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Constitutionalism and the Mechanics of Global Law Transfers

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Abstract

This article explores rule of law transfers from an international perspective. Based on the observation that the proposal of an emerging international constitutional order seems to have lost momentum this article emphasizes a global legal reality that is characterized by a complex and rather non-hierarchical interplay between various (fragmented) international legal orders and suborders as well as national legal orders. This article discusses four legal mechanisms that are of pivotal relevance with respect to global rule of law transfers. These mechanisms include, first, so-called "hinge provisions" as doorways between different legal orders, second, harmonious interpretation as a legal tool of integration, third the sources of international law enabling transmission of norms and providing a framework for judicial interaction and, fourth, judicial dialogue as an informal means of rule of law transfer.

A. Introduction

The rule of law is a well-established concept of municipal legal systems.[1] Despite ongoing discussions about its content, it seems to be widely acknowledged that it refers to a core of essential features of legal systems, in particular a government of laws, the supremacy of the law, and equality before the law.[2] The government of laws requires that the exercise of public power may not be arbitrary but subject to law.[3] Law must be prospective, accessible, and clear.[4] In other words, those subjected to the law must be able to know the norms that they are supposed to follow in the future. The rule of law ensures the stabilization of normative expectations by requiring coherence and predictability.[5] It requires norms to be determinate in order to provide legal certainty. The supremacy of the law demands that all institutions and persons exercising public power are subordinated to the law.[6] Thus, the rule of law must be distinguished from the

[1] See e.g. the *Rechtstaatsprinzip* (rule of law) in Germany (in particular Articles 20(3), 101 and 103 of the Basic Law). For a comprehensive discussion of the *Rechtstaatsprinzip*, see P. Kunig, *Das Rechtsstaatsprinzip: Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland* (1986). For an early discussion of the rule of law in the UK, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (1915). On the evolution of the rule of law in national legal systems, see M. Krygier, 'Rule of Law', in M. Rosenfeld & A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012); the overview in S. Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008) 2, 331, 333-340 [Chesterman, An International Rule of Law?]; and A. Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993), 15, 17-18.

[2] S. Chesterman, 'Rule of Law', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2007), para. 2 [Chesterman, Rule of Law], and Chesterman, 'An International Rule of Law?', *supra* note 1, 342; Britannica Academic, Encyclopædia Britannica, 'Rule of Law', available at https://www.britannica.com/topic/rule-of-law (last visited 13 December 2018).

[3] Chesterman, 'Rule of Law', *supra* note 2, para. 2, and Chesterman, 'An International Rule of Law?', *supra* note 1, 342; Britannica Academic, 'Rule of Law', *supra* note 2.

[4] Chesterman, 'Rule of Law', *supra* note 2, para. 2, and Chesterman, 'An International Rule of Law?', *supra* note 1, 342; J. Crawford, 'International Law and the Rule of Law', 24 *Adelaide Law Review* (2003) 1, 3, 4.

[5] Cf. M. Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model', 44 *Virgina Journal of International Law* (2003) 1, 19, 26.

[6] Chesterman, 'Rule of Law', *supra* note 2, para. 2, and Chesterman, 'An International Rule of Law?', *supra* note 1, 342.

rule by law.[7] Law is more than simply an instrument to govern but also puts constraints on those exercising public power. The rule of law demands that "the creation of laws, their enforcement, and the relationships among legal rules are themselves legally regulated, so that no one—including the most highly placed official—is above the law".[8] The rule of law does not only subject all persons and institutions to the law but also provides mechanisms, in particular judicial review, to hold accountable those who exercise public power.[9] Equality before the law requires that laws must apply equally to all persons subjected to it.[10]

The substantive and institutional expansion of international law, the widening and deepening of international regulation and adjudication,[11] including its expansion into subject areas that were before solely a matter of the *domaine réservé* of the nation State,[12] has posed the question of how the international rule of law can be upheld.[13] In particular, international sanctions against individuals

7 Chesterman, 'Rule of Law', *supra* note 1, para. 2; and Chesterman, 'An International Rule of Law?', *supra* note 1, 342.

8 Britannica Academic, 'Rule of Law', *supra* note 2.

9 See e.g. K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2010); E.-U. Petersmann, 'How to Promote the International Rule of Law: Contributions by the World Trade Organization Appellate Review System', 1 *Journal of International Economic Law* (1998) 1, 25; Crawford, *supra* note 4, 4.

10 Chesterman, 'Rule of Law', *supra* note 2, para. 2; *Britannica Academic*, 'Rule of Law', *supra* note 2.

11 On the substantive expansion of international law, see the Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006 [ILC Fragmentation Report]. On the expansion of international adjudication, see the special issue of the *New York University Journal of International Law & Politics*, Vol. 31 (1998). Publications that are more recent include, e.g. G. Gaja, 'Relationship of the ICJ with Other International Courts and Tribunals', in A. Zimmermann et al. (eds), *The Statute of the International Court of Justice – A Commentary*, 2nd ed. (2012), 582-584 paras. 23-25 [Gaja, ICJ], and P.-M. Dupuy & J. E. Viñuales, 'The Challenge of "Proliferation": An Anatomy of the Debate', in C. P. R. Romano, K. J. Alter & Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014).

12 Cf. *ILC Fragmentation Report*, *supra* note 11, 10, para. 7; Crawford, *supra* note 4, 7-8.

13 See e.g. Chesterman, 'An International Rule of Law?', *supra* note 1; A. Nollkaemper, *National Courts and the International Rule of Law* (2011) [Nollkaemper, National Courts]; Kumm, *supra* note 5; Watts, *supra* note 1; G. A. Christenson, 'World Civil Society and the International Rule of Law', 19 *Human Rights Quarterly* (1997) 4, 724; B. Zangl, 'Is There An Emerging International Rule of Law?', 13 *European Review* (2005) S1, 73; T. Nardin, 'Theorising the International Rule of Law', 34 *Review of International Studies* (2008) 3, 385; Crawford, *supra* note 4; J. Waldron, 'The Rule of International Law', 30

by the UN Security Council have put concerns regarding the rule of law in a multilayer global legal order on the agenda.[14]

An approach that found particular support in German legal scholarship has proposed a constitutionalization of international law as a way of transferring the rule of law to the international level. By providing a clear normative hierarchy, granting supremacy to certain principles, and integrating all international legal subsystems into a unitary structure, constitutionalism aims at dealing with the expansion of international law by constitutional means.

The constitutionalist project, however, seems to have lost some of its momentum in recent years. Constitutionalism's suggestion of a unitary international normative system struggles to deal with some of international law's main successes, namely with the increasing internationalization of national law, the development of highly integrated supranational legal orders such as the European Union, and an increasing specialization of international subsystems. State organs increasingly apply international law in domestic *fora*.[15] This growing intertwinement of national and international law has led to a paradoxical situation. On the one hand, international law is not exclusively an inter-State matter anymore (if it ever was). A constitutional hierarchy disconnected from domestic constitutional structures has difficulties to fulfil constitutionalist aspirations. On the other hand, national law has not become fully internationalized. National constitutions do not unconditionally give way to some sort of global constitution. Moreover, the proposed unity of international law has been increasingly challenged by the normative fragmentation and functional differentiation of international law. Thus, much of the constitutional discourse seems to have been replaced by a discourse on fragmentation.[16] While the fragmentation of international law does not necessarily exclude the

Harvard Journal of International Law and Public Policy (2006) 1, 15; B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004).

14 See e.g. S. Chesterman, *The UN Security Council and the Rule of Law: The Role fo the Security Council in Strengthening a Rule-based International System, Final Report and Recommendations from the Austrian Initiative, 2004-2008* (2008) [Chesterman, SC and Rule of Law].

15 P. Allot, 'The Emerging Universal Legal System', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between International Law and National Law* (2007); P. Allot, *Eunomia: New Order for a New World*, 2nd ed. (2001), 80-82.

16 On the fragmentation discourse, see e.g. M. Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 3, 553; B. Simma & D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *European Journal of International Law* (2006) 3, 483; and A. Roberts, *Is International Law International?* (2017).

implementation of certain elements of the rule of law, such as judicial review of the exercise of public power in restricted subject-areas,[17] it nevertheless implies a farewell to a broader rule of law vision of international law. It thus endangers rule of law transfers, referring to the dissemination and implementation of the rule of law across boundaries of international legal subsystems.

While we do not intent to revive a total constitutionalism as a utopian promise of an overarching global order, we certainly do not tune into fragmentation's requiem about the end of international law as common endeavor for the international implementation of the rule of law. While the different legal orders require analytical distinction, the plurality of the contemporary legal reality is characterized by a complex and dynamic interplay between various legal orders and sub-orders (including some private legal regimes). Instead of following a constitutional hierarchy, the law behind rule of law transfers and implementation is characterized by elements of mutual recognition of different legal orders – such as doorways for the application of norms of other legal systems, mutual respect, harmonious interpretation, and informal means of dialogue – that enable integration and accommodation.

B. Rule of Law Transfers Between Constitutionalism and Fragmentation

I. The German Project: Rule of Law Transfers and International Constitutionalism

As a response to the expansion of international law and the disaggregation of the modern State,[18] an approach that found particular support in German legal scholarship has proposed the constitutionalization of international law as a means to implement the rule of law internationally.[19] A transfer of the concept of

[17] On the judicialization of specialized sub-regimes in international law as an aspect of an international rule of law, see Zangl, *supra* note 13.

[18] Cf. A.-M. Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995) 1, 503 [Slaughter, Int. Law and Liberal States].

[19] Constitutionalism as an approach to international law can be traced back to the inter-war years, cf. A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926). For a comprehensive overview over constitutionalist approaches, see T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012) [Konstitutionalisierung im Völkerrecht]. Contributions include A. Peters, 'The Merits of Global Constitutionalism', 16 *Indiana Journal Global Legal Studies* (2009) 2, 397 [Global Constitutionalism]; A. Peters, 'Compensatory Constitutionalism:

constitution from the domestic to the international level has been considered a way of administering the increasing exercise of public power on the international level by constitutional means.

