, it shows that, in theory, constitutionalism may be conceived as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism. Hence, by featuring international constitutionalism as a methodological approach to fragmentation with own characteristics, the article contributes a framework for further advancing the theory of constitutionalism beyond the state.

This article is divided into two parts, followed by some final remarks. Section 2 conceptualises the relationship between fragmentation and constitutionalisation of international law. It examines substantive issues underlying the idea of fragmentation and provides an account of existent remedies thereto. Section 3 examines issues of autonomy and originality of constitutionalism as a methodological approach to fragmentation. It explores the idea of constitutionalism as an autonomous concept of international law.

II. FRAGMENTATION OF INTERNATIONAL LAW

1. *Conceptualising Fragmentation*

The idea of fragmentation of international law is generally regarded as a phenomenon associated with the globalization of international society, especially the economic side of globalization.[4] Although there is no universally accepted definition, international legal scholars maintain that fragmentation consists of the development of highly specialised fields of

[4] Malcolm N Shaw, *International Law* (6th ed, CUP 2008) 66; Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008) 196-207; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 Intl L & Politics 259, 262-264.

international law. Accordingly, some acknowledge that fragmentation is a technical problem rooted on conceptual matters. Martineau, for instance, writes that 'the possibility of a debate on fragmentation presupposes that people disagree on how the tension between unity and diversity [in international law] is and should be managed'.[5] Others recognise that it is a technical problem stemming from procedural matters. Koskenniemi and Simma, for example, refer to fragmentation as the manifold act of transposition of technical expertise from the national to the international context.[6] Finally, others identify fragmentation with the interaction between conflicting rules and institutional practices culminating in the erosion of general international law.[7]

International legal scholars also argue that fragmentation is a characteristic of modern international law stemming from international practice.[8] The *MOX Plant* case of 2006,[9] for instance, is regarded as a prominent example of this phenomenon. The dispute concerned the construction of a nuclear power installation – the MOX plant – in Sellafield (United Kingdom) and involved three stages and three different jurisdictions.[10]

In the first stage, following several rounds of correspondence between the United Kingdom and Ireland which failed to address Ireland's concerns regarding the radioactive discharges of the MOX plant, Ireland instituted an international tribunal for violation of Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[11] The OSPAR arbitral tribunal considered itself

[5] Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22(1) LJIL 1, 27.
[6] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern L Rev 1, 4; Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 270.
[7] Sahib Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 LJIL 23, 24-25.
[8] Benvenisti and Downs, for instance, argue that fragmentation consists of 'the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries'. Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stanford L Rev 595, 596; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998-99) 31 NYU J Intl L & Politics 791.
[9] Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-4635.
[10] For a background on the litigation see, among many, Robin Churchill and Joanne Scott, 'The Mox Plant Litigation: The First-Half Life' (2004) 53 ICLQ 643.
[11] Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) (1993) 32 ILM 1072(OSPAR Convention). For extensive analysis of the case, see Malgosia Fitzmaurice, 'Dispute Concerning Access to Information Under Article 9 of the

competent to take into consideration only the provisions of the OSPAR Convention.[12] It held that the United Kingdom had not violated the duty to make available the relevant information to Ireland under Article 9 of the OSPAR Convention.[13]

In the second stage, Ireland claimed a violation of the UN Convention on the Law of the Sea (UNCLOS) of 1982[14] for contamination of its water by the operation of the MOX plant. It brought proceedings against the United Kingdom pursuant to Article 287 UNCLOS, requesting the suspension of the MOX plant activities or, at least, interim measures.[15] The ITLOS took the view that, although competent, it would be necessary to determine whether itself or the European Court of Justice (ECJ) had definite jurisdiction to settle the dispute.[16] Thus, bearing in mind considerations of mutual respect and comity between the two judicial institutions, the ITLOS stayed the proceedings in order to avoid the risk of conflicting decisions.[17] At the same time, the European Commission started an infringement procedure against Ireland[18] for violation of Article 292 of the European Community (EC) Treaty[19] and Article 193 of the Euratom Treaty.[20]

OSPAR Convention *(Ireland* v *United Kingdom and Northern Ireland)*' (2003) 18 Intl J Marine and Coastal L 541.

[12] *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland versus United Kingdom of Great Britain and Northern Ireland)*, final award, 2 July 2003, UN Reports of Iternational Arbitral Awards 2006, vol XXIII 59, paras 85 and 92, <http://untreaty.un.org/cod/riaa/cases/vol_XXIII/59-151.pdf> accessed 8 May 2013.

[13] ibid para 106.

[14] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261(UNCLOS).

[15] International Tribunal for the Law of the Sea (ITLOS), *The Mox Plant Case* (Ireland v United Kingdom) (request for provisional measures) (2003) 41 ILM 405. For a comment, see Chester Brown, 'International Tribunal for the Law of the Sea: Provisional Measures before the ITLOS: The MOX Plant Case' (2002) 17 J Intl Maritime and Coastal L 267.

[16] For a detailed comment on this issue, see Barbara Kwiatkowska, 'The *Ireland v United Kingdom* (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism' (2003) 18 J Intl Maritime and Coastal L 13.

[17] International Tribunal for the Law of the Sea (ITLOS), *The Mox Plant case* (Ireland v United Kingdom) (suspension of proceedings on jurisdiction and merits, and request for further provisional measures) (2003) 42 ILM 1187, especially para 29, 1191.

[18] Case C-459/03 *Commission of the European Communities v Ireland* (MOX plant case) [2006] ECR I-4635. On this issue, see Gao Jianjun, 'Comments on *Commission of the European Communities v. Ireland*' (2008) 7 Chinese J Intl L 417.

[19] Now art 344 of the Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47(TFEU).

[20] Treaty Establishing the European Atomic Energy Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 167(Euratom Treaty).

In the third stage, the ECJ held that by establishing an arbitral tribunal for alleged violations of UNCLOS provisions by the United Kingdom, Ireland had violated EC law.[21] The ECJ recognised that both the EC and its members entered the UNCLOS as a mixed agreement,[22] and established that since mixed agreements have the same status within EC law as agreements concluded by the EC alone, they become integral part of EC law.[23] Hence, the ECJ concluded that it had exclusive jurisdiction under Article 292 EC Treaty[24] and found Ireland in breach of the duty to inform and consult the competent EC institutions prior to establishing the UNCLOS arbitral tribunal.[25]

Koskenniemi and Lavranos argue that, from the limited perspective of concerns of fragmentation, in this case the ECJ's decision avoided the fragmentation of EC law without taking into consideration other international provisions relevant to the dispute.[26] It thus contributed to the perceived fragmentation of international law.