Among the various constitutional approaches, we find a number of communalities. They are united in their emphasis on the rule of law in international relations by establishing a (hierarchical) structure, unity, and coherence of international law.[20] They are unified in their insistence on international law's legitimacy, in their support for coupling law and politics, and putting institutional and procedural restraints on those exercising public power internationally.[21] Another major concern among constitutionalists relates to the substantive dimension of international law (in particular human rights).[22] Most constitutionalists perceive international law as an order that is built upon

The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579 [Compensatory Constitutionalism]; J. E. Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options', in E. de Wet & A. Nollkaemper (eds), *Review of the Security Council by Member States* (2003); C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours* (1993), 195 [Tomuschat, Obligations]; B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009); J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (2009), 67. See also the lecture series of the Max-Planck Institute in Heidelberg on the future of international law scholarship in Germany in 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 583. See, furthermore, the references accompanying this section.

20 Cf. T. Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law', 81 *Nordic Journal of International Law* (2012) 2, 79 [Kleinlein, Constitutionalism].

21 Cf. J. Klabbers, 'Setting the Scene', in Klabbers, Peters & Ulfstein (eds), *supra* note 19, 11-14.

22 See e.g. G. Ulfstein, 'The Relationship Between Constitutionalism and Pluralism', 4 *Goettingen Journal of International Law* (2012) 2, 575.

some fundamental values[23] of the international community[24] that are *inter alia* reflected in the purposes and principles of the *Charter of the United Nations* (UN Charter)[25] (Preamble, Articles 1 and 2). The normative substrate of such a "constitution of the international community" is to be found in the foundational principles that are enshrined in the UN Charter, in *jus cogens* and *erga omnes* obligations.[26] Accordingly, States as the relevant actors in international law are complemented by international organizations, actors of a global civil society, and international corporations in a single, constitutional framework.[27]

However, the constitutional discourse seems to be on the defensive in recent years.[28] In light of the still dominant position of the nation State in international relations, autonomous constitutionalization of international law appears utopian.[29] Even though international law has become much more inclusive, an "international community" that includes other actors than States is still in its infancy.[30] The widespread disregard of the UN by many States and its inability to undergo necessary reforms due to the lack of basic consensus among

23 See e.g. E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden Journal of International Law* (2006) 3, 611, 612-613; P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', 16 *European Journal of International Law* (2005) 1, 131, 135 [Dupuy, Contemporary International Law]; C. Tomuschat, 'International Law Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (1999), 9 [Tomuschat, Survival of Mankind]; D. Thürer, 'Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung?', 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000), 557, 598 ("ordre public").

24 On the so-called "international community school" of scholars, see B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529, 546-551. On the concept of "international community", see A. L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001) [Paulus, Internationale Gemeinschaft].

25 *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI.

26 Cf. Kleinlein, 'Constitutionalism', *supra* note 20, 89.

27 Cf. A. L. Paulus, 'International Community', in R. Wolfrum (ed), *Max Planck Encyclopedia of International Law* (2013) [Paulus, International Community], with further references.

28 Cf. already G. Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 657.

29 Cf. A. L. Paulus, 'Zusammenspiel der Rechtsquellen aus völkerrechtlicher Perspektive', 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* (2014), 13 [Paulus, Rechtsquellen].

30 See Paulus, *Internationale Gemeinschaft*, *supra* note 24.

its members challenge a qualification of the UN Charter as the all-embracing constitution. There is no real balance of power in the UN system, which would be an essential requirement for a system that adheres to the rule of law. In turn, except for the veto power of the permanent members, institutionalized restraint on the UN Security Council is almost non-existing. Despite the multiplication of international judicial bodies and the growing application of international norms by domestic courts, judicial review mechanisms are still relatively underdeveloped. The development of many different powerful regimes also seems to preclude a *one-size fits all* approach of international constitutionalism. Fragmentation is fed by the increasing numbers of international treaty-regimes with their own dispute settlement procedures and mechanisms of implementation. They reflect remaining global dissent on important structural and value questions. The increasing differentiation of international law into specialized regimes, such as the international multilateral trade system, the international criminal legal system, and the highly integrated European legal order have led to the formation of different centers of gravity. Territoriality has been replaced by a differentiation of legal (sub-)system along functional lines instead of constitutional unification.[31]

As a consequence, a growing branch of international constitutionalism assumes a more integrated constitutionalization of both international law and domestic legal orders. Whereas few would suggest a radical monism, many of modern constitutionalists describe a unification of international law and domestic law under the umbrella of a unified value system. The proposal of *the* "constitution of the international community" has been largely set aside

[31] Cf. A. Fischer-Lescano & G. Teubner, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2003) 4, 999 [Fischer-Lescano & Teubner, Regime-collisions] and A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (2006) [Fischer-Lescano & Teubner, Regime-Kollisionen].

by "complementary constitutionalism",[32] "constitutional principles",[33] and "constitutional networks".[34]

However, also proponents of an integrated constitutionalism of international and domestic law struggle in providing satisfactory answers to concerns of (democratic) legitimacy – regarding the justification of public authority[35] – resulting from the disaggregation of the functions of the State and their relocation to the international and supranational level. So far, only the State is able to provide democratic legitimacy to justify the exercise of public authority over individuals as well as the control of public authority. While our understanding of democratic legitimacy does not preclude a pluralist model of different democratic legal orders that complement each other and operate with different levels of (in)direct democratic legitimacy,[36] international and supranational orders remain deficient in this regard.

II. Fragmentation and Challenges to Law Transfers

Much of the constitutional discourse seems to have been replaced by a discourse on fragmentation.[37] As constitutionalism's antipode, fragmentation

32 Peters, 'Compensatory Constitutionalism', *supra* note 19, 579. See also C. Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen', in J. Frowein (ed), 36 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1978), 52-53 [Tomuschat, Verfassungsstaat].

33 See e.g. S. Kadelbach & T. Kleinlein, 'International Law-A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles', 50 *German Yearbook of International Law* (2007), 303, 342 [Kadelbach & Kleinlein, Constitution for Mankind] (the principles discussed include respect for human rights and the environment, democracy, accountability and the rule of law). See also S. Kadelbach & T. Kleinlein, 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht' (2006), 44 *Archiv des Völkerrechts* (2006) 3, 235 [Kadelbach & Kleinlein, Überstaatliches Verfassungsrecht].

34 Cf. e.g. A.-M. Slaughter, *A New World Order* (2004) [Slaughter, New World Order].

35 On *legitimacy* as a justification of public authority, see R. Wolfrum, 'Legitimacy in International Law', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2011), para. 1.

36 Cf. J. Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society', 15 *Constellations* (2008) 4, 444 [Habermas, Constitutionalization of International Law], and J. Habermas, *Zur Verfassung Europas: Ein Essay*, 4th ed. (2012) [Habermas, Verfassung Europas].

37 On the fragmentation discourse, see: Koskenniemi & Leino, *supra* note 16; Simma & Pulkowski, *supra* note 16; and Roberts, *supra* note 16.

embraces plurality and diversity.[38] The different legal orders, be they international or national, are considered as distinct legal systems with their own sources of legitimacy, institutions, and functional concerns. In other words, variety has become the new *avant-garde*.

Indeed, international law is subject to strong centrifugal forces, with heightened risks of normative fragmentation and a growing disparity in international law. Many international legal regimes have undergone a "functional differentiation" into various legal subsystems and seem to have developed into autonomous legal orders.[39] The lack of unity and clear structures in international law and the substantive fragmentation of international law cannot simply be seen as accidental phenomena. To a certain extent, they reflect the intention of States, who have decided to establish specialized legal regimes to solve special problems without foregoing sovereignty more generally.

Nevertheless, all international legal (sub)systems find their origin in general international law. In a formal sense, they are based in the sources of international law (Article 38 *Statute of the International Court of Justice*[40]) and derive their existence from States' consent. Thus, it would be premature to deny international law's systemic nature.

Despite the increasing receptiveness of national legal systems for international law, international law and domestic legal orders remain independent – at least in a formal sense.[41] International law does not determine or describe legal validity in national law.[42] Thus, international law does not require direct

38 See e.g. N. Krisch, 'The Pluralism of Global Administrative Law' (2006), 17 *European Journal of International Law* (2006) 1, 247; R. M. Cover, 'Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation', 22 *William and Mary Law Review* (1980) 4, 639; P. S. Berman, 'Global Legal Pluralism', 80 *Southern California Law Review* (2006) 6, 1155, 1155, 1164; N. Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) 3, 317, 361. See also A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law', 6 *International Journal of Constitutional Law* (2008) 3-4, 397, 398, who describes pluralism as a referring, descriptively and normatively, to the diversity within the legal sphere.

39 Fischer-Lescano & Teubner, 'Regime-collisions:', *supra* note 31, and Fischer-Lescano & Teubner, *Regime-Kollisionen*, *supra* note 31. On *Regimetheorie*, see N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997) [Luhmann, Gesellschaft der Gesellschaft]; N. Luhmann, *Das Recht der Gesellschaft* (1993) [Luhmann, Recht der Gesellschaft].

40 *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993 [ICJ Statute].

41 Nollkaemper, *National Courts*, *supra* note 13, 13; G. Gaja, 'Dualism – A Review', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007), 52 [Gaja, Dualism].

42 Nollkaemper, *National Courts*, *supra* note 13, 68.

effect in the domestic legal systems. Rather, the applicability of international law in domestic legal systems is contingent on national law.[43] The same holds true *vice versa*. The validity, applicability, and effect of domestic law in international law is contingent on the latter.

However, fragmentation fails to do justice to the various systemic elements that we can find in international law and in the relationship between national and international law.[44] It easily dismisses the agreement on many of the fundamental values underlying the international legal order that transgress international and domestic law. It is true that finding common principles risks falling prey to minimalism.[45] Nevertheless, we should not ignore the common ground that is shared by the various legal orders, in particular with regard to some fundamental norms, such as the prohibition of the use of force, Genocide or torture.[46] The real divide is often not between different legal systems but between the rule of law and power politics.