Other case law shows that functional regimes of international law act like autonomous regimes. In *Kadi and Al-Barakaat*,[27] for example, the ECJ held that implementation of provisions of a UN Security Council's resolution by EU member states cannot violate certain basic human rights that are protected under EU law. It thus established the primacy of EU law over other norms of international law. Likewise, in the *Beef Hormone* case the Appellate Body of the World Trade Organization (WTO) decided that the precautionary principle developed under international environmental law was not binding under the WTO covered treaties[28] while in *EC-Biotech* the WTO panel held that some international treaties, such as the Biosafety

[21] *Commission of the European Communities v Ireland* (n 9).
[22] ibid para 61.
[23] ibid para 69. On this issue, see Paul J Cardwell and Duncan French, 'Who Decides? The RCJ's Judgment in the MOX Plant Dispute' (2007) 19 J Env L 121, 123-124.
[24] *Commission of the European Communities v Ireland* (n 9), paras 63, 133 and 136.
[25] ibid para 184.
[26] Nikolaos Lavranos, 'Freedom of Member States to Bring Disputes Before Another Court or Tribunal: Ireland Condemned for Bringing the MOX Plant Dispute Before an Arbitral Tribunal. Grand Chamber Decision of 30 May 2006, Case C-459/03, Commission v Ireland' (2006) 2 Eur Constl L Rev 456, 465-466.
[27] Joined Cases C-402 and 415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.
[28] WTO, *European Communities – Measures Concerning Meat and Meat Products–Report of the Panel* (13 February 1998) WT/DS26/AB/R [123]–[125].

Protocol, represent non binding informative law that could be taken into account in interpreting WTO agreements.[29]

Although the phenomenon of fragmentation may arguably be regarded as either the precondition or the consequence of the emergence of functional regimes of international law,[30] there is no agreement on which perspective is the correct one. Koskenniemi, for example, argues that, given the structural nature of autonomous regimes, the tendency of international courts and tribunals to interpret international law provisions from the perspective and within the limits of their own jurisdiction contributes to an uncertain process of development of international law:

> It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias... *whatever the rules*.[31]

Despite the fact that international lawyers resort to different techniques to try to overcome the phenomenon of fragmentation,[32] there is no agreement on the relationship between general rules and special rules of international law.[33] This prevents the formulation of a universally accepted hierarchy of the sources of international law, which would be used as the international law of normative conflicts.[34] Hence, fragmentation turns out to be a condition inherent to international law, that is to say, a phenomenon to be managed rather than a problem to be solved.

2. *Remedies to Fragmentation*

a. ILC Report on Fragmentation

To restore unity in international law, scholars and practitioners rely upon two main approaches to fragmentation. The first one consists of the

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[29] WTO, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products–Reports of the Panel* (29 September 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) (2000) 39 ILM (2000).

[30] See (n 5) and (n 6).

[31] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 EJLS <http://www.ejls.eu/1/3UK.htm> *accessed 14 January 2013 (emphasis original)*.

[32] As discussed in sec 2.2 below.

[33] See text (n 37).

[34] Koskenniemi argues that '[t]he choice of the frame determine[s] the decision. But for determining the frame there is no meta-regime, directive or rule'. Koskenniemi (n 6) 6.

findings of the ILC Report on Fragmentation. Conceived as a technical tool-box for the legal professional,[35] it offers the most comprehensive approach to the idea of fragmentation of international law. Since the ILC Report on Fragmentation aims at addressing normative conflicts arising from the emergence of autonomous regimes of international law, provisions of the VCLT (1969) are regarded as the basis of a possible international law of conflicts. The second methodological approach to fragmentation is represented by scholarly contributions on the constitutionalisation of international law.[36]

The ILC Report on Fragmentation establishes that normative conflicts may be approached from both the perspective of the subject-matter and the perspective of the number of subjects bound by the same rule(s) of international law. Each methodology is grounded on the assumption that there is no formal hierarchy governing the primary sources of international law, due to the decentralised nature of international law.[37] However, in some cases the determination of the same subject-matter within which to locate the relationship between general and special law may not be obvious, as long as the distinction between general and special rules is not always clear.[38] For instance, a treaty on maritime transport of chemicals relates to various fields of international law, including trade law, the law of the sea and maritime transport.[39] Hence, as a matter of principle, the Report on Fragmentation recognises that no rule 'is general or special in the abstract but in relation to some other rule'.[40] For the condition of same-subject matter cannot be regarded as decisive in establishing whether or not there is a conflict of international rules, the Report on

[35] Against the formalistic approach of the ILC Report on Fragmentation (n 1), see Maksymilian Del Mar, 'System Values and Understanding of Legal Language' (2008) 21 LJIL 29 (arguing that the ILC's formalistic approach to international law leads to a surface coherence of the system instead of bolstering its responsiveness to social problems); Singh (n 7) arguing against international law as a system and in favour of formal unity governed by a hierarchical conception of the sources of international law.

[36] See sec 2.2.2 below.

[37] ILC Report on Fragmentation (n 1), paras 9, 14, 485 and 493. See also Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553; Antonio Cassese, *International Law* (2nd ed, OUP 2005) 198-199.

[38] Like general rules, special rules must be generally defined, even when they apply to a few cases only. This marks the difference between a special rule and an order given to somebody. ILC Report on Fragmentation (n 1), paras 111, 116.

[39] ibid para 21.

[40] ibid para 112.

Fragmentation establishes that logical reasoning needs to be complemented by legal reasoning.[41]

For the purpose of the Report on Fragmentation, the process of legal reasoning comprises three steps.[42] The first one consists of the initial assessment of what the applicable rules and principles to the case in point might be.[43] This step aims to single out the regulatory purpose of a specific cluster of provisions. The second step consists in determining which particular rules apply to the selected case.[44] To that end, the choice must be consistent with and justified in light of the regulatory purpose. The third step consists in formulating the conclusions of the legal argumentation. Its purpose is to establish the pertinent relationship between conflicting principles and rules.[45] Such conclusions must comport with general international law, including the rules of the VCLT (1969), customary international law and general principles of law recognised by civilized nations.[46]

The main strength of this model of legal reasoning is that it is simple and clear, and proves to be a valuable tool for practitioners and scholars alike. However, it is grounded on the premise that 'no homogeneous, hierarchical meta-system is realistically available to do away with such problems [of fragmentation]'.[47] It also recognises that logical reasoning alone is not able to solve normative conflicts, but needs to be complemented by legal reasoning.[48] Consequently, it acknowledges general principles and rules as interpretive guidelines on one hand, and provides that the pertinent relationship between the relevant rules must be established 'in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole' on the other hand.[49]

Within this context, the systematic use of the provisions of the VCLT (1969) operates only once the regulatory purpose has been chosen. It follows that, although this model of legal argumentation may contribute to restore coherence in international law, it does not provide evidence of the legitimacy of the process of legal argumentation in itself. This in turn

[41] ibid para 25.
[42] ibid para 36.
[43] ibid.
[44] ibid.
[45] ibid.
[46] ibid para 492.
[47] ibid para 493.
[48] ibid para 21.
[49] ibid para 36.

suggests that, since international norms are not organised around a formal hierarchy, the process of establishing the regulatory purpose through which interpret the correct relationship between the relevant clusters of rules turns out to be based on an arbitrary choice.

The considerations above show that, given the structural nature of international law as a consensual system governed by a relative hierarchy of norms, clashes between international legal provisions turn out to be unavoidable. From this perspective, the model of legal reasoning set forth in the Report on Fragmentation is aimed at managing normative conflicts on a case-by-case basis rather than eliminating the perceived idea of fragmentation. Therefore, it cannot be regarded as a remedy to the phenomenon of fragmentation.

b. Constitutionalisation of International Law

Terminological Issues

Current scholarship on international constitutionalism appears to divide into three schools, namely, the normative school, the functionalist school, and the pluralist school.[50] The normative school is based on the assumption that domestic constitutionalism needs to be complemented by international institutions and practices. From this perspective, international constitutionalism represents a form of supplemental constitutionalism. The functionalist school evaluates the process of constitutionalisation of selected regimes of international law. It analyses the extent to which a centralised authority enables or restrains the production of international law. Finally, the pluralist school examines processes of constitutionalisation beyond the state and comprises several conceptions of transnational constitutionalism.

Despite the fact that there is a growing body of scholarly literature on constitutionalism beyond the state, there exists no generally accepted definition of constitutionalism or constitutionalisation of international law.[51] Some authors use the terms constitutionalism, the international constitution and constitutionalisation as synonyms. Stone Sweet, for instance, examines the meaning of both constitutionalism and the

[50] Antje Wiener and others, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 Global Constitutionalism 1.

[51] Garrett Wallace Brown, 'The Constitutionalization of What?' (2012) 1 Global Constitutionalism 201; Bardo Fassbender, 'The Meaning of International Constitutional Law' in Ronald St J Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 837; Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Colum J Transnational L 529, 552ff.

constitution, and concludes that 'the constitutional*isation* of the legal system is largely the product of how the tensions inherent in legal pluralism are resolved'.[52] Others use them associated with different meanings.[53] For instance, constitutionalism is generally regarded as a concept broader than that of constitutionalisation. Others avoid any definitional conundrum not to restrict the field within the boundaries of any arbitrary definition[54] while others rely upon them as if they were concepts taken for granted.[55] Besson, for example, examines the concepts of constitution and constitutionalism in light of the debate on constitutional pluralism. However, the analysis is entirely grounded on the idea of constitutionalisation of international law, the definition of which is not provided. Within this context, what exactly constitutes the process of constitutionalisation of international law remains unclear.[56] Hence, the interpretive function of constitutionalism remains an unstated assumption.

Theoretical Issues

Although existent scholarly contributions rely upon the idea of constitutionalism as an instrument through which conceptualise issues of legitimacy of international institutions and practices, such as the systemic relationship between conflicting principles and rules of international law, its theoretical foundations remain largely undermined by the uncertainty surrounding the use of constitutional language in international law.

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[52] Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 Indiana J Global Legal Studies 644 (emphasis added).

[53] For example, Johnston refers to constitutionalism as a model of international utopianism whereas Fassbender endorses the vision of constitutionalism as a normative and institutional project. Douglas M Johnston, 'World Constitutionalism in the Theory of International Law' in Macdonald and Johnston (n 51) 27; Fassbender (n 51) 552.

[54] Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 9; Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Nijhoff 2011).

[55] Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Dunoff and Trachtman (n 54) 381-407. See also Susan C Breau, 'The Constitutionalization of the International Legal Order' (2008) 21 LJIL 545; Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 1.

[56] Bardo Fassbender, 'The Meaning of International Constitutional Law' in Macdonald and Johnston (n 51) 837; Fassbender, 'The United Nations Charter' (n 51) 552; Jörg Kammerhofer, 'Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems' (2010) 23 LJIL 725 (arguing that '[i]nternational constitutionalism is not a legal theory').

Regarding this, the theoretical inquiry into the terminology associated with international constitutionalism has practical implications that are related to the purpose of international constitutionalism. Schwöbel, for example, proposes a classification of conceptions of international constitutionalism that is based on the purpose of such conceptions.[57] It comprises four dimensions, which 'reflect the primary focus of the contributors of public international law to the field of global constitutionalism'.[58]

The first dimension is referred to as social constitutionalism. It recognises that the purpose of constitutionalism is to promote and protect the web of social relations that emerge under international law. Concerns about participation as a means of limiting power, accountability of all international actors and individual rights are central to this vision. For example, Teubner argues that constitutionalism is entirely disassociated from the state while Fischer-Lescano maintains that global constitutionalism is a political process that goes beyond public international law and state sovereignty to include civil society.[59]

The second dimension is referred to as institutional constitutionalism. It acknowledges that international constitutionalism is a network of constitutional levels traversing both the national and the international order. It deals with the institutionalization or limitation of power, especially in the form of accountability of decision-makers. Peters, for instance, argues that the constitutions of states do not form anymore a complete basic order. In particular, it is contended that the combined effects of the phenomenon of globalization and the related de-constitutionalisation of domestic law entail that national constitutions can no longer regulate the totality of governance, with the consequence that the relationship between national and international law turns out to be a network rather than a hierarchy of norms.[60]

The third dimension is referred to as normative constitutionalism. It establishes that international law is governed by certain superior rules whose legitimacy lies in their moral value for society. For example, de Wet argues that the international constitutional order is composed of *jus cogens* norms and obligations *erga omnes*, which represent the core of the international value system. Since international law is conceived as a system

[57] Schwöbel (n 54) 4; Christine EJ Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 IJCL 611.
[58] Schwöbel, *Global Constitutionalism* (n 54) 13.
[59] ibid 17-18.
[60] ibid 22-23.

with strong ethical underpinnings, emphasis is thus placed on human rights as the common value of international society.[61]

The fourth dimension is referred to as analogical constitutionalism. It draws analogies between features of the national and the international constitutional order. The EU, in particular, is regarded as a model of constitutionalism beyond the state. Drawing from this assumption, scholars make analogies between EU law and international law. For example, Habermas and Petersmann consider the EU as a political and legal model of constitutionalism for international law, respectively. Likewise, Kumm suggests that in order to assess the degree of legitimacy of international law from a constitutional perspective, the international legal principle of sovereignty should be replaced with the EU legal principle of subsidiarity.[62] From another perspective, Walker argues that the debate surrounding EU constitutionalism refers to the act of translation of constitutional concepts from the national to the international settings and is aimed at solving problems of responsible and legitimate self-government within the EU.[63]

It follows from the preceding that global constitutionalism is not a comprehensive theory but a conglomeration of scholarly contributions addressing concerns related to the issue of legitimacy of international institutions and practices rather than normative conflict. As a result, the ultimate purpose of global constitutionalism as a remedy to fragmentation turns out to be another unstated assumption.