Fragmentation that refers to a functional differentiation of international legal (sub)systems easily loses sight of the individual, on the one hand, and values, on the other hand, that have to be taken into account and balanced with each other.[47] Functional differentiation of *autopoietic* legal (sub)systems lacks legitimacy and does not offer a substitute for the democratic structures of the nation State. A return to legal fragmentation along territorial boundaries ignores the necessity to find common answers to global problems. While a fragmentation of international law does not necessarily exclude the implementation of certain elements of the rule of law internationally, such as judicial review within different autonomous regimes,[48] it implies a farewell to a broader vision of the rule of law

43 Nollkaemper, *National Courts*, *supra* note 13, 69; Gaja, 'Dualism', *supra* note 41, 52.

44 On tools dealing with the multiplication of international disputes settlement procedures, see e.g. L. Boisson de Charzournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', 28 *European Journal of International Law* (2017) 1, 13. On interpretative tools to deal with normative fragmentation, see e.g. *ILC Fragmentation Report*, *supra* note 11.

45 A. L. Paulus, 'International Adjudication', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 209, 220 [Paulus, Adjudication].

46 Cf. Article 2(4) UN Charter (Prohibition of the Use of Force); *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (Prohibition of Genocide); and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (Prohibition of Torture).

47 Paulus, 'Adjudication', *supra* note 45, 215.

48 On an emerging rule of law through judicialization of specialized sub-regimes in international law, see Zangl, *supra* note 13.

in international affairs. It waves normative coherence among different specialized fields of international law and prevents rule of law transfers across boundaries of international legal subsystems.

Approaches that try to reconcile constitutionalist concerns with a fragmented world order by proposing a plurality of constitutional sites[49] – or even "constitutional fragments"[50] within constitutional sub-systems – seem to reflect, rather than to solve the crisis of the dichotomist conception of constitutionalism and fragmentation. International administrative law[51] has been proposed as a site for competition from which by way of induction common basic principles can be derived. This proposal appeals as a modest version of a pluralistic constitutionalism, but also struggles to overcome the underlying political tensions, which the fragmentation and constitutional dichotomy brought to the surface.

C. Rule of Law Transfers in a Pluralist Order: Between Formal Structures and Mutual Respect

A number of mechanisms offer a framework for the implementation of the rule of international law across legal (sub)systems and implement certain features of the rule of law. International law is characterized by a complex and dynamic interplay between various legal orders and sub-orders, including national legal systems.[52] It depends on a similar practice of mutual recognition of the different legal orders – such as doorways for the application of norms of other legal systems and mutual respect – that enable integration and accommodation.[53]

In the following, we will highlight three mechanisms that play a pivotal role in the dissemination and implementation of an international rule of law. These mechanisms include so-called hinge provisions as doorways between different legal orders, harmonious interpretation as a tool for the interpretative integration, and informal judicial dialogue. These mechanisms cannot compensate for the

49 Walker, *supra* note 38; M Avbelj & J Komárek, *Four Visions of Constitutional Pluralism* (2008).

50 G. Teubner, *Verfassungsfragmente – Gesellschaftlicher Konstitutionalismus in der Globalisierung* (2012).

51 See, for example, Krisch, *supra* note 38; B. Kingsbury, N. Krisch & R. B. Stewart, 'The Emergence of Global Administrative Law' 68 *Law and Contemporary Problems* (2005) 3, 15.

52 Cf. Paulus, 'Rechtsquellen', *supra* note 29, 9. See in a similar line, Crawford, *supra* note 4, 10.

53 See further Paulus, 'Rechtsquellen', *supra* note 29.

lack of a clear hierarchy and constitutional structure that would ensure unity in international law, whether within specialized international subsystems or in their application in national legal systems. They cannot fill the gaps left by the deficient judicial review mechanisms that could ensure accountability of those who exercise public power towards individuals directly or indirectly affected by international regulation and action. Nevertheless, these mechanisms may be able to mitigate a number of concerns arising from the expansion and fragmentation of international law. The overall structure, however, remains fragile. When the readiness for mutual respect breaks down, clashes are inevitable.

I. "Hinge Provisions" as Doorways between Legal Orders

So-called "hinge provisions" ("*Scharniernormen*") constitute important mechanisms for the dissemination and implementation of the rule of international law.[54] These provisions establish doorways of legal orders for the inclusion of norms of other legal regimes. In doing so, hinge provisions ensure the establishment of a common normative framework that is (subject to certain conditions) applicable across systemic boundaries. These hinge provisions enable the incorporation of rule of law principles emanating from international law into domestic law and from general international law into specialized subsystems. The shared characteristic of these hinge provisions is that they recognize the applicability of general international law (Article 38 ICJ Statute) in their respective legal (sub)system as the residual rule in the absence of *lex specialis*.

Various constituent instruments of international courts and tribunals replicate or refer to Article 38 ICJ Statute.[55] For example, Article 21 of the

[54] On this term, see P. M. Huber & A. L. Paulus, 'Cooperation of Constitutional Courts in Europe: The Openess of the German Constitution to International, European, and Comparative Constitutional Law', in M. Andenas & D. Fairgrieve (eds), *Courts and Comparative Law* (2015), 281.

[55] Cf. A. Pellet, 'Article 38', in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice – A Commentary*, 2nd ed. (2012), 745-747, paras. 49-54; Special Rapporteur Michael Wood, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672, 22 May 2014, 5, para. 16 [ILC Second Report on Custom]. See already the UN Secretariat, *Systematic Survey of Treaties for the Pacific Settlement of Disputes 1928-1948*, October 1948, 16-122 [Survey of Treaties], giving an extensive overview over applicable law provisions that make the sources of Article 38 ICJ Statute (or its predecessor Article 38 PCIJ Statute) applicable as the residual rule for international dispute settlement procedure in the absence of *lex specialis*.

Rome Statute[56] builds on the language of Article 38 and complements it.[57] Article 20(1) of the *Protocol of the Court of Justice of the African Union* also takes up the wording of Article 38 and modifies it.[58] A number of instruments contain a general reference stating that judicial decisions shall be rendered in accordance with the "rules" or "principles" of "international law", thereby referring to Article 38 ICJ Statute.[59] Examples are Article 42(1) of the ICSID Convention,[60] and Article 1131(1) of the *North American Free Trade Agreement* (NAFTA).[61] Other instruments contain cross-references to Article 38, such as Articles 74(1), 83(1) and 311 of the *United Nations Convention on the Law of the Sea* (UNCLOS)[62] and Article 28 of the *General Act of Arbitration (Pacific Settlement of International Disputes)*.[63] Other instruments refer to parts of the

56 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90.

57 Cf. W. A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (2011), 206-212, who argues that Article 38 ICJ Statute is applicable in the case of absence of special regulation in the Rome statute (and Rules of Procedure and Evidence).

58 *Protocol of the Court of Justice of the African Union*, 1 July 2003, available at http://www.peaceau.org/uploads/protocol-court-of-justice-of-the-au-en.pdf, last visited 13 December 2018 (see also Article 20(1)).

59 Cf. *Survey of Treaties*, *supra* note 55, 116-122.

60 *Convention for the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 dealing with the applicable law. An explicit reference to Article 38 ICJ Statute was included in earlier drafts of Article 42, but eventually not taken up, cf. International Centre for Settlement of Investment Disputes, 'Draft Convention: Working Paper for the Legal Committee', 11 September 1964, in *History of the ICSID Convention – Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Vol II-1 (1968), Article 45, 610, 630 [History ICSID Convention]; see also the 'Memorandum From the General Counsel and Draft Report of the Executive Directors to Accompany the Convention', 19 January 1965, in *ibid.*, Vol II-2, 952, 962. The fact that no explicit reference was included, was not, however, perceived a substantial modification excluding an application of Article 38, cf. 'Modifications of Parts IV and V of the Draft Report of the Executive Directors to accompany the Convention', 9 March 1965, in *ibid.*, 1025, 1029, paras. 25-27. See further C. H. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed. (2009), Article 42, 604-612, paras. 169-188, 613-630 paras. 192-244, and Paulus, 'Rechtsquellen', *supra* note 29, 17.

61 *North American Free Trade Agreement*, 17 December 1992, Canada, Mexico and United States of America, 32 ILM 289 [NAFTA]. See also *Methanex Corporation v. United States of America (Final Award on Jurisdiction and Merits)*, 3 August 2005, Part II Chapter B, 1, paras. 2-3 [Methanex v. USA], highlighting that the reference to "applicable rules of international law" in Article 1131(1) NAFTA refers to Article 38(1) ICJ Statute.

62 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

63 *General Act of Arbitration (Pacific Settlement of International Disputes)*, 26 September 1928, 93 LNTS 343 refers to then Article 38 PCIJ Statute.

language of Article 38, such as Article 3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.[64] By virtue of such hinge provisions, Article 38 ICJ Statute must be considered applicable as a general rule before courts and tribunals across different international legal subsystems, despite its wording and position in the Statute of the ICJ, which refers to "[t]he Court" and makes it applicable only before the ICJ.[65] Thus, "in substance,

[64] *Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement*, 15 April 1994, 1869 UNTS 401. Most scholars support residual reliance on general international law in the WTO system. See, e.g.,: L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 *Journal of World Trade Law* (2001) 3, 499, 501-502, 504; D. Palmeter & P. C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, 2th ed. (2012), 49-50; D. Palmeter & P. C. Mavroidis, 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 3, 398, 398-399; J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* (2001) 3, 535, 541-550 [Pauwelyn, Public International Law and WTO]; but see J. P. Trachtman, 'Institutional Linkage: Transcending 'Trade and...'', 96 *American Journal of International Law* (2002) 1, 77, 88, fn. 28 and G. Marceau, 'A Call for Coherence in International Law', 33 *Journal of World Trade* (1999) 5, 87, 109-115.