Methodological Implications

From international legal perspective, one of the weaknesses of international constitutionalism is that, considered as an interpretive instrument, it lacks the objectivity of a methodological approach. Therefore, it may be argued that if the purpose of constitutional interpretations of international law is to restore coherence and unity within international law, then the positional perspective of analysis remains unstated. Alternatively, there are as many positional perspectives as the number of scholars that entered the debate. This suggests that in order to restore coherence and unity within international law, interpretations of the international legal system should be carried out by using legal tools that are tailored to the characteristics of modern

[61] ibid 40-41.
[62] ibid 47-48.
[63] Neil Walker, 'Postnational Constitutionalism and the Problem of Translation' in Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 32.

international law. Furthermore, to be original the selected methodology should not double the findings of the ILC Report on Fragmentation.[64]

It is however difficult to envisage a model of legal reasoning alternative to the findings of the ILC Report on Fragmentation that is able to restore the alleged unity of general international law. Indeed, it is widely accepted among the international community of scholars that international law is a system based on state consent whose ultimate purpose consists in facilitating inter-state relations, with a view to support the interest of each state. Thus, as a functional system, international law does not possess any overarching teleology or ultimate purpose of its own. Alternatively, there are as many purposes of international law as the number of state interests protected by clusters of international provisions, which end up legitimating the perception of the idea of fragmentation.

Within this context, existent conceptions of global constitutionalism cannot be regarded as an original approach to fragmentation, since they aim at restoring coherence in international law without addressing normative conflicts. However, existent scholarly contributions do not cover the whole spectrum of conceptions of constitutionalism beyond the state. An argument is therefore made that a possible way to frame the debate on constitutionalism as a remedy to the phenomenon of fragmentation is to conceive constitutionalism as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism.

The following section explores the idea of international constitutionalism as a methodological approach specifically devised for interpreting international law. It aims to show whether constitutionalism is able to address normative conflicts and, consequently, restore coherence within international law.

III. CONSTITUTIONALISM AS AN AUTONOMOUS CONCEPT OF INTERNATIONAL LAW

Despite terminological and theoretical differences characterising the debate on post-national constitutional settings, a shared characteristic of all conceptions of international constitutionalism is that they are conceived as interpretive instruments of international law. However, international law is a contested concept[65] and scholars refer to it according to their understanding of the idea of legal system. For instance, some argue

[64] As discussed in sec 2.2.1.
[65] Cheng (n 3).

that international law is not even law[66] while others write that it is a conglomeration of rules instead of a system.[67] Others also maintain that it is a social system[68] rather than a legal system.[69]

Beyond the differences surrounding substantive arguments about the nature of international law, a common feature of all such conceptions is that they ultimately understand the international order as the product of the interaction between certain rules and certain subjects. However, questions such as who the subjects of international law are or what the ultimate sources of international law are remain without a universally accepted answer, although they have practical relevance. Likewise, it is not clear whether the ultimate purpose of international law is to facilitate inter-state relations[70] or to establish an autonomous system that prevails over state will and national interests.[71] Within this context, the issue of international personality, including its relation with the sources of international law, turns out to be the cornerstone of any theory of international law, since the notion of personality is used to distinguish between those actors that international law takes into account and those that are excluded from it.

Regarding this, it is widely accepted that the definition of international personality is the one articulated by the International Court of Justice (ICJ) in the *Reparation* Opinion of 1949:

> [A]n international person is... capable of... possessing international rights and duties, and has capacity to maintain its rights by bringing international claims.[72]

However, this definition does not say which entities are international persons, nor does it state the criteria according to which international personality is attributed. An argument is therefore made that, from a

[66] John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, CUP 1995) 117-26.
[67] HLA Hart, *The Concept of Law* (Clarendon Press 1961) 208-231.
[68] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan J Intl L 999 (arguing that international law is a system grounded on social relations).
[69] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).
[70] See, for instance, Eric A Posner, 'International Law: A Welfarist Approach' (2006) 73 U of Chicago L Rev 487.
[71] In relation to the international human rights treaty regime, see Eric A Posner, 'Human Welfare, Not Human Rights' (2008) 108 Columbia L Rev 1758.
[72] *Reparation for Injuries in the Service of the United Nations* (Advisory Opinion) 1949 < http://www.icj-cij.org/docket/files/4/1835.pdf > accessed 19 April 2013 [179].

logical point of view, it is possible to single out as many definitions of international personality as the number of conceptions of international law. It is further contended that resort to the findings of the most recent scholarship on international legal personality turns out to be helpful in order to examine the structural nature of international law in light of concerns of fragmentation and constitutionalisation.

According to Portmann, there are three main conceptions of modern international law – namely, the formal conception, the individualistic conception and the actor conception.[73] By implication, conceptions of international constitutionalism may be grounded on each of the three above mentioned conceptions of modern international law. As a thought-experiment, this section attempts to feature constitutionalism as an autonomous concept of international law. Its purpose is to establish the extent to which, if any, such conceptions of constitutionalism are able to address concerns of fragmentation of international law and whether they double the findings of the ILC Report on Fragmentation or possess conceptual autonomy.

In order to avoid the terminological and theoretical concerns related to the idea of constitutionalisation of international law,[74] the analysis of models of international constitutionalism is based on a conception of constitutionalism beyond the state that applies, in turn, to each of the three conceptions of modern international law. Such conception establishes that 'constitutionalism provides the ideological context within which constitutions emerge and constitutionalisation functions'.[75]

Although a seminal idea, this procedural conception of constitutionalism comprises three elements. First, constitutionalism is regarded as the idealistic component beyond the process of constitutionalisation. For the purpose of this article, such idealistic component is represented by each of the three conceptions of modern international law. Second,

[73] Portmann's analysis is the most comprehensive contribution to the issue of international personality from a normative point of view. Roland Portmann, *Legal Personality in International Law* (CUP 2010). For an historical perspective, see Janne E Nijman, *The Concept of Legal Personality: an Inquiry into the History and Theory of International Law* (TMC Asser Press 2004). For a selection of essays, see Fleur Johns, *International Legal Personality* (Ashgate 2010).

[74] See sec 2.2.2.1 above.

[75] Nicholas Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in Nicholas Tsagourias (ed), *Transnational Constitutionalism. International and European Perspectives* (CUP 2007) 1. Likewise, Walker describes constitutionalism as 'a multidimensional form of practical reasoning,' that is to say, 'a framing mechanism'. Neil Walker, 'Constitutionalism Beyond the State' (2008) 56 Political Studies 525.

constitutionalisation is conceived as the process of implementation of the idealistic components of constitutionalism.[76] Third, a constitution is regarded as the outcome of the process of constitutionalisation.

1. *Formal Conception*

a. Constitutionalism

Basic Propositions

According to the procedural structure of international constitutionalism,[77] the basic propositions of the formal conception of international law may be used as the idealistic component beyond the process of constitutionalisation of international law. The latter, in turn, represents the methodology through which interpret rule systems of international law.

Regarded as the dominant conception of international law,[78] the formal conception has two main propositions. The first one acknowledges that the personal scope of international law is an open concept and establishes that international actors are the addressees of the norms of international law. It thus recognises that the status of international personality is a byproduct of the international law-making process. The second one establishes that there are no further consequences attached to international legal personality. Its main manifestations in legal practice are the *LaGrand*[79] and *Avena*[80] cases before the ICJ and the *AMCO v Indonesia* case[81] before the International Centre for Settlement of International Disputes (ICSID).