[65] On the general relevance of Article 38 ICJ Statute before international courts and tribunals, see also: *ILC Second Report on Custom*, *supra* note 55, 6, para. 16, fn. 15; Special Rapporteur Michael Wood, *First Report on Formation and Evidence of Customary International Law*, UN Doc A/CN.4/663, 17 May 2013, 14, para. 32 [ILC First Report on Custom]; H. Mosler, 'General Principles of Law' in R. Bernhardt & R. L. Bindschedler (eds), *Encyclopedia of Public International Law*, Vol. 7 (1984), 89, 93; M. Virally, 'The Sources of International Law', in M. Sørensen (ed), *Manual of Public International Law* (1968), 116, 121-122; J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. (1963), 56; R. Jennings & A. Watts, *Oppenheim's International Law*, Vol. 1, 9th ed. (1992), 24; *ILC, Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work Within the Purview of Article 18, Paragraph 1, of the of the International Law Commission*, UN Doc A/CN.4/1/Rev1, Extract from the Yearbook of the International Law Commission (1949), 22, para. 33 [ILC, Survey of International Law]; C. Brown, *A Common Law of International Adjudication* (2009), 36-37; I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 4-5; H. W. A. Thirlway, 'Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking', in R. Wolfrum & I. Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (2012), 311, 313-314. See with regard to international arbitration: J. L. Simpson & H. Fox, *International Arbitration: Law and Practice* (1959), 130-131; see also Article 10 and the commentary of the *Model Rules on Arbitral Procedure with a General Commentary* (1958), Yearbook of the International Law Commission Vol. II(2), which can be found in *Report of the International Law Commission on the Work of its Tenth Session, 28 April – 4 July 1958*, UN Doc A/CN.4/117, UN Doc A/38/59, 84 and 87. Even Article 15(1) of the 'Rules for Uniform Domain Name Dispute Resolution Policy' as approved by the ICANN Board

applicable law provisions […] do not depart from the general framework set up in Art. 38".[66] The constant practice of international courts and tribunals referring to this provision while relying on the ICJ's interpretation and modes of legal reasoning when determining rules of international law confirms the general applicability of Article 38 ICJ across international legal subsystems.[67] The application of Article 38(1) ICJ Statute by arbitral tribunals serves as an illustrative example.[68] The applicability of Article 38 ICJ Statute, however, is not set in stone. If an instrument explicitly excludes the (residual) applicability

of Directors on 28 September 2013, available at www.icann.org/resources/pages/udrp-rules-2015-03-11-en (last visited 13 December 2018), as an example of an instrument of a modern form of transnational private/public judicial settlements procedure, is interpreted as relying on rules of general international law, to be applied by the ICANN review panel. Skeptical on a general application of Article 38 ICJ Statute to other courts: C. I. Fuentes, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* (2016), 135-136.

66 M. Forteau, 'The Diversity of Applicable Law before international Tribunals as a Source of Forum Shopping and Fragmentation of International Law', in R. Wolfrum & I. Gätzschmann (eds), *supra* note 65, 417, 429. For an overview of the applicable law provisions in different international tribunals, see *Survey of Treaties*, *supra* note 55, 116-122. A number of instruments even include decisions *ex aequo et bono* (similarly to Article 38(2) ICJ Statute) in their applicable law provisions.

67 See e.g. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 22; C. Tams & A. Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development', 23 *Leiden Journal of International Law* (2010) 4, 781; J. d'Aspremont, 'If International Judges Say So, It Must Be True: Empiricism or Fetishism?', 4 *ESIL Reflections* (2015) 9 [d'Aspremont, International Judges]. See also J. d'Aspremont, 'International Lawyers and the International Court of Justice: Between Cult and Contempt', in J. Crawford *et. al.* (eds.), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz* (2017), 117, 122-123 [d'Aspremont, Lawyers and the ICJ], who argues that the ICJ fulfills the role of the "guardian of international lawyers' modes of legal reasoning'. See also C. Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making', 14 *Law and Practice of International Courts and Tribunals* (2015) 1, 51-79. With a view to the interpretation of Article 38(1)(b) ICJ Statute, see *ILC First Report on Custom*, *supra* note 65, 28, para. 66; *ILC Second Report on Custom*, *supra* note 55, 6, para. 16, fn. 15. See already *ILC, Survey of International Law*, *supra* note 65, 22, para. 33.

68 See e.g. *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal v. Germany)*, Award, 31 July 1928, 2 Reports of International Arbitral Awards (1949), 1011, 1016; *International Thunderbird Gaming Corporation v. Mexico*, Award, 26 January 2006, 31 para. 90; *Methanex v. USA*, *supra* note 61, Part II Chapter B, 1 paras. 2-3. See further Brown, *supra* note 65, 37, and *ILC, Survey of International Law*, *supra* note 65, 22 para. 33.

of general international law, only the respective *lex specialis* applies.[69] With the exception of Article 103 UN Charter and *jus cogens*, international law remains dispositive and accepts the primacy of individual agreement.

Domestic legal systems also provide different kinds of hinge provisions which provide doorways for international law into their system.[70] For example, Articles 23, 24, 25, 59(2) of the *German Basic Law* (the German Constitution, *Grundgesetz*)[71] constitute hinge provisions, which establish the "openness", or rather "friendliness", of the German legal order towards international and European law.[72] Articles 10 and 11 of the Italian Constitution provide additional examples of hinge provisions which open the Italian legal order to international and European law.[73] Without challenging the formal division of international and domestic law, these hinge provisions make international law applicable in domestic legal systems as far as they incorporate international into domestic law.[74] International law is "agnostic" as to how (and how far) international law becomes applicable within the municipal legal system.[75] While a number of domestic legal orders allow for the automatic incorporation of international law,[76] others require its transformation (or rather explicit adaptation) into domestic

69 *ILC First Report on Custom*, *supra* note 65, 14, para. 32; *ILC Second Report on Custom*, *supra* note 55, 6, para. 16, fn. 15; Forteau, *supra* note 66, 421-423; *Survey of Treaties*, *supra* note 55, 116-122.

70 Paulus, 'Rechtsquellen', *supra* note 29, 24-27.

71 An English translation can be found in the database of "Constitute: The World's Constitutions to Read, Search, and Compare", developed by the Comparative Constitutions Project at the University of Texas at Austin, available at https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en (last visited 13 December 2018).

72 On the "Friendliness" ("*Freundlichkeit*") and "openness" of the German Basic Law, see e.g. *Land Reform (Bodenreform) III*, Case No. 2 BvR 955/00, Order of the Second Senate of 26 October 2004, BVerfGE 112, 1, 25-26, para. 91-95. "Friendliness" expresses more distinctively the receptive approach of the Basic Law to international and European law than the term "openness". The concept of "friendliness" finds its basis in the broader concept of "Open Statehood" ("*Offene Staatlichkeit*"), a label that was initially coined by K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: ein Diskussionsbeitrag zu einer Frage der Staatstheorie sowie des geltenden deutschen Staatsrechts* (1964).

73 See e.g. Italian Constitutional Court, *Sentenza No 238/2014*, 22 October 2014, ECLI:IT:COST:2014:238, Conclusions in Point of Law, para. 3.1., available in Italian at https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238 (last visted 28 November 2018).

74 Cf. Nollkaemper, *National Courts*, *supra* note 13, 70.

75 *Ibid*.

76 For examples of countries that provide for automatic incorporation *ibid*., 73-77.

legislation.[77] Others differentiate between the sources of international law. For instance, according to Article 25 of the German Basic Law, general international law, such as customary international law and general principles, are an integral part of federal law with direct effect on German citizens as far as they also address individuals.[78] In contrast, international treaties become part of German law only through legislative consent in the form of federal legislation according to Article 59(2) of the Basic Law.[79] From the international legal perspective, the only thing that counts is whether States fulfil their international obligations; how they do this remains their own business. This is even the case with regard to the *European Convention on Human Rights* (ECHR)[80] as a special international treaty that operates in a highly integrated European environment.[81]

II. Effects of Hierarchies Within International Law

The opening of legal orders through hinge provisions, however, is not unconditional and unlimited. The diversity of legal hierarchies is reflected in the permissibility of disengagement from "the other" legal order and in so-called "counter-limits" to their domestic application.[82]

77 For examples of countries were international treaties require domestic legislations see *ibid.*, 77-81.

78 On customary international law in the German legal order, see A. L. Paulus, 'Customary Law Before the Federal Constitutional Court of Germany', in L. Lijnzaad & Council of Europe (eds), *The Judge and International Custom / Le juge et la coutume internationale* (2016) and A. L. Paulus, 'The Judge and International Custom', 12 *Law and Practice of International Courts and Tribunals* (2013) 2, 253.

79 On international treaty law in the German legal order, see A. L. Paulus, 'Germany', in D. Sloss & D. Jinks (eds), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009).

80 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222.

81 See e.g. *Swedish Engine Drivers' Union v. Sweden*, ECtHR Application No. 5614/72, Judgment of 2 February 1976 [Swedish Engine Drivers' Union (ECtHR)].

82 Paulus, 'Rechtsquellen', *supra* note 29, 30-37. See also A. L. Paulus & J.-H. Hinselmann, 'International Integration and Its Counter-Limits: A German Constitutional Perspective', forthcoming in C. Bradley (ed.), *Oxford Handbook on Foreign Relations Law* (2019). To our knowledge, the term "*contralimiti*" ("counter-limits") has been introduced by P. Barile, 'Ancora su diritto comunitario e diritto interno', in G. Ambrosini (ed), *Studi per il XX anniversario dell'Assemblea costituente*, Vol. VI (1969), 49 cited in accordance with G. Martinico, 'Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law Before National Courts', 23 *European Journal of International Law* (2012) 2, 401, 419, fn. 103.

On their own, clauses of supremacy or precedence, such as Article 103 UN Charter or Article 53 *Vienna Convention on the Law of Treaties* (VCLT) (*jus cogens*)[83] do not bring about but presuppose systemic unity in international law. They only lead to a certain superiority between international legal rules that have thereby not been detached from general international law. But these clauses do not apply in the relationship between domestic and international law, at least directly.[84] In spite of a general openness to international law, many (if not most) domestic legal systems have not given up their claim to normative sovereignty and thus final authority over the role of international law within the domestic legal system. Moreover, hinge provisions do not solve – at least directly – institutional conflicts between courts from different legal orders. Normative synchronization does not prevent divergent interpretation of international norms and conflicting judgments by different judicial bodies that are not part of one overarching hierarchical institutional structure.