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[76] In this context, constitutionalisation is understood as 'a constitution-hardening process'. See Tsagourias (n 75).

[77] Tsagourias (n 75).

[78] Portmann (n 73) 248.

[79] The ICJ held that, according to general principles of treaty interpretation, art 36(1) (b) of the Vienna Convention on Consular Relations (1963) directly applies to individuals. According to the ICJ, direct effect of treaty provisions granting rights on individuals is an issue concerning treaty interpretation. There is no presumption or consequence associated with the concept of legal personality of the individual. *LaGrand Case (Germany v. United States)* (Judgment) [2001] ICJ Rep 466.

[80] The ICJ reaffirmed its interpretation of art 36(1) (b) of the Vienna Convention on Consular Relations (1963) as articulated in *LaGrand*. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* [2004] ICJ Rep 12.

[81] In *Amco v Indonesia* the arbitral tribunal held that, in the absence of any specific clause in the contracts entered by Amco and the state-owned Indonesian company, international law applies, directly and fully, to those contracts. By interpreting art 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, 1965) without any restriction, the arbitral tribunal stated that international law prevails over national law. Consequently, it granted compensation to Amco without relying on the issue of

Considered 'a merely descriptive device belonging to the realm of legal doctrine and as such being without concrete legal implications',[82] this conception of international law provides that international legal personality does not confer the competence to create international law on international actors. In particular, it acknowledges that the capacity of international law creation stems from customary international law, which contains rules declaring that states are competent to create law by concluding international treaties.[83] This creates a hierarchy of norms authorising specific international actors to create and apply international law.

Purpose of Constitutionalism

Any model of international constitutionalism aims to provide interpretations of international law in light of the structural nature of the system, as established by the underlying conception of international law adopted. Accordingly, the purpose of international constitutionalism comports with the purpose of the selected conception of international law. In the case of the formal conception of international law, its basic propositions do not clarify what the ultimate purpose (or teleology) of international law is. Instead, they establish that the subjects of international law are the recipients of the norms of international law and that the ultimate sources of international law consist of treaties and international customary law.

Since the concept of personality is used to distinguish between those actors that international law takes into account and those that are excluded from it, recourse to it has practical implications. With regard to

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international personality. This shows that, although in principle companies may be considered international persons, there are neither presumptions nor consequences associated with such recognition. *Amco Asia Corporation and Others v. The Republic of Indonesia*, Resubmitted Case: Award on Merits (31 May 1990), reported in [1992] ILR 580.

[82] Portmann (n 73) 174.

[83] Kelsen writes that international law is a system of norms created by customs. As long as the state is regarded as an organ of international law, a legal rule created by international custom also obligates states which did not participate to its creation. Drawing from this assumption, Kelsen concludes that '[l]aw regulates its own action. So does international law'. Hans Kelsen, *General Theory of Law and the State* (Russell&Russell 1961) 351–354, 354. See also Portmann (n 73) 176-177; Jochen von Bernstorff and Thomas Dunlap, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 165-178; Francois Rigaux, 'Hans Kelsen on International law' (1998) 9 EJIL 325; Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 EJIL 287; WB Stern, 'Kelsen's Theory of International Law' (1936) 30 American Political Science Rev 736.

the concept of subjects of international law, the first basic proposition of the formal conception of international law endorses the definition of international legal personality articulated by the ICJ in the *Reparation* opinion of 1949.[84] Although this definition does not say which entities are international persons, nor does it state the criteria according to which international personality is attributed, it does say that international actors have rights and duties and, accordingly, can act in a legally relevant way. Viewed from this angle, international actors are the recipients of the norms of international law.

With regard to the ultimate sources of international law, the first basic proposition complies with the provision of Article 38(1) of the Statute of the ICJ, according to which the sources of international law comprise treaties and customs.[85] This suggests that states are regarded as the primary subjects of international law.

However, to say that international law is a state-centered system implies a circular definition of international law: states are the primary actors of international law, that is to say, the recipients of the norms of international law, but they create the norms of international law themselves. From this perspective, the ultimate purpose of international law turns out to be what states have chosen to regulate for their mutual benefit and, consequently, to be bound by. While such regulations may address both state and non-state actors, the issue of the binding force of international law provisions becomes independent of state will by means of tacit agreement and creates a supra-national system of rules. It follows that there are as many purposes of international law as the number of interests covered by regulation and such purposes stay on an equal footing of importance. Hence, international law cannot be regarded as a homogeneous system of rules.

In this context, the purpose of international constitutionalism consists in preserving the heterogeneous nature of international law. This implies that as long as it is conceived as an interpretive instrument, constitutionalism relies upon a model of legal reasoning that by necessity duplicates the one set forth in the ILC Report on Fragmentation, even though the relative nature of such model of legal reasoning does not entail that provisions of the VCLT (1969) represent the sole positional perspective of analysis.

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[84] See (n 72).

[85] Art 38(1) ICJ Statute also refers to general principles of law recognised by civilised nations and the decisions and teachings of the most highly qualified publicists of all nations. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Annex I (ICJ Statute).

b. Constitutionalisation

The second element of the procedural definition of international constitutionalism is constitutionalisation.[86] Dunoff and Trachtman write that a functional approach to the constitutionalisation of international law provides insights into the purposes that international constitutional norms are intended to serve.[87] They argue that constitutionalisation is a process[88] and propose a functionalist methodology that is based on the constitutional matrix of international law.[89]

Regarded as an analytical device,[90] the constitutional matrix aims to rationalise the allocation of powers within the legal order of both international organisations and the international law system as a whole. Dunoff and Trachtman argue that:

> [A] functional approach permits conceptual analysis that is not premised upon a definition setting forth a group of necessary and sufficient conditions which determine whether a given order is constitutional or not. ... [C]onstitutionalism consists of a type – rather than a quantum – of rules.[91]

Such a functional approach is grounded on the presumption that 'the distinguishing feature of international constitutionalization is the extent to which international law-making authority is granted (or denied) to a centralized authority'.[92] Accordingly, the purpose of the constitutional matrix is to establish the extent to which a centralised authority enables or restrains the production of international law. To that end, it possesses a normative structure comprising seven mechanisms[93] whose function is to implement three basic constitutional functions.[94] Such functions serve the purpose of enabling the formation of international law, constraining the formation of international law and supplementing deficiencies of domestic constitutional law caused by the phenomenon of globalization.[95]

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[86] Tsagourias (n 75).
[87] Dunoff and Trachtman (n 54) 10.
[88] ibid 18.
[89] ibid 26.
[90] ibid 26-30.
[91] ibid 9.
[92] ibid 4.
[93] They are horizontal allocation of powers, vertical allocation of power, supremacy, stability, fundamental rights, review and accountability/democracy. ibid 27-29.
[94] They are referred to as enabling constitutionalisation, constraining constitutionalisation and supplemental constitutionalisation. ibid 10.
[95] ibid.

The constitutional matrix complies with the two basic propositions of the formal conception of international law and it has been used to assess the process of constitutionalisation of five selected regimes of international law – namely, the international legal system, international human rights law, UN law, EU law and WTO law.[96] However, Dunoff and Trachtman argue that the constitutional matrix aims 'to allow to compare the constitutional development of different regimes, but it does not allow to identify strengths and weaknesses in various regimes'.[97] As a result, the functional approach to constitutionalisation embedded in the constitutional matrix provides a map of the law-making centres of international regimes.

c. Fragmentation and Constitutionalisation

In order to determine whether the formal conception of international constitutionalism is a methodological approach endowed with conceptual autonomy or it relies upon the same model of legal reasoning set forth in the ILC Report on Fragmentation, this sub-section draws a comparison between the two models of legal reasoning.

The constitutional matrix entails a functional approach to international law. Viewed from this angle, the rule-system of international law under scrutiny may be regarded as the equivalent of the regulatory purpose of analysis, as set forth in the ILC Report on Fragmentation. Compliance with the other two steps of the ILC's model of legal reasoning follows as a logical consequence. This shows that the constitutional matrix lacks originality with regard to the methodology proposed. There are nonetheless significant differences between the two models of legal reasoning.

In particular, while the ILC Report on Fragmentation recognises provisions of the VCLT (1969) as the nascent international law of conflict, the constitutional matrix establishes a hierarchy of the norms of international law consisting of the constitutional norms of the regime of international law under scrutiny. This shows that the ultimate purpose of the process of constitutionalisation through the constitutional matrix turns out to be an assessment of internal efficiency of the selected regimes of international law. Consequently, the constitutionalisation of international law turns out to be aimed at strengthening the emergence of autonomous regimes of international law, thus contributing to normative conflict and the erosion of general international law.

[96] ibid 27-29.
[97] ibid 30.

2. *Individualistic Conception*

a. Constitutionalism

Following the pattern of analysis adopted in relation to the formal conception of international constitutionalism, the basic propositions of the individualistic conception of international law may be regarded as the idealistic component beyond the process of constitutionalisation of international law. Such a conception of international constitutionalism may thus be referred to as the individualistic conception of international constitutionalism.

Basic Propositions

The individualistic conception of international law is currently regarded as a conception that is functional to the field of human rights law. It draws on the teachings of Lauterpacht[98] and it has two basic propositions. The first proposition establishes that states are entities created by individuals for individuals. In principle, this entails that there is no difference between the interest of the state and the interest of individuals, so long as the latter are regarded as the beneficiaries of all law, including international law. Regarding this, Lauterpacht writes that:

> No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.[99]

From this standpoint, international law creates basic rights and duties of the individual, in addition to rights and duties of states, state actors and non-state actors.

The second basic proposition maintains that, in addition to treaties and customs, the sources of international law include general principles of law, which are independent of state will. This entails a qualified presumption in favour of the international legal personality of the individual, which is not derived from state will. Its main manifestations in legal practice are the Nuremberg trials,[100] the US *Alien Tort Claims Act* case law[101] and the case law on the European Convention of Human Rights (ECHR).[102]

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[98] Portmann (n 73) 126-172.

[99] Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 430-31.

[100] In the judgment of 1 October 1946, the International Military Tribunal (IMT) at Nuremberg sentenced to death twelve Nazi defendants. It held them individually responsible for committing the crime of war aggression under international law. The

Purpose of Constitutionalism

The basic propositions of the individualistic conception of international law show that, as a conception functional to the field of human rights, it pursues a teleological and normative approach to international law. Hence, the conception of international constitutionalism grounded on the individualistic conception of international law recognises that the ultimate beneficiary of the international legal system is the world community of individuals. [103] It then assesses the legitimacy and coherence of international law against this assumption. Viewed from this angle, the individualistic conception turns out to be an interpretive, non-binding device.

By establishing that the primary normative unit is the individual rather than the State, [104] the individualistic conception of international law recognises that the boundaries of international law are not limited to horizontal relationships between sovereign states. Likewise, certain scholarship maintains that international law is entirely based on an individualized view of sovereignty[105] where the principles of equality and

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IMT held that Germany was a party of the Kellogg-Briand Pact of 1928 prohibiting the use of war as an instrument of national policy. Subsequently, it established that aggressive war was not only illegal under international law, but that it should be treated as an international crime. It derived this status from general principles of justice instead of the provisions of the treaty itself. It then established the presumption that the international crime of aggression entails international responsibility of individuals and not of states. *In re Goering and Others, Judgement of the Nuremberg International Military Tribunal* (1947) 41 AJIL 172, 220-221.

[101] *Alien Tort Claims Act*, 28 USC §1350. The Alien Tort Act is a civil procedure enacted in 1789 that allows non-US citizens to bring a tort action in US courts 'for violation of the law of nations or a treaty of the United States'. In the *Kadic* v. *Karadzic II* judgment of 1995, the Court of Appeals affirmed that private entities can violate international norms of *jus cogens*. It held that *jus cogens* norms equally apply to individuals acting on behalf of the state or of a non-state entity, therefore they cannot be judged by different standards. *Kadic* v. *Karadzic II* (US Court of Appeals, Second Circuit, 1995) (Chief Judge Newman), (1997) 104 ILR 149.

[102] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) ETS No. 5; 213 UNTS 221. In *Loizidou v. Turkey*, for example, the ECtHR affirmed that the ECHR 'is an instrument for the protection of individual human beings'. *Loizidou v Turkey I*, (1995) Series A No 310, para 75.

[103] Anne Peters, 'Membership in the Global Constitutional Community' in Klabbers, Peters and Ulfstein (n 55) 155.

[104] cf Fernando R Tesón, 'The Kantian Theory of International Law' (1992) 92 Columbia L Rev 53, 54.

[105] Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513, 515ff. Against Peters's position, see Emilie Kidd White, Catherine E Sweetser, Emma Dunlop and Amrita Kapur, 'Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters' (2009) 20 EJIL 545. See also Anne Peters, 'Humanity as the A and Ω

human dignity constitute the pillars of the international legal system.[106] This suggests that the teleological perspective embodied in the individualistic conception of international law extends far beyond international human rights law.

b. Constitutionalisation

According to the procedural definition of constitutionalism, [107] constitutionalisation is the process of implementation of the normative components of constitutionalism. In this case, it represents the methodology used to interpret clusters of international provisions in light of the basic propositions of the individualistic conception of international law. As long as the individualistic conception of international law is a teleological conception, an argument is made that a possible constitutional matrix grounded on its two basic propositions should be based on the twin concepts of human dignity and human rights. From this perspective, implementation of the normative components of constitutionalism turns out to be based on a human rights constraint, which, in turn, entails the idea of rule of law.