Parties to international treaties may disengage from their international obligations through acts of revocation, if the treaty explicitly provides for it. Article 50 of the *Treaty on European Union* (TEU) serves as a well-known example in this regard explicitly allowing for exiting the EU.[85] As an alternative, States may invalidate, terminate, or suspend a treaty under the narrow conditions of Articles 46-53 VCLT. Under international law, simply invoking domestic reasons is generally not sufficient (Article 46 VCLT). If States override domestic legislation implementing treaty commitments, the international obligations remain untouched and the international responsibility of that State is triggered. Disengagement from international obligations deriving from the unwritten sources of international law (customary international law or general principles) is not less complicated. *Persistent objection* to new custom as one way of disengaging from customary international law is possible only under narrow conditions,[86] and is rarely successful in the long run.

83 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

84 Paulus, 'Rechtsquellen', *supra* note 29, 25.

85 *Consolidated Version of the Treaty of the European Union*, 26 October 2012, OJ C 326/13.

86 On the persistent objector rule and its narrow scope, see Special Rapporteur Michael Wood, *Third Report on Identification of Customary International Law*, UN Doc A/CN.4/682, 27 March 2015, 59-67, paras. 85-95.

III. Domestic Counterlimits to the Domestic Application of International Law

Moreover, domestic and international courts have developed a number of so-called counter-limits to the application of (general) international law in their respective legal (sub)systems, which enable disentanglement of different legal orders (even if only in the concrete case).[87]

1. "*Solange*"

Some counter-limits have a rather *outward-looking* character towards international (and European) law. They aim at fostering dialogue and accommodation, instead of outright disintegration. One example of such an outward-looking counter-limit is the so-called "*Solange*"- approach developed by the German Federal Constitutional Court (FCC; *Bundesverfassungsgericht*). Even though the FCC has developed this approach in the relationship between German constitutional law and EU law, it also finds application in the relationship with general international law and with other international courts and tribunals. The Court held that a supranational institution (in this context the EU) must ensure effective human rights protection equivalent to that under the domestic German Basic Law as a precondition for the opening of the German legal order. In *Solange II*, the FCC held that it would not exercise its jurisdiction and would abstain from reviewing EU secondary law against the Basic Law "so long as" ("*solange*") the EU secured human rights protection that is equivalent to fundamental rights protection under German law.[88] The *Solange* approach

[87] Paulus, 'Rechtsquellen', *supra* note 29, 7-37.

[88] *Re Wünsche Handelsgesellschaft (Solange II)*, Case No. 2 BvR 197/83, Order of the Second Senate of 22 October 1986, BverfGE 73, 339, 387, para. 132 [Solange II (FCC)]. *The case Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, Case No. 2 BvL 52/71, Order of the Second Senate of 29 May 1974, BverfGE 37, 271, 285, para. 56, marked the beginning of this approach. Given the then deficient human rights protection in the EU, the FCC held initially that it would exercise its jurisdiction over the application of EU law in German law "so long as" ("*solange*") the standard of fundamental rights protection under EU law is not "adequate" ("*ädequat*") compared to the fundamental rights protection under German law. See the further development of the *Solange II* jurisprudence in *Maastricht*, Case No. 2 BvR 2134, 2159/92, Judgment of the Second Senate of 12 October 1993, BverfGE 89, 155 [Maastricht (FCC)]; *Lisbon (Lissabon)*, Case No. 2 BvE 2/08, Judgment of the Second Senate of 30 June 2009, BVerfGE 123, 267 [Lisbon (FCC)]; *Emission Allowance (Treibhausgas-Emissionsberechtigungen)*, Case No. 1 BvF 1/05, Order of the First Senate of 13 March 2007, BVerfGE 118, 79; *European Act on Warrants of Arrest (Europäisches Haftbefehlsgesetz)*,

aims at "equivalent protection" and harmonization rather than "identity" of human rights protection as the precondition for the reciprocal acceptance of different legal orders. It does not do so with a view to the individual case but it pursues systemic human rights protection in a multi-level system of law through "mutual respect" and engagement with foreign law.[89] Even though, the *Solange* approach has successfully avoided a divergence between German fundamental rights protection and EU law, the potential for conflicts remain.[90] The FCC does not grant an absolute precedence of EU law over national constitutional law rather, it requires that the constitutional limits of EU precedence (avoiding the more hierarchical term of "supremacy" as contained in Article 23 and Article 79(3) Basic Law) are respected.[91]

The European Court of Human Rights (ECtHR) applied an approach similar to the *Solange* jurisprudence in the *Bosphorus* case.[92] This case dealt with

Case No. 2 BvR 2236/04, Judgment of the Second Senate of 18 July 2005, BVerfGE 113, 273; *Honeywell*, Case No. 2 BvR 2661/06, Order of the Second Senate of 6 July 2010, BVerfGE 126, 286 [Honeywell (FCC)]; *Data Retention (Vorratsdatenspeicherung)*, Case Nos. 1 BvR 256/08 and others, Judgment of the First Senate of 2 March 2010, BVerfGE 125, 260. The literature on the relationship between the FCC and the CJEU abounds. See e.g. T. Giegerich, 'Zwischen Europafreundlichkeit und Europaskepsis – Kritischer Überblick über die bundesverfassungsgerichtliche Rechtsprechung zur europäischen Integration', 19 *ZEuS Zeitschrift für Europarechtliche Studien* (2016) 1, 3; U. Kranenpohl, 'Kompetenzgerangel oder Interpretationsdiskurs? Intrajustizielle Kontrolle im Mehrebenensystem', 26 *Zeitschrift für Politikwissenschaft* (2016) 1, 149; M. D. Poli, 'Der Justizielle Pluralismus der Europäischen Verfassungsgemeinschaft: „Babylonische Gerichte" oder „Gerichte für Babylon"?', 55 *Der Staat* (2016) 3, 373; C. Calliess, 'Die Rolle des Grundgesetzes und des Bundesverfassungsgerichts', in K. Böttger & M. Jopp (eds), *Handbuch zur Deutschen Europapolitik* (2016), 149; A. Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 6 *European Constitutional Law Review* (2010) 2, 175.

89 *Solange II (FCC)*, *supra* note 88; *Banana Market Regulation (Bananenmarktordnung)*, Case No. 2 BvL 1/97, Order of the Second Senate of 7 June 2000, BVerfGE 102, 147, 161-164, paras. 56-62.

90 Huber & Paulus, *supra* note 54, 286-287.

91 *Solange II (FCC)*, *supra* note 88, 375; *Lisbon (FCC)*, *supra* note 88, 346-369, paras. 225-272; *Honeywell (FCC)*, *supra* note 88, 292-295, paras. 55-61.

92 *Bosphorus Hava Yollari Turizm Ve Ticaret AS v. Ireland*, ECtHR Application No. 45036/98, Judgement of 30 June 2005 [Bosphorus (ECtHR)]. On the *Bosphorus* decision, see F. Schorkopf, 'The Judgment of the European Court of Human Rights in the Case Bosphorus Hava Yollari Turizm v Ireland', 6 *German Law Journal* (2005) 9, 1255; K. Kuhnert, 'Bosphorus – Double Standards in European Human Rights Protection?' (2006) 2 *Utrecht Law Review* (2006) 2, 177. See more recently the ECtHR Grand Chamber judgment in the case *Avotiņš v. Latvia*, ECtHR Application No. 17502/07,

the responsibility of parties to the ECHR for legal measures imposed by the (then) European Community. The ECtHR made clear that Member States of an international organization (such as the EU) remain liable under the Convention for "all acts and omissions of its organs regardless of whether the act or omission in question was a consequence [...] of the necessity to comply with international legal obligations".[93] However, the ECtHR underlined that it would only review national measures implementing EU measures against the obligations arising from the ECHR if the organization did not offer human rights protection "at least equivalent to that for which the Convention provides".[94] Moreover, the Court applied a (rebuttable) presumption that a Member State complies with its obligations under the convention when fulfilling its obligations under EU law.[95] More recently, a Chamber of the ECtHR also applied an "equivalent protection test" when dealing with a possible conflict between obligations arising from ECHR law and UN law.[96] The Grand Chamber, however, did not follow the Chamber's approach. Instead, it avoided the normative conflict by harmonizing interpretation.[97] Whether the *Solange*- or *Bosphorus*-style of reasoning becomes a blueprint for relationships between different legal (sub)orders remains to be seen.[98]

2. "*Ultra-vires*"

The so-called "*ultra vires*" test developed by the FCC constitutes another outward-looking counter-limit that deals with possible conflicts over final claims of authority by providing a process of dialogue and accommodation, rather than

Judgment of 23 May 2016 [*Avotiņš* (ECtHR)] and the comment by S. Øby Johansen, 'EU Law and the ECHR: The Bosphorus Presumption is Still Alive and Kicking – The Case of Avotiņš v. Latvia' (2016), available at http://eulawanalysis.blogspot.com/2016/05/eu-law-and-echr-bosphorus-presumption.html (last visited13 December 2018).

93 *Bosphorus (ECtHR)*, *supra* note 92, para. 153.

94 *Ibid*.

95 *Ibid*., 155-156.

96 *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR Application No. 5809/08, Judgement of 26 November 2013, 55-58, paras. 111-121 [Al-Dulimi (ECtHR)].

97 *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], ECtHR Application No. 5809/08, Judgement of 21 June 2016, 65-67, paras. 134-140 [Al-Dulimi (Grand Chamber) (ECtHR)].