Within the individualistic conception of international constitutionalism, the process of operationalization of the rule of law possesses four normative features. The first feature acknowledges that individuals are decision-makers. This characteristic stems from the presumption in favour of the personality of international law of the natural person.[108] A similar argument is put forward by Peters, who argues that the natural person is 'the ultimate unit of legal concern'[109] and partakes in the process of creation of international norms by virtue of her participatory rights.[110]

The second feature establishes that the rule of law is a means for the empowerment of individuals. It stems from the assumption that the individual possesses rights and obligations under international law, irrespective of nationality concerns[111] and entails that the function of the rule of law consists in creating the conditions for the fulfilment of the

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of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur' (2009) 20 EJIL 569.

[106] Peters, *Humanity as the A and* Ω (n 105) 515 ff.

[107] Tsagourias (n 75).

[108] As established by the basic propositions of the individualistic conception of international law.

[109] Anne Peters, *Membership in the Global Constitutional Community* (n 103) 155.

[110] ibid 160. Peters also writes that 'the individual capacity to claim [before an international tribunal] is a limited functional equivalent to the law-making power of states'. ibid 161.

[111] ibid 174.

individual's needs, both as a single and in society. The UN Secretary-General, for example, writes that the rule of law is a powerful tool for the empowerment of individuals and civil society.[112]

The third feature recognises the value-oriented character of the process of implementation of the rule of law. It is derived from the normative concept of human dignity. The UN Secretary-General, for example, stresses that engagement in the rule of law assistance rests upon the 'need to evaluate the impact of [its] programming *on the lives of the peoples* the Organization serves'.[113] This entails that the operationalization of the rule of law requires the constant participation of local communities in the various decision-making and verification processes.

The fourth feature acknowledges that the rule of law as a mere concept is not enough.[114] For instance, Ringers writes that to become operational, the idea of the rule of law should be accompanied by a structured procedure.[115] In context of the individualistic conception of constitutionalism, this process of operationalization of the rule of law fosters a bottom-up perspective[116] while recognising the existence of several decision-making levels, including the individual.

The observations above suggest that a possible constitutional matrix may be represented by the normative structure of the right to development, as set forth in the UN Declaration on the Right to Development of 1986.[117]

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[112] Report of the Secretary-General, 'Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities' (2009) UN Doc A/64/298, paras 42-45.

[113] Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law' (2008) UN Doc A/63/226, para 64 (emphasis added).

[114] Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005, para 133.

[115] Thom Ringer, 'Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice' (2007) 10 Yale Human Rights & Development L J 186.

[116] '[S]tates should not be conceived as the 'primary' subjects of international law'. Peters (n 103) 179. See also Janet K Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 Yale J Intl L 395. In favour of a state-centered conception of international law, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005).

[117] UNGA Res 41/128 (4 December 1986) UN Doc A/RES/41/128. For a historical and normative account, see Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart 2012); Richard N Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development' (1988) 35 NILR 257. On the legal rationale behind the right to development, see Stephen P Marks, 'Obligations to Implement the Right to Development: Philosophical, Political and Legal Rationales' in Bård A Andreassen and Stephen P Marks (eds),

There are three reasons supporting this view. First, solemnly proclaimed as a human right in itself, the Declaration on the Right to Development comprises all other human rights. It is therefore regarded as a particular vector of human rights.[118] Second, it is a procedural right. The UN Independent Expert on the Right to Development, for instance, suggests that one way to implement the right to development consists in adopting development compacts. The latter require specific negotiations on a case-by-case basis.[119] Such negotiations must ensure the prioritization of certain basic commitments,[120] popular participation[121] and the accountability of the actors involved.[122] Third, the process of operationalization of the right to development through development compacts turns out to be consistent with the bottom-up conception of the rule of law. Implementation of a global compact would thus represent a constitutional outcome, according to the procedural definition of constitutionalism.

c. Fragmentation and Constitutionalisation

The findings of the analysis carried out in the previous sub-section shows that as long as the ultimate purpose of the individualistic conception of constitutionalism does not consist in solving normative conflicts,

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Development as a Human Right: Legal, Political and Economic Dimensions (2nd ed, Intersentia 2010) 73, 90-98. On the issue of justiciability of the right to development, see Amartya Sen, 'Human rights and Development' in Andreassen and Marks (eds), ibid 3, 8-9; Martin Scheinin, 'Advocating the Right to Development through Complaint Procedures under Human Rights treaties' in Andreassen and Marks (eds), ibid, 339ff.

[118] Arjun Sengupta, 'The Human Right to Development' (2004) 32 Oxford Development Studies 183, 191 (arguing that the right to development represents a right to a process of development or a meta-right).

[119] UNHCHR 'First Report of the Independent Expert on the Right to Development, Dr. Arjun
Sengupta' (27 July 1999) UN Doc E/CN.4/1999/WG.18/2, para 34. Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 Human Rights Quarterly 837, 880-83.

[120] Priority should be accorded to the protection of the worst-off, the poorest and the most vulnerable. See UN Independent Expert on the Right to Development (n 119), paras 32 and 69–76.

[121] A passage from the Global Consultation report reads: 'participation is the right through which all other rights in the Declaration on the Right to Development are exercised and protected'. Report of the Secretary-General 'Global Consultation on the Right to Development as a Human Right' (1990) UN Doc E/CN.4/1990/9/Rev.1, para 177.

[122] For example, the UN Independent Expert writes that '[the responsibility of states] is complementary to the individuals' responsibility [...] and is just *for the creation of the conditions for realizing*, not for actually realizing the right to development. Only the individuals themselves can do this'. UN Independent Expert on the Right to Development (n 119), para 41 (emphasis added).

fragmentation is not a component of the process of constitutionalisation. This suggests that the individualistic conception of constitutionalism does not aim at restoring coherence within the international legal system. Hence, it cannot be regarded as a remedy to the phenomenon of fragmentation of positive international law.

As noted above in relation to the formal conception of international constitutionalism, the process of constitutionalisation of selected regimes of international law entails a functional approach to international law. Likewise, the process of constitutionalisation implementing the basic propositions of the individualistic conception of international law entails a teleological, that is to say functional, approach to international law. This further strengthens the conclusion that the teleological matrix does not represent a remedy to the phenomenon of fragmentation of positive international law.

However, the main difference between the two constitutional matrices is that they do not rely upon the same model of legal reasoning. Consequently, as the constitutional matrix implementing the tenets of the individualistic conception of constitutionalism does not double the findings of the ILC Report on Fragmentation, it turns out to be an interpretive instrument of international law endowed with conceptual autonomy.

3. *Actor Conception*

The actor conception is currently regarded as the minoritarian conception of international law. It proposes a policy-oriented approach to international law and draws on the teachings of the scholars of the New Haven school of international law.[123] It has two basic propositions. The first proposition establishes that international law is not a set of rules but a process of authoritative decision-making. The second proposition maintains that participation in the decision-making process is open to all those state and non-state actors that have authoritative power. Its main manifestations in legal practice are the *Reineccius et al v Bank for International Settlements* case,[124] the *International Tin Council* case[125] and the *Sandline v Papua New Guinea* award.[126]

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[123] Portmann (n 73) 208-242.

[124] In its judgment of 2002, the Permanent Court of Arbitration declared the Bank for International Settlements (BIS) an international person. Created in 1930 by two international treaties, the BIS is chartered as a 'Company by limited shares' under Swiss law. Its shares are held by some of the contracting governments and private parties. The Permanent Court of Arbitration ruled on the legality of the BIS Board of Directors' proposal to amend the BIS Statutes in order to recall all privately held

Like the individualistic conception, this policy-oriented conception of international law is also a teleological conception of international law. Such a characteristic stems from a two-fold consideration. First, the actor conception establishes the presumption that law is a means for creating a global public order of human dignity.[127] A world order of human dignity is described as 'one which approximates the optimum access by all human

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shares against payment of compensation. The arbitral tribunal established that 'the functions of the Bank were essentially public international in their character'. It held that the BIS was an international organisation and concluded that the applicable law was international law, not municipal law. It thus found that there was no violation of the BIS Constitutive Instruments. In addition, it established that under general international law on expropriation, the share recall was lawful. However, after further research into international case law on compensation for expropriation, it found that BIS owed full compensation to its former private shareholders. Permanent Court of Arbitration, *Dr. Horst Reineccius, First Eagle SoGen Funds, Inc., Mr. Pierre Mathier and La Société de Concours Hippique de la Châ*tre, v. *Bank for International Settlements*, Partial Award on the Lawfulness of the Recall of the Privately Held Shares and the Applicable Standards for Valuation of those Shares, 8 January 2001, (2003) 15 World Trade and Arbitration Materials 73.

[125] Recalling the conclusions of the ICJ Advisory Opinion on *Reparation for Injuries*, the ECJ Advocate-General Darmon declared that the International Tin Council (ITC) possessed personality in international law, since it was an independent organ having its own decision-making power. Drawing from this assumption, the English Court of Appeal concluded that this precluded liability of member states for the debts of the organization, even in the absence of any international rule declaring such liability. Case C-241/87 *Maclaine Watson & Company Limited* v. *Council and Commission of the European Communities* [1990] ECR I-01797, Opinion of M Darmon, para 133; *Maclaine Watson & Co Ltd* v. *Department of Trade and Industry; J. H. Rayner (Mincing Lane)* v. *Department of Trade and Industry and Others*, England, Court of Appeal, 1988, (1989) 80 ILR 49, 108.

[126] The dispute arised from the interpretation of the agreement between Papua New Guinea and Sandline International Inc. establishing that Sandline would provide military and security services to Papua New Guinea against payment of a fee of 36 million US dollars, in two instalments. Following the refusal by Papua New Guinea to pay the second instalment, an *ad hoc* arbitral tribunal was constituted to settle the dispute. According to terms of the agreement, the parties chose English law as the applicable law. However, the arbitral tribunal held that, as a contract concluded by a state, public international law was the applicable law. It also pointed out that international law forms a part of English law. The arbitral tribunal thus established that a state cannot rely on its internal law for justifying the non-performance of an international obligation and concluded that the contractual obligation still existed and ordered Papua New Guinea to pay the second fee to Sandline. *Sandline Inc.* v. *Papua New Guinea*, Interim Award, 9 October 1998, (2000) 117 ILR 552, paras 10-13.

[127] Siegfried Wiessner, 'Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman' (2009) 34 Yale J Intl L 525, 528. Myres S McDougal, 'Perspectives for an International Law of Human Dignity' (1959) 53 American Society Intl L Proceedings 107.

beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude'.[128] Second, like the individualistic conception of international law, it recognises that the natural person is the ultimate beneficiary of all law. Wiessner, for example, writes that 'an ideal legal order should allow all individuals, and particularly the weakest among them, to realize themselves and accomplish their aspirations'.[129]

However, the two conceptions of international law rely upon different methodological approaches. On one hand, the actor conception does not provide any definition of human dignity. It acknowledges that the process of law-making consists of a sequence of authoritative and controlling decisions. [130] On the other hand, the individualistic conception of international law implies that commitment to individual empowerment is based on the idea of rule of law while the policy-oriented approach fostered by the actor conception does not acknowledge international law as a system of rules. This suggests that the actor conception of international law does not recognise the idea of constitutionalisation of international law altogether.

IV. Conclusion

The elusive challenge of restoring unity in international law has fascinated generations of scholars. The nascent literature on constitutionalism beyond the state is the last attempt to organize the body of international laws into a predictable, value-oriented system of rules. However, as a system created by state consent, international law proves to be a system crystallized on international practice rather than constrained by superior rules. Whether this makes the hunt for unity of the system an impossible task, the issue of coherence of existent international rules and principles represents the ultimate goal of existent methodological approaches to fragmentation, including global constitutionalism.

Current conceptions of constitutionalism in international law conflate the idea of unity and coherence of the system. This results in a lack of terminological and theoretical consensus among scholars, which ultimately undermines the ultimate purpose of such conceptions. In particular, constitutional interpretations of international law attempt to tackle the perceived phenomenon of fragmentation of international law by creating

[128] W Michael Reisman, Sigfried Wiessner and Andrew R Willard, 'The New Haven School: A Brief Introduction' (2007) 32 Yale J Intl L 575, 576.
[129] Wiessner (n 127) 531.
[130] Eisuke Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) 1 Yale Studies in World Public Order 1, 29.

hierarchies of extra-legal values – eg the Western conception of human dignity and human rights – and of rules such as *jus cogens* without addressing normative conflicts.

This article examined the idea of global constitutionalism from international legal perspective. It showed that in the absence of any definition of either fragmentation or constitutionalism, the latter may be featured as an interpretive means endowed with conceptual autonomy under international law. Since international law is in turn regarded as a contested concept, the analysis established the presumption that conceptions of international constitutionalism may be grounded on each of the three conceptions of modern international law taken into consideration.

The findings of the analysis show that resort to different conceptions of constitutionalism is not able to restore coherence and unity within international law. In particular, the inquiry reveals that the purpose of the formal conception of international constitutionalism is to address concerns of optimization of internal allocation of powers of functional regimes of international law whereas the purpose of the individualistic conception of constitutionalism is to evaluate whether a selected cluster of international provisions is able to protect a minimum core of human dignity through the process of implementation of human rights provisions. The findings of the analysis also show that as long as it implies a policy-oriented approach, there is no scope to feature constitutionalism from the perspective of the actor conception of international law.

It follows from the preceding that it is difficult to envisage a model of legal reasoning that is able to restore the alleged unity of general international law. Indeed, it is widely accepted among the international community of scholars that, as a consensual and decentralised system, international law does not possess any overarching teleology or ultimate purpose of its own. Alternatively, there are as many purposes of international law as the number of state interests protected by clusters of international provisions, which end up legitimating the perception of the idea of fragmentation. This suggests that, perhaps, it is not possible to redress the phenomenon of fragmentation, either through the findings of the Report on Fragmentation or through the process of constitutionalisation. If this holds true, then the Report on Fragmentation ought to be regarded as a means for managing normative conflict rather than a remedy to fragmentation while constitutional interpretations of international law eventually turn out to be an academic, though valuable, exercise in normative theory.