98 See e.g. the suggestion that the ICJ should apply a similar approach in P.-M. Dupuy, 'Competition Among International Tribunals and the Authority of the International Court of Justice', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), 873 [Dupuy, International Tribunals].

confrontation.[99] The FCC held that the openness of the German legal order is limited to the powers that have been transferred to the EU level. Thus, EU law is only applicable in the German legal order to the extent that it finds a basis in the powers referred to the EU in accordance with the delegating act (Article 24(1) and, explicitly, Article 23 of the Basic Law) that emanates from the democratic will of the German legislator.[100] Acts of EU organs that are *ultra vires*, in other words which go beyond those transferred powers,[101] are not applicable in the German legal order.[102] As a consequence, the FCC reserves a right of ultimate control of last resort of the European law principle of conferral (or enumerated powers) with regard to the powers transferred by the German legislator.[103] Importantly, however, the *ultra vires* test is less confrontational as it may seem at first glance. The FCC repeatedly emphasized that the constitutional principles of "open statehood", and more specifically the principle of "friendliness" to EU law, require an application of the *ultra vires* test in a "Union-friendly" manner. The FCC must request a preliminary reference under Article 267 TFEU from the CJEU before declaring an act *ultra vires* and non-binding on German authorities.[104] Thus, the CJEU has the possibility to correct eventual transgressions of transferred competences itself while taking into consideration concerns of the FCC.[105] Moreover, only qualified transgressions may lead to an *ultra vires* finding by the FCC.[106] As the Court made clear:

99 On the *ultra vires* test as a counter-limit, see Paulus & Hinselmann, *supra* note 82, and Paulus, 'Rechtsquellen', *supra* note 29, 32-33, with further references.

100 *Maastricht (FCC)*, *supra* note 88, 187-188; *Lisbon (FCC)*, *supra* note 88, 346-369, paras. 225-272; *Honeywell (FCC)*, *supra* note 88, 303-302, paras. 54-57. On the purpose of the ultra vires control, see also *OMT (Judgment)*, Cases Nos. 2 BvR 2728/13 and others, Judgment of the Second Senate of 21 June 2016, BVerfGE 142, 123, Headnote 1 [OMT (Judgement) (FCC)].

101 *Maastricht (FCC)*, *supra* note 88, 187-188; *Lisbon (FCC)*, *supra* note 88, 352-355, paras. 240-241; *Honeywell (FCC)*, *supra* note 88, 302-303, paras. 54-57.

102 *Maastricht (FCC)*, *supra* note 88, 187-188; *Lisbon (FCC)*, *supra* note 88, 353-355, paras. 240-241; *Honeywell (FCC)*, *supra* note 88, 302-303, paras. 54-57. Nevertheless, the FCC constantly takes into account the CJEU's jurisprudence even beyond the scope of application of EU law, cf. Huber & Paulus, *supra* note 54, 298.

103 *Honeywell (FCC)*, *supra* note 88, 302, paras. 55.

104 *Lisbon (FCC)*, *supra* note 88, 353, para. 240, 397-398, para. 333; *Honeywell (FCC)*, *supra* note 88, 304, para. 60.

105 *Lisbon (FCC)*, *supra* note 88, 353, para. 240, 397-398, para. 333; *Honeywell (FCC)*, *supra* note 88, 304, para. 60.

106 *Honeywell (FCC)*, *supra* note 88, Headnote 1.

> "Ultra vires review [...] is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences."[107]

Even though, conflicts cannot be categorically excluded as both the FCC and CJEU claim the competence to declare acts by EU organs *ultra vires*,[108] most potential conflicts between EU law and German constitutional law are likely to be prevented by the preliminary reference mechanism as long as both sides cooperate and aim at accommodation rather than confrontation. To date, the FCC has not found any acts by EU organs to be *ultra vires*.[109] The *ultra vires* control, however, does not seem to be easily transferrable to the relationship with other international legal orders (or to the relationship between different international legal orders) because it is based on an explicit dialogue of the two jurisdictions. It would require a formal mechanism comparable to the preliminary reference in Article 267 TFEU with a similar potential for accommodation and communication before irresolvable conflicts arise.

3. Constitutional Identity

The so-called "identity control" developed by the FCC is an example of a rather inward-looking counter-limit.[110] The Court held that the application of

107 *Ibid*.

108 For the FCC, see *Eurocontrol I*, Cases Nos. 2 BvR 1107/77 and others, Order of the Second Senate of 23 June 1981, BVerfGE 58, 1, 30 and 31; *6th VAT Directive (6. Umsatzsteuerrichtlinie)*, Case No. 2 BvR 687/85, Order of the Second Senate of 8 April 1987, BVerfGE 75, 223, 235, 242; *Maastricht (FCC)*, *supra* note 88, 188; *Lisbon (FCC)*, supra note 88, 353-355, paras. 240-241; *Honeywell (FCC)*, *supra* note 88, 302-307, paras. 54-66.

109 So far, the FCC has referred preliminary requests in two cases. The first preliminary request was *OMT (Preliminary Reference)*, Case No. 2 BvR 2728/13, Order of the Second Senate of 14 January 2014, BVerfGE 134, 366 [OMT (Preliminary Reference) (FCC)]. The court accepted the response of the CJEU in *Gauweiler et al. v. Deutscher Bundestag*, Cases No. C-62/14 *et al.*, ECLI:EU:C:2015:400, Judgment of 16 June 2015 (though not without some critique), see *OMT (Judgment) (FCC)*, *supra* note 100, 222-223, para. 193. As a response to the second request of the FCC (cf. *Public Sector Purchase Program* (*EZB Ankauf*), Cases Nos. 2 BvR 859/15 and others, Order of the Second Senate of 10 October 2017 (FCC)), the CJEU rendered its judgment on 11 December 2018 (cf. Weiss *et al.*, Case No. C-493/17, ECLI:EU:C:2018:1000).

110 On the identity control as a counter-limit, see Paulus, 'Rechtsquellen', *supra* note 29, 34-35.

international law and EU law in the German legal order is subject to Germany's constitutional identity referring to the core values of the German basic law that are unmodifiable as enshrined in Articles 1-20, and 79(3) Basic Law.[111] In contrast to the *Solange* control and the *ultra vires* test, the identity control poses an absolute limit without leaving room for mutual accommodation.[112] Notably, however, until now the FCC has never applied it with a negative result.[113] But a violation of the "core" principles of the constitution by international norms is difficult to establish. So far, reasonable interpretative divergence has not lead to an "exit" from implementation, as best exemplified by the OMT case on European Union.[114]

Other national courts, however, have been less hesitant. For instance, the Italian Constitutional Court set up constitutional barriers towards international law in its 2014 *Sentenza 238/2014* decision.[115] It denied Germany's immunity for atrocities committed during World War II. In so doing, it took a considerably different approach than the ICJ in its *Immunities of the State* judgment.[116] The Court applied its *contralimiti* doctrine and held that the openness of the Italian legal order to international and supranational law (according to Articles 10 and 11 of the Constitution) finds it limits in fundamental principles and inviolable human rights enshrined in the Italian Constitution.[117] The Russian Constitutional Court also took a comparable approach in a recent decision putting itself in opposition to the ECtHR.[118] It underlined that the Russian legal order reserves barriers to international law.

111 *Lisbon (FCC)*, *supra* note 88, 353-355, paras. 240-241. See, comprehensive discussion in *Constitutional Identity (FCC)*, *supra* note 88.

112 The FCC considers the "identity control" to constitute an absolute limit, cf. *OMT (Preliminary Reference) (FCC)*, *supra* note 109, 368-387, para. 29.

113 However, see *Constitutional Identity (FCC)*, *supra* note 88.

114 See the FCC in *OMT (Preliminary Reference)*, *supra* note 109 and the CJEU in *Gauweiler*, *supra* note 110.

115 *Sentenza No 238/2014*, *supra* note 73.

116 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgement of 3 February 2012, ICJ Reports 2012, 99 [Jurisdictional Immunities].

117 *Sentenza No 238/2014*, *supra* note 73, Conclusions in Point of Law para. 3.4.

118 *OAO Neftyanaya Kompaniya Yukos v. Russia* [2017], 1-II/2017 (Russian Federation, Constitutional Court). See the critique of I. Marchuk & M. Aksenova, 'The Tale of Yukos and of the Russian Constitutional Court's Rebellion against the European Court of Human Rights' (2017), available at https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/iryna-marchuk/the-tale-of-yukos-and-of-the-russian-constitutional-court-s-rebellion-against-the-european-court-of-human-rights (last visited 13 December 2018).

In its famous *Kadi* judgment, the CJEU applied a similar rational itself, albeit with regard to the exercise of international executive rather than judicial powers.[119] When discussing a possible conflict between obligations emanating from UN Security Council resolutions and EU law, the Court granted supremacy to EU law from its internal perspective. It held that the EU has developed into an autonomous legal order with its own normative hierarchy.[120] It abstained from applying approaches that would have aimed at accommodation, rather than confrontation, such as harmonious interpretation or a kind of *Solange*-reservation. In our view, such an approach would have been an alternative, arguably even preferable solution.[121]

IV. The Sources of International Law as a Common Normative Framework

Article 38 ICJ Statute itself provides some sort of hinge provision and a framework for rule of law transfers as it allows for a reception of national law through customary international law, general principles, and judicial decisions. It seems to be commonly accepted that for the determination of rules of customary international law, in accordance with the so-called "two-elements" approach,[122] acts of the legislative, executive, and judicial branch may be taken into account for establishing the required practice and *opinio juris*.[123] Similarly,

119 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the EU and European Commission*, Joined Cases Nos. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, Judgment of 3 Septemeber 2008, [2008] ECR I-06351.

120 *Ibid.*, paras. 281-282, 286-288. See also *European Commission and Others v. Yassin Abdullah Kadi*, Joined Cases Nos. C-584/10 *et al.*, ECLI:EU:C:2013:518, Jugdment of 18 July 2013.

121 Another alternative would have been the approach of the Court of First Instance of the EU in *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case No. T-315/01, ECLI:EU:T:2005:332, Judgment of 21 September 2005, [2005] ECR II-3649.

122 On the general support for the traditional "two-elements" approach by international judicial bodies (such as the WTO dispute settlement organs, IAtCHR, ECtHR, CJEU, ICTY, and ICTR), states, and scholarship, see the *ILC First Report on Custom*, *supra* note 65, 20, paras. 50 and 52, 21-25, paras. 55-63, 28-37, paras. 66-82, 45-49, paras. 96-97, with further references.

123 See e.g. *ILC Text of the Draft Conclusions on Identification of Custom*, UN Doc. A/73/10, 2018, Draft Conclusion 5 and Draft Conclusion 6(2) [ILC Draft Conclusions]; Jennings & Watts, *supra* note 65, 26; B. Simma & A. L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *American Journal of International Law* (1999) 2, 302, 306.

general principles may be drawn from manifestations of principles of national law from all branches of domestic government in accordance with the so-called "domestic" approach.[124] This is so despite the fact that recourse to national law seems to be the exception rather than the rule, at least in the practice of the ICJ.[125] Since the *LaGrand* provisional measures decisions,[126] the *Immunity of the State*[127] and *Diallo* judgments,[128] however, the ICJ seems to have adopted a more inclusive approach towards domestic law that takes domestic constitutional law and Court decisions into account in the determination of international law and for the implementation of its decisions.

One aspect that has received remarkably little attention is that Article 38 ICJ does not only provide a framework for the *substantive* dimension of

[124] Cf. e.g. Pellet, *supra* note 55, 835, fn. 734 and 836, para. 260; W. Friedmann, 'The Uses of 'General Principles' in the Development of International Law', 57 *American Journal of International Law* (1963) 2, 279, 284 [Friedmann, General Principles]; J. Ellis, 'General Principles and Comparative Law', 22 *European Journal of International Law* (2011) 4, 949, 949-950; C. W. Jenks, *The Common Law of Mankind* (1958), 109-167 [Jenks, Comman Law of Mankind]; A. McNair, 'The General Principles of Law Recognized by Civilized Nations', 33 *British Yearbook of International Law* (1957), 1, 1-19; H. C. Gutteridge, 'The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice', Discussion from 11 June 1952, printed in 38 *Transactions of the Grotius Society* (1952), 125. See further the references in J. G. Lammers, 'General Principles of Law Recognized by Civilized Nations', in F. Kalshoven, P. J. Kuyper & J. G. Lammers (eds), *Essays on the Development of the International Legal Order in Memory of Haro F Van Panhuys* (1980), 53, 56-57. In the drafting committee of the PCIJ Statute, see *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (16 June-24 July 1920) with Annexes* (1920), 335 (Lord Phillimore). See also Separate Opinion Judge Simma, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, ICJ Reports 2003, 161, 354-358, paras. 66-74.

[125] With regard to custom, see S. Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion', 26 *European Journal of International Law* (2015) 2, 417; A. Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady', in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (2012), 239, 248, and A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007) 4, 649, 654-655. With regard to general principles, see Pellet, *supra* note 55, 839 para. 266.

[126] *LaGrand Case (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, 9.

[127] *Jurisdictional Immunities*, *supra* note 116.

[128] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgement of 24 May 2007, ICJ Reports 2007, 582, and *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment of 19 June 2012, ICJ Reports 2012, 324.

international law but also for its *institutional*, judicial dimension.[129] Article 38(1) ICJ provides an important element in the institutional dimension of law transfers between domestic courts and international courts. Today, it has become generally acknowledged that national (and certain international) judicial decisions constitute formative elements of customary international law and general principles.[130] Furthermore, national and international judicial decisions constitute "subsidiary means for the determination of" the sources of international law as reflected in Article 38(1)(a)-(c) ICJ Statute.[131] Article 38 ICJ Statute determines the judicial interaction and allocates authority between courts from different legal systems in the process of determination of

[129] M. Andenas & J. R. Leiss, 'The Systemic Relevance of 'Judicial Decisions' in International Law', 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2017) 4, 907.

[130] On national judicial decisions as elements of customary international law, see e.g. *Jurisdictional Immunities*, *supra* note 116, 122, para. 54, 127, para. 64, 129, para. 68, 131-134, paras. 71-75, 134, para. 76, 135, para. 78, 136, para. 83, 137, para. 85, 139, para. 90, 142, para. 96, 148, para. 118, and *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3, 23-24, paras. 56-58; see also *ILC Draft Conclusions*, *supra* note 123, Draft Conclusion 5 and Draft Conclusion 6(2), and *ILC Identification of Customary International Law, The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law*, Memorandum by the Secretariat, UN Doc A/CN.4/691, 5, Observation 1 and 8, and 32, Observation 23 [ILC Memorandum by the Secretariat on the Decisions of National Courts and Custom]; P. M. Moremen, *National Court Decisions as State Practice*, 1999-2000 Proceedings and Committee Reports of the American Branch of the International Law Association, 100, 119. In scholarship, see e.g. Brownlie, *supra* note 65, 6; Jennings & Watts, *supra* note 65, 26, 41; Pellet, *supra* note 55, 862 para. 321; M. N. Shaw, *International Law*, 5th ed. (2003), 78. See, however, the traditional view: L. Oppenheim, 'The Science of International Law: Its Task and Method', 2 *American Journal of International Law* (1908) 2, 313, 336-341; K. Strupp, 'Regles générales du droit de la paix', 47 *Recueil des Cours* (1934), 259, 313-315; D. Anzilotti, *Cours de Droit International*, Vol. 1 (1929), 74-75. On national judicial decisions as formative elements of general principles, see K. Doehring, 'The Participation of International and National Courts in the Law-Creating Process', 17 *South African Yearbook of International Law*, 8; A. Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' 5 *Chinese Journal of International Law* (2006) 2, 301, 304 [Nollkaemper, Domestic Courts]; Nollkaemper, *National Courts*, *supra* note 13, 272. See also *ILC Memorandum by the Secretariat on the Decisions of National Courts and Custom*, *supra* n 131, 3-4 [4].

[131] On judicial decisions as "subsidiary means", see Andenas & Leiss, *supra* note 129; A. Zammit Borda, 'A Formal Approach to Article 38 (1)(d) of the ICJ Statute From the Perspective of the International Criminal Courts and Tribunals', 24 European Journal of International Law (2013) 2, 649.

international law. It offers a framework for authority and historical lineages of reasoning among different courts and so provides a communicative framework for the dissemination of the rule of law. Similar to Article 38 ICJ Statute's role as a blueprint for a common yet decentralized international legal order with limited means, it also provides guidance for the dialogue between courts belonging to different legal systems.[132] It provides an instruction manual for the judicial interaction of courts and their mutual reception in the determination of the applicable international law. It is here where the role of domestic courts – in particular those with the highest jurisdiction – is of particular relevance.

V. Harmonious Interpretation and Conflict Avoidance

Harmonious interpretation is another mechanism for fostering normative coherence and thus the international rule of law across different legal systems. In case of (possible) normative conflict, it aims at giving effect to the norms of all legal systems involved to the greatest extent possible.[133] The International Law Commission's Fragmentation Report suggests that the threat of fragmentation could be contained by recourse to interpretative devices as a means of countering the centrifugal forces of our multipolar world.[134] Consistent interpretation is considered one way to avoid possible conflicts between international norms, but also between domestic law and international law.[135] Most prominently, the principle of systemic integration reflected in Article 31(3)(c) VCLT is considered as a tool for avoiding normative conflicts and mitigating the substantive dimension of the fragmentation of international law.[136] Article 31(3)(c) VCLT

[132] With regard to letter (d) of Article 38(1) ICJ Statute, see Andenas & Leiss, *supra* note 129.

[133] See Paulus, 'Rechtsquellen', *supra* note 29, 18. Other interpretative principles for conflict avoidance are *lex specialis* (cf. A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', 74 *Nordic Journal of International Law* (2005) 1, 27; *ILC Fragmentation Report*, *supra* note 11, 30-115, paras. 46-222; Simma & Pulkowski, *supra* note 16, 485-490 and *lex posterior* (cf. *ILC Fragmentation Report*, *supra* note 11, 115-166, paras. 223-323).

[134] *ILC Fragmentation Report*, *supra* note 11.

[135] On consistent interpretation as a tool to give effect to international obligations in domestic law, see Nollkaemper, *National Courts*, *supra* note 13, 139-165; G. Betlem & A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law Before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation', 14 *European Journal of International Law* (2003) 3, 569. See also A. Cassese, 'Modern Constitutions and International Law', 192 *Recueil des Cours* (1985), 331, 398.

[136] See on this principle: C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International and Comparative Law Quarterly*

defines the context in the interpretation of treaties, providing that "[t]here shall be taken into account, together with the context [...] (c) any relevant rules of international law applicable in the relations between parties".[137] Accordingly, when interpreting international rules, the broader normative environment must be taken into account.[138] The provision aims at avoiding conflicting claims to final authority by preventing conflicts in the first place.[139] By taking into account norms of other legal (sub)systems, it ensures normative coherence and in the best case legal certainty – as a core element of the rule of law – for the addressees of norms. As the wording makes clear, Article 31(3)(c) is not limited to "general international law" but covers "any relevant rules of international law applicable in the relations between the parties".[140] It is based on the insight that "treaties are themselves creatures of international law",[141] that derive their validity and character from general international law.[142] They do not operate in isolation but alongside rights and obligations derived from other international treaties, rules of customary international law and general principles.[143] Their non-hierarchical relationship "can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole".[144]

As the principle of systemic integration's companion, the presumption of compatibility derives from the same rationale, namely that States do not intend to create conflicting legal norms.[145] As the ICJ put it in the *Right of Passage* case:

(2005) 2, 279; *ILC Fragmentation Report*, *supra* note 11, 206-244, paras. 410-480.

137 Cf. *ILC Fragmentation Report*, *supra* note 11, 208, para. 413.

138 Cf. *Ibid.*, 208, para. 413 and 209, para. 415.

139 On these principles in the broader context of the discussion on "normative hierarchy" in international law, see A. L. Paulus & J. R. Leiss, 'Article 103', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd ed. (2012), 2116-2119, paras. 11-18.

140 Cf. *ILC Fragmentation Report*, *supra* note 11, 212, para. 422.

141 McLachlan, *supra* note 136, 280.

142 Cf. *ILC Fragmentation Report*, *supra* note 11, 208, para. 414.

143 McLachlan, *supra* note 136, 280.

144 Cf. *ILC Fragmentation Report*, *supra* note 11, 208, para. 414.

145 On the presumption of compatibility, see the ICJ in the *Case Concerning Right of Passage Over Indian Territory (Portugal v. India) (Merits)*, Judgment of 12 April 1960, ICJ Reports 1960, 6, 142. See also the ECtHR in *Al-Jedda v. United Kingdom*, ECtHR Application No. 27021/08, Judgment of 7 July 2011, 60, para. 102 [Al-Jedda (ECtHR)], in *Nada v. Switzerland*, ECtHR Application No. 10593/08, Judgment of 12 September 2012, 48-49, paras. 170-172 [Nada (ECtHR)], and in *Al-Dulimi (Grand Chamber) (ECtHR)*, *supra* note 97, 66-67 paras. 138-140. See further: *ILC Fragmentation Report*, *supra* note 11, 25 paras. 37; C. W. Jenks, 'The Conflict of Law-Making Treaties', 30 *British Yearbook of International Law* (1953), 401, 428-429 [Jenks, Law-Making Treaties]; J. Pauwelyn,

"it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it".[146] Thus, both principles require that normative conflicts be avoided by all available interpretative means.[147]

The ECtHR's Grand Chamber judgment in *Al-Dulimi* serves as an illustrative example.[148] The Court was confronted with possible conflicts between obligations emanating from the UN Charter, more specifically from UN Security Council resolutions, on the one hand, and obligations arising from the Convention, on the other hand. By applying Article 31(3)(c) VCLT and the presumption of compatibility, the ECtHR came to the conclusion that a normative conflict did not exist.[149] Notably, however, eight out of seventeen judges disagreed with the majority opinion arguing that the majority reasoning stretched harmonious interpretation too far.[150]

As the disagreement between the majority's opinion and the numerous judges in their individual opinions demonstrates, conflict prevention by way

Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (2003), 240-244 [Pauwelyn, Conflict of Norms]; Paulus & Leiß, *supra* note 139, 2118, para. 18.

146 *Case Concerning Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objetions)*, Judgment of 26 November 1957, ICJ Reports I957, 125, 142.

147 See Jenks, 'Law-Making Treaties', *supra* note 145, 429; Pauwelyn, Conflict of Norms, *supra* note 145, 240-241 and 245-246; C. J. Borgen, 'Resolving Treaty Conflicts', 37 *George Washington International Law Review* (2005) 3, 573, 639.

148 *Al-Dulimi (Grand Chamber) (ECtHR)*, *supra* note 97, 66-71, paras. 138-149. See also *Al-Jedda (ECtHR)*, *supra* note 146, 60-63, paras. 102-109; *Nada (ECtHR)*, *supra* note 146, 48-49, paras. 170-172.

149 *Al-Dulimi (Grand Chamber) (ECtHR)*, *supra* note 97, 65-67, paras. 134-140. See also *Al-Jedda (ECtHR)*, *supra* note 145, 63, para. 102, and *Nada (ECtHR)*, *supra* note 145, 48-49, paras. 170-172. A similar approach was proposed by Nigel Rodley in his Concurring Opinion in *Sayadi and Vinck v. Belgium*, UNHRC Decision of 22 October 2008, UN Doc CCPR/C/94/D/1472/2006), 36, when discussing a possible conflict between obligations from UN Security Council resolutions and the *Optional Protocol to the International Covenant on Civil and Political Rights*, UNGA Res 2200A (XXI), 19 December 1966, 999 UNTS 302.

150 Vice-President Nussberger refers in her dissenting opinion to "fake harmonious interpretation", Dissenting Opinion of Judge Nussberger, *Al-Dulimi (Grand Chamber) (ECtHR)*, *supra* note 97, 140, 141. Judge Pinto de Albuquerque, joined by judges Hajiyev, Pejchal and Dedov, recommended a *Bosphorus* approach, *Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judges Hajiyev, Pejchal and Dedov, ibid.*, 76-114. See also the concurring opinion of Judges Keller (*Concurring Opinion of Judge Keller, ibid.*, 123-125), Kūris (*Partly Dissenting Opinion of Judge Kūris, ibid.*, 133); and Ziemele (*Partly Dissenting Opinion of Judge Ziemele, ibid.*, 134-139).

of harmonious interpretation is not a magic weapon.[151] If norms stand in clear contradiction and do not leave any interpretative leeway that would allow interpreting the conflict away, the principle of systemic integration reaches its limits. Moreover, harmonious interpretation does not necessarily avoid conflicts between divergent interpretations of different actors, most importantly courts, in the interpretation and application of international law.

VI. Informal Judicial Dialogue

Informal forms of judicial interaction, often discussed under the label of judicial dialogue, constitute another device furthering the rule of law transfers in international law.[152] They include non-formal communicative processes of cooperation, interaction, and exchange,[153] collegiality among judges, and a common mind-set. The venues of this dialogue among judges are international conferences, private gatherings, and meetings of the courts.[154] While generally informal judicial interaction is to be welcomed for a better mutual understanding and learning,[155] the turn to informal coordination and networks is not completely unproblematic,[156] given the often "competing loyalties, commitments, and obligations" of national courts *vis-à-vis* national and international law.[157] Due

[151] McLachlan, *supra* note 136, 318.

[152] See e.g. A.-M. Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (2003) 1, 191 [Slaughter, Global Community of Courts] and Boisson de Charzournes, *supra* note 44, who base significant parts of their analysis on informal elements of judicial interaction.

[153] See on different forms of informal interaction: Slaughter, 'Global Community of Courts', *supra* note 152, 192-193; A.-M. Slaughter, 'Judicial Globalisation', 40 *Virginia Journal of International Law* (1999-2000) 4, 1103, 1120-1123 [Slaughter, Judicial Globalisation]; C. Baudenbacher, 'Judicial Globalization. New Developments or Old Wine in New Bottles', 38 *Texas Journal of International Law* (2003) 3, 505, 524-525.

[154] Cf. Slaughter, 'Global Community of Courts', *supra* note 152, 192-193; Slaughter, 'Judicial Globalisation', *supra* note 153, 1120-1123.

[155] See also T. Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law', 21 *ICSID Review – Foreign Investment Law Journal* (2006) 1, 126, 129, arguing that "[i]nformal contacts between the various courts should also be encouraged".

[156] For some skepticism, see T. Streinz, 'Winners and Losers of the Plurality of International Courts and Tribunals: Afterword to Laurence Boisson de Chazournes' Foreword', 28 *European Journal of International Law* (2017) 4, 1251, 1251; Dupuy, 'International Tribunals', *supra* note 98, 864; and W. Friedmann, *The Changing Structure of International Law* (1964), 146-147 [Friedmann, Changing Structure].

[157] Nollkaemper, *National Courts*, *supra* note 13, 14. See also Y. Shany, 'Dédoublement Fonctionelle and the Mixed Loyalties of National and International Judges', in F.

to their volatility, informal judicial networks cannot entirely compensate for the lack of formal structures. Their existence and functioning depends on numerous factors, in particular the persons involved and their commitment to a cooperative spirit among courts from different legal systems.

Moreover, it is important that informal judicial dialogue be not entirely hidden from the public in order to dispel fears of non-transparent decisions-making. Transparency in international cooperation may help mitigating fears of an uncontrolled self-empowering global judiciary.

D. Conclusion

International (or even global) constitutionalism constitutes a utopian promise rather than an accurate reflection of the status of the integration of different legal orders into an overarching legal unity. As appealing as a clear constitutional setting may be, constitutionalism cannot simply do away *once and for all* with the tensions between different values and principles, which find the expression in the creation of specialized subsystems of international law. Thus, in order to strengthen the international rule of law it is required to deal with pluralism instead of fighting it. Finding the transitional elements between different normative orders rather than constructing another hierarchy can help us mitigating the challenges arising from the complex setting of international law. The practice of mutual recognition of the different legal orders through hinge provisions and harmonious interpretation that enable integration and accommodation are among the most important elements that are able to guarantee the implementation of the international rule of law. Only in applying these elements, are we able to uphold the rule of law and avoid anarchy, which leads to nothing more than the *rule of the powerful*. However, given the often-deficient formal structures in international law, the transfer and implementation of the international rule of law through mutual recognition requires a commitment of the actors involved, what Raz refers to as the "politics of the rule of law".[158]

Fontanelli, G. Martinico & P. Carrozaa (eds), *Shaping Rule of Law Through Dialogue: International and Supranational Experiences* (2010), 36-37, and Y. Shany, 'Plurality as a Form of (Mis)management of International Dispute Settlement: Afterword to Laurence Boisson de Chazournes' Foreword', 28 *European Journal of International Law* (2017) 4, 1241, 1242, 1245.

158 J. Raz, 'The Politics of the Rule of Law', 3 *Ratio Juris* (1990) 3, 331 [Raz, Politics of RoL (1990)], and J. Raz, 'The Politics of the Rule of Law', in J. Raz (ed), *Ethics in the*

As such, an international rule of law does not necessarily require a strong analogy with domestic conceptions of constitutions.[159] The international rule of law may differ from the standards that we are familiar with from national legal systems.[160] The rule of law in international law operates in a legal system where the subjects with plenary power remain States, in spite of the ever growing relevance of individual and human rights, whereas the rule of law in domestic legal systems is primarily concerned with the rights and obligations of individuals *vis-à-vis* each other and against the state. Nevertheless, the more international law also regulates the rights and duties of individuals,[161] and thus overlaps with domestic regulation, the more the international rule of law must work hand in hand with and conform to standards of the domestic rule of law. Thus, the need for coordination will continue to grow, even if the political winds are currently blowing into the face of the international rule of law. Respecting the pluralism of legal orders, and maintaining the authority of *the* rule of law, are more and more becoming two sides of the same coin. In this perspective, rule of law transfers are an important tool for keeping the rule of law alive.

Public Domain: Essays in the Morality of Law and Politics (1995), 354 [Raz, Politics of RoL (1995)]. See also Crawford, *supra* note 4, 12.

159 H. Krieger & G. Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure', KFG Working Paper Series No. 1, 2016/10.

160 Highlighting the difference between the rule of law in municipal law and in international law: Waldron, *supra* note 13; Watts, *supra* note 1, 16-17; Chesterman, 'An International Rule of Law?', *supra* note 1, 333.

161 Cf. Peters, 'Compensatory Constitutionalism', *supra* note 19